

THIS THESIS IS SUBMITTED FOR THE DEGREE OF  
DOCTOR OF PHILOSOPHY  
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**OPTIMIZATION OF GEORGIAN COMPETITION FRAMEWORK ON  
THE BASIS OF THE EU EXPERIENCE**

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# ABSTRACT

## *Optimization of Georgian Competition Framework on the basis of the EU Experience*

This thesis examines how to transform the Georgian competition framework into its most effective version while keeping in mind the real-life legal, economic and institutional constraints posed by broader national and international settings ('optimization'). It deploys the EU competition framework as a blueprint due to a recently intensified trade relations between the two jurisdictions and the resulting resemblance of their competition frameworks. The thesis builds on an existing scholarship regarding legal transplants and the jurisdiction-specific nature of the competition law. It aims to offer a set of lessons for optimizing the Georgian competition framework by utilizing the EU experience, considering the inherent jurisdictional differences.

To achieve its aim, the thesis examines three dimensions of the Georgian competition framework – policy, law and enforcement – in a comparative context by analysing historical developments, existing legislative landscape and institutional dynamics among primary actors responsible for the framework implementation. It finds partial incoherence among current policy objectives and infeasibility of their simultaneous implementation. The legislative level has recently benefited from comprehensive amendments. However, sub-optimally configured *ex-ante* (concentration) control jurisdiction complicates realizing these benefits in practice. Similarly, an initially limited capability of case handling has conditioned administrative self-restraint in *ex-post* (antitrust) assessments, while legislative changes might unintentionally solidify this trend. The thesis elaborates on all these shortcomings and offers ways of overcoming them based on the analysis of selected EU experiences.

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# DEDICATIONS

*This thesis is dedicated to my ‘magnificent seven’, without whose unwavering love, encouragement and support I would not exist.*

***To my father, Vladimer Japaridze***, the man entirely devoted to the service of his loved ones. He taught me to have faith, work hard, and dream big while supporting me in every possible way to make my dreams come true. He is living proof that God exists, and He loves me.

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## Table of Abbreviations

AA	EU-Georgia Association Agreement
AJCL	American Journal of Comparative Law
AmJCL	American Journal of Competition Law
AMSG	Anti-Monopoly Service of Georgia
ASCOLA	Academic Society for Competition Law
BKA	Bundeskartellamt
BLRev	Business Law Review
CCG	Constitutional Court of Georgia
CEPR	Center for Economic Policy Research
CEU	Central European University
CJEU	Court of Justice of the European Union
CJIL	Chicago Journal of International Law
CLR	The Competition Law Review
CMLR	Common Market Law Review
ComCom	National Commission for Communications
CS	Caucasus Survey
CUP	Cambridge University Press
DCFTA	Deep and Comprehensive Free Trade Area
DMA	Digital Markets Act
EAS	Europe-Asia Studies
EC	European Communities
ECLR	European Competition Law Review
ECR	European Court Reports
EE	Edward Eglar
EEC	European Economic Community

ELP	European Public Law
EMJ	European Management Journal
EoT	Economics of Transition
EU	European Union
EUMR	EU Merger Regulation
EurBRev	European Business Review
EurBLRev	European Business Law Review
EurCompJ	European Competition Journal
EurEconRev	European Economic Review
EurJPR	European Journal for Political Research
EurLRev	European Law Review
EWMI	East West Management Institute
FFJV	Full Function Joint Venture
FIntLJ	Fordham International Law Journal
FordLR	Fordham Law Review
FTA	Free Trade Agreement
FTCA	Agency of Free Trade and Competition
GC	General Court
GLC	Law of Georgia on Competition
GME	Ministry of Energy of Georgia
GMF	Ministry of Finance of Georgia
GMTC	Ministry of Transport and Communications of Georgia
G(N)CA	(National) Competition Agency of Georgia
GNERC	Georgian National Energy and Water Supply Regulatory Commission
GTC	Tax Code of Georgia
HUP	Harvard University Press
IBRD	International Bank of Reconstruction and Development

IBSU	International Black Sea University
IEI	Institute of European Integration
IJEB	International Journal of Economic and Business
IMF	International Monetary Fund
JAE	Journal of Antitrust Enforcement
JCMS	Journal of Common Market Studies
JCL&E	Journal of Competition Law and Economics
JCSTP	Journal of Communist Studies and Transition Politics
JEconB&O	Journal of Economic Behavior and Organization
JECL	Journal of European Competition Law
JECL&P	Journal of European Competition Law and Practice
JELS	Journal of Empirical Legal Studies
KLInt	Kluwer Law International
LARA	Law on Accounting, Reporting and Audit
LFTC	Law of Georgia on Free Trade and Competition
LGE	Law of Georgia on Entrepreneurs
LIEI	Legal Issues of Economic Integration
LJO	Law Journal Online
LMAC	Law on Monopolistic Activities and Competition
MichLRev	Michigan Law Review
MIA	Ministry of Internal Affairs of Georgia
MLR	Modern Law Review
MSMEs	Micro, Small and Medium-sized Enterprises
NAPR	National Agency of Public Registry
NBG	National Bank of Georgia
NCP	Nova Science Publishers, Inc.
NDLR	The Notre Dame Law Review
NGO	Non-Governmental Organization

OCA	Order on Complaint Admissibility
OECD	Organization of Economic Co-operation and Development
OLCCG	Organic Law on the Constitutional Court of Georgia
OUP	Oxford University Press
OJ L	Official Journal of the European Communities (Legislation Series)
OJLS	Oxford Journal of Legal Studies
OJ C	Official Journal of the European Communities (Information and Notices Series)
PA&Dev	Public Administration and Development
POCCP	Poland Office of Competition and Consumer Protection
PSGeo&Econ	Post-Soviet Geography and Economy
RCI	Rules of Case Investigation
RCNA	Rules on Concentration Notification and Assessment
R&D	Research and Development
RIPE	Review of International Political Economy
RLP	Rules on Leniency Program
SCRG	State Council of the Republic of Georgia
SEA	Single European Act
SIEC	Significant Impediment to Effective Competition
SME	Small and Medium-sized Enterprise
SOE	State Owned Enterprise
TAB	The Antitrust Bulletin
TEJ	The Electricity Journal
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TIG	Transparency International Georgia
TLLRev	The Liverpool Law Review
TLR	Texas Law Review

TSU	Tbilisi State University
UCLJLJ	University College London Journal of Law and Jurisprudence
UCP	University of California Press
UNCTAD	United Nations Conference of Trade and Development
UNTS	United Nations Treaty Series
UPP	University of Pennsylvania Press
US(A)	United States (of America)
USAID	United States Agency of International Development
USSR	Union of Soviet Socialist Republics
UtrechtLRev	Utrecht Law Review
PUP	Princeton University Press
WB	World Bank
WBPRS	World Bank Policy and Research Series
WCLER	World Competition Law and Economic Review
YLJ	Yale Law Journal

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## Georgia

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## EU

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# INTRODUCTION

Designing an efficiently working competition framework is a multi-faceted exercise, stretching beyond the adoption of relevant legislation. First, the purpose of this framework needs to be determined, whether it is protecting the robustness of the competitive market process, promoting free trade, increasing economic welfare, ensuring equality and justice, or any other desirable end, as deemed relevant by a particular jurisdiction. Additionally, the substance of competition legislation should provide a well-developed toolbox to achieve the pre-determined desirable end(s). Similarly, it is essential to develop enforcement mechanisms that guarantee a complete and coherent application of this toolbox. Finally, as economies constantly evolve, the competition framework should correspond to national market dynamics alongside international trade requirements and be flexible enough to cope with ongoing changes on both fronts.

Georgia has been engaged in the above-described exercise since the 1990s, albeit with varying degrees of success. 2014 EU-Georgia Association Agreement (hereinafter – ‘EU-Georgia AA’ or ‘AA’)<sup>1</sup> considerably accelerated this process as it incorporated an obligation to address effectively various anti-competitive practices by a national legal framework.<sup>2</sup> This obligation became one of the bases of the recent (2020) legislative amendments that significantly upgraded the national competition legislation across the board.<sup>3</sup> The EU competition framework has been

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<sup>1</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L 261/4.

<sup>2</sup> Ibid, art 204(1).

<sup>3</sup> For details, see Erika Szyszczak, Liana Japaridze, ‘Competition development in Georgia: Approximation to the EU regime’ (2022) 1 Concurrances N104216.

consistently used as a source model (blueprint) throughout this process. Desiring a deeper trade integration with the Union, Georgia chose this blueprint while keeping in mind the EU's track record of operating one of the most successful competition frameworks worldwide since the late 1950s. Consequently, mimicking this framework in the Georgian setting was considered a precondition for achieving performance efficiency.<sup>4</sup> However, significant differences between the legal, economic, and institutional contexts within which the competition frameworks function in these two jurisdictions make it questionable to what extent the usage of the EU blueprint is appropriate and hence advisable for Georgia.

This work addresses the above-mentioned issue by studying the development and current state of competition frameworks in Georgia and the EU, as embedded in wider jurisdictional fabrics, constrained by institutional settings, and affected by international cooperation in trade-related matters. As a result, it identifies principal problems that prevent the Georgian competition framework from functioning effectively and the relevant EU experience in solving similar problems. The study draws key lessons from this experience and elaborates on specific advice for Georgia to help it navigate the complex process of competition framework-building.

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<sup>4</sup> This approach does not concern competition framework only. Georgia generally views EU law as a model to aspire. See Gaga Gabrichidze, 'National and Bilateral Normative Framework for Legislative Impact of the EU Law on the Georgian Legal System' in Stefan Lorenzmeier, Roman Petrov and Christoph Vedder (eds), *EU external relations law: shared competences and shared values in agreements between the EU and its eastern neighbourhood* (Springer 2021) 148-149.

# 1. Key Concepts used in the Research

To give this study a proper focus, the title of the doctoral project – ‘Optimization of Georgian Competition Framework on the basis of the EU Experience’ – requires clarification at least in three respects. Namely, one should determine what the concepts of ‘optimization’, ‘competition framework’, and ‘EU experience’ denote for the forthcoming analysis.

The **competition framework** is defined first since it partially qualifies the other two terms. The definition stems from the observations of different sets of activities undertaken by Georgia and the EU to ensure the smooth functioning of the process of market competition. This research focuses on three key activities: policymaking, law-making, and enforcement. The thesis refers to *competition policymaking* to describe public policymaking that ensures the maintenance of legal and institutional mechanisms protecting market competition within a particular jurisdiction.<sup>5</sup> This process includes, *inter alia*, determining the purpose and the place of the competition framework within a broader economic setting of the particular jurisdiction. *Competition lawmaking* denotes two complementary processes in this thesis: 1) adopting competition legislation in line with the pre-determined policy;<sup>6</sup> 2) designing soft law measures that clarify legislative provisions and the process of their implementation. *Competition enforcement* refers to carrying out competition policy by implementing competition legislation.

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<sup>5</sup> This definition comes with a caveat that “competition” might mean different things to different jurisdictions. See discussion in subchapter II.2.1.2.2. below.

<sup>6</sup> See Pablo Ibanez Colomo, ‘Beyond the “more economics-based” approach: A legal perspective on Article 102 TFEU case law’ (2016) 53 CMLR 509, 726, stating that ‘competition policy is implemented through the law’.

Together, these three activities serve as principal pillars of competition framework-building. Consequently, the term ‘Georgian competition framework’ denotes a combination of competition policy, law (including soft law), and enforcement in Georgia.

**Optimization** is defined in relation to the competition framework. The meaning of this term differs depending on the field of application. This thesis uses the term in its general sense, meaning ‘[t]he action or process of making the best of something’.<sup>7</sup> Consequently, when assessing how to optimize the Georgian competition framework, the discussion will concern the possible improvements to all three pillars of the existing framework – policy, law and enforcement – that could transform it into its best possible version. However, how does one determine whether the Georgian competition framework is the best possible version of itself? The answer is connected to the AA obligation to maintain an effective competition framework in Georgia and the national reality in which such maintenance should occur. In other words, the Georgian competition framework would be the best possible version of itself (i.e., be optimized) when it functions effectively, considering various circumstances under which it has to operate on national markets and in the international setting.

Such a definition requires two qualifications. First, perfect competition frameworks (just like perfect competition) do not exist in real life. Therefore, the Georgian competition framework operates in an imperfect life and on an imperfect national market while experiencing various restraints from the broader national economic, legal, and institutional

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<sup>7</sup> *Oxford English Dictionary: the definitive record of the English language* (OUP 2010).

framework to which it is embedded. Consequently, when discussing the optimization of this framework, the thesis focuses on the process of its improvement to the best possible extent (i.e., achieving effectiveness), considering these pre-identified limitations. Second, since markets are not static, the competition framework also requires constant renovation. Hence, optimization is a never-ending process. Consequently, when analyzing how to optimize the Georgian competition framework, the thesis will consider the optimization process not in a vacuum but under the current circumstances of the national market.

**EU Experience** refers to the relevant knowledge accumulated by the Union while developing its competition framework. In this respect, the thesis assesses the critical developments in the Union's competition policymaking, lawmaking and enforcement from 1957 onward. The thesis pays particular attention to how the EU competition framework was adapted to the changes in a broader EU framework (for example, how the framework reacted to the expansion of the Union's overall mandate via successive Treaties), as well as to both EU-level and international market/trade circumstances. It also analyses the Union's reasoning for making fundamental changes to the various pillars of the framework (policy, law, enforcement) at different times of its development. Similarly, the work assesses how these pillars affected each other over the years. Finally, sometimes a particular experience is highlighted to show the difference between two jurisdictions and explain why the choice made by one of them would not work for the other.

To summarize, 'optimization of Georgian competition framework' refers to *the process of improving this framework to the best possible extent (i.e., in a way that allows the framework*

*to function effectively), considering: a) current market circumstances, b) jurisdictional needs on both domestic and international fronts and c) all the limitations posed on it by a broader national economic, legal and institutional setting.* The knowledge of managing a similar process in the EU is used to the extent allowed by similarities between the two jurisdictions.

## **2. Rationale and Relevance of the Research**

Before the substantive analysis begins, two preliminary issues require attention. First, considering the well-developed nature and success of the EU competition framework, one could wonder whether this framework should be transplanted in its entirety into Georgia. In other words, why undertake this research when there might be a more straightforward way to establish an effective competition framework in Georgia by copying the EU one? Second, Georgian competition legislation was substantially amended less than two years ago (and was approximated to EU competition law in the process. Hence, one could question the timing of this research, as a certain level of optimization seems to have already taken place. In other words, even if the proposed research is worthwhile, why should it be done now? These are legitimate questions, as they require clarification about the underlying rationale and relevance of this research. They are answered below.

## 2.1. Rationale

While the EU competition framework is a success story, the accumulated research suggests that its direct transposition to any national jurisdiction might be a suboptimal solution. Namely, such transposition would fail to recognize inherent differences between the origin and destination places of the framework. First, the existing scholarship suggests that the shape of the competition framework significantly depends on the jurisdictional environment within which it needs to function.<sup>8</sup> Similarly, another line of research highlights the unique character of EU competition law, stemming from specific features of its mother jurisdiction.<sup>9</sup> Some parts of this character are not transplantable to any national setting, while others might require a significant adjustment.<sup>10</sup> Next, the scholarship also identifies specific parameters that affect the design of competition frameworks across jurisdictions. These include: the history of the free

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<sup>8</sup> See, for example, Thomas Cheng, *Competition law in developing countries* (OUP 2020); Ariel Ezrachi, ‘Sponge’ (2016) 5 JAE 49; Michal Gal and others (eds), *Economic characteristics of developing jurisdictions: their implications for competition law* (EE 2015); Eleanor Fox and Michael Trebilcock, *The design of competition law institutions: global norms, local choices* (OUP 2013). See also Maher Dabbah, *International and comparative competition law* (CUP 2010) ch 6. For a broader context of legal transplants and competition law, see Jurgita Malinauskaite, *Harmonisation of EU competition law enforcement* (Springer 2020) 14-15 and the authors listed therein.

<sup>9</sup> See, for example, Christopher Townley, *A framework for European Competition Law: Co-ordinated Diversity* (Hart 2018); Wolf Sauter, *Coherence in EU competition law* (OUP 2016); Vasiliki Brisimi, *Interface between competition and the internal market: market separation under Article 102 TFEU* (Hart 2014); An informative comparative analysis (with the USA competition framework) is also provided in Roger van den Bergh, Peter Camesasca and Andrea Giannaccari, *Comparative competition law and economics* (EE 2017).

<sup>10</sup> These characteristics (according to their relevance for this research) are discussed below, in Chapters II, V and VIII.

market emergence and development at the national level;<sup>11</sup> the size of the domestic economy;<sup>12</sup> level of economic development;<sup>13</sup> broader economic concerns;<sup>14</sup> institutional setup of a particular jurisdiction;<sup>15</sup> the age of the competition framework;<sup>16</sup> the competition culture existing on the markets of the latter.<sup>17</sup> Finally, academics highlight that the differences in the above-listed parameters might lead to different priorities in competition policy-setting and

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<sup>11</sup> Most relevantly for this research, a vast literature exists regarding the problems of making competition work efficiently in post-Soviet countries/economies in transition. For general context, see Armando Rodriguez and Ashok Menon, *The limits of competition policy: the shortcomings of antitrust in developing and reforming economies* (Kluwer Law International 2010). An extensive analysis for the specific context of post-Soviet countries has been undertaken by OECD. See, for example, OECD, *Reviews of Competition Law and Policy: Ukraine 2016 – A Report on the Implementation of Previous Recommendations* (OECD 2016); OECD, *Reviews of Competition Law and Policy: Regulatory Reform in Poland – from Transition to New Regulatory Challenges* (OECD 2002); OECD, *Competition Law and Policy in the Baltic Countries* (OECD 1999).

<sup>12</sup> See, for example, Michal Gal, *Competition Policy in Small Market Economies* (HUP 2003). For Europe-specific context, see, for example, Jurgita Malinauskaite, *Merger control in post-Communist countries: EC merger regulation in small market economies* (Routledge 2011); Pajtim Melani, Servete Gruda and Brilanda Bushati, 'Application of Competition Policy and Law in Small and transition Economies - Albanian Case' (2011) 30 *Euro Economica* 63. For specific competition issues, see, for example, Pierre Horna, *Fighting cross-border cartels: the perspective of the young and small competition authorities* (Hart 2020).

<sup>13</sup> See, for example, Cheng (n 8); Gal and others (eds) (n 8); Dabbah (n 8) ch 6. See also Eleanor Fox, 'Competition Policy: The Comparative Advantage of Developing Countries' (2016) 79 *Law and Contemporary Problems* 69; Michal Gal and Eleanor Fox, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' (2014) NYU Law and Economics Research Paper No 14-11; Paul Cook, Raul Fabella and Cassey Lee (eds), *Competitive Advantage and Competition Policy in Developing Countries* (EE, 2007).

<sup>14</sup> See, for example, Damien Gerard and Ioannis Lianos (eds), *Reconciling efficiency and equity: a global challenge for competition law?* (CUP 2019); see also CCLP (University of Oxford) studies 'The Effect of Competition Policy on Economic Inequality' (2020-2021) <<https://www.law.ox.ac.uk/effect-competition-policy-economic-inequality>> accessed 21 January 2022. The relationship between competition policy and broader economic concerns (public policy objectives) was also highlighted by OECD, 'Objectives of competition law and policy' (note by the Secretariat) (2003) <<https://www.oecd.org/daf/competition/2486329.pdf>> accessed 11 November 2021.

<sup>15</sup> See, for example, Boris Begović and Dušan Popović, *Competition Authorities in South Eastern Europe: Building Institutions in Emerging Markets* (Springer 2018); see also Fox and Trebilcock (n 8).

<sup>16</sup> For general approach, see, for example, William Kovacic and Marianela Lopez-Galdos, 'lifecycles of Competition Systems, Explaining Variation in the Implementation of New Regimes' (2016) 79 *LCP* 85; see also Horna (n 12).

<sup>17</sup> See, for example Jasminka Pecotić Kaufman, 'On the development of (not so) new competition systems—findings from an empirical study on Croatia' (2021) 2 *JAE* 1.

enforcement.<sup>18</sup> Overall, the accumulated scholarly expertise suggests that when a well-functioning competition framework of one jurisdiction is transplanted into another jurisdiction, the key to the effectiveness of the transplant is to fine-tune it to the characteristics of its new home market and a broader economic, legal and institutional framework.<sup>19</sup>

The above-discussed research is relevant for the current study since the two target jurisdictions – Georgia and the EU – exhibit considerable inherent differences that necessitate different approaches during their competition framework-building. Georgia is a country with transitioning,<sup>20</sup> developing and small market economy that operates a novel competition framework. This framework is suboptimally integrated into the broader institutional setting, suffers a lack of experience and expertise in competition case-handling, and has to operate on markets that are characterized by the absence of well-developed competition culture. In contrast, the EU is a supranational institution with a seasoned, developed and large market economy that operates a mature competition framework.<sup>21</sup> This framework is well-established

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<sup>18</sup> See, for example, Cheng (n 8); see also Tembinkosi Bonakele, Eleanor Fox and Liberty Mncube (eds), *Competition policy for the new era: insights from the BRICS countries* (1st edn, OUP 2018).

<sup>19</sup> Work on the operability of legal transplants is vast. For a competition-specific and Europe-specific context, see Begović and Popović (n 15). For general context, see also Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'Economic development, legality, and the transplant effect' (2003) 47 *EurEcoRev* 165, where the authors provide empirical evidence showing that transplants work better if they are fine-tuned to the local reality. Similarly, see Roger Cotterrell, *Law, culture and society: legal ideas in the mirror of social theory* (Ashgate 2006) ch 7, where the author discusses the peculiarities of receiving societies that can affect the effectiveness of legal transplants.

<sup>20</sup> For the purposes of this thesis, the word “transition” refers to the economic transition of countries from planned to free market economies. For the concept of transition economics and the problems posed at the initial stage of this process, see Gérard Roland, *Transition and Economics: Politics, Markets, and Firms* (MIT Press 2000) 1-22.

<sup>21</sup> Kovacic and Lopez-Galdos (n 16), 97, observe that a competition framework needs at least 20 to 25 years to mature. In contrast, the EU framework already counts 60+ years.

within the overall institutional system of the Union, enjoys substantial administrative and judicial expertise in handling complex competition cases, and operates on markets with a well-developed competition culture. Due to these disparities, transplanting the Union law to Georgia without significant adjustments is not advisable. Instead, deep and careful research is necessary to reveal how the EU experience in competition framework-building is relevant for Georgia in optimizing its national competition framework.

## 2.2. Relevance

As mentioned above, Georgian competition legislation went through a significant overhaul in 2020 and was approximated to the EU competition *acquis*. In this context, one could argue that the research about further optimization is too early. Instead, the framework should be allowed to test the effectiveness of the legislative amendments, detect the shortcomings and be subject to analysis about further optimization later on. However, this argument is faulty, considering that the amendments have touched only Georgian competition law in a narrow sense (i.e., only legislation and not the soft law). In contrast, the Georgian competition policy has remained the same since its inception in 2014. There is no evidence of any significant change in enforcement directions either. Hence, even if one agrees that the Georgian competition legislation was optimized significantly, the same cannot be claimed about soft law, policy and enforcement. Meanwhile, as this thesis will argue in subsequent chapters, optimizing these areas is equally essential to maintaining an effective national framework.

The principal concern related to the Georgian competition policy is its strong correlation with the AA obligations. This link between this international agreement and national competition policy is not a problem in itself. On the contrary, as the prior research reveals, the ongoing process of establishing an effective national competition framework in Georgia (alongside other Eastern European countries) primarily results from enhancing trade relationships with the EU.<sup>22</sup> However, Georgia faces the danger of perceiving its domestic competition framework only from the viewpoint of international trade obligations. Such perception could prevent designing the competition policy that serves both the local market needs and international trade obligations. Hence, this research evaluates whether the Georgian competition policy fulfills this balancing function at the moment and assesses how the EU experience could provide lessons for policymaking improvements.

One should also note that approximation to the EU *acquis* does not automatically equate to optimization of Georgian competition legislation. As this work reveals, certain legislative shortcomings were left below the legal drafters' radars for one reason or another. Similarly, the 2020 amendments left the soft law provisions practically untouched. Such a development is problematic as these provisions clarify the competition issues that cannot be regulated by the legislative acts due to the more general nature of the latter. Hence, this research elaborates on

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<sup>22</sup> For details, see Kseniia Smyrnova, 'Europeanization of Competition Law: Principles and Values of Fair Competition in Free Market Economy in the EU and Association Agreements with Ukraine, Moldova, and Georgia' in Lorenzmeier, Petrov and Vedder (eds) (n 4).

the competition issues that soft law should address in Georgia and considers the extent to which the EU experience could help in this area.

In terms of enforcement, one could argue that the best approach would be to let the competition framework self-correct first – i.e., allow the national enforcer to make its practice more effective by utilizing the benefits of the recently amended legislation. This argument, however, overlooks the dangers of path dependency. The 2020 legal amendments materialized after six years of the competition framework establishment in Georgia. As revealed below,<sup>23</sup> certain undesirable enforcement trends have emerged in Georgia throughout this time. These trends might not automatically disappear because of the legislative improvements. This is partly because they were developed as mechanisms of administrative self-defense in the reality where the competition enforcement took place with defective legislation and minimal resources. Hence, such trends might be viewed positively even now, while the dangers of their continuation might be ignored. Consequently, analysis of the enforcement trends is timely and necessary. Such analysis enables the identification of harmful practices and consideration of the ways of changing them in line with the relevant EU experience.

To conclude, the research is both justified and timely. It is justified as the existing scholarship reveals the necessity of adapting a transplanted EU competition framework to Georgia's legal, economic and institutional context to enable its effective functioning. It is timely because its results will be the easiest to internalize now, when the national framework

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<sup>23</sup> See Chapter VII.

is still very young, less stifled with path dependencies, and more open to alternations/adaptations. Meanwhile, the research should be correctly focused in order to identify an optimal way of the above-mentioned adaptation. This is what we will discuss next.

### **3. Research Focus**

As the thesis centers on the optimization of the Georgian competition framework on the basis of the EU experience, the number of issues it can consider is quite broad. A proper focus of this work depends on the questions it will aim to answer and the issues it will discuss while answering those questions. Both aspects are briefly highlighted below.

#### **3.1. Research Questions**

To fully encompass all aspects of the competition framework – policy, law and enforcement – the research breaks them down and addresses them separately. However, as both law and enforcement serve the implementation of competition policy, their analysis is similar to a certain extent. Hence, the research focuses on two key questions – one policy-related and the other law/enforcement-related.

The first question centers around Georgia's problems in designing an effective competition policy, embedding it properly within a broader national market framework, and simultaneously maintaining the alignment with international trade obligations. In this respect,

it asks: *to what extent is EU experience significant for Georgia in the process of identifying the suitable policy objectives of its competition framework for the current stage of its development?*

This question will be dealt with first since its answer significantly determines the content of competition legislation and directions of competition enforcement in Georgia.

The second question focuses on Georgia's problems of effectively realizing the pre-determined competition policy in real life and real time. In this respect, it asks: *to what extent is the EU experience utilizable for Georgia in the process of designing competition laws (including soft laws) and ensuring their enforcement in a way that serves best to the achievement of its policy objectives?* While law and enforcement are addressed under the same 'umbrella' question, they are analysed under separate sections to ensure comprehensive coverage of both. Meanwhile, analysing law and enforcement in such an interlinked way maintains the coherence between the two while working out the ways to achieve their optimization. Such coherence is one of the critical aspects of developing and maintaining an effective competition framework.<sup>24</sup>

### **3.2. What this research is (not) about**

It is impossible to critically analyse every aspect of a competition framework within a single doctoral project. Hence, certain limitations need to be established from the beginning to narrow

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<sup>24</sup> The importance of coherence for the EU competition framework has been already explored elsewhere. See Sauter (n 9).

down the list of the assessed issues and guarantee the necessary depth and quality of the research.

The first limitation stems from the definition of the term ‘framework’. Namely, in this research, the term does not include competition advocacy – one of the (more recent) supporting pillars of the competition framework. Competition advocacy refers to the combination of activities that promote competition by various means (other than enforcement) and aim to increase awareness about the positive effects of competition.<sup>25</sup> The thesis does not address advocacy issues unless they are linked with policymaking, lawmaking, or enforcement-related analysis. Such a focus was conditioned by the fact that, while it is an essential part of the competition framework, advocacy still plays a subordinate role to lawmaking and enforcement in achieving pre-determined policy objectives.

The next limitation concerns the list of issues that the thesis will analyse while covering competition policymaking, lawmaking and enforcement in Georgia. Namely, while the aspects of policymaking will be covered as comprehensively as possible, the thesis will elaborate only on selected problematic issues of the national competition law and its public enforcement. This focus was conditioned by the inability to cover all lawmaking and enforcement aspects within a single analytical work. As already acknowledged, every competition framework is a work in progress where legislation and enforcement are constantly improved on a trial-and-error basis.

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<sup>25</sup> UNCTAD, 'Guidelines for implementing competition advocacy' <[https://unctad.org/system/files/non-official-document/ccpb\\_SCF\\_AdvocacyGuidelines\\_en.pdf](https://unctad.org/system/files/non-official-document/ccpb_SCF_AdvocacyGuidelines_en.pdf)> accessed 18 February 2021, 4. For specific challenges of competition advocacy in developing countries, see John Clark, 'Competition advocacy: challenges for developing countries' (2005) 6 OECD JCLP 69.

This applies to the Georgian competition framework as well. Hence, the principal task of this work is to evaluate *the most prominent problems* of competition law and public enforcement that prevent the attainment of the pre-determined competition policy objective(s) in Georgia. By performing this exercise, the thesis will also provide a roadmap that could be used for addressing other problems that exist nowadays or might arise in the future.

An additional limitation concerns the list of anti-competitive activities that are regulated under the Georgian competition framework. Namely, while Georgian competition legislation prohibits six types of anti-competitive activities, the thesis will only touch on three of them: anti-competitive agreements, abuse of dominance, and concentrations that significantly impede effective market competition. Such limitation is necessary to enable a comparative analysis underlying this research. The three above listed anti-competitive activities are regulated similarly in Georgia and the EU – they are enforced by administrative bodies, are addressed to the market participants, and have comparable legal definitions. The other three anti-competitive activities under the Georgian competition framework are not suitable for a comparative study within the same thesis. Two of these activities – unfair competition and anti-competitive market interventions by state bodies – do not have direct analogues in the EU competition framework. The third activity – state aid – is regulated in a very different context. Namely, EU state aid rules are vertical in nature – they are enforced by the Union (supranational level) and addressed to the Member States (national level). In contrast, Georgian state aid regulation is horizontal in nature – it is enforced by a national competition enforcer (a state body) against other state bodies within the same country. The difference highlighted above

leads to significant disparities in state aid rules between Georgia and the EU. Consequently, the EU experience in regulating state aid is largely inapplicable to Georgian reality. Even for those aspects of experience that might be valuable for Georgia, the analysis needs to be conceptually different from the three activities that currently form the focus of the research. Hence, state aid analysis was excluded from the thesis to ensure better coherence among the different parts of this work.

The final limitation concerns the level of critical analysis of the EU competition framework within this thesis. Such analysis is conducted to the extent that enables the identification of useful/suitable experiences for Georgia in the process of optimizing its national framework. Consequently, while the thesis will evaluate the evolution of the EU competition framework, identify the current state of its different pillars, and highlight possible future developments, it will not engage in a deep analysis of how the EU framework should be designed or improved. In other words, the optimization of the EU system as the blueprint is outside the research focus of this thesis. Instead, this work only indicates how and why the blueprint was developed in a particular manner and highlights its imperfect character. It then moves to the central exercise, analyzing how to use this advanced, yet not perfect, blueprint in an entirely different legal, economic, and institutional setting to make it work effectively under the changed circumstances. In this sense, the thesis covers both Georgian and the EU competition frameworks, but the design of the Georgian framework (in the light of the EU framework) is its principal focus.

## 4. Methodological Approach

Comparative analysis is the central premise of the research. However, this thesis does not follow the path of comparing two sets of competition laws to determine which is a superior one. Nor does it automatically assume that, due to the significant advancement of the EU competition framework, any disparity found between the competition legislations of the Union and Georgia is a result of the latter making mistakes that need to be corrected.<sup>26</sup> Instead, the research will focus on how the same legal framework needs to be adapted to the different jurisdictional settings to function effectively. Such a focus is aligned with the existing scholarship that explicitly suggests or implies that competition framework-building requires a differentiated approach across jurisdictions, considering their specific legal, economic, institutional, and other circumstances.<sup>27</sup> It is also necessary since Georgian competition framework already exhibits the signs of a top-down approach due to being designed to fulfil the obligation under the international trade agreement (AA).<sup>28</sup> In this respect, and based on the above-mentioned scholarship, the focus of this research shall ensure a healthy balance between top-down and bottom-up approaches while analysing the ways of national competition framework-building.

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<sup>26</sup> It has been noted that such a trend exists in a comparative competition scholarship, mostly vis-à-vis the US antitrust law. See David Gerber, 'Comparative competition law', in Mathias Reimann and Reinhard Zimmermann, *The Oxford handbook of comparative law* (OUP 2019) 174-179.

<sup>27</sup> See above, nn 8-19.

<sup>28</sup> This is a general trend for developing countries. See Dabbah (n 8) 338.

Comparing the context within which Georgian and the EU have to implement their respective competition frameworks will be the foundation of the proposed analysis. The comparative analysis will be conducted separately for each pillar of the competition framework – policy, law and enforcement. In each case, Georgian reality will be the starting point of the assessment. The EU-related analysis for each pillar will mirror the key issues discussed regarding Georgia. Such comparison will allow one to see whether the Union competition framework has dealt with the same problems Georgia faces today. This insight will further enable one to determine how such problems were handled and why they were approached in a specific way.

For each pillar, the purpose of the comparative assessment will be to distil the EU experience into specific key statements – ‘lessons’ – that Georgia could build upon while optimizing its competition framework. These lessons will not be normative statements – i.e., they will not mandate the adoption of particular legal provisions just because the EU has them and because they work effectively in the Union. Instead, they will provide directions for the framework development based on which, and considering the peculiarities of Georgian reality, specific normative claims could be made. The end goal of this thesis is to come up with such claims based on provided directions and thus make specific suggestions on how to internalize the EU experience in Georgia at all three levels of competition framework-building – policymaking, lawmaking, and enforcement. In this respect, the analysis will choose a middle road between classic comparative studies and international (peer) reviews of competition

regimes,<sup>29</sup> combining the benefits and avoiding shortcomings of both assessment types. Namely, on the one hand, it will identify similarities and differences between the two target frameworks via a comparative overview<sup>30</sup> without making value judgments about the superiority of any jurisdiction. On the other hand, it will use a tailored approach of a peer review to: (1) determine an optimal extent of further convergence; (2) indicate the areas where Georgia needs a different approach from the EU to guarantee the effectiveness of its national competition framework. Simultaneously, it will go into a deeper review of a broader context than the above-mentioned review format allows. Such depth, in turn, will result in a better jurisdiction-tailored advice for Georgia.

The above-mentioned comparative analysis will be offered within a particular lens. More specifically, frameworks will be compared across three dimensions: historical development, current legal landscape, and institutional dynamics. Each of these lenses serves a particular purpose highlighted below.

The **historical development** will enable two types of analysis necessary for the thesis: intra-jurisdictional and inter-jurisdictional. For intra-jurisdictional comparison, different eras (phases) of competition framework development will be identified separately for both Georgia and the EU. Here, the thesis will combine comparative and legal history methods for each

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<sup>29</sup> See for example OECD works cited at n 11.

<sup>30</sup> This is one of the well-acknowledged methods in comparative analysis. See Malinauskaite (n 8) 31-32.

jurisdiction.<sup>31</sup> Namely, it will elaborate on how the competition framework transitioned from one phase to another in Georgia and the EU (and look for the reasons for these transitions). The intra-jurisdictional comparison will serve as a basis for inter-jurisdictional analysis. Namely, it will enable one to identify: (1) which phases of development in Georgian and EU competition frameworks are the most similar and (2) the experience of which phases of the EU development are the most suitable ones for Georgia to use as of now. The overview of the historical development will play a significant role in determining suitable competition policy objectives for Georgia.

Historical development will also inform the comparative analysis of selected parts of Georgian and EU **competition law**. Namely, while the thesis will highlight the legislative and soft law differences between the two jurisdictions, lessons for Georgia will not be based on the premise that it should adopt all the provisions existing in the EU. Instead, the thesis will elaborate on how existing competition provisions came to be in the EU, explain the rationale behind their adoption, and analyse whether having a similar legal setting will be advisable for Georgia, considering its current circumstances.

Finally, **the institutional dynamics** will be analyzed through the same lens. The comparison reveals significant differences in institutions, their powers and their correlation with each other. In this respect, the thesis will focus on how and why these differences

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<sup>31</sup> Such a combination has been suggested as a way to overcome shortcomings of both methods in their classical form and to produce a more comprehensive analysis across jurisdictions. The concept of a merged 'comparative legal history' method is provided in Heikki Pihlajamäki, 'Merging Comparative Law and Legal History: Towards an Integrated Discipline' (2018) 66 AJCL 733.

originated (considering historical and legal developments) and will analyse the extent to which the convergence is advisable to maintain effective enforcement in Georgia – i.e. the enforcement that enables the attainment of pre-determined optimal policy objectives for the ongoing phase of Georgian competition framework.

The threefold approach will be consistently maintained throughout the thesis, albeit with varying levels of explicit expression. Specifically, the policy analysis will see the most precise delineation between historical development, law and institutional dynamics. In comparison, such delineation will be present during the analysis of law and enforcement more impliedly. This style of analysis is adopted because the key aspects of historical development and institutional dynamics will already be fully covered by the time the thesis reaches the discussion about law and enforcement problems in Georgia. Hence, the matters discussed in the policy analysis will be referred to but not reiterated in detail during the subsequent assessment.

The above-mentioned approach of the thesis requires coverage of a significant ground to show competition frameworks as they currently stand in both target jurisdictions. Consequently, parts of the thesis will be unavoidably descriptive. Yet, such deep descriptions are necessary on occasions since they enable subsequent critical analysis. This is especially true for Georgia since this thesis represents the first attempt to create a picture of its competition framework development from its inception until now, having all the framework pillars – policy, law and enforcement – in mind. Hence, this work takes special care to make the descriptions as detailed as possible, creating a solid ground for subsequent assessment.

A brief note needs to be made regarding the statistical analysis supporting this thesis. The latter tries to cover relevant enforcement statistics whenever such analysis is possible based on the available data. Unfortunately, the author encountered instances where such supportive analysis was impossible due to the lack of access to the original materials. For example, the robustness of the enforcement during the initial phase of the competition framework development in Georgia had to be assessed based on the secondary sources due to the inaccessibility of the primary ones. Namely, the judicial decisions between 1992-2005, which serve as primary sources for such statistics, could not be obtained from the Tbilisi City Court since the archive of the target period is not digitized yet. Meanwhile, in-person access and on-demand large-scale digitization was made impossible due to Covid-19 restrictions. However, the statistics for the most recent phase of the Georgian competition framework are provided, as the enforcer decisions (primary sources) are openly available on the government website.

## 5. Thesis outline

This thesis adopts a two-title and nine-chapter structure to encompass all three pillars of the competition framework (policy, law, enforcement) and cover all three principal infringements (anti-competitive agreements, abuse of dominance, and concentrations that significantly impede effective competition).

**Title I – ‘Optimizing Objectives’** - provides the answer to the first research question. It consists of three chapters. **Chapter I** reviews Georgian competition policy objectives from three

aspects: (1) historical development between 1992-2021; (2) existing objectives, as expressed in the law; (2) institutional dynamics among the Parliament (legislator), National Competition Agency/its predecessors (enforcers), and Common and Constitutional Courts of Georgia (judiciary). The chapter explains how each of these aspects affects the development of the national competition policy. **Chapter II** contains a similar exercise for the EU. First, it chronicles the development of the competition policy objectives between 1958 and 2021. Next, it reviews the explicit and implicit indications of these objectives in the EU's primary, secondary and soft laws. Finally, it shows the role of the institutional dynamics (primarily between the EU Commission and the CJEU) in shaping the EU competition policy objectives. The chapter also contains six intermediary conclusions/lessons about the EU experience, which might be helpful for Georgia. **Chapter III** uses the information and analysis of the previous two chapters to point out problems regarding the existing objectives of Georgian competition policy. It discusses how these objectives should be shaped to become more suitable for the Georgian competition framework in its current state, considering the novelty of the framework, the characteristics of the national economy and the overall level of the competition culture within the country.

**Title II – ‘Optimizing Law and Enforcement’** – corresponds to the second research question. It is divided into two subtitles, each comprising three chapters. The sequence of the topics discussed in these subtitles slightly differs from the mainstream academic work. Namely, while the works encompassing all three classic infringements usually discuss antitrust issues before concentration control, this work analyses the two in a reverse order. This is done because such sequence serves better to the overall structure of the thesis. More specifically,

nowadays, the biggest legal shortcomings of Georgian competition framework relate to the *ex-ante* control (concentrations) while major enforcement shortcomings happen during the *ex-post* control (antitrust). This does not mean that the former is devoid of enforcement problems while the law related to the latter does not require any further improvement. Nevertheless, to conduct a deep and comprehensive doctoral-level analysis, this work focuses on the problematic legal provisions of the concentration framework, on the one hand, and on the suboptimal practices in the antitrust enforcement, on the other hand. For coherence, it is logical to consider parts of the framework – policy, law, and enforcement – in the indicated order. Consequently, as the legal shortcomings concerns concentration control, they are analysed before the antitrust procedure.

Keeping the above-mentioned situation in mind, **Subtitle II.I.**, titled ‘**Optimizing the Law: Focus – *ex-ante* Control**’, elaborates on the extent and possibilities of internalizing the EU experience while delimiting the jurisdiction of concentration control in Georgia. The subtitle begins with **Chapter IV**, which explains the principal jurisdictional problems of Georgian *ex-ante* control: narrowness of the concept of concentration, broadness of exemptions, and an extensively low level of turnover thresholds. **Chapter V** researches the EU experience, discussing the evolution of and the rationale behind the concept of concentration, reasons for narrow configuration of exemptions, and the set boundaries, as well as possibilities of adjustment, within the notion of the Union dimension (turnover thresholds and referrals). It draws three principal lessons for Georgia. **Chapter IV** elaborates on these three lessons, indicating how Georgia could optimize the *ex-ante* jurisdiction by redefining the concept of

control and exemptions. In addition, it offers a method of determining turnover thresholds for concentrations with both national and regional dimensions.

Subsequently, **Subtitle II.II.**, titled ‘**Optimizing the Enforcement: Focus – *ex-post* Control**’ – elaborates on utilizing EU competition enforcement experience in Georgia. The subtitle focuses on the situations where the legislation empowers the enforcer with decision-making discretion and the latter uses it in a self-limiting manner, hurting the process of enforcement. **Chapter VII** focuses on two such problematic enforcement trends in Georgia: turning the complaint-based investigations into a quasi-private proceeding and overfocusing on effects analysis in antitrust cases. **Chapter VIII** overviews the EU experience in both areas and offers the final two lessons to Georgia. **Chapter IX** explains how Georgia could utilize this experience and optimize antitrust enforcement, in particular, by respecting the public nature of antitrust proceedings without infringing the complainant’s rights and identifying a pool of antitrust cases where effects analysis is not required for establishing the infringement due to their apparent presence.

The thesis ends with a concluding chapter. The latter summarizes key findings and highlights the principal messages for Georgia’s competition framework optimization. It also briefly explains how the researchers might find this work valuable for their future academic work in at least three areas: the research related the competition framework in Georgia; the research related to optimizing competition frameworks in transitioning, developing and small economies on the basis of the international experience; and the research related to the transplantation of the EU competition framework outside its borders.

# TITLE I. Optimizing Objectives

Choosing suitable objectives for competition policy has been a subject of academic research for several decades now.<sup>32</sup> This is unsurprising since the choice of these objectives conditions the place of the competition framework within the broader economic and social setting of its home jurisdiction, affects the design of the substantive legal tests, and shapes enforcement methods and priorities.<sup>33</sup> Simultaneously, competition policy objectives seem to reflect the context of their adoption and implementation, as revealed by their diversity and somewhat conflicting nature.<sup>34</sup> Consequently, their meaning, merits, relevance and the benefits of their pursuit, as well as their relationship and prioritization, are often intensely debated. Engagement in these debates lies beyond the scope of this research. However, it is worthwhile to highlight several aspects of it to provide a context for subsequent analysis regarding optimal policy choices for Georgia in the light of the EU experience.

The debates are firmly linked to the classification of the objectives of competition policy.

Depending on the research scope, they can be classified in several ways, including: efficiency

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<sup>32</sup> The earliest collection of works about the EU competition policy objectives consulted in preparation of this work is Claus-Dieter Ehlermann and Laraine Laudati (eds), *European Competition Law Annual 1997: the Objectives of Competition Policy* (Hart 1998).

<sup>33</sup> David Hyman and William Kovacic, 'Institutional design, Agency life cycle and the goals of competition law' (2013) 81 *FordhamLRev* 2163.

<sup>34</sup> For example, see ICN 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies' (2007) <<http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf>> accessed 10 October 2017, 5-38, in relation to the multiplicity and a partially contradictory character of objectives pursued unilateral conduct (abuse of dominance) frameworks worldwide.

and non-efficiency objectives;<sup>35</sup> economic and non-economic/socio-political objectives;<sup>36</sup> ‘core’ competition objectives and public policy/public interest objectives.<sup>37</sup> Adopting a universal classification is difficult as particular objectives might be interpreted and perceived differently.<sup>38</sup> Meanwhile, the following classification will be helpful for subsequent analysis:

- **Primary/‘Core’ objectives**<sup>39</sup> – also called ‘system-function’ objectives – focus on maintaining and supporting a competitive market/economic system.<sup>40</sup> They fall in two sub-categories: (1) objectives of *protecting market structure* and *competitive process*; (2) objectives of *economic efficiency* and *consumer welfare*.<sup>41</sup> Scholars almost universally agree that at least one of these objectives should lead any domestic competition policy.
- **Secondary objectives**<sup>42</sup> – or value-oriented objectives – use a competition framework to uphold specific (often cross-disciplinary) values. These values can be economic, such as

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<sup>35</sup> Ben van Rompuy, *Economic Efficiency: the Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations under Article 101 TFEU* (Kluwer 2012) 5 and 8.

<sup>36</sup> David Gerber, *Competition Law and Antitrust* (OUP 2020) 19; Sauter (n 9) 61.

<sup>37</sup> OECD (n 14) 3.

<sup>38</sup> For example, objective of economic freedom has been classified as economic objective by Gerber (n 36) and as a non-economic one by Sauter (n 9).

<sup>39</sup> OECD (n 14) 3.

<sup>40</sup> Gerber (n 36) 20-23.

<sup>41</sup> Ibid.

<sup>42</sup> OECD (n 14) 2.

*freedom to compete/economic freedom*<sup>43</sup> or the *protection of SMEs*.<sup>44</sup> They also can be socio-political, such as *fairness*,<sup>45</sup> *equality*,<sup>46</sup> and *economic democracy*.<sup>47</sup> These objectives are usually pursued alongside core objectives and are aligned with the former.

- **Jurisdiction-specific and outcome-oriented objectives.** These objectives can be primary or secondary. They are rooted in the short and long-term concerns of their home jurisdictions and are usually targeted to specific outcomes. For example, the EU uses its competition framework to achieve *market integration*.<sup>48</sup> In contrast, developing and

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<sup>43</sup> Gerber (n 36) 25; Van den Bergh, Camesasca and Giannaccari (n 9) 100-101; ICN (n 34) 14-17; For EU-specific context, see also Pinark Akman, 'The role of 'freedom' in EU competition law' (2014) 34 *Legal Studies* 183. See also Ariel Ezrachi, 'EU Competition Law Goals and the Digital Economy' (2018) *Oxford Legal Studies Research Paper* No. 17/2018, <<https://ssrn.com/abstract=3191766>> accessed 18 November 2020, 17-19, focusing specifically on the role of this objective in the EU digital economy.

<sup>44</sup> See, for example, Laura Parret, 'Shouldn't We Know What We are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate about the Objectives of EU Competition Law and Policy' (2010) 6 *EurCompJ* 339, 353-354.

<sup>45</sup> See, for example, Niamh Dunne, 'Fairness and the Challenge of Making Markets Work Better' (2021) 84 *MLR* 230. At 231-234, the author notes the cross-disciplinarity of this objective and discusses the varied engagement of the EU competition framework with this objective over the years.

<sup>46</sup> The concept of equality may encompass equality of opportunity between the competitors (which forms a part of competitive process). However, it might also refer to wealth or income inequality. Some authors advocate the usage of competition framework to combat inequality in this sense. See, for example, Jonathan Baker and Steven Salop, 'Antitrust, Competition Policy, and Inequality' (2015) 104 *The Georgetown LJO* 1, <<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2474&context=facpub>> accessed 21 January 2020.

<sup>47</sup> For the concept of 'economic democracy', see Ioannis Lianos, Valentine Korah and Paolo Siciliani, *Competition Law: Analysis, Cases & Materials* (1st edn, OUP 2019) 98-100.

<sup>48</sup> For a detailed explanation of the EU approach towards this objective, see *ibid* 130-176.

transitioning economies often use the same framework to directly target high prices,<sup>49</sup> attract foreign investments,<sup>50</sup> intensify international trade,<sup>51</sup> or foster economic growth.<sup>52</sup>

- **Other policy considerations**<sup>53</sup> – also called ‘public policy’/‘public interest’ objectives<sup>54</sup> – are not the objectives of competition policy in a strict sense. Instead, they utilize competition enforcement to address other policy concerns, including financial stability,<sup>55</sup> employment,<sup>56</sup> preservation of the environment,<sup>57</sup> and protection of public health.<sup>58</sup>

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<sup>49</sup> This is especially true for post-Soviet countries which have a legacy of direct price regulation. For Georgian context, see subchapter I.2.1. below. Note that some of the post-Soviet countries of the central Asia still maintain the direct price regulation. See, for example, OECD, *Competition Law and Policy in Kazakhstan: A Peer Review* (OECD 2016) 8, 17, 39-55, elaborating on how the abuse of dominance framework is used to directly target prices. Similar approach is used in Uzbekistan. See OECD, *An introduction to Competition Law and Policy in Uzbekistan* (OECD 2022, forthcoming) 38-40.

<sup>50</sup> See, for example, Natalya Yacheistova, *Competition policy in countries in transition – legal basis and practical experience* (UNCTAD 2020) 42-43, where the author discusses the engagement of the competition enforcers of various post-Soviet countries in the process of approving trade and investment related legislation and activities.

<sup>51</sup> Ibid.

<sup>52</sup> Cheng (n 8).

<sup>53</sup> The term was borrowed from Rompuy (n 35).

<sup>54</sup> OECD (n 14) 3.

<sup>55</sup> See, for example, OECD, ‘Competition and the Financial Crisis’ (OECD 2009) <<https://www.oecd.org/competition/sectors/42538399.pdf>> accessed on 13 February 2021, especially at 4-12.

<sup>56</sup> See, for example, OECD, *Competition Law and Policy in South Africa: An OECD Peer Review* (OECD 2003) 17-18 where employment is explicitly stated as a public policy objective supported via competition framework.

<sup>57</sup> A detailed overview of the interaction between competition law and environmental protection is provided in Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws* (OUP 2016).

<sup>58</sup> The issue of competition law/public health policy relationship has been especially intensified in recent years, in the light of Covid-19 pandemic. See, for example, Małgorzata Kozak, ‘Competition Law and the COVID-19 Pandemic – Towards More Room for Public Interest Objectives?’ (2021) 17 *UtrechtLRev* 118.

Sometimes, this might happen at the expense of primary and secondary competition policy objectives.

The diversity and complexity of the above-listed objectives have fueled several lines of debate.<sup>59</sup> First, it is questionable whether competition policy should adopt a monist or a pluralist approach in the process of objective-setting. Several jurisdictions, such as the USA and Norway, maintain a competition framework with a single core objective. However, most jurisdictions acknowledge the firm embedment of the competition framework in a broader economic and socio-political landscape and advocate a multi-objective approach.<sup>60</sup>

Next, both monists and pluralists debate the sole (ultimate) competition policy objective. Usually, the choice rests between the core objectives of competition protection and efficiency/welfare enhancement. Nowadays, the majority seems to favour efficiency/welfare objectives. However, concepts of ‘efficiency’ and ‘welfare’ encompass multiple standards. For example, efficiency is an umbrella term for allocative, productive and dynamic efficiencies. Welfare might refer to both total and consumer welfare standards. Considering the different focuses these standards have during the policy implementation process, they are hard to reconcile. This hardship invites further debate regarding the optimal choice among them.<sup>61</sup>

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<sup>59</sup> A useful and comprehensive review of these debates in relation to the EU competition law has been recently provided by Konstantinos Stylianou and Marios Iacovides, ‘The goals of EU competition law: a comprehensive empirical investigation’ [2022] *Legal Studies* 1, 5-12.

<sup>60</sup> For the jurisdictions following a monist approach, see Van den Bergh, Camesasca and Giannaccari (n 9) 89-91; for the importance of pluralist approach see Ezrachi 2016 (n 8).

<sup>61</sup> For a brief overview of these debates, see Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Texts, Cases and Materials* (7th edn, OUP 2019) 28-31. For a comprehensive analysis, see Van den Bergh,

Supporters of the pluralist approach also debate the inherent conflicts among various objectives and the proper level of balance between them, acknowledging the necessity of trade-offs during their implementation. For example, there is an ongoing discussion on balancing the protection of economic freedom against the standards of efficiency and consumer welfare enhancement (that might occasionally require the restriction of this freedom).<sup>62</sup> Similar discussion concerns, for example, the balance between fairness and various efficiency/welfare standards<sup>63</sup> or the choice between protecting MSEs and protecting the competitive market process.<sup>64</sup> A parallel debate concerns the merits of jurisdiction-specific and outcome-oriented objectives. While some of these objectives – such as direct price control – are recognized as harmful to the effectiveness of the competition framework,<sup>65</sup> others – such as market integration and international trade enhancement – can undoubtedly benefit the competitive process. Meanwhile, the extent to which they should be the direct concerns of competition policy is debatable.<sup>66</sup> A related discussion also concerns the capacity and operational

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Camesasca and Giannaccari (n 9) 91-117; Lianos, Korah and Siciliani (n 47) 90-115. See also Pinar Akman, *The concept of abuse in EU competition law: law and economic approaches* (Hart 2012) 12-24.

<sup>62</sup> Sauter (n 9) 64-69.

<sup>63</sup> Parret 2010 (n 44) 354-356. For EU specific context (concerning Article 102 TFEU), see also case-studies in Akman 2012 (n 61) 187-266.

<sup>64</sup> Parret 2010 (n 44) 353-354.

<sup>65</sup> Gerber (n 36) 24-25.

<sup>66</sup> For market integration, See Lianos, Korah and Siciliani (n 47), especially at 142-146; see also Brisimi (n 9). For correlation between competition and trade policies, see Dabbah (n 8) ch 11.

effectiveness of a competition framework in accommodating multiple policy objectives in the face of limited implementation resources.<sup>67</sup>

Precise definitions of particular objectives are also debatable. For example, the definition of the consumer welfare concept depends on the interpretation of its ‘consumer’ and ‘welfare’ components.<sup>68</sup> Similarly, the notion of fairness might refer to establishing a level playing field for competitors, guaranteeing equal outcomes for every market participant, or ensuring fair redistribution of resources (i.e. awarding consumers a fair share of market benefits).<sup>69</sup> Concepts of equality, competition protection, and freedom may also have different connotations across jurisdictions. These debates are important as definitions affect the correlation of the objectives within a multi-objective framework and the enforcement focus pursued within that framework.

Finally, debates on the competition policy objectives have to factor in the real-life market and market-related economic and social developments. Consequently, significant milestones such as global crises and the emergence of digital markets are usually followed by discussions regarding their novel interpretation and re-adjustment.<sup>70</sup>

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<sup>67</sup> Hyman and Kovacic (n 33).

<sup>68</sup> Van den Bergh, Camesasca and Giannaccari (n 9) 95-100; see also ICN, ‘Competition Enforcement and Consumer Welfare: Setting the Agenda’ (2011) <[https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP\\_CWelfare2011.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP_CWelfare2011.pdf)> accessed 15 June 2021, 18-36.

<sup>69</sup> Dunne (n 45) 234-237.

<sup>70</sup> For crisis-related discussion, see Małgorzata (n 58). For the discussions regarding competition policy objectives and digital economy, see Ezrachi (n 43).

These debates have a central underlying theme – ‘[t]here is no “one size fits all” competition policy’.<sup>71</sup> Consequently, the design of competition policy objectives strongly depends on peculiarities of the markets these objectives are addressed to and the characteristics of the jurisdictions in which these markets are located. Meanwhile, notwithstanding the jurisdiction, competition policy functions best when its objectives are clearly defined, appropriately prioritized, do not overload the competition framework with too many tasks to perform, and are well-balanced against each other during their implementation.

Looking at the experience of Georgia (Chapter I) and the EU (Chapter II) suggests that they are coping with the above-listed tasks with a different degree of success. Both jurisdictions have opted for a pluralist approach toward competition policy objectives. However, the emergence and development of various objectives were conditioned by significantly different historical, legal and institutional environments. These three factors are relevant for policymaking because:

- *Historical developments* reveal how competition policy objectives emerge and evolve in relation to the changed circumstances within the markets they regulate and within the jurisdictions in which they operate. Consequently, some objectives seem to be more relevant than the others at different stages of the development of a competition framework.<sup>72</sup>

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<sup>71</sup> Richard Whish and David Bailey, *Competition Law* (10th edn, OUP 2021) 18.

<sup>72</sup> For example, developing countries prioritize value-oriented, outcome-oriented, and public policy objectives as the latter correspond to their more urgent needs. In contrast, alongside economic development and acquisition of competition enforcement expertise, the countries switch towards system-function objectives. OECD 2003 (n 14) 3.

- *Amendments in legislation and soft law* indicate what objectives are perceived as important by policy and lawmakers at a particular stage of jurisdictional development.
- *The institutional dynamics* between key public bodies engaged in competition framework-building (legislators, enforcers and courts) reveals the preferred objectives of each institution and the actual powers they have in shaping and implementing.<sup>73</sup>

This Title aims to find optimal competition policy objectives for Georgia – i.e. *the most relevant objectives for the current stage of its development, considering the three factors listed in the previous paragraph*. Considering the overviewed policy debates, automatically copying the EU competition policy objectives is not advisable. However, several valuable lessons learned based on the EU experience would be helpful for Georgia in the process of competition policymaking (Chapter III).

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<sup>73</sup> Ibid, 4-5.

# Chapter I. Overview of Competition Framework Objectives - Georgia

## 1. Introduction

Almost three decades have passed since establishing the first competition framework in Georgia. However, the debate on its policy objectives has hardly taken place. Identification of the optimal objectives is complicated by several factors. First, the framework changes frequently – it has been through 3 distinct phases throughout the past 30 years. Next, the legislation points at multiple, partially overlapping, and contradictory objectives. Finally, the institutional dynamics complicate the policy clarification process.

This chapter starts with a historical overview revealing the causes and effects of the introduction and abandonment of particular objectives between 1992 and 2022. Next, the substance, coherence and feasibility of current objectives are assessed by reviewing the current legislative landscape. Further, the vagueness of these objectives is explained based on existing institutional dynamics in Georgia. Finally, the observations made by looking at historical, legal and institutional dimensions of competition policymaking are used to point out relevant factors to be considered during the objective-setting process in Georgia.

## 2. Changes in Objectives - Timeline

Since 1992, Georgia's competition policy objectives have gone through three phases. Each phase corresponded to substantive revisions of national economic policy and to the shifts in perception regarding the role of the competition framework in market development.<sup>74</sup>

The first phase began in 1992, with the introduction of competition (then “anti-monopoly”) provisions in Georgia in the wake of transitioning from a centrally planned to a free market economy. The second phase, initiated by a new libertarian economic policy, started in 2005 by drastically deviating from the orthodox understanding of the competition framework. The third (current) phase, driven by the desire to have a closer economic relationship with the EU, commenced in 2012/2014<sup>75</sup> and is marked by the re-introduction of classic competition provisions.<sup>76</sup> The transformation of competition policy objectives throughout the above-listed three phases, together with their causes and consequences, are discussed below.

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<sup>74</sup> These do not always correspond to the development of competition enforcement phases. Details about the latter are provided in Slava Fetelava, 'The Evolution of Competition Theory and Antimonopoly Regulation in Georgia' (Doctoral thesis, GRSU 2008) 117-131. For Georgia's economic development throughout 1990s in general see Vladimer Papava, *Economic Reforms in Post-Comunist Georgia: Twenty Years After* (NCP 2013) 1-14; a more recent competition-specific review is provided in Zurab Gvelesiani, 'The Necessity of Consumer Law for Effective Competition and a More Robust Enforcement of Competition Law: A Comparative Analysis of the EU and Georgian Legal Systems' (Doctoral thesis, CEU, 2017) 80-90.

<sup>75</sup> For clarification see subchapter 1.2.3.

<sup>76</sup> For the purposes of this thesis, the term “classic competition provisions” refers to provisions related to anti-competitive agreements, abuse of dominant position and regulation of market concentrations.

## 2.1. 1992-2005 – Phase I: Formation

The formation of Georgia's competition framework began in the early 1990s, with the collapse of the USSR and the emergence of Georgia as an independent state with its national market. The process was difficult to manage for the newly formed country.<sup>77</sup> From a theoretical perspective, there was no framework dealing with the challenges of transition.<sup>78</sup> From a practical perspective, planned economies could not readily use any existing economic experience to turn themselves into thriving markets.<sup>79</sup> This background significantly affected the development of competition policy objectives.

In Georgia, the transition involved a twofold transformation process: establishing necessary state institutions after the collapse of the USSR and transferring from the centrally planned to a free market economy.<sup>80</sup> The high uncertainty accompanying this process influenced all areas of policymaking. The principal outcome was a strong need to focus on short-term benefits to save the country from the immediate (and significant) economic problems. Although justified in a crisis, such an approach postponed discussions regarding long-term

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<sup>77</sup> For the overview of specific difficulties, see Papava 2013 (n 74) 1-10.

<sup>78</sup> Vladimer Papava, *Necroeconomics. The political Economy of post-communist capitalism (Lessons from Georgia)* (iUniverse Inc., 2005) 12-14.

<sup>79</sup> A reason for this was that post-Soviet transition involved a rapid change on multiple fronts – something that has been never attempted before. For details, see Leszek Balcerowicz, *Socialism, Capitalism, Transformation* (CEU Press 1995) 145-165.

<sup>80</sup> Papava 2013 (n 74) 1-2; see also Papava 2005 (n 78) 123-124.

policies for the indefinite future. Such postponing negatively affected the stability and effectiveness of market-related frameworks, including competition.

Arguably, the initial competition framework revolved around three policy objectives (these were mostly similar to all post-Soviet states, due to their shared past):<sup>81</sup>

(1) **The protection of free enterprise.** This objective was first mentioned in the 1992 Antimonopoly Decree.<sup>82</sup> It was linked to the objective of competition protection by the Constitution of Georgia ('the Constitution').<sup>83</sup>

(2) **Establishing and developing a competitive environment within the national market.** This objective was also first mentioned in the 1992 Antimonopoly Decree, which aimed to establish 'conditions for the development of competition'.<sup>84</sup> Later, it was reaffirmed in the 1996 Law on Monopolistic Activities and Competition ('LMAC').<sup>85</sup>

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<sup>81</sup> Ketevan Lapachi, 'Anti-monopoly regulation in a transition country: the example of Georgia' [2001] ECLR 374, 375, mentions only two of the three. The similarities in competition policy objectives of the transitioning economies has been noted in Tibor Varady, 'The Emergence of Competition Law in (Former) Socialist Countries' (1994) 47 AmJCL 229, 249-250.

<sup>82</sup> Decree on Limitation of Monopoly Activities and Development of Competition in the Republic of Georgia (SCRG, 16/10/1992) (1992 Antimonopoly Decree) art 13(1)

<sup>83</sup> Constitution of Georgia (Law N786, 24/08/1995) unconsolidated version (Constitution) art 30(2)

<sup>84</sup> 1992 Antimonopoly Decree, Art 13(1)

<sup>85</sup> Law of Georgia on Monopolistic Activities and Competition (Law N288, 25/07/1996 – revoked on 11/07/2005) (LMAC) Art 1(1)

(3) **The protection of consumer rights.** Protection of consumer rights and competition were first linked by the Constitution.<sup>86</sup> Later, LMAC declared consumer protection as an official objective of competition law.<sup>87</sup>

Several factors conditioned the choice of the three above-mentioned objectives. This work will discuss some of these factors below to explain their importance in the initial phase of competition framework formation and show a rationale for their abandonment at a later stage.

### *2.1.1. Factors behind initial (short-term) objectives*

**The protection of free enterprise** became a competition policy objective due to two principal factors: the legalization of free enterprise in a newly independent Georgia and the extreme vulnerability of this institution in the 1990s.

Free enterprise was one of the institutions acknowledged and protected by the newly independent Georgia as a necessary pre-condition to a free market economy.<sup>88</sup> Setting the protection of this institution as a duty of the country<sup>89</sup> highlighted a radical shift from the USSR

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<sup>86</sup> Constitution (n 83) art 30(2)

<sup>87</sup> LMAC (n 85) Art 1(1)

<sup>88</sup> Apart from the Article 30(2) of the Constitution (n 83), free enterprise (organizational side) was also protected by commercial law; see Law of Georgia on Entrepreneurs (Law N577, 28/10/1994 – revoked on 01/01/2022) (LGE) art 1(1). The organic link between free enterprise and competition, as the basis of the market activities, was later affirmed by the CCG, Case N1/2/411 *Rusenergoservisi and others v Parliament and GME* (19/12/2008) pt II, para 5.

<sup>89</sup> Constitution (n 83) art 30(2)

approach, where the former existed only underground, was criminalized and had an extremely negative, shameful image due to state propaganda.<sup>90</sup> The fact that competition and free enterprise were organically linked to each other<sup>91</sup> conditioned the protection of the latter to become a key concern for the framework regulating the former.

In addition, free enterprise required such protection during the transition period. In the 1990s, the private sector experienced an extreme lack of resources: land and production factors were still legally owned by the state;<sup>92</sup> the absence of the national currency<sup>93</sup> conditioned dependence on money supply from Russia, while the latter was unreliable due to its financial difficulties;<sup>94</sup> the labour force was not skilled in production for competitive circumstances;<sup>95</sup> technology and infrastructure were not advanced enough for such production.<sup>96</sup> The desire for

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<sup>90</sup> Rationale of the USSR for opposing free enterprise is provided in Stephen Kotkin, *Magnetic Mountain: Stalinism as a Civilization* (UCP 1997) 27-36; for the overview of the prominence and difficulties of the underground economy in Soviet Georgia see Gavin Slade, *Reorganizing Crime: Mafia and anti-Mafia in post-Soviet Georgia* (1st edn, OUP 2013) 37-43.

<sup>91</sup> *Rusenergoservisi* (n 88) pt II, para 5.

<sup>92</sup> Privatization of the state property began in Georgia in 1992. However, initial mechanical transfer (i.e., transfer of land without transferring attached legal rights) and the absence of the public registrar affirming the property rights of individuals complicated the process and prolonged it till the early 2000s; see Leonard Rofles Jr. and Melany Grout, *Assessment of Citizens' Property Rights in Georgia* (Landesa, USAID and EWMI 2013) 2.

<sup>93</sup> National currency, Lari, entered into circulation on 2 October 1995; NBG, 'Banknotes' (2006) <<https://www.nbg.gov.ge/index.php?m=193&lng=eng>> accessed 28 September 2019.

<sup>94</sup> Difficulties undergone by the Soviet (and subsequently Russian) currency, Rouble, are overviewed in Rawi Abdelal, 'Contested Currency: Russia's Rouble in Domestic and International Politics' (2003) 19 JCSTP 55, 55-57.

<sup>95</sup> This was a result of living under a centrally planned economy for around 70 years, where the workforce was not accustomed even with the idea to produce for competitive markets; Anna Fornalczyk, Working Paper IV in Ehlermann and Laudati (eds) (n 32) 67-80, 67.

<sup>96</sup> Eveline Baumann, 'Post-Soviet Georgia: It's a long, Long Way to "Modern" Social Protection' (2012) 46 *Economies et Societes* 259, 261.

market participation was further diminished by the financial crisis following the collapse of the USSR<sup>97</sup> and by instability resulting from the armed conflicts in two regions of the country – Abkhazia and Samachablo.<sup>98</sup> Consequently, many newly established entrepreneurs voluntarily exited the market because of the high risks associated with market participation.<sup>99</sup>

In these circumstances, the state's primary task was to maintain a functioning national market by ensuring that entrepreneurs (i.e. market players) existed and were willing and capable of operating. Consequently, protection of free enterprise – an objective otherwise belonging to the industrial policy – found its way among the competition policy objectives.<sup>100</sup>

As noted during the classification of objectives, such occurrences are commonplace – competition policy often accommodates other policy considerations. Besides, accommodating the interests of free enterprise was crucial for Georgia in the short run as the country did not have a developed industrial policy and separate legislation on entrepreneurs yet. Meanwhile, establishing the competition framework during economic transition meant that other policy

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<sup>97</sup> Pre-requisites of the financial crisis – including extreme budgetary and monetary problems of the USSR before its immediate collapse - are discussed in Grigorii Khanin, 'The Soviet Economy – From Crisis to Catastrophe' in Anders Åslund, *The Post-Soviet Economy: Soviet and Western perspectives* (Pinter 1992) 9-24, 16-19.

<sup>98</sup> For the effects of these armed conflicts on Georgian economy, see Niklas Nillson, 'Georgia's Conflicts: Abkhazia and South Ossetia' in Svante Cornell, Michael Jonsson and Jana Arsovska (eds), *Conflict, Crime, and the State in Postcommunist Eurasia* (UPP 2014) 103-128.

<sup>99</sup> European Initiative - Liberty Academy Tbilisi NGO, *The Economic Transformation of Georgia in its 20 Years of Independence* (USAID and EWMI 2012) 5.

<sup>100</sup> The challenges of the free enterprise were not a unique attribute to Georgian transition. Similar problems were experienced by other post-Soviet countries. Certain problems continue up till today. For details see Arnis Sauka and Alexander Chepurensko, *Entrepreneurship in transition economies: diversity, trends, and perspectives* (Springer 2017).

considerations frequently required prioritization. This was a difficult start for a novel framework that still needed to learn how to implement its core objectives.

Such core objective was **establishing and developing a competitive environment within the national market**. Two principal factors that conditioned its emergence were the danger of damaging a newly formed free market by the existing monopolistic tendencies and a total absence of a competition culture in post-Soviet Georgia.

The existence of state monopolies, a natural environment in the USSR economy, was one of the primary targets of Georgian policymakers during the transition. This primarily materialized in privatization – breaking up state monopolies and transferring their ownership to private parties.<sup>101</sup> This process constantly faced two predicaments: attempts of various state bodies to maintain public monopolies as an accustomed status-quo and similar attempts from market players, creating a threat of the emergence of private monopolies.<sup>102</sup> Both scenarios were highly undesirable for a country during the national free market formation phase.

The absence of competition culture was another legacy of the centrally planned economy, where both legal (i.e. state-controlled) and illegal (i.e. underground) markets functioned through strong co-operation and planning – either by the state's direct involvement

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<sup>101</sup> The process was ongoing in all other post-Soviet states; see Yacheistova (n 50) 37-38; for Georgian context, see Avtandil Silagadze and Teimuraz Beridze, 'Notes on Privatization in Georgia' in Bartłomiej Kamiński (ed), *Economic Transition in Russia and the New States of Eurasia* (M.E. Sharpe 1996) 354-356.

<sup>102</sup> This problem has been a general trend in the countries with novel market regimes. See Dabbah (n 8) 289.

or behind its back.<sup>103</sup> The collapse of the USSR ended the necessity of such co-operation from a legal perspective. However, 70-years-old customs - whereby market success depended either on the co-operation of market players and deceit of public authorities or on state protectionism - were not easily eliminated.<sup>104</sup> Hence, initially, Georgian market players neither knew how to compete on merits nor were willing to adjust to a new market reality that required their independent operation.

Against this background, the objective of establishing and developing a competitive environment within the national market served at least two purposes. First, it enabled the state to ensure the maintenance of the competitive environment without jeopardy from either public or private powers. Second, it supported the establishment of a market culture where undertakings depended solely on their own merits.

The existence of this objective was a welcoming sign as it signalled Georgia's understanding and appreciation of the importance of the competitive process. One could argue that despite a different formulation, it corresponded to the objective of protecting the competitive process (as named in the west). Interestingly, the adoption and development of this objective throughout the 1990s coincided with the time when efficiency/welfare objectives

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<sup>103</sup> For a detailed account of this process, see Papava 2005 (n 78) 39-62.

<sup>104</sup> For general discussion of why customs governing economic activity are hard to change over time, even with legal framework, see Gary Goodpaster, 'Law Reform in Developing Countries' in Timothy Lindsey (ed), *Law Reform in Developing and Transitional States* (Routledge 2007) 106-140, 111-112; a respective analysis about the post-Soviet space (including Georgia) is provided in Alexander Kapatadze, 'Political Corruption in Eurasia: Understanding Collusion Between States, Organized Crime and Business' (2015) 19 *Theoretical Criminology* 198.

slowly gained worldwide recognition and prominence (see Chapter II below). In this respect, focusing on the objective that was concerned by the competitive process as such affirmed the fact that Georgian competition framework was rooted in the national reality.

Meanwhile, this framework had to accommodate yet another objective of a related consumer policy. Two principal factors for introducing the objective of **consumer rights protection** within the competition framework were a desire to eliminate the Soviet legacy of consumer treatment and the extreme vulnerability of Georgian consumers throughout the 1990s.

The Soviet legacy of consumer treatment significantly differed from similar treatment in the Western economies. In this world – where the government was in charge of market demand (i.e. consumption depended not on the consumer desire but on the availability of goods created under the pre-designed production plans), the power asymmetry between producers and consumers was not recognized, and the consumerism in the Western sense was stigmatized as an essentially anti-socialist value - there was no room for frameworks protecting consumer rights, interests or welfare.<sup>105</sup> Despite certain positive developments in consumer choice and overall consumption culture throughout the 1970s and 1980s,<sup>106</sup> consumers largely were not viewed as market participants worthy of protection and empowerment.

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<sup>105</sup> Gvelesiani (n 74) 158-162; see also Olga Kravets and others (eds), *The SAGE Handbook of Consumer Culture* (1<sup>st</sup> edn, SAGE 2018), ch 7; Katalin Cseres, *Competition Law and Consumer Protection* (KLInt 2005) 166-167.

<sup>106</sup> For a detailed account, see Natalya Chernyshova, *Soviet Consumer Culture in the Brezhnev Era* (Routledge 2013).

Such treatment made consumers extremely vulnerable after the collapse of the USSR since they had to learn from scratch how to defend their interests in the market economy by using various legal tools to which they never had access before.<sup>107</sup> The total absence of a consumer protection culture was coupled with the extreme consumer hardships resulting from the economic crisis in the 1990s – the latter effectively deprived consumers of the necessary financial resources for participating in market activities.<sup>108</sup>

In these circumstances, it was logical to have consumer protection as an objective of competition policy – the latter ensured that, just like in the case of entrepreneurs, the consumers had incentives and capabilities to engage in market transactions. Meanwhile, the inclusion of this objective within the competition framework meant that the latter strongly focused on two objectives borrowed from other policy areas (industrial policy and consumer policy) while having only one core objective of its own.

To summarize, the above-described three objectives logically corresponded to the immediate needs of an economy in transition by: (1) ensuring the existence, willingness and capability of market participants – both producers and consumers – to partake in market activities and (2) creating a market atmosphere where such participation was actually possible, unhindered by anti-competitive involvement of either the public or private powers.

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<sup>107</sup> Gvelesiani (n 74) 162; see also Cseres 2005 (n 105) 168-169.

<sup>108</sup> Baumann (n 96) 265 and 268.

Meanwhile, they also strained the framework since it had to pay equal (and perhaps even more) attention to non-core competition policy concerns at the initial stage of its development.

### ***2.1.2. Absence of debates regarding long-term objectives: reasons and consequences***

The problems that the initial objectives of the competition policy aimed to address remained unresolved for longer than expected. For example, despite recommendations regarding rapid changes from international advising bodies,<sup>109</sup> the process of privatization stretched over time due to its complexity.<sup>110</sup> Similarly, the legal base for the protection of free enterprise (ex. commercial law, financial law, bankruptcy law, etc.) was forming throughout the entire 1990s. This prevented debates about long-term objectives since it seemed that short-term ones could not be achieved in the short-term after all.

Another factor conditioning this delay was the approach of Georgian policymakers to assign multiple policy areas to a single enforcer – this blurred the line among the several policies and their respective objectives. For example, a newly formed State Anti-Monopoly Service of Georgia ('AMSG') dealt with implementing at least two sets of policies: competition policy and related but, in essence, still separate (consumer and advertising) policies.<sup>111</sup> This situation

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<sup>109</sup> Alan Gelb and Cheryl Gray, *The Transformation of Economies in Central and Eastern Europe: Issues, Progress, and Prospects* (N17, WBPRS 1991) 12.

<sup>110</sup> A detailed account is provided in Robert Cemovich, 'Land Privatization and Enterprises in Georgia' (2000) 41 *PSGeo&Econ* 217.

<sup>111</sup> LMAC (n 85) art 20(e)

complicated thinking about the competition framework as a separate framework with its own policy objectives.

Finally, similar to many post-Soviet states, Georgia had to pursue some jurisdiction-specific and outcome-oriented tasks (such as price control) that were essential in the short run but directly contradicted the idea of competition policy.<sup>112</sup> This caused further confusion about whether this policy should be directly involved with prices or indirectly address their rising levels by enhancing a competitive market environment. While the latter option was a proper solution, it still required a longer time to reap its benefits. Meanwhile, the former choice was luring for the transitioning country where financial vulnerability made consumers extremely sensitive to price fluctuations.

Due to all the above-mentioned problems, those engaged with this framework both on a theoretical and practical level did not debate the suitable long-term policy objectives but instead focused on the immediate problems the framework had to address. This problem was not Georgia-specific but instead represented a general impediment for transitioning countries (at least in the post-Soviet space). The overview of the international documents shows that while these countries focused on enhancing competition laws and improving enforcement in the 1990s and early 2000s, the discussion on the long-term policy objectives was mostly absent. For some countries, the short-term focus continues to be a problem even now.<sup>113</sup> The scholarly

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<sup>112</sup> The AMSC performed the price controlling function for no more than two years; Fetelava (n 74) 36-37. For similar practices in the post-Soviet space, see OECD, *Kazakhstan – 2016* (n 49); *ibid*, *Uzbekistan – 2022* (n 49).

<sup>113</sup> This is equally true for the transitioning countries in Europe and Asia. See, for example, OECD, *Baltic countries – 1999* (n 11); OECD, *Ukraine – 2016* (n 11); OECD, *Kazakhstan – 2016* (n 49). These reports strongly focus on

literature also noted the preference of less developed countries for objectives yielding immediate outcomes.<sup>114</sup>

Although this focus may be initially essential, justified and effective for the transition economies, a subsequent experience of Georgia shows that it is a risky exercise in the long run. Namely, once all of the short-term policy objectives were deemed to be achieved in the country, the competition framework exhausted its relevance in the eye of Georgian policymakers. This risk materialized during the early 2000s and took Georgian competition framework in an unexpected (and, as revealed later, very undesirable) direction.

## **2.2. 2005-2012/2014– Phase II: Stagnation**

The early 2000s marked a significant shift in Georgian policymaking. The key to this was the Rose Revolution of 2003.<sup>115</sup> Fueled by the desire of a younger generation of policymakers to combat the existing ineffective governance and to support the fast winding up of the

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law/enforcement and give some advice on policy development. However, they rarely involve discussion on policy objectives. In this respect, the Kazakhstan report, for example, highlights a strong subordination of competition enforcement to other policy objectives, much similar to Georgia (see pages 16 and 102). Similar trend, as well as focus on short-term problems, can be noted in Uzbekistan. See OECD, *Uzbekistan – 2022* (n 49) 18-20. A notable exception from this general trend is Poland where discussions regarding long-term objectives seem to have been taking place even in 1990s. See OECD, *Poland – 2002* (n 11) 90-91.

<sup>114</sup> See, for example, Gerber (n 36) 24.

<sup>115</sup> The event was suggested to might have been a “second transition”. Jonathan Wheatley, *Georgia from National Awakening to Rose Revolution: Delayed Transition in the Former Soviet Union* (Ashgate 2005) ch 7.

transition,<sup>116</sup> the revolution substantively changed approaches in economic thinking within the country – including the perception of the competition framework.

The advocates of substantive changes attributed the lack of economic development in Georgia to multiple factors, including the following:

- The structure and administration style of the 1990s government significantly resembled the Soviet one – large, overly bureaucratic, and slow in decision-making.<sup>117</sup> Consequently, market players encountered multiple difficulties in their activities, from uncomfortable registration procedures<sup>118</sup> to overly lengthy court proceedings in business-related matters.<sup>119</sup>
- The 1990s and early 2000s saw the adoption of a wide range of legislation which, while crucial for creating the legal basis for market functioning, was inherently incoherent. For example, a single policy objective was sometimes implemented via multiple frameworks.<sup>120</sup> Policymakers viewed such implementation as over-regulation and unnecessary intrusion into the free market.

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<sup>116</sup> Major players are described in Gabriel Monson, *Georgia after Rose Revolution* (NCP 2009) ch 4.

<sup>117</sup> David Rinnert, 'The Politics of Civil Service and Administrative Reforms in Development—Explaining Within-Country Variation of Reform Outcomes in Georgia after the Rose Revolution' (2015) 35 PA&Dev 19, 24.

<sup>118</sup> In 2003, Georgia had 9 procedures for business registration, requiring on average 30 days for completion. IBRD, *Doing Business 2004* (IBRD 2004) 118.

<sup>119</sup> *ibid* 79; as of 2003, Georgia had one of the most inefficient court procedures related to bankruptcy among more than 130 countries worldwide.

<sup>120</sup> For example, competition and consumer frameworks pursued the objective of consumer protection throughout 1990s and early 2000s.

- During the transition, the state could not offer adequate remuneration to its public servants due to budgetary problems.<sup>121</sup> Consequently, corruption occurred at all government levels.<sup>122</sup> This was a significant problem for the business sector - its market success once again depended not on the merits but the patronage of state officials.<sup>123</sup>

Inefficient bureaucracy, incoherent market-related legislation and widespread corruption hindered the national economic development. The overall feeling was that the Soviet regime of market regulation did not go anywhere after its collapse at the beginning of the 1990s – it just adopted the facade of a free market economy.<sup>124</sup>

The Post-Rose Revolution government attempted to remedy this situation by extensive changes aimed at market liberalization.<sup>125</sup> This attempt entailed two major lines of simultaneous reforms. Namely:

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<sup>121</sup> Wheatley (n 115) 106.

<sup>122</sup> Monson (n 116) 31.

<sup>123</sup> Wheatley (n 115) 106.

<sup>124</sup> *ibid* 130.

<sup>125</sup> *On Approving Socio-Economic Development Strategy of Georgia - 'Georgia 2020' – and Associated Activities* (Government Ordinance N400, 17/06/2014) 4

- State involvement in the market was significantly lessened by downsizing the government bureaucracy (particularly by restructuring or dissolving multiple units)<sup>126</sup> and market-related legislation.<sup>127</sup>
- Systemic combat against corruption was launched.<sup>128</sup> Among other benefits, such an approach aimed to establish a culture where market forces (and not state favouritism) dictated economic development.<sup>129</sup>

The above-mentioned developments conditioned substantive changes in competition policy objectives. The rationale and consequences of these changes are overviewed below.

### ***2.2.1. Factors behind changing competition framework objectives***

By the mid-2000s, maintaining the protection of free enterprise as a policy objective of Georgian competition framework had lost its relevance due to the improvements in the overall legal framework regulating the establishment and operation of the market players. Namely, privatization equipped the private sector with necessary production factors; the introduction of

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<sup>126</sup> For example, the number of federal ministries was reduced from 18 to 13, while the number of civil servants was reduced by 50% from 2001 to 2007; Rinnert (n 117) 24-25.

<sup>127</sup> Robert Lawson, Kevin Grier and Samuel Absher, 'You Say You Want a (Rose) Revolution? The Effects of Georgia's 2004 Market Reforms' (2019) 27 EoT 301, 302-304; see also WB, *Fighting Corruption in Public Services: Chronicling Georgia's Reforms* (WB 2012) 55, indicating that in 2005, the number of licences and permits necessary for carrying out certain activities was reduced from 909 to 137.

<sup>128</sup> WB 2012 (n 128).

<sup>129</sup> *ibid* 96.

national currency and close cooperation with IMF ensured necessary financial stability for commencing successful business;<sup>130</sup> Georgia adopted several significant legal acts regulating the establishment and operation of enterprises, including the Law on Entrepreneurs,<sup>131</sup> Law on Insolvency,<sup>132</sup> and a more business-friendly Tax Code.<sup>133</sup> Consequently, market players became less vulnerable than in the initial transition period.

A similar shift occurred concerning the objective of consumer rights protection. First, in the mid-1990s, it became a policy objective of a separate framework.<sup>134</sup> Implementation of this framework made consumers less vulnerable to various business practices. Second, by the mid-2000s, Georgia's experience suggested that competition and consumer frameworks required different approaches: while the latter dealt with consumer concerns individually, the former addressed them collectively (consumption side of the market).<sup>135</sup> Since consumer rights protection focused on safeguarding individual consumer interests, it became unnecessary as a policy objective under the competition framework.

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<sup>130</sup> For the overview of IMF's involvement with Georgia during the Formation Phase, see Papava 2013 (n 74) ch 2.

<sup>131</sup> LGE (n 88)

<sup>132</sup> Law of Georgia on Conducting Bankruptcy Proceedings (Law N286, 25/07/1996 – revoked on 15/08/2007)

<sup>133</sup> Tax Code of Georgia 1997 (Law N768, 07/08/1997 – revoked on 01/01/2005)

<sup>134</sup> Gvelesiani (n 74) 21.

<sup>135</sup> This is not a stand-alone experience. For general discussion, see Cseres 2005 (n 105) 1-2. See also OECD, *The interface between competition and consumer policies – Policy Roundtable* (OECD 2008) 8-9. For the negative experience of the joint enforcement of competition and consumer policies in another post-socialist country (Poland) see Marek Martyniszyn and Maciej Bernatt, 'Implementing a competition law system: three decades of Polish experience' (2020) 8 JAE 165, 185-188.

The most interesting development was the gradual shift in perception regarding the objective of establishing and developing a competitive environment within the national market. This shift could be attributed to the AMSG practices which, while addressing immediate problems, caused unforeseen long-term consequences for the re-definition of competition policy objectives.

First, in the 1990s, AMSG primarily focused on so-called monopoly activities – almost 1/3 of the enforcement caseload concerned the latter.<sup>136</sup> This situation was natural for a recently de-monopolized market. However, the normative regulation of monopolies was controversial. Namely, while LMAC defined ‘monopoly’ as dominance,<sup>137</sup> monopolies were expressly prohibited by Article 30 of the Constitution.<sup>138</sup> Consequently, provisions of LMAC caused confusion – it seemed that while the country's highest law did not allow monopolies, the statutory regulation only prohibited the latter if the monopoly power was abused. Resolving this contradiction was possible by defining ‘monopoly’ and ‘dominance’ separately so that just the former would be subject to constitutional prohibition. Meanwhile, because of the Soviet experience, only the existence of monopolies felt problematic from the viewpoint of Georgian policymakers. The likely risks associated with dominance were not as troubling, especially considering the small size of the economy. One could even argue that accumulating a certain

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<sup>136</sup> Lapachi 2001 (n 81) 378.

<sup>137</sup> LMAC (n 85) art 2(d)

<sup>138</sup> Constitution (n 83) art 30(2)

level of market power was the first indication of the decreased vulnerability and increased competitiveness of Georgian business operators.

Second, a significant number of the cases inspected by the AMMSG concerned state actions distorting market competition. The Soviet legacy of heavy market control and the vulnerability of market players during the transition period explains such enforcement focus well. Namely, while enforcers were keen to prevent state bodies from getting involved in markets, they were less willing to interfere with the development of newly established market players through frequent investigations, unless the latter unilaterally possessed significant market power. Consequently, the investigations concerning anti-competitive actions by the state constituted 27% of the AMMSG's caseload throughout the 1990s while, for example, the respective number for the anti-competitive agreements was only 13%.<sup>139</sup>

Above-mentioned approaches indirectly supported the perception that, in Georgian reality, the state was the primary culprit in distorting market competition. The only significant source of distortion from the private sector seemed to be monopolies. However, the Constitution already prohibited them. In these circumstances, establishing and developing a competitive environment within the national market slowly got equated to preventing the state from harming the latter. This perception resembled the early understanding of the competitive process, as formulated by classical economists. Namely, many of them believed competition to

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<sup>139</sup> Lapachi 2001 (n 81) 378.

be a dynamic process that required the least involvement of the state to function effectively.<sup>140</sup> The peculiarities of Georgia's competition framework development seemed to lead to a similar conclusion.

To summarize, post-Rose Revolution policymakers were handed the competition framework which pursued three seemingly outdated policy objectives. Two of these objectives were already picked up by other frameworks. The perception of the third objective was substantially deviant from its classic understanding. The resulting situation painted the state as a primary culprit in competition restrictions. In contrast, the possible negative impact of private restrictions was largely invisible due to the peculiarities of competition policy implementation during the Formation Phase.

Within the new framework of policy-making - which supported the small-sized and liberal government, less market regulation, and a minimal level of corruption – the above-described situation was problematic for at least three reasons:

- Maintaining a competition framework that pursued policy objectives largely covered by other frameworks but still provided a separate set of restrictions for market players was considered to be over-regulation;
- It seemed unnecessary to maintain a separate enforcer for safeguarding the framework with (mainly) outdated policy objectives;

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<sup>140</sup> For basic premises of classical economics, see Van den Bergh, Camesasca and Giannaccari (n 9) 17-20.

- Maintaining regulations focusing on possible anti-competitive actions of undertakings was viewed as a source of corruption – a tool in the hands of the state (an alleged primary infringer of competition) to extract resources from business entities instead of giving them freedom of market actions.<sup>141</sup>

While the negative perception of the existing competition framework was rooted in Georgia's reality, it disregarded post-classical developments in competition economics and enforcement theory at the international level. Throughout the 20<sup>th</sup> century, scholars started to increasingly acknowledge the necessity of protecting the competitive market process from *both public and private actors*.<sup>142</sup> The discovery of the imperfect nature of the market mechanism was a driving force behind this understanding.<sup>143</sup> Namely, the accumulated evidence suggested that 'the invisible hand' functioned well only under specific circumstances, including when market participants competed on merits (which was not always the case).<sup>144</sup> Consequently, maintenance of competition rules addressed to market participants slowly became the mainstream feature of competition regimes worldwide. While the exact extent to which these

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<sup>141</sup> Liberty Academy – Tbilisi (n 99) 7.

<sup>142</sup> For a detailed overview of the development in legal and economic thinking related to the competition law, see Daniel Crane and Herbert Hovenkamp, *The making of competition policy: legal and economic sources* (OUP 2013).

<sup>143</sup> For the concept and parameters of 'perfect competition', see Whish and Bailey (n 71) 9. For the other, more real-life models of competition, see Crane and Hovenkamp (n 142) ch 5.

<sup>144</sup> The term 'invisible hand' belongs to Adam Smith. For the necessity to support this hand via competition framework, see Van den Bergh, Camesasca and Giannaccari (n 9) 19-20.

rules should regulate market competition is still debated among various schools of thought,<sup>145</sup> the international experience warns against the absence of such rules altogether.

Against this background, the optimal way forward for the Georgian competition framework would have been to reform the latter in the light of both national reality and international experience. However, the policymakers did not adopt such a balanced view. Considering only Georgian reality, they deemed the framework problematic. This attitude was expressed through a set of significant changes administered in the mid-2000s. These changes conditioned a unique setup of the Georgian competition framework for the next several years, including substantive changes in its policy objectives.

### ***2.2.2. Defining new objectives***

Change manifested itself in the Law on Free Trade and Competition ('LFTC') of 2005.<sup>146</sup> The law followed the idea that only state actors could restrict competition.<sup>147</sup> Hence, while the constitution maintained provisions that protected market competition and prohibited monopolies,<sup>148</sup> the three key objectives under the LMAC disappeared. In turn, LFTC introduced

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<sup>145</sup> See *ibid*, 13-85. See also Crane and Hovenkamp (n 142).

<sup>146</sup> Law of Georgia on Free Trade and Competition (Law N1550, 03/06/2005 - revoked on 23/07/2012) (LFTC)

<sup>147</sup> *ibid* arts 7-10

<sup>148</sup> Constitution (n 83) art 30(2)

two new objectives: (a) dissolving the barriers to market competition; (b) dissolving the barriers to free trade.<sup>149</sup>

The objective of **dissolving the barriers to market competition** was a logical outcome of the enforcement practice of the AMSG, which perceived the state as a principal culprit in infringing market competition.<sup>150</sup> The objective manifested into state obligations to (a) not intervene with the competition among undertakings; (b) abolish administrative<sup>151</sup> and discriminatory<sup>152</sup> barriers to the market established by various public bodies; (c) prevent (re)introduction of such barriers.<sup>153</sup> Consequently, under this objective, the notion of protecting market competition was equated to protecting the latter from the state, mainly by ensuring the freedom of market entry.

The objective of **dissolving the barriers to free trade** was primarily conditioned by the desire to increase the competitiveness of national competitors. Namely, the government hoped to successfully combat Soviet market culture by exposing the latter to pressure from their foreign counterparts experienced in operating under competitive market conditions.<sup>154</sup> Such

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<sup>149</sup> LFTC (n 146) art 3

<sup>150</sup> See subchapter I.2.2.1.

<sup>151</sup> LFTC (n 146) art 2(o)

<sup>152</sup> *ibid* art 2(p)

<sup>153</sup> *ibid* art 3

<sup>154</sup> Georgia was not alone in this hope. Intensification of the free trade has been considered as one of the factors of increased competition in domestic setting, especially for developing countries. However, recent scholarship warns that the free trade alone might not be enough in this respect. See Douglas Irwin, *Free Trade Under Fire* (5th edn, PUP 2020) ch 5.

encouragement to transfer a competition culture from abroad made perfect sense if one believed that this culture (together with the international competitive pressure) would ensure the absence of competition restrictions from private players and relieve the necessity of having a separate competition framework.

The choice of new objectives fully corresponded to the general spirit of post-revolution policymaking. Namely, it: (a) allowed for reducing the number of market-related regulations by abolishing antitrust provisions;<sup>155</sup> (b) dismissed old policy objectives which were deemed outdated or encompassed by other frameworks; (c) enabled the new government to substantially reduce the tasks and number of public servants engaged in competition enforcement<sup>156</sup> and thus, reduce possible corruption threats. Meanwhile, it left the government without adequate tools to enforce competition law against private market participants, in contradiction with the international experience.

To summarize, in 2005, the three old policy objectives of Georgian competition framework were replaced with the two new ones. These objectives were perceived as tools preventing the state from harming the invisible hand of the market. The latter, in turn, was deemed sufficient as a competition protector for a small national economy in the face of free trade and intense international competition. They were also fully aligned with the new

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<sup>155</sup> Merger control was not the part of the original framework.

<sup>156</sup> Ketevan Lapachi, 'A critical analysis of competition policy reforms in Georgia over the last 20 years' in *Dimensions of Competition Law and Policy - A Collection of Essays* (POCCP 2014) 43-56, 47.

governmental policies of minimal market regulation, efficient governance and corruption elimination. However, these objectives did not consider recent developments in competition theory that advocated addressing competition law provisions both to public and private actors. Consequently, implementing these objectives delivered results significantly different from those expected.

### ***2.2.3. Results of the introduction of new objectives***

Initially, the reduction of the government size, introduction of simplified regulations and across-the-board fight against corruption positively affected the national economy. Georgia was characterized by economic growth<sup>157</sup> and improved its global business ratings.<sup>158</sup> Recent economic analysis also confirmed overall positive trends in selected fields.<sup>159</sup>

However, the situation prevailing on Georgian markets was not assessed favourably. By the end of the 2010s, various publications reported extreme market concentrations, price increases and either inability or tremendous obstacles to market entry in the light of the absence

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<sup>157</sup> The exception being 2008-2009, due to a world financial crisis and Georgian-Russian war in August 2008. See Beso Namchavadze, 'Economic History of Independent Georgia' *Forbes Georgia* (Tbilisi, 22/01/2018).

<sup>158</sup> For example, Georgia was named as a top improver of business regulations between 2005 and 2012. See IBRD, *Doing Business 2013 - Smarter Regulation for Small and Medium-sized Enterprises* (IBRD, 2013) 8. Georgia also improved its ranking in the Global Competitiveness Report from 86 to 77 between 2005-2012. World Economic Forum, *The Global Competitiveness Report 2005-2006*, Executive Summary, xvii; World Economic Forum, *The Global Competitiveness Report 2012-2013*, 13.

<sup>159</sup> Lawson, Grier and Absher (n 127).

of classical competition provisions.<sup>160</sup> The necessity of these provisions (and corresponding policy objectives) was revealed in several ways.

First, change in competition policy objectives tied the effectiveness of the competition process at national markets with the intensity of the international trade. However, it was soon revealed that competing with strong international counterparts required a certain level of market power within the country. This revelation led to significant market concentrations in the absence of merger regulation. Meanwhile, due to the absence of antitrust regulation, market barriers began to be created by the very market participants with significant powers. A clear example of this was the fuel market that included 179 competitors before abolishing classic competition provisions in 2005. This number reduced to 5 between 2005 and 2012. However, it immediately increased to 25 after the re-enactment of the mentioned provisions in the 2012 Law of Georgian on Competition ('GLC').<sup>161</sup>

Second, pre-2005 regulation enabled the AMSG to suggest amendments to market-related legislation if the latter hindered market competition, including through the facilitation of infringements by private parties.<sup>162</sup> Due to a change in policy objectives, this function was

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<sup>160</sup> For General overview, see Transparency International Georgia, *Competition Policy in Georgia* (TIG 2012). See also Nutsa Tokhadze, *Pharmaceutical Market in Georgia* (TIG 2016). A comprehensive overview of competition problems in several sectors is provided in Paul Rimple, *Who owned Georgia 2003-2012* (TIG 2012).

<sup>161</sup> GNCA, *Fuel Companies I – Article 7* (Order N81, 14/07/2015).

<sup>162</sup> More specifically, article 20 of the LMAC (n 85) gave AMSG powers to: a) present executive branch of the Government with propositions regarding carrying out measures for supporting competition development and restricting monopoly activities (Art 20(h)) and b) liaise with the executive branch in order to solve, among others, problems faced by anti-monopoly legislation (Art 20(j)).

omitted from LFTC. Consequently, no mechanism was left for assessing the impact of new regulations on the competitive conditions of the market. The absence of such mechanisms created a fertile ground for adopting regulations with anti-competitive effects.

Third, change in policy objectives affected enforcement. A reformed enforcer – the Agency of Free Trade and Competition (‘FTCA’) – had neither powers nor abilities to discipline market players. It became a sub-unit under the Ministry of Economic Development, with advisory powers regarding state infringements.<sup>163</sup> Among other consequences, this change diminished the trust towards the FTCA in the eyes of market players<sup>164</sup> – the latter understood that the state did not possess the necessary tools to protect smaller but efficient competitors.

Lastly, competition policy objectives changed when market players were slowly beginning to respect competition as a process where they succeeded based on their efforts. This was an important but sensitive learning exercise which could have resulted in breaking away from the old Soviet market culture of co-operation, state deception and favouritism. However, the new framework conditioned the maintenance of the old market culture, where large size and cooperation were rewarded, while survival without state protection was almost

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<sup>163</sup> LFTC (n 146) arts 6, 10 and 12(2)

<sup>164</sup> Fetelava (n 74) 219-220.

impossible.<sup>165</sup> Consequently, substantive changes promised by the new policy mainly happened on paper, while the old system continued to exist in practice, albeit in a changed form.<sup>166</sup>

Extreme market concentration, high barriers to entry created by competitors, disabled enforcement, and loss of the competition culture acquired throughout the 1990s and early 2000s affected markets and the economy at large. Namely, despite a short-term improvement in economic parameters, the markets could not sustain economic progress in the long run.<sup>167</sup> Some of the other most negative outcomes included the low competitiveness of Georgian business, a rising level of unemployment and the inability to reduce poverty and economic inequality.<sup>168</sup>

Such an outcome was a source of criticism for both national and international reviewers who strongly advocated reintroducing a ‘classic’ competition regulation.<sup>169</sup> In addition, by 2012, the (un)enforcement experience already indicated that pursuing objectives of dissolving

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<sup>165</sup> For the shortcomings of the institutional design of Georgian market regulation during the Stagnation Phase, see Lela Rekhviashvili and Abel Polese, 'Liberalism and shadow interventionism in post-revolutionary Georgia (2003–2012)' (2017) 5 CS 1, 27-50. Interestingly, the scholars have also remarked that simply opening up a transitioning country to a foreign trade does not eliminate problems of the post-Soviet legacy. A specific example is provided for trade intensification and corruption, whereas it is revealed that domestic firms of the transitioning economies might actually be more willing to pay bribes in the face of strong international competition, as corruption might be seen from them as the only way of survival. See Celeste Beesley, 'Globalization and corruption in post-Soviet countries: perverse effects of economic openness' (2015) 56 Eurasian Geography and Economics 170.

<sup>166</sup> Michael Dobbins, 'The Post-Rose Revolution Reforms as a Case of Misguided Policy Transfer and Accidental Democratisation?' (2014) 66 EAS 759, 760. The paper primarily addresses political reforms but same applied for the market-related changes.

<sup>167</sup> Ordinance N400 (n 125) 12 and 15.

<sup>168</sup> *ibid* 13-15.

<sup>169</sup> For Georgian experts, see Fetelava (n 74) 234. For international experts, see the criticism of the LFTC by Juan Ramon Ituria Gagoitia in Lapachi (n 156) 47-48.

barriers to market competition and free trade was not enough for creating a competitive market environment in Georgia. This indication aligned with a preceding work by Georgian scholars who indicated that, while the national competition framework should be rooted in local needs, it cannot ignore the international experience.<sup>170</sup> The latter, in turn, pointed to the necessity of regulating private market players by competition rules.<sup>171</sup> Therefore, the framework and its policy objectives had to be reconsidered once again.

### **2.3. 2012/2014 and beyond – Phase III: Revival**

The reconsideration was triggered by both internal and external factors. Internally, the 2012 parliamentary elections resulted in a shift of power and, subsequently, the ideology behind economic policymaking. Externally, advancement in trade relations with the EU led to the adoption of the 2014 EU-Georgia AA<sup>172</sup> which explicitly tied Georgia's economic integration into a wider Europe to the maintenance of an effective national competition framework.

The government formed after the 2012 parliamentary elections, while focusing on long-term inclusive and sustainable economic growth as its key objective,<sup>173</sup> brought about two significant differences in approaches taken by previous policymakers from the viewpoint of

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<sup>170</sup> Fetelave (n 74) 223-234.

<sup>171</sup> Ibid.

<sup>172</sup> AA (n 1)

<sup>173</sup> Ordinance N400 (n 51) 3

competition framework. First, while acknowledging the importance of free trade, new policymakers also stressed that the competitive market environment (i.e. absence of both public and private restrictions) was necessary for an effective national economy.<sup>174</sup> Second, whereas the fight against corruption remained a priority and state involvement in the market was limited to necessary situations, policy-makers also focused on effective public governance – i.e. reasonably sized public institutions that would help the market function properly.<sup>175</sup> Therefore, policymakers re-focused from minimal to optimal government regulation/size.

The AA was one of the so-called ‘new generation’ agreements, encompassing the Deep and Comprehensive Free Trade Area (‘DCFTA’) – a legal tool enabling Georgia to deeper integrate into the EU Internal Market.<sup>176</sup> It addressed competition matters in more detail than any of the previous EU-Georgia agreements did.<sup>177</sup> Fostering competition was declared one of the central components of Georgia’s economic modernization.<sup>178</sup> In this vein, DCFTA specified two important obligations for Georgia: 1) maintaining competition legislation addressing both

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<sup>174</sup> *ibid* 6

<sup>175</sup> *ibid* 5-6

<sup>176</sup> AA (n 1) preamble, paras 21-22

<sup>177</sup> See, for example, Consolidated Version of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part [1999] OJ L 205/3, arts 43-44.

<sup>178</sup> *ibid*.

public and private parties;<sup>179</sup> 2) enhancing its administrative and institutional capacity for effective competition enforcement.<sup>180</sup>

The competition framework of Georgia was significantly affected by both of these developments. Meanwhile, the influence of the latter has been especially strong over the years. At least two factors can explain this. The first factor relates to the general role of the free trade agreements (FTAs) in the adoption of the competition laws worldwide – especially in developing countries.<sup>181</sup> FTAs are a powerful tool for incentivizing the introduction of classical competition provisions in national settings since they make the prospects of free trade dependent upon the existence of effective competition laws. Georgia has not been an exception in this respect. The second factor relates to the bitter lessons learned from the Stagnation Phase when Georgia discarded the international experience while reforming its competition regime. The adverse market outcomes resulting from this decision have made the country especially cautious about treating the international experience lightly. This caution explains the overemphasis on developing a national competition framework according to international standards. If these standards are precisely followed, one could argue that nothing could go wrong in competition framework-building this time.

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<sup>179</sup> AA (n 1) arts 203-205

<sup>180</sup> *ibid*

<sup>181</sup> This phenomenon was recently explored by OECD Global Forum of Competition. See OECD, 'Competition Provisions in Trade Agreements' (05/12/2019) <<https://www.oecd.org/daf/competition/competition-provisions-in-trade-agreements.htm>> accessed on 13 April 2022. In a similar vein, a positive impact of the EU accession on the competition policies in transitioning Central and Eastern European countries has been noted in Michael Böheim and Klaus Friesenbichler, 'Exporting the Competition Policy Regime of the European Union: Success or Failure? Empirical Evidence for Acceding Countries' (2016) 54 *JCMS* 569.

The above-described belief has been strongly manifested in post-2014 developments of the competition framework and its policy objectives. An overview of the latter is provided below.

### ***2.3.1. Changing framework and redefining objectives***

Deliberations about the new national economic policy and negotiations of the AA resulted in substantive changes in competition legislation even before the formal adoption of the respective policy document and the Agreement in 2014. Namely, in 2012, a new law – GLC – re-introduced regulation of competition infringements by private entities.<sup>182</sup> In 2014, for the complete alignment of the competition framework with both national economic policy and international obligations, the law incorporated an enforcement mechanism – the Competition Agency of Georgia (‘GCA’) was established.<sup>183</sup> Thus, new policy objectives were formulated in 2012, while 2014 changes established the framework for their implementation.

GLC introduced three overarching objectives: support to market liberalization, support to free trade and support to competition.<sup>184</sup> Comparing the latter to the previous policy objectives under LFTC allows one to put forward at least three observations.

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<sup>182</sup> Law of Georgia on Competition (Law N6418-I, 08/05/2012) (GLC) arts 6-11

<sup>183</sup> *ibid*, consolidated version of 25 March 2014, arts 24-29

<sup>184</sup> *ibid* art 2

First, objectives were (re)formulated in line with the new national economic policy and international obligations. For example, the objective of dissolving barriers to free trade under the old law (LFTC) was replaced by the objective of supporting free trade, while the objective of supporting competition replaced the objective of dissolving barriers to market competition. The formulations included in the new law (GLC) are broader. Such broadness corresponds to the general spirit of the national economic strategy and the AA, which demand a far more comprehensive approach to market competition than simply monitoring the actions of the public bodies.

Second, the pairing of the policy objectives related to free trade and competition under a single framework still prevails. This is conditioned both by pre-2012 thinking that these objectives are cumulatively necessary for the effective functioning of the national market and by the new economic policy which strongly connects the increase in the international competitiveness of Georgia's private sector to the improvement of both external and internal competition in the national market.<sup>185</sup> The desire to fully implement the AA, which links competition to the integration of Georgian and EU markets,<sup>186</sup> also plays its part. Whether a national competition framework should pursue both objectives is a separate matter.

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<sup>185</sup> Ordinance N400 (n 125) 27-29

<sup>186</sup> AA (n 1) art 203

Third, support to market liberalization is a new objective of the competition framework – none of the two previous frameworks included it. It is yet to be determined what this objective stands for and how it can be effectively implemented under the current framework.

To summarize, changes in internal policy and external trade relations have resulted in a new set of competition policy objectives which consider the risks posed to the market competition both from the public and private sectors. However, certain issues need to be clarified to ensure their effective implementation.

### *2.3.2. Issues posed by the new set of objectives*

At least three issues need to be addressed in terms of current competition policy objectives: their coherence, clarity of substance, and feasibility of their implementation through the competition framework.

- Coherence needs to be ensured both along vertical and horizontal lines. **Vertical coherence** implies that the objectives at the lower level of the legal hierarchy do not contradict those at higher levels. **Horizontal coherence** excludes conflicts among the objectives of the same hierarchical level. The absence of horizontal and vertical inconsistencies among objectives is a basis for having an optimally designed framework in place and hence, is essential for effective enforcement.
- Clarity of the substance is necessary to exclude overlaps and contradictions among various objectives. Such clarity enables one to achieve both vertical and horizontal

coherence. It is also helpful in determining the role of policy objectives within the framework and showing the extent of their necessity for the optimization of the latter.

- Finally, particular policy objectives can be suitable for the framework only if their implementation is feasible via the latter. Therefore, it is necessary to evaluate whether the competition framework toolbox can fully implement various objectives. While undertaking this evaluation, one also needs to ensure a proper balance between the needs of local markets and international obligations. Namely, while the new objectives should support the implementation of the DCFTA obligations, they should be formulated in a way that allows the competition framework to be a *competition* framework by its content and not just by name.

A comprehensive overview of the existing objectives is necessary to address the above-listed issues. This overview is provided below.

### **3. Objectives Today – Overview of the Legislative Landscape**

According to the tradition of Georgian legal drafting, policy objectives of particular frameworks are usually provided in legislative provisions regulating the latter.<sup>187</sup> For the competition framework, these objectives are either explicitly stated in or can be inferred from legislative

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<sup>187</sup> Law of Georgia on Normative Acts (Law N1876, 22/09/2009) art 17 states that each draft law should be accompanied by an explanatory note specifying its rationale – including its objectives. Usually, one of the first articles of the draft also contains these objectives. Upon adoption by the Parliament of Georgia, these provisions become integral part of the law.

acts of at least three different levels of legal hierarchy: (a) the highest law of the country – the Constitution; (b) the AA; (c) GLC – the legal act setting out the details of competition regulation in Georgia, based on the two acts mentioned above.<sup>188</sup>

### **3.1.Objectives under the Constitution**

The Constitution addresses competition in Article 6, titled ‘Economic Freedom’. This article establishes the basis of national economic policy by recognizing and guaranteeing economic freedom,<sup>189</sup> prohibiting the abolition of the right to private property,<sup>190</sup> and affirming the state responsibility to caretake the development of competition, alongside free enterprise and a free and open economy.<sup>191</sup>

Declaring the caretaking of the development of competition as one of the aspects of general economic policy is relatively new – respective constitutional changes have been in force since 2018.<sup>192</sup> Previously, competition was addressed by Article 30 of the Constitution, forming part of Chapter II incorporating fundamental human rights and liberties. The latter article

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<sup>188</sup> *ibid* art 7(3) establishes the following hierarchy: 1) the Constitution; 2) Constitutional Agreement between Georgia and its Orthodox Church; 3) International Treaties and Agreements; 4) Organic Laws and Presidential Decrees; 5) Laws/Statutes.

<sup>189</sup> Constitution (n 83) art 6(1)

<sup>190</sup> *ibid* art 6(3)

<sup>191</sup> *ibid* art 6(2)

<sup>192</sup> *ibid*, consolidated version of 13 October 2017, art 3(2)

affirmed a state obligation to protect free enterprise and competition, prohibited monopolies and guaranteed statutory protection of consumer rights.<sup>193</sup>

The objective behind protecting competition, as fundamental liberty under Article 30, was to ensure a free and competitive market,<sup>194</sup> including by creation of statutory protection of competition.<sup>195</sup> This fundamental liberty presented the state with a dual obligation:

- It prohibited the creation of unfavourable conditions to market competition,<sup>196</sup> including prevention from putting market participants into unequal conditions – for example, subjecting them to the differentiated tax treatment under similar conditions,<sup>197</sup> charging double fees for the same services by using different regulations,<sup>198</sup> etc.
- It obliged the state to ensure the market environment that supported the livelihood of effective and competitive market players.<sup>199</sup>

The above-described state obligation implied that only free competition (and not state intervention) should determine market outcomes.<sup>200</sup> However, the meaning of ‘free

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<sup>193</sup> *ibid*, original version, art 30(2)

<sup>194</sup> *Rusenergoserlisi* (n 88), legal analysis, para 5.

<sup>195</sup> CCG, Case 2/6-23 *Danelia&Tsomaia v GMF* (07/05/1997), legal analysis, para 1.

<sup>196</sup> *Rusenergoserlisi* (n 88).

<sup>197</sup> *Danelia&Tsomaia* (n 195).

<sup>198</sup> CCG, Case No 2/1/187-188 *Airzena v Parliament and GMTTC* (10/01/2003), legal analysis, para 6.

<sup>199</sup> CCG, Case No 2/7/667 *Teleneti v Parliament* (20/12/2017) para 61.

<sup>200</sup> *Rusenergoserlisi* (n 88) para 15.

competition' itself changed alongside the shifts in the national economic policy. For example, during the Stagnation Phase, this term denoted the freedom of market players from state-induced barriers but did not include infringements by private parties. However, since 2012, it has been acknowledged that free competition should be protected both from public and private interventions.

Transferring the competition provision from Article 30 to Article 6 removed it from Chapter II of the Constitution - it is not fundamental liberty anymore. Consequently, it is unclear whether and to what extent the above-listed interpretations, delivered by the Constitutional Court of Georgia ('CCG') within its powers to clarify constitutional provisions,<sup>201</sup> apply to a competition provision under Article 6. According to the first indications, this shift was merely technical.<sup>202</sup> However, Article 6 talks about the state 'taking care of the development of competition', while Article 30 referred to the state obligation of 'protecting competition'. The difference in wording suggests that Article 6 may include protection of the existing competitive conditions and policies aimed at improving/developing them – the latter being a more proactive approach. However, this still needs to be clarified by the CCG rulings – until then, existing interpretations apply.

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<sup>201</sup> Organic Law on the Constitutional Court of Georgia (Organic Law N95, 31/01/1996) (OLCCG) art 19(1)(a)

<sup>202</sup> According to the explanatory note, this change was intended to clarify the wording of article 30. Namely, one of the readings of this article allowed the interpretation that "the freedom of enterprise and competition" was as a single freedom. This interpretation found its way in the judgments of the Constitutional Court. Hence, the lawmakers decided to clarify that the freedom of enterprise was a separate freedom by leaving only the latter under article 30.

Another shift that this change highlighted is the separation of competition and consumer policies. Previously, these two policies were grouped under Article 30. However, the constitutional change affecting the competition provision did not concern the consumer protection provision.<sup>203</sup> This highlights the departure from the old system where consumer protection was an explicit objective of the competition framework. In comparison, the link between free enterprise and free competition is maintained. Such maintenance is consistent with CCG interpretations stating that competition is the foundation of market activities, without which the right to free enterprise could not be realized.<sup>204</sup>

### **3.2.Objectives under the AA**

The constitutional provision on competition can partially be clarified in the light of the AA. Namely, the latter indicates that market competition needs protection both from private and public bodies. Further, AA links the protection of competition to two issues: (1) trade liberalization and integration of Georgia into the EU Internal Market; (2) respect for the relevant procedural principles in competition enforcement.

The fact that protecting competition equals protecting it from both public and private bodies can be inferred from articles 204 and 205 of the AA. Article 204 entails an obligation to

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<sup>203</sup> The latter remains in the Constitution (n 83) ch II, art 26(4)

<sup>204</sup> *Rusenergoservisi* (n 88).

maintain both substantive<sup>205</sup> and procedural<sup>206</sup> legislation regulating actions of private market players, namely: anti-competitive agreements, abuse of dominance and control of concentrations. Article 205, titled ‘State monopolies, state enterprises and enterprises entrusted with special or exclusive rights’, recognizes the ability of the state to have such entities<sup>207</sup> but obliges it to apply competition rules to the latter as long as such application does not impede the performance of their public duties.<sup>208</sup> These articles, together with the general principle of the free market economy upheld under the AA,<sup>209</sup> guarantee that competition policy objectives will never be interpreted in a way that excludes regulating anti-competitive actions by market players.

The link between competition and trade liberalization can be inferred from several provisions of the AA. First, the competition chapter of the AA is an integral part of the DCFTA. Next, the first article of this chapter, titled ‘General Principles’, highlights the value of the market competition for EU-Georgia trade relations and indicates that interventions in the former serve as a detriment to trade liberalization.<sup>210</sup> This link is further supported by one of the general objectives of this agreement - Georgia’s gradual integration into the EU Internal

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<sup>205</sup> AA (n 1) art 204(1)

<sup>206</sup> *ibid* art 204(2)-(3)

<sup>207</sup> *ibid* art 205(1)

<sup>208</sup> *ibid* art 205(2)

<sup>209</sup> *ibid* art 2(2)

<sup>210</sup> *ibid* art 203

Market,<sup>211</sup> indicating that the policies regulated by the AA (including the competition policy) should be implemented in a way to uphold the latter. However, AA does not stipulate that Georgia's integration in the EU Internal Market should become a competition policy objective. Therefore, despite the apparent link between trade liberalization and competition framework under this legal act, making the former an objective to the latter entirely depends on national policymakers.

Finally, Article 204 AA lists specific procedural requirements - transparency, non-discrimination, and respect for the principles of procedural fairness and right to defence - as key safeguards to be respected under the competition framework.<sup>212</sup> These safeguards should also be respected when defining Georgia's competition policy objectives.

### **3.3.Objectives under the GLC**

Article 2 of the GLC lists three overarching objectives of the competition policy: support of market liberalization, support of free trade and support of competition. According to the same article, these objectives can be realized by six various means (Table 1). Two of these are explicitly addressed to public bodies, one to market players and the remaining three can be used for both.

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<sup>211</sup> *ibid* art 1(2)(h)

<sup>212</sup> *ibid* art 204(3)

*Table 1. Means of realizing competition policy objectives*

<p><b>Public bodies</b><sup>213</sup></p>	<ul style="list-style-type: none"> <li>• Preventing imposition of administrative, legal and discriminatory barriers to market entry<sup>214</sup></li> <li>• Preventing grant to undertakings exclusive powers that unlawfully restrict competition<sup>215</sup></li> </ul>
<p><b>Market players</b></p>	<ul style="list-style-type: none"> <li>• Preventing unlawful restrictions of competition, including anti-competitive agreements, abuse of dominance and concentrations which significantly impede effective competition<sup>216</sup></li> </ul>
<p><b>General</b></p>	<ul style="list-style-type: none"> <li>• Safeguarding the principle of equality of undertakings in their activities<sup>217</sup></li> <li>• Ensuring proper conditions for free market access<sup>218</sup></li> <li>• Ensuring maximum publicity, fairness, non-discrimination and transparency during competition enforcement<sup>219</sup></li> </ul>

The wording of the Article 2 GLC gives room for several assumptions. For example, it shows policymakers' attempt to maintain vertical coherence of competition policy objectives.

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<sup>213</sup> According to the GLC (n 182), these include state authorities, authorities of the Autonomous Republics, local self-government authorities and any other administrative bodies.

<sup>214</sup> GLC (n 182) art 2(d)

<sup>215</sup> *ibid* art 2(e)

<sup>216</sup> *ibid* art 2(c)

<sup>217</sup> *ibid* art 2(a)

<sup>218</sup> *ibid* art 2(b)

<sup>219</sup> *ibid* art 2(f)

Provisions of both the Constitution and the AA are reflected in the GLC. A strong influence of the latter is especially visible. First, Article 2 echoes the demand of the AA to regulate market-related behaviour for both public and private parties. Further, the link between trade liberalization and competition is affirmed by making free trade an objective for competition policy. Finally, GLC declares transparency, non-discrimination, procedural fairness and the right to defence as the means to achieve overarching objectives.<sup>220</sup>

The situation is less favourable regarding the clarity of content of the overarching objectives under the GLC, which poses threats to their horizontal coherence and implementation feasibility. One example of this threat is a potential overlap between market liberalisation and competition protection objectives. Market liberalization, a term usually used in relation to regulated markets in the EU and the USA, normally refers to keeping regulatory restrictions to an optimal minimum to enjoy the benefits of competition.<sup>221</sup> During the Stagnation Phase Georgia, this term was also defined as the lessening of regulatory restrictions in general.<sup>222</sup> Finally, it could refer only to the abolition of market entry barriers.<sup>223</sup> Each definition leads to separate problems.

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<sup>220</sup> *ibid.*

<sup>221</sup> See, for example, Eva Barrett, 'Market liberalization: Five seductively simple steps to making it work' (2017) 30 TEJ 51, 51-52.

<sup>222</sup> Ordinance N400 (n 125) 10-11

<sup>223</sup> GLC (n 182) art 2(a) could be used as an evidence to this interpretation.

Suppose market liberalization is defined as keeping regulation to an optimal minimum (or removing entry barriers). In that case, it becomes unclear why it is necessary to have this objective separately, alongside the objective of protecting competition – according to the CCG case-law, the latter already includes protecting competition from public bodies.<sup>224</sup> In this respect, it can freely encompass the removal of anti-competitive regulations and market entry barriers. One way of justifying the separate existence of the two policy objectives could be to say that one is addressed to public bodies while the other is designed to prevent private parties from infringing competition. However, this explanation is at odds with the constitutional case-law. Another way of justification is designating market liberalization as an objective addressing regulated markets<sup>225</sup> and competition protection as the one for all other markets. However, the wording of GLC does not support such separation. This situation blurs the line between two objectives and makes it unclear how the market liberalization objective can be achieved via a competition framework.

Suppose the objective of market liberalization stands for the removal of regulations per se. In that case, this might contradict other objectives which sometimes require the introduction of additional regulations facilitating free trade and competition. This scenario raises at least two issues. First, it is unclear which objective would be given preference in case of a conflict - Article 2 GLC does not give any hierarchy among objectives. Next, it becomes questionable how the market liberalization objective can be realized via the competition

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<sup>224</sup> CCG, Case No 2/11/747 *Giganti and Tiganosi v Parliament and MIA* (14/12/2018) para 27.

<sup>225</sup> In Georgia, these include banking, communications, energy, and water supply.

framework, given the legal approximation requirements under the AA, which often entail the adoption of significant pieces of new market-related legislation.

Another example of the coherence and feasibility problem lies between the objectives of protecting free trade and protecting competition. Inclusion of the former objective in the GLC can be attributed to two factors: 1) the legacy of the Stagnation Period, nowadays supported by the new economic policy, where competition by international counterparts is a necessary component of increasing competitiveness of national market players; 2) an influence of the AA where free trade and competition are linked. However, the inclusion of a trade-related objective in the competition framework raises another problem of interpretation.

More specifically, in the Georgian context, it is unclear whether the notion of free trade concerns internal or external/international trade. If the answer is 'internal trade' (i.e. trade within Georgia), the difference between the objectives of supporting free trade and supporting competition becomes unclear since, according to the CCG case-law, the latter already encompasses fighting against market entry barriers which could freely include the barriers posed by various regional markets. This implies that the objective of protecting competition fully encompasses the objective of protecting free (internal) trade.

Therefore, if an objective of protecting free trade has a separate 'life' under the GLC, the latter should concern international trade. Such definition also supports the vertical coherence with the AA, where free trade denotes the trade between Georgia and the EU. However, it is questionable whether and to what extent international trade should be a separate objective of

the national competition framework. Neither the Constitution nor the AA give explicit directions in this respect – both link free trade and competition but do not necessarily imply the implementation of these separate policies under a single framework.

To summarize, the three current competition policy objectives in Georgia are formulated in a way to guarantee vertical coherence. However, their content is not clarified by law. This lack of clarity leads to various interpretations and raises concerns about their horizontal coherence and feasibility. The situation needs to be remedied soon to avoid implementation problems.

#### **4. Institutional Dynamics<sup>226</sup>**

The institutional dynamics related to the competition law objectives largely reflects the development of the latter throughout the three phases described in the sub-chapter I.2. These dynamics include the change in powers and interrelation of four different institutions responsible for the formulation and interpretation of the objectives – the Parliament of Georgia ('the Parliament'), the competition enforcer within the country (with changing names and powers throughout all three phases), common courts of Georgia and the CCG.<sup>227</sup>

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<sup>226</sup> The term "institutional dynamics" is borrowed from David Gerber, 'The goals of European Competition Law: Some Distortions in the Literature – Comments on Paret' in Daniel Zimmer (ed), *The goals of competition law* (ASCOLA, EE 2012) 89.

<sup>227</sup> Due to the fact that the thesis does not concern regulated industries, enforcers operating in these fields are not considered here.

Two strings of dynamics can be detected throughout all three periods. First is the primary role of the Parliament in formulating these objectives and the similar role (at least until 2018) of the CCG in interpreting the ones under the Constitution. Second is the changing clarification powers of a principal competition law enforcer and the common courts of Georgia. Both developments are discussed below.

#### **4.1. Stability of Formulating Powers – the Parliament**

Due to the legislation-making tradition in Georgia, competition policy objectives are prescribed by various legal acts. This makes the Parliament a leader in policymaking. Throughout the years, competition policy changes have always manifested themselves in the legislative actions of this institution. Consequently, all the legal acts containing competition policy objectives are either ratified (the AA) or adopted (every other act discussed above) by the latter.

Adoption and ratification do not necessarily entail participation in creating legal drafts under Georgian legislative procedure. For example, a draft of Constitutional amendments can be initiated by the Parliament or at least 200 000 Georgian citizens.<sup>228</sup> In case of ordinary laws like LMAC, LFTC and LGC, this list of draft-proposing entities is even broader.<sup>229</sup> However, due to the complexity of the parliamentary process - which includes both substantive pre-hearing

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<sup>228</sup> Constitution (n 83) art 77(1)

<sup>229</sup> *ibid* art 45(1)

deliberations where the text of the draft can be subject to significant revisions<sup>230</sup> and the peculiarities of the voting procedure<sup>231</sup> - the Parliament has the final word in the formulation of policy objectives. In case of the AA, since the document would not become a source of national law without the parliamentary ratification, it could be reckoned that the latter had a decisive influence on it.<sup>232</sup>

Adoption and ratification powers have been in place since the establishment of the Parliament and are not planned to be amended in the near future. Therefore, it is safe to assume that the formation power of competition policy objectives will remain in the hands of this institution. Meanwhile, adopting and ratifying legal acts does not entail interpreting the content of the policy objectives in them. This task has been left to enforcement and judicial bodies.

#### **4.2.A shift in Interpretative Powers – CCG**

Interpretative powers of the CCG stem from its general function to ensure the primacy of the Constitution in the entire territory of the country.<sup>233</sup> As a judicial body exercising constitutional

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<sup>230</sup> Reglment of the Parliament of Georgia (N3875, 06/12/2018) arts 99-109

<sup>231</sup> *ibid* arts 110-119

<sup>232</sup> In addition, the specifics of the ratification procedure allow the parliament to make reservations vis-à-vis international treaties. *ibid* art 192

<sup>233</sup> OLCCG (n 201) consolidated version, art 1

control,<sup>234</sup> CCG holds power to interpret and clarify provisions of the Constitution during the proceedings of finding compatibility of various legislative acts to it.<sup>235</sup> It has used this power to interpret competition provisions during all three phases of the policy development, including the Stagnation Phase when it was effectively the only body with binding powers to make rulings regarding infringements of competition within the country.<sup>236</sup>

In general, CCG exercises its power of constitutional control by assessing:

- the compatibility of various sources of national law with different constitutional provisions – a process initiated by the constitutional complaint<sup>237</sup> of the President of Georgia, Government of Georgia, or at least 1/5 of Georgian MPs;<sup>238</sup>
- Georgia’s laws and by-laws vis-à-vis fundamental rights and liberties protected under Chapter II of the Constitution<sup>239</sup> - a process initiated by the constitutional complaint of physical or legal entities<sup>240</sup> or by the Ombudsman of Georgia.<sup>241</sup>

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<sup>234</sup> *ibid* art 1(1)

<sup>235</sup> The list of the types of acts to be evaluated in this respect by the CCG are listed in *ibid* art 19(1)(a)

<sup>236</sup> *Rusenergoservisi* (n 88).

<sup>237</sup> OLCCG (n 201) art 31(1)

<sup>238</sup> *ibid* art 33(1)

<sup>239</sup> *ibid* art 19(1)(e)

<sup>240</sup> *ibid* art 39(1)(a)

<sup>241</sup> *ibid* art 39(1)(b).

Until 2018, the competition provision under the Constitution was triggered by both options. Such triggering was possible since this provision was included in Chapter II of the Constitution,<sup>242</sup> while ‘right to compete’ was treated by the CCG as one of the fundamental rights protected therein.<sup>243</sup>

Between 1995 (adoption of the Constitution) and 2018 (when the competition provision was taken out of Chapter II), constitutional complaints concerning the competition provision were reviewed by the CCG five times. This enabled the court to clarify its standing regarding the objectives of the competition policy. Namely, the CCG affirmed that protection of competition included safeguarding from both public and private powers. In addition, the state had both an obligation to protect the existing level of market competition and to take care of its development for the future.<sup>244</sup>

In 2018, the competition provision moved to Article 6 which is not a part of Chapter II of the Constitution. This move eliminated the option for individuals to address the CCG with constitutional complaints about the breach of the right to compete since the latter does not exist anymore. Consequently, the ability of the court to interpret a new competition provision has been limited significantly. The constitutional interpretation of this provision shall take place only if the head of the state (i.e. the President) or the representatives of the other two branches

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<sup>242</sup> Constitution (n 83) ch II, art 30(2)

<sup>243</sup> *Giganti and Tiganosi v Parliament and MIA* (n 145) paras 1-7.

<sup>244</sup> See subchapter I.3.1 for details.

of power (either legislative or executive) ask for it. This has not been the case in the past – all previous complaints were lodged by individuals/legal entities. However, the interpretative powers of the CCG remain – it is just to be seen to what extent the latter will be put into practice.

### **4.3.Changing Powers of Clarification - Principal Competition Law Enforcer and Common Courts of Georgia**

While the CCG clarifies competition policy objectives under the Constitution, the ones under the AA and the GLC are left to the enforcers and common courts. The same applied to the predecessors of the GLC – LMAC and LFTC. However, the practice shows a lack of interpretations from these two powers.

In terms of enforcers, the first reason for this could be the frequent changes in structure and powers – this has already occurred five times. First, during the Formation Phase, the relevant enforcement powers were vested in the AMSG (1996-2005), a public law body under the Ministry of Economics of Georgia.<sup>245</sup> Next, during the Stagnation Phase, the enforcer was reshaped into the FTCA - first as a structural unit (2005-2010)<sup>246</sup> and then as a separate public law body (2010-2012) under the Ministry of Economic Development of Georgia – with mostly

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<sup>245</sup> LMAC (n 85) art 16

<sup>246</sup> LFTC (n 146) unconsolidated version, art 6

recommendatory powers.<sup>247</sup> Finally, during the Revival Phase, the enforcer was first merged with the Public Procurement Agency (2012-2014) and only in 2014 obtained the current form of the GCA,<sup>248</sup> an independent public body implementing the competition legislation. Finally, by the legislative amendments of 2020, the enforcer transformed into a collegial decision-making body named the National Competition Agency of Georgia ('GNCA') and acquired new powers, including overseeing the implementation of anti-dumping policy.<sup>249</sup> An additional set of changes is still ongoing. Namely, on 29 March 2020, the Parliament adopted a new law on consumer protection.<sup>250</sup> This law, which enters into force in November 2022, designates GNCA as its principal implementer.<sup>251</sup> Consequently, now the enforcer has to restructure again to accommodate the implementation mechanism for consumer policy. These shifts effectively disable the enforcer from engaging in almost anything but coping with the immediate consequences of institutional reforms.

The second reason could be the initially limited character of the decision-making powers of the respective enforcers. For example, the AMSG could not take infringement decisions (after preparing the case, it had to argue the latter in the court),<sup>252</sup> while FTCA and its successor

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<sup>247</sup> *ibid*, consolidated version, art 6

<sup>248</sup> From 4 November 2020, the Agency is called 'National Competition Agency of Georgia' (see art 4(1) of the GLC).

<sup>249</sup> Law of Georgia on the Introduction of Anti-dumping Measures in Trade (Law N6749, 13/07/2020) art 4(1)

<sup>250</sup> Law of Georgia on Protection of Consumer Rights (Law N1455, 29/03/2022) (LPCR)

<sup>251</sup> *Ibid*, art 29(1).

<sup>252</sup> LMAC (n 85) art 21(1)(c)

mainly had advisory powers.<sup>253</sup> However, this changed in 2014 – nowadays, GNCA has full administrative powers to issue infringement decisions<sup>254</sup> and related powers to adopt various explanatory documents.<sup>255</sup> However, the enforcer also has an increasingly expanded mandate that could easily curb its competition policy powers in practice.

The GNCA has been established for slightly longer than eight years now. During this period, it has not interpreted competition policy objectives. Such a development is surprising, considering that both the infringement decisions and advisory/explanatory documents frequently refer to Article 2 of the GLC. The explanation for such a paradox might be that the enforcer is relatively young and has been occupied with solidifying the administrative/enforcement framework up till now. One could hope that, since interpretative powers are already in place (and, as practice shows, it has been used quite extensively vis-à-vis vague substantive provisions of the GLC<sup>256</sup>), it is just a matter of time before the enforcer begins to interpret the objectives as well.

However, the process might take a long time for two reasons. The first reason is linked to the limited human resources of the GNCA (Table 2). As of 31 March 2022, the total number of the Agency staff is 62, out of which 31 are engaged in substantive case-handling. However,

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<sup>253</sup> LFTC (n 146) arts 10 and 12(2)

<sup>254</sup> GLC (n 182) ch V

<sup>255</sup> *ibid* art 17<sup>2</sup>(g)

<sup>256</sup> For example, GNCA clarified that the concept of ‘economic agent’ (Georgia’s equivalent of ‘undertaking’) encompasses the notion of a single economic entity. See GNCA, *Case of Citroen Georgia Ltd. – Article 7* (Order N04/166, 06/07/2018) 13-22.

these case handlers have to take up all the workload: classical infringement of the competition law, state aid, unfair competition cases, state infringements of the competition law, anti-dumping cases and (unless the number of staff increases until November 2022) consumer complaints. Consequently, the number of specialists working on competition cases is significantly less than 31. As the GNCA needs to deploy its limited human resources with the utmost care, it is doubtful whether it will be able to deliver comprehensive interpretations of policy objectives in the near future.

**Table 2. Human Resources of the GNCA – breakdown<sup>257</sup>**

	<b>Position</b>	<b>Description</b>	<b>Number</b>
1	<b>Management</b>	<i>Chairman, Deputy Chairmen, Heads and Deputy Heads of Departments</i>	<b>12</b>
2	<b>Case Handling</b>	<i>Lawyers and economists engaged in substantive analysis of cases</i>	<b>31</b>
3	<b>Assistance</b>	<i>Secretarial, HR, Public Relations, Internal Oudit, Finance Handling, Logistics and Correspondence Handling Staff</i>	<b>9</b>
4	<b>Technical Support</b>	<i>Cleaners, Drivers, Security and IT Personnel, Other Contractual Support (ex. Translators)</i>	<b>10</b>
			<b>Total: 62</b>

<sup>257</sup> The data were taken from the GNCA website. See GNCA, ‘Proactive Information’ <<https://gnca.gov.ge/public/proactive-information>> accessed 15 April 2022.

Second, even if used, these interpretation powers might have a somewhat limited effect in practice. Namely, common courts could always overturn interpretations made through the infringement decisions of the GNCA. In this respect, as mentioned above, the most authoritative body is the CCG. Therefore, unless verified by the judiciary, the Agency decisions might not count as the authoritative source of interpretation. Interpretations could still be made in the soft law measures – these cannot be appealed to the court.

Meanwhile, common courts of Georgia – bodies responsible for administering justice in Georgia, including through civil, administrative and criminal adjudication<sup>258</sup> - also do not seem too keen to interpret competition policy objectives. However, the reasons for such behaviour are different for courts and enforcers.

The first reason is the nature of common courts, whereby the latter are limited by the issues presented by parties during the adjudication process. For competition proceedings, both under the Formation Phase scenario (where the court was deciding the case based on the submission of the AMSG) and the Revival Phase rules (where the CNGA issues a formal decision which is appealed to the court), this means that the court may not go beyond the arguments presented before it. Besides, according to the adjudication rules before common courts, the latter only engages with objectives of the law and legal principles when there is no specific

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<sup>258</sup> Constitution (n 83) art 59(3); Law on Common Courts of Georgia (Law N2257, 04/12/2009) art 1(2)

norm regulating the issue under discussion.<sup>259</sup> For competition proceedings, there is rarely such a case. Therefore, the courts might not feel entitled (and obliged) to clarify policy objectives.

Next, amendments to the competition legislation during the past 28 years significantly affected the adjudication dynamics since common courts engage in competition cases primarily via infringement proceedings (either directly – during the Formation Phase, or through the appeal of GNCA decisions – during the Revival Phase).<sup>260</sup> Such engagement meant that the courts practically could not work on competition issues during the Stagnation Phase when the competition regulator – FTCA - had no enforcement powers. Therefore, the possibility of their involvement in clarifying competition policy objectives was absent.

Further, during the Revival Phase, in the wake of giving GNCA enforcement powers, the role of the common courts was (at least quantitatively) limited in terms of addressing competition policy objectives. More specifically, unlike the Formation Phase, where every investigation of the AMSG should end in the court to have a final judgment on the matter, now the enforcer can issue formal decisions that may not be appealed to the court. Consequently, the number of cases filed to the court about competition matters is fewer now than it used to be in the 1990s and early 2000s. In fact, the numbers are so low that in 2017, when there was the first opportunity to review a competition case by the Supreme Court of Georgia (the highest appellate court in the common courts' system – 'SCG'), the latter rejected the appeal on the

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<sup>259</sup> Georgian Code of Civil Procedure (Law N1106, 14/11/1997) art 7(1)

<sup>260</sup> GLC (n 182) arts 21 and 28

grounds of non-relevancy for the purposes of developing adjudication practice in the country.<sup>261</sup> Such rejection is especially negative from the perspective of clarification, since the SCG possesses the power to establish interpretational practices which the lower courts widely follow.<sup>262</sup> Obviously, the current approach of the latter leaves even less room for clarifying competition policy objectives in the courtrooms.

One of the reasons why the changes in the above-mentioned situation cannot be expected anytime soon is that common courts struggle to understand the economic side of competition adjudication. For the vast majority of other cases, they are accustomed to dealing with the legal issues only - the economic side of the competition assessments is completely new territory for judges. On occasions, this leads to significant mistakes in judicial decision-making (for example, finding an abuse of dominance without establishing the dominance in the first place<sup>263</sup>). There is also no room for specialization since Georgia does not have separate economic courts enabling specialization in competition adjudication. The lack of understanding in economics might be making the court wary of major competition cases. This reduces the chance of interpretation of policy objectives even further.

To sum up, nowadays Georgia operates a competition enforcer with increased powers of policy interpretation which has no time to use them due to frequent structural changes.

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<sup>261</sup> SCG Administrative Chamber, Case No.ბბ-500-497(3-17) *Fuel Market Judgment* (14 July 2017).

<sup>262</sup> Georgian legislature does not recognize legal precedents. However, clarifications of the Supreme Court have a strong advisory/recommendatory power for lower courts.

<sup>263</sup> Tbilisi City Court, *Fillip Morris Judgement* (10 February 2017).

Meanwhile, the common court system has far more limited abilities to adjudicate competition law matters than it used to during the Formation Phase. This is coupled to the nature of common courts which are limited by the issues presented before them and (as of now) unwillingness of the Supreme Court to engage with clarifications of competition provisions due to the limited amount of cases circulating in the courts system and its relative inexperience in dealing with cases involving economic analysis. Overall, this makes it highly unlikely that competition policy objectives will be clarified via either enforcement or adjudication anytime soon.

## **5. Concluding Remarks**

Managing the multiplicity of policy objectives is an outstanding issue for the Georgian competition framework. As the analysis of the legal sources reveal, while these objectives are vertically coherent, their horizontal coherence, clarity of substance and the feasibility of their implementation leave significant room for improvement. This is the area in which the country could use the EU experience. Meanwhile, historical development and institutional dynamics reveal several issues to be considered while applying this experience to Georgian reality.

The frequency and significance of changes in competition policy objectives throughout the three major phases of historical development – Formation, Stagnation and Revival – raises the issue of the level of maturity of Georgia’s competition framework. In this respect, even though the first introduction of competition law provisions happened 28 years ago, the countdown for establishing the competition culture in the country should begin from 2014.

The reason for this is the absence of classic competition provisions from the framework during the Stagnation Period. This observation does not deny the significance of the work undertaken by the AMSG between 1992 and 2005. However, it also acknowledges the reality: the absence of the policy objectives targeting both public and private infringers between 2005-2012 and no effective enforcement of a new framework between 2012-2014 resulted in a loss of a competition culture accumulated during the Formation Phase. This is an important detail – when discussing approaches which Georgian competition framework needs to take in choosing suitable objectives for its competition policy, the latter should address a newly created (barely eight years old) system instead of a more mature (i.e. more than thirty years old) one.

The remaining effects of the Soviet legacy still cannot be avoided during the policy discussion. At least until 2014, no matter the legal changes, the existing systems encouraged an old-style pattern of market behaviour. In the Formation Phase, such facilitators could have been an inefficient bureaucracy, market overregulation and corruption. During the Stagnation Phase, same role was played by leaving the markets without any effective regulation. Despite having a functional enforcement framework for the past eight years, one cannot safely say that the old culture of co-operation and favouritism has been entirely eliminated. Objectives of competition policy need to address this problem as well.

Policymakers should also pay attention to the small national market size, where concentration is welcome up to a certain level as a necessary precondition to effective competition. Meanwhile, such concentration can happen quite rapidly nationwide. Consequently, maintaining the balance between the optimal concentration and competition

levels needs to be discussed. Whether and how this issue can be addressed on the level of policy objectives is yet to be seen.

A strong aspiration to be integrated into the wider European market cannot be overlooked either. As noted above, this was one of the primary motivators of Georgia to re-introduce classic competition provisions during the Revival Phase. While this aspiration is fundamental in many ways, policymakers need to explore in detail whether and to what extent should the competition policy objectives address it.

A related issue is a balanced approach to policymaking from an ‘insider’ and ‘outsider’ perspectives. As the Formation Phase shows, the competition policy objectives can differ from the classic ones known worldwide but still be justified due to national market circumstances. Meanwhile, the Stagnation Phase reveal that designing policy objectives only based on the national market peculiarities and at the expense of international experience is not an effective strategy. A balance needs to be found between the proper attention to the national market characteristics and consideration of the international factors. The Revival Phase policymaking seems to be leaning away from this balance towards the overreliance on the international experience. Such deviation should be kept in check to ensure the optimal design of the competition framework.

Finally, the institutional dynamics in formulating and interpreting competition policy objectives must be considered. The current pattern conditions institutions to abstain from engaging in interpretations. It is to be seen how this can be remedied so that the mechanism of

formulating and interpreting objectives functions well both now and in the future, when changed circumstances require the rethinking of the objectives once again.

# Chapter II. Developing Competition Framework Objectives –

## EU Experience

### 1. Introduction

The EU competition framework now has a lifespan of more than 6 decades. Provisions prohibiting anti-competitive practices have been in place since the Treaty of Paris,<sup>264</sup> later became an integral part of the Treaty of Rome<sup>265</sup> and have been almost unchangeable since then.<sup>266</sup> Meanwhile, EU competition framework and its policy objectives have significantly evolved over time.<sup>267</sup>

The most remarkable feature of these objectives is their multiplicity without a hierarchy. They operate according to the principle of ‘mutual subordination’ - no objective is superior to the other and the prevailing objective is determined on a case-by-case basis.<sup>268</sup> Such a setup allows for prioritization of certain objectives by administrative and judicial interpretation

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<sup>264</sup> Treaty Establishing the European Coal and Steel Community [1951] 261 U.N.T.S. 140 arts 65-67.

<sup>265</sup> Treaty establishing the European Economic Community [1957] 298 U.N.T.S. 11 arts 85-94.

<sup>266</sup> The phrase ‘common market’ was replaced with ‘internal market’.

<sup>267</sup> Imelda Maher, ‘Competition Law Modernization: an Evolutionary Tale?’ in Paul Craig and G. De Búrca (eds), *The evolution of EU law* (2<sup>nd</sup> edn, OUP 2011) 724-725.

<sup>268</sup> Oles Andriychuk, ‘Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process’ (2010) 6 *EurCompJ* 575, 587.

during different phases of the EU (market) evolution. So far, the Union has handled this exercise successfully, making its competition framework one of the exemplary ones around the world.<sup>269</sup>

To discover the reasons of this success, this chapter analyzes the development of the EU competition policy objectives from several viewpoints: 1) historically, across three broad phases; 2) through the legal sources containing references to competition policy objectives; 3) by looking at them via the prism the institutional dynamics between the Commission and the CJEU. Such analysis enables one to identify useful lessons for optimizing Georgian competition policy objectives.

## 2. Changes in the Prioritization of Objectives – Timeline

The development of the EU competition policy objectives has been a subject of academic research from diverse viewpoints.<sup>270</sup> Most of these works slightly differ while dividing EU competition framework history into various phases, depending on the key issues addressed. This chapter is underpinned by the same rationale: while staying true to the overall timeline, it identifies development phases which best serves the research question under consideration. Besides, while the other works provide *insider views* by focusing on the desired path of the development of the EU competition policy objectives, this chapter adopts an *outsider*

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<sup>269</sup> Fox 2016 (n 13) 70.

<sup>270</sup> See David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon 1998); Rompuy (n 35); Brisimi (n 9); Sauter (n 9); Townley (n 9).

*perspective*. Namely, it describes the evolution of these objectives in a way that helps one to identify lessons for Georgia at the current stage of its competition framework development.

Consequently, this chapter overviews three phases: 1) 1958-1992 – initial shaping of the internal market (“Formation”); 2) 1993-2003 – finalizing the embedment of competition culture in the latter (“Performance”); 3) 2004 and beyond – focusing on the outcomes of the market (“Efficiency”). Overview of these phases reveals how EU competition policy objectives were prioritized over time, along with the changed circumstances. The chapter also elaborates on ongoing processes which might influence the EU competition policy objectives and draws several lessons for Georgia.

### **2.1.1958-1992 – Phase I: Formation**

The first phase of the competition framework development coincided with early efforts of the Union to make market integration a workable reality. Creating a transnational space with trading conditions resembling ‘to those of a domestic market’<sup>271</sup> became a central task of the EU project since the Treaty of Rome. Later, Single European Act set the deadline of forming this

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<sup>271</sup> Case C-26/76 *Metro v Commission* ECLI:EU:C:1977:167 (Metro I) para 20.

space by 1992.<sup>272</sup> Consequently, the initial phase of market formation took place during 1958-1992.<sup>273</sup>

From the competition framework perspective, this period could be divided into two subphases: 1) 1958-1972 – building the framework with market integration as an initial objective; 2) 1973-1992 – testing the framework and acknowledging the multiplicity of its objectives. These subphases are overviewed below.

### ***2.1.1. 1958-1973 – Market integration as an initial objective***

The period from 1958 to early 1970s is an initial formation era for the EU (back then - EEC).<sup>274</sup> Establishing a solid foundation for integration was the leading concern for the newly formed Community which was based on an advanced version of an international treaty without creating a federal state.<sup>275</sup> Hence, the initial 15 years were devoted to shaping doctrines and institutions ensuring that: a) nobody deviated from the integration objective under the Treaty of Rome and b) the Union processed necessary tools for minimizing the risk of such deviation.<sup>276</sup>

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<sup>272</sup> Single European Act (SEA) [1987] OJ L169/1, art 13.

<sup>273</sup> Eventually, constancy of this process was acknowledged. Commission, *Internal Market Scoreboard No. 11* (2002) 3.

<sup>274</sup> Joseph Weiler and others, 'The Transformation of Europe' (1991) 100 YLJ 2403, 2410.

<sup>275</sup> *ibid* 2407.

<sup>276</sup> *ibid* 2412-2423.

Market integration was a central part of the overall integration process. Indicating the commitment of the EU to maintain a boundary-free trade within its territory,<sup>277</sup> it was perceived as a means of achieving economic development both at national and community-wide level.<sup>278</sup> Competition provisions were one of the key ones ensuring an undistorted trade within the Union.<sup>279</sup> Consequently, EU competition framework played an integral part in the internal market formation, while its objectives got significantly affected by the single market imperative.

The first effect was identification of market integration as an initial objective of the EU competition policy.<sup>280</sup> The importance of this objective was first affirmed by the CJEU in 1966 by indicating that the Union was concerned with anti-competitive agreements – both horizontal and vertical<sup>281</sup> – only insofar as the latter went against the single market imperative.<sup>282</sup> The court would continue upholding the objective further, by targeting both explicit and

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<sup>277</sup> Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/47, art 26(2)

<sup>278</sup> Gerber 1998 (n 270) 347-348.

<sup>279</sup> Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP 2017) 6-8; Conor Talbot, 'Ordoliberalism and Balancing Competition Goals in the Development of the European Union' (2016) 61 TAB 264, 266.

<sup>280</sup> Commission, *XXXIII Report on Competition Policy* (2004) 15; in contrast, Brisimi (n 9) 39-40 argues that market integration is not a stand-alone objective of competition law.

<sup>281</sup> Joined Cases 56 and 58/64 *Consten and Grundig v Commission* ECLI:EU:C:1966:41, 339.

<sup>282</sup> Case 56/65 *Société Technique Minière v Maschinenbau* ECLI:EU:C:1966:38, 249; Case 32/65 *Italy v. Council and Commission* ECLI:EU:C:1966:42, 408. In comparison, undertakings with weak market positions (Case 5/69 *Völk v S.P.R.L.* ECLI:EU:C:1969:35, paras 5-7 and Case 1/71 *SAC v Firma Höss* ECLI:EU:C:1971:47, para 9) and actions affecting only national market (Case 43/69 *Brauerei v Jehle* ECLI:EU:C:1970:20, para 6) were not considered a threat to this objective.

implicit market partitioning,<sup>283</sup> as well as assessing both actual and potential effects on the inter-state trade.<sup>284</sup>

Next, market integration became a priority objective of the EU competition framework.<sup>285</sup> On the administrative level, the Commission highlighted the importance of competition provisions for ensuring unhindered competition within the internal market in the very first enforcement regulation.<sup>286</sup> On the judicial level, the CJEU focused on competition cases dividing the Union across the national lines - including gentlemen's agreements allocating national markets to respective producers,<sup>287</sup> concerted practices cementing the existing national fragmentation,<sup>288</sup> and trademark usages for the purpose of hindering inter-state trade.<sup>289</sup>

Finally, this objective established a lasting base within the EU competition framework. Namely, its development got firmly linked to the constantly ongoing process<sup>290</sup> of market

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<sup>283</sup> Case 23/67 *SA Brasserie v Wilkin-Janssen* ECLI:EU:C:1967:54, 415-416, indicated that some agreements contradict the internal market objective only within a certain legal and economic context. See also Case 8/72 *Cementhandelaren v Commission* ECLI:EU:C:1972:84, para 29, where an agreement covering an entire Member State reinforced the 'compartmentalization of markets on a national basis' and thus infringed article 85 by going against the single market imperative.

<sup>284</sup> *SAC v Firma Höss* (n 282) paras 5-6.

<sup>285</sup> Barry Hawk, 'Antitrust in the EEC - The First Decade' (1972) 41 *FordLR* 231.

<sup>286</sup> Council Regulation (EEC) No 17: First Regulation Implementing Articles 85 and 86 of the Treaty [1962] OJ L13/87 (Regulation 17)

<sup>287</sup> Case 44/69 *Buchler v Commission* ECLI:EU:C:1970:72, paras 24-31.

<sup>288</sup> Case 48/69 *ICI v Commission* ECLI:EU:C:1972:70, paras 69-124.

<sup>289</sup> Case 40/70 *Sirena v Eda* ECLI:EU:C:1971:18, paras 10-11.

<sup>290</sup> Commission, *Internal Market Scoreboard No. 11* (n 273) 3.

integration.<sup>291</sup> Consequently, although being jurisdiction-specific,<sup>292</sup> the latter was guaranteed a permanent presence within the framework due to the nature of the internal market itself.<sup>293</sup>

Despite the above-described effects, market integration could not remain the sole explicitly identified objective of the EU competition framework forever. Change manifested itself in the early 1970s, along with significant economic and legal developments overviewed below.

### ***2.1.2. 1973-1992 – Broadening the pool of objectives***

The first breakthrough came in 1973 with the CJEU judgment in *Continental Can*<sup>294</sup> - the case concerning a concentration resulting in an elimination of competition on two product markets in the Union.<sup>295</sup> This was considered an abuse of dominance due to opposition to the EU competition policy objectives, one of them being protection of the ‘effective competition structure’ of the internal market.<sup>296</sup> The textual constraints of the predecessor of the Article 102 TFEU – non-inclusion of concentration appraisals – did not deter the Court from such finding.

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<sup>291</sup> Desmond Dinan, *Ever Closer Union: an Introduction to European Integration* (4<sup>th</sup> edn, Palgrave Macmillan 2010), 359.

<sup>292</sup> Sauter (n 9) 73.

<sup>293</sup> For a more recent case-law regarding the market integration objective, see Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission* ECLI:EU:C:2009:610.

<sup>294</sup> Case 6/72 *Continental Can v Commission* ECLI:EU:C:1973:22.

<sup>295</sup> *ibid* para 18.

<sup>296</sup> *ibid* paras 24-26.

This highlighted both the importance of a newly emerged objective and the future possibility of emergence of other objectives. The court also indicated that objectives were the same in case of prohibiting anti-competitive agreements.<sup>297</sup>

Despite this evolution, the market integration objective maintained a leading role throughout 1970s,<sup>298</sup> 1980s<sup>299</sup> and early 1990s,<sup>300</sup> by both administrative and judicial records.<sup>301</sup> The principal reason was commitment to complete the internal market by the end of 1992.<sup>302</sup> However, starting from 1973, the EU competition framework saw a fast increase in the number and variety of its policy objectives. These objectives had their trigger factors and accompanying challenges, some of which continue up to this day.

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<sup>297</sup> Case 14/68 *Walt Wilhelm v BKA* ECLI:EU:C:1969:4, paras 4-5; Joined Cases 6 and 7/73 *Commercial Solvents v Commission* ECLI:EU:C:1974:18, para 32.

<sup>298</sup> Commission, *Sixth Report on Competition Policy* (1977) 9; Commission, *Seventh Report on Competition Policy* (1978) 9.

<sup>299</sup> Commission, *Twelfth Report on Competition Policy* (1983) 12; Commission, *Fifteenth Report on Competition Policy* (1986) 15; Commission, *Sixteenth Report on Competition Policy* (1987) 13-15; Case 126/80 *Salonia v Poidomani* ECLI:EU:C:1981:136, para 12; Case 27/87 *Louis Erauw-Jacquery v La Hesbignonne* ECLI:EU:C:1988:183, para 14.

<sup>300</sup> Commission, *XX Report on Competition Policy* (1991) 11-12; Commission, *XXII Report on Competition Policy* (1993) 13; Commission, *XXIII Competition Report on Competition Policy* (1994) 14; Commission, *XXIV Report on Competition Policy* (1995) 17, 19-22; Case T-69/89 *RTE v Commission* ECLI:EU:T:1991:39, para 76.

<sup>301</sup> Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ International v Commission* ECLI:EU:C:1983:310, paras 23-25 and 27; Joined Cases 25 and 26/84 *Ford v Commission* ECLI:EU:C:1985:340, paras 27-46; Case 28/77 *Tepea v Commission* ECLI:EU:C:1978:133, para 65; Case 22/78 *Hugin v Commission* ECLI:EU:C:1979:138, para 17; Case 42/84 *Remia v Commission* ECLI:EU:C:1985:327, para 22.

<sup>302</sup> SEA (n 277) art 13.

### *Factors behind identification of non-integration objectives*

A major factor was the 1973 oil crisis and the resulting economic disturbance in Europe,<sup>303</sup> prompting the Union to internalize wider economic policy objectives within its competition framework.<sup>304</sup> The idea of such internalization, already tested by the CJEU in 1969,<sup>305</sup> was affirmed in the *Metro I* judgment which explicitly acknowledged the possibility of pursuing multiple objectives under the Union's competition policy.<sup>306</sup> This development also seems logical from the retrospect. As explained during the introductory overview of competition policy objectives, when in need, jurisdictions often implement wider policy objectives via competition framework when they are in crisis and in need to deliver short-term outcomes.

A related factor was an increase in concentration levels of the internal market. This process, initially encouraged by the EU as one of the pro-integration tools, picked up a pace from the mid-1960s and by the beginning of the 1970s had already become a major concern for the Commission.<sup>307</sup> This concern was actively voiced throughout the 1970s and 1980s,<sup>308</sup>

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<sup>303</sup> David Gerber, 'The Transformation of European Community Competition Law?' (1994) 35 HILJ 97, 114-115; Commission, *Fifth Report on Competition Policy* (1976) 9.

<sup>304</sup> Rompuy (n 35) 150-151, 158.

<sup>305</sup> *Walt Wilhelm* (n 297) para 5.

<sup>306</sup> *Metro I* (n 271) para 21.

<sup>307</sup> Commission, *Second Report on Competition Policy* (1973) 10-11; Commission, *Seventh Report* (n 298) 10; Commission, *Ninth Report on Competition Policy* (1980) 10.

<sup>308</sup> Commission, *Seventh Report* (n 298) 10; Commission, *Ninth Report* (n 307) 10.

culminating in the first Merger Regulation in 1989<sup>309</sup> which ensured that concentrations would not cause a 'lasting damage to competition'.<sup>310</sup> Until then, the Commission and the CJEU joined forces and used predecessors of the Article 101<sup>311</sup> and 102 TFEU<sup>312</sup> to achieve the same objective. This co-operation began in 1973 with the *Continental Can* judgement, which explicitly acknowledged that the market integration was not the sole objective of the EU competition policy.<sup>313</sup> The integrated market also needed to function well – i.e. involve healthy competitive processes. Keeping this in mind, the EU started to pay a more balanced attention to the *internal* (i.e. integration) and *market* (i.e. competitive process) components of the internal market.

Finally, starting from 1973, the list of EU tasks began to broaden along geographic and subject-matter dimensions. Geographically, enlargements doubled the initial number of the Union members by mid 1980s.<sup>314</sup> The subject-matter broadening resulted from the judicial activism – the CJEU interpreted EU competences far more widely than anticipated.<sup>315</sup> These

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<sup>309</sup> Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings (EUMR 1989) [1989] OJ L395/1.

<sup>310</sup> *ibid* recital 4.

<sup>311</sup> Joined cases 142 and 156/84 *BAT v Commission* ECLI:EU:C:1987:490, paras 36-40; Case 43/85 *Ancides v Commission* ECLI:EU:C:1986:450, para 13.

<sup>312</sup> *Continental Can* (n 294) paras 18-27.

<sup>313</sup> *ibid* paras 24-26.

<sup>314</sup> Denmark, Ireland and the UK were initial accessors in 1973, Greece joined in 1981, and Spain and Portugal were accepted in 1985. Commission, 'From 6 to 27 members' (2020) <[https://ec.europa.eu/neighbourhood-enlargement/policy/from-6-to-27-members\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/from-6-to-27-members_en)> accessed 05 February 2020

<sup>315</sup> Types of these mutations, resulting powers not explicitly provided by the Treaties and the challenges of the EU constitutional order created by such judicial activism are described in detail in Weiler and others (n 274) 2431-2450.

changes obliged the Union to pay a closer attention to various economic and social developments in order to maintain the functionality of internal market. This, in turn, reflected on the EU competition policy objectives.<sup>316</sup>

The combination of these factors triggered identification of a wide set of objectives of the EU competition framework throughout 1970s and 1980s. The list of the most well-known objectives as well as the rationales behind them are provided below.

### *Objectives identified between 1973-1992*

Starting from 1973, the Commission and the CJEU identified competition protection, fairness, economic freedom, efficiency, as well as consumer-related objectives and a significant number of objectives of a wider economic policy.

**The objective of competition protection**<sup>317</sup> is rooted in ordoliberalism - a philosophy developed in response to the difficulties faced by German economy during the first half of the 20<sup>th</sup> century.<sup>318</sup> This philosophy centered on the idea of shielding the process of market competition from both public and private powers for the sake of sound economic, social and political development.<sup>319</sup> Ordoliberals perceived the process of competition as a necessity for

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<sup>316</sup> For the detailed analysis, see Rompuy (n 35) 145-160.

<sup>317</sup> This objective has been referred to by different names throughout the CJEU case law: 'protecting effective competitive structure of the market', 'protection of competition', protecting 'competition as such', etc. However, it seems that the meaning behind these phrases is the same.

<sup>318</sup> Rompuy (n 35) 128-129; Gerber 1998 (n 270) ch VII.

<sup>319</sup> *ibid.*

such development, but also acknowledged the fragility of this process and advocated its protection by a capable legal order.<sup>320</sup> It is believed that this philosophy significantly influenced the wording of competition provisions in the Treaty of Rome.<sup>321</sup> Consequently, the EU competition framework accommodated the objective of competition protection from the very beginning.<sup>322</sup>

Apart from competition provisions, the above-mentioned objective stemmed from the joint reading of articles 2 and 3(f) of the Treaty of Rome, according to which securing the system of undistorted competition was one of the means of establishing the internal market. Due to such wording, it was easy to consider the former as a means to the latter. However, starting from 1970s, both the Commission and the CJEU started to identify competition protection as a stand-alone objective by clarifying that, even if anti-competitive practices did not partition the internal market across national lines, they might still harm the competitive structure of the latter.<sup>323</sup>

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<sup>320</sup> *ibid* 130-131 and ch IX respectively; see also Mathias Siems and Gerhard Schnyder, 'Ordoliberal Lessons for Economic Stability: Different Kinds of Regulation, Not More Regulation' (2014) 27 *Governance* 377, 379-381; Peter Behrens, *The Ordoliberal Concept of 'Abuse' of a Dominant Position and its Impact on Article 102 TFEU* (IEI 2015) 14.

<sup>321</sup> For details, see Gerber 1998 (n 270) ch VII.

<sup>322</sup> Alberto Pera, 'Changing Views of Competition, Economic Analysis and EC Antitrust Law' (2008) 4 *EurCompJ* 127, 147; Giorgio Monti, *EC Competition Law* (CUP 2007) 28-30.

<sup>323</sup> *Continental Can* (n 294) paras 18-27; *Commercial Solvents* (n 297) para 32; Case 27/76 *United Brands v Commission* ECLI:EU:C:1978:22, para. 201; Case 85/76 *Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36, paras 90-91, 125; *Hugin* (n 301) para 17; Case 22/79 *GFP v SACEM* ECLI:EU:C:1979:245, para 11; Case 322/81 *Michelin v Commission* ECLI:EU:C:1983:313, para 30; Case 30/87 *Corinne Bodson v SA Pompes funèbres des régions libérées* ECLI:EU:C:1988:225, para 24; case 30/87, para 24.

Such identification initially happened as a reaction of the EU to the alarming level of market power concentration.<sup>324</sup> Consequently, the objective of competition protection significantly affected abuse of dominance case-law. Namely, the CJEU defined dominance as an ability of an economically powerful undertaking to prevent the maintenance of market competition.<sup>325</sup> In addition, realization of this ability in a way that went against the competition protection objective<sup>326</sup> by either impeding,<sup>327</sup> eliminating<sup>328</sup> or stopping the emergence of competition<sup>329</sup> was classified as an abuse.

This approach proved to be controversial. The initial reaction was to assume that the EU protected market participants instead of competitive process.<sup>330</sup> However, the CJEU quickly clarified that protection was only afforded to competition 'on the basis of quality' and applied to competitors 'as efficient as the dominant undertaking'.<sup>331</sup> In other words, the Union was concerned more about maintaining a healthy competitive process in the face of economic

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<sup>324</sup> *Continental Can* (n 294).

<sup>325</sup> *Hoffmann* (n 323) para 38.

<sup>326</sup> *ibid*, it is referred as 'the objective of undistorted competition'.

<sup>327</sup> Case 31/80 *L'Oréal v AMCK* ECLI:EU:C:1980:289, paras 27 and 30; *Michelin* (n 323) para 57; Case 311/84 *CBEM v CLT & IPB* ECLI:EU:C:1985:394, para 16; Case C-62/86 *AKZO Chemie v Commission* ECLI:EU:C:1991:286, paras 69 and 72.

<sup>328</sup> *CBEM* (n 327) paras 26-27.

<sup>329</sup> *Michelin* (n 323) para 30; see also *RTE* (n 300) para 63.

<sup>330</sup> See, for example, Eleanor Fox, 'Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness' (1986) 61 *NDLR* 981.

<sup>331</sup> *AKZO Chemie* (n 327) para 70.

difficulties and market power accumulation than shielding weak competitors from market forces.

The above-mentioned rationale is also evident in the emergence of **the objective of fairness**. Initially, the CJEU considered ‘fair competition’ as a means of achieving a single market objective.<sup>332</sup> However, since both the 1973 crisis and the rising concentration levels complicated market participation of smaller but still efficient competitors, they created fertile conditions of acknowledging fairness as a stand-alone objective.

This occurred in the *Ninth Report on Competition Policy* by identifying three dimensions of fairness – equality of opportunity to participate in the single market, acknowledgement of diverging situations under which undertakings operated and equity for consumers.<sup>333</sup> This way, while being a separate objective, fairness maintained firm links to market integration and competition protection, as affirmed by the CJEU case-law. In terms of the market integration, fairness of prices imposed by dominant undertakings was judged by the fact whether price differentiations divided the internal market across national lines.<sup>334</sup> As for competition protection, the equality of opportunity for all competitors (one of the elements of fairness) was declared a necessary precondition for maintaining undistorted competition within

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<sup>332</sup> *Italy v. Council and Commission* (n 282) 405.

<sup>333</sup> Commission, *Ninth Report* (n 307) 10.

<sup>334</sup> Ex. *United Brands* (n 323).

the EU.<sup>335</sup> Overall, the notion of fairness, as defined by the EU, took into consideration the specifics of the competition framework in the Union (i.e. existing primary objectives) and corresponded to the existing needs of the internal market competition.

**The objective of economic freedom** was also linked to the objective of competition protection. This objective stemmed from the notion regarding the abolition of total elimination of competition contained in the Treaty.<sup>336</sup> Consequently, it served as a limit beyond which the restrictions on competition were unjustifiable.<sup>337</sup> For anti-competitive agreements, such limit was restriction of a buyer's freedom to act 'in accordance with his own economic interests'.<sup>338</sup> For abuse of dominance cases, it was the economic freedom of non-dominant competitors.<sup>339</sup> Such interrelation enabled the CJEU to declare restrictions of economic freedom equal to restrictions of competition.<sup>340</sup> Consequently, this objective further supported non-powerful but

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<sup>335</sup> Case C-18/88 *RTT v GB-Inno-BM* ECLI:EU:C:1991:474, para 25; Case C-202/88 *France v Commission* [1991] ECR I-1223, para 51.

<sup>336</sup> Article 101(3) TFEU did not allow 'saving' of agreements resulting into the elimination of competition. Similar sentiments were expressed about Article 102 TFEU in *Continental Can*.

<sup>337</sup> *Brisimi* (n 9) 15.

<sup>338</sup> Case 319/82 *SVCB E v Kerpen & Kerpen* ECLI:EU:C:1983:374, para 6; such restrictions were also called restrictions of the freedom of competition in Case 107/82 *AEG-Telefunken AG v Commission* ECLI:EU:C:1983:293, para 43; see also *Michelin* (n 323) para 73, where the abuse of dominance was, among other things, judged by the fact whether it removed/restricted 'buyer's freedom to choose his source of supply'.

<sup>339</sup> Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: a Reformed Approach to Article 82 EC* (Hart 2008) 42-43.

<sup>340</sup> Case 86/82 *Hasselblad v Commission* ECLI:EU:C:1984:65, paras 42 and 46; see also Giuliano Amato, *Antitrust and the Bounds of Power: the Dilemma of Liberal Democracy in the History of the Market* (Hart 1997) 113.

efficient undertakings in their market activities during the economic crisis and increasing concentration levels in the absence of EU-wide merger regulation.

The emergence of **consumer-related objectives** had a different rationale. Even though these objectives were accommodated by the predecessors of both articles 101 and 102 TFEU<sup>341</sup> and have been a subject of policy considerations since early 1970s,<sup>342</sup> the case-law did not explicitly identify them as stand-alone objectives during 1970s and 1980s. More specifically, the CJEU used consumer interests,<sup>343</sup> as well as actions undertaken to the benefit of producers and detriment of consumers,<sup>344</sup> to find market activities anti-competitive but did not call them objectives as such.

One of the reasons of this was the idea that consumer benefits automatically stemmed from integrated and competitive markets.<sup>345</sup> Another reason could have been a strong focus on the primary objectives of the day – market integration and maintenance of a competitive market structure. Such focus ultimately left consumers in the background. In addition, it was believed that one of the dimensions of the fairness objective – equity to consumers – sufficiently

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<sup>341</sup> Article 101(3) indicates that allowing consumers ‘a fair share of resulting benefit’ was one of the preconditions of exemptions under it, while Article 102 considers market development limitations abusive if the latter happened ‘to the prejudice of consumers’.

<sup>342</sup> Commission, *First Report on Competition Policy* (1972) 12; Commission, *Second Report* (n 307) 12; Commission, *Fourth Report on Competition Policy* (1975) 7; Commission, *Seventh Report* (n 298) 9-10.

<sup>343</sup> *Consten* (n 281) 349; *Metro I* (n 271) para 21.

<sup>344</sup> *United Brands* (n 323) 183.

<sup>345</sup> Stephen Weatherill, *EU Consumer Law and Policy* (2<sup>nd</sup> edn, EE 2013) 4; Parret 2010 (n 44) 347.

guaranteed the protection of consumer interests. This thinking is supported by the fact that consumer concerns have been referred to in the block exemption regulations which, among other factors, focused on giving consumers a fair share of market benefits.<sup>346</sup>

Similar development occurred in terms of **the efficiency objective**. The latter was accommodated in the Treaty provisions from very beginning.<sup>347</sup> On a policy level, orientation towards efficiency was supported by first by Spaak Report<sup>348</sup> and affirmed in several Competition Policy Reports.<sup>349</sup> On a judicial level, CJEU opened room for efficiency analysis in 1966 by the *Société Technique Minière* case.<sup>350</sup> Additional incentives for identifying efficiency as a stand-alone objective can be seen in the development of economic thinking in 1970s.<sup>351</sup> This period is associated with the success of Chicago School. Scholars of this school, unlike ordoliberalists, firmly believed in the self-regulatory nature of the market and hence, deemed state interventions less necessary for its effective functioning<sup>352</sup> - unless the market allowed

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<sup>346</sup> Commission Regulation (EEC) 67/67 of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements [1967] OJ Spec Ed 10, recital 9 and article 3b; Commission Regulation (EEC)123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, OJ L 15/16, recitals 12 and 14.

<sup>347</sup> According to the Article 101(3) TFEU, anti-competitive agreements contributing 'to improving the production or distribution of goods or to promoting technical or economic progress' may be exempted from being declared anti-competitive.

<sup>348</sup> Talbot (n 279) 270.

<sup>349</sup> Commission, *First Report* (n 342) 12 and 17; Commission, *Eleventh Report on Competition* (1982) 11; Commission, *Sixteenth Report* (n 299) 14.

<sup>350</sup> Pera (n 322) 57-158; see also *Société* (n 282) 249-250.

<sup>351</sup> Pera (n 322) 137-138 and 144.

<sup>352</sup> Siems and Schnyder (n 320) 379.

inefficient allocation of resources.<sup>353</sup> Chicago scholars advocated efficiency a sole objective of competition law.<sup>354</sup> EU could not adopt this approach since other objectives were either expressed or implied in the Treaty provisions. However, policy reports and case-law of the Formation Phase laid a solid foundation for the eventual emergence of efficiency as a primary objective of the Union's competition policy.

Finally, the post-crisis economic situation and widening of the EU tasks compelled the competition framework to accommodate **various objectives of a wider economic policy**. This was due to a fact that competition policy was considered as a remedy to a large number of economic problems arising in the Union.<sup>355</sup> Although limitations of this approach were acknowledged, it was still approved as a relevant precondition for the Union's economic development.<sup>356</sup> This way, EU balanced long-term objectives of the competition policy against short-term problems of its broader economic framework.

While the CJEU explicitly acknowledged the existence of the objectives of a wider economic policy in *Metro I*,<sup>357</sup> it was the Commission which highlighted the majority of the latter in its annual reports. These included, among others, finances (specifically, post-1973

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<sup>353</sup> Amato (n 340) 22.

<sup>354</sup> Van den Bergh, Camesasca and Giannaccari (n 9) 50.

<sup>355</sup> Commission, *Fifth Report* (n 303) 8.

<sup>356</sup> Commission, *Ninth Report* (n 307) 11; Commission, *Thirteenth Report on Competition Policy* (1984) 11; Commission, *Fourteenth Report on Competition Policy* (1985) 12.

<sup>357</sup> *Metro I* (n 271) para 21.

inflation),<sup>358</sup> unemployment,<sup>359</sup> industrial policy (especially SME-related policies),<sup>360</sup> and competitiveness of EU market players.<sup>361</sup>

The above-listed objectives did not originate from the Treaty competition provisions. Rather, they corresponded problematic areas which EU had to address during the economic hardships of 1970s and 1980s and to which the primary law had no ready-made solutions. That is why the EU accommodated them on an ad-hoc basis within the competition framework, as one of the principal frameworks protecting free market. Such an attitude signaled the willingness of the Commission to test the framework beyond its conceived limits. It also required precaution in order not to render the latter ineffective altogether. As the scholars would later note, competition policy cannot and should not be required to do everything at once.<sup>362</sup> Formation Phase developments pushed the EU to test the validity of this statement to a certain extent. However, as the later analysis reveals, the core functions of the framework were never forgotten.

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<sup>358</sup> Commission, *Fourth Report* (n 342) 7.

<sup>359</sup> Commission, *Sixth Report* (n 298) 9.

<sup>360</sup> Commission, *Seventh Report* (n 298) 11.

<sup>361</sup> Commission, *Seventeenth Report on Competition Policy* (1988) 14.

<sup>362</sup> Ezrachi (n 8) 50; Akman 2012 (n 61) 48.

### *Challenges of a multi-objective framework*

Identification of multiple policy objectives throughout 1970s and 1980s raised questions in three principal areas – coherence among objectives (including their possible hierarchy), clarity of their substance and feasibility of their implementation.

In terms of coherence, the framework faced the challenge of balancing competition protection objective against others. For example, in certain cases, where pursuing the market integration objective could reduce the market competition, enforcers had to pursue one objective at the expense of the other. This meant that pro-competitive market outcomes might not be allowed if the latter opposed the single market imperative.<sup>363</sup> Similar balancing test was required for competition protection and efficiency. Although the initial reaction of the EU was to pay more attention to the former, the efficiency versus competition debate would continue throughout the entire process of the competition framework development.<sup>364</sup>

In terms of substance, objectives of competition protection and efficiency required more clarity. In the first case, the ambiguity surrounds the concept of ‘competition’<sup>365</sup> - the

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<sup>363</sup> Talbot (n 279) 275.

<sup>364</sup> Selected significant works in this respect are listed in n 4 of Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (2013) CLES Working Paper Series 3/2013 <<https://papers.ssrn.com/abstract=2235875>> accessed 11 November 2017.

<sup>365</sup> For the different meanings of the concept see Christoph Lütge, *The Ethics of Competition: How a Competitive Society is Good for All* (EE 2019) ch 1.

consequences of the latter were discussed without elaborating on its meaning.<sup>366</sup> For some, competition was equated to the process of rivalry on the marketplace<sup>367</sup> - an independent value that requires protection on its own right.<sup>368</sup> For others, this rivalry was just means of achieving 'socially desirable ends'.<sup>369</sup> EU competition case-law initially advanced the first definition.<sup>370</sup> However, this choice had to be repeatedly defended since, according to critics, it led to overly formalistic approach.<sup>371</sup> A similar challenge was faced regarding efficiency objective. Namely, considering the three types of efficiencies – allocative, productive and dynamic (the latter being associated with the innovation<sup>372</sup> and referred frequently in Commission reports<sup>373</sup>) - policy makers constantly faced a choice among them based on value judgements regarding their short/long term effects.<sup>374</sup>

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<sup>366</sup> Phedon Nicolaides, 'An Essay on Economics and the Competition Law of the European Community' (2000) 27 LIEI 7, 11.

<sup>367</sup> Whish and Bailey (n 71) 5.

<sup>368</sup> Oles Andriychuk, 'Dialectical antitrust: an alternative insight into the methodology of the EC competition law analysis in a period of economic downturn' (2010) 31 ECLR 155, 155.

<sup>369</sup> Monti (n 322) 22; William Kolasky, 'What is Competition? A Comparison of U.S. and European Perspectives' (2004) 49 TAB 29, 35.

<sup>370</sup> Earlier cases include *Continental Can* (n 294) para 26; *Hoffmann* (n 323) para 91; *United Brands* (n 323) para 113; *Michelin* (n 323) para 57.

<sup>371</sup> Pera (n 322) 149 and 154-155; Whish and Bailey (n 71) 204-205.

<sup>372</sup> Whish and Bailey (n 71) 5-6; Jones, Sufrin and Dunne (n 61) 7-8.

<sup>373</sup> Commission, *Sixth Report* (n 298) 9; Commission, *Seventh Report* (n 298) 11; Commission, *Thirteenth Report* (n 356) 11; Commission, *Fifteenth Report* (n 299) 11.

<sup>374</sup> Jones, Sufrin and Dunne (n 61) 47.

Finally, the framework needed to figure out the extent to which the objectives of a wider economic policy could be accommodated. *Metro II* judgement provided a basis – their pursuit should not harm the objectives of market integration and competition protection.<sup>375</sup> However, the case-law did not clarify whether these objectives should be pursued every time when they did not reveal such eliminatory effect. For example, cooperation between SMEs was not seen as having a threatening effect to the market integration objective.<sup>376</sup> However, it was unclear whether industrial policy objectives related to SMEs should always be pursued by competition policy and whether competition framework could accommodate such a pursuit in the first place. As this overview later reveals (Subchapter II.2.2.4), this interface between the industrial and competition policies has become one of the recurring themes for the EU policymakers, where the balance between the two policies changes according to the new challenges arising from both physical and digital market developments.

The response to these challenges reflected the nature of the EU competition framework. Namely, the latter constantly evolves with time, evaluates its place within a broader economic setting of the Union, and (re)prioritizes its policy objectives accordingly. For the Formation Phase policy objectives, such reprioritization happened against the backdrop of significant changes within the Union brought by the Maastricht Treaty<sup>377</sup> that signalled a new era in the EU internal market development. This is what the thesis turns next.

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<sup>375</sup> Case 75/84 *Metro v Commission* ECLI:EU:C:1986:399 (*Metro II*) para 65.

<sup>376</sup> *Völk v S.P.R.L.* (n 282) paras 5-7.

<sup>377</sup> Treaty on European Union (TEU) [1992] OJ C191/1.

## 2.2. 1993-2003 – Phase II: Performance

In 1993, the EU finally became both an economic and a political institution.<sup>378</sup> The Treaty of Maastricht, effective from 1 November 1993, declared the internal market established,<sup>379</sup> transformed EEC into EC,<sup>380</sup> and committed the Union to pursue social objectives alongside the economic ones.<sup>381</sup> Hence, political and social sides of the Union got inscribed in the Treaties as constitutional texts. This completed the initial era of market formation. Instead, focus shifted to the market performance within a new system where non-market factors were paid significant attention in both policy and constitutional terms.

This new system introduced several important changes for the EU competition framework. First, Maastricht Treaty enlarged the subject-matter jurisdiction of the EU by introducing new policy areas – a trend that continued throughout the 1990s. One important outcome for such enlargement was that the necessity to implement such policy objectives by the competition framework ceased to exist. This was a positive sign for now a developed framework – now it could better focus on implementing core policy objectives.

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<sup>378</sup> Cseres 2005 (n 105) 99.

<sup>379</sup> TEU (n 377) art B(3)

<sup>380</sup> *ibid* art A(1)

<sup>381</sup> *ibid* art B(1)

Next, both the Commission and the CJEU met 1993 with increased competences. In 1989, the EU finally adopted the Merger Regulation<sup>382</sup> which offered the Commission deeper insight into the market functioning and thus, enabled it to back up its policy choices with more economic evidence. During the same year, the CJEU became a two-instance court,<sup>383</sup> making competition policy objectives subject of consideration under the two levels of the EU judiciary. Both developments affected the process of shaping competition policy objectives since 1993, when the initial completion of the internal market demanded rethinking of the latter.<sup>384</sup>

Finally, by the beginning of the 1990s, the EU institutions accumulated significant enforcement and adjudication experience. The latter proved the importance of paying more attention to the effects of allegedly anti-competitive actions on a case-by-case basis and considering the specifics of markets under question.<sup>385</sup> This, in turn, enabled the Commission (and later the CJEU) to reconsider the roles of competition policy objectives in order to focus on more harmful infringements. This development once again proved the scholarly finding that the more a particular jurisdiction develops, the more it navigates towards competition policy objectives requiring comprehensive economic assessment for their implementation.<sup>386</sup>

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<sup>382</sup> EUMR 1989 (n 309)

<sup>383</sup> Council Decision (ECSC, EEC, Euratom) 88/591/ of 24 October 1988 establishing a Court of First Instance of the European Communities [1988] OJ L 319/1, art 1.

<sup>384</sup> For the institutional dynamics between the Commission and the Court and the effects of this dynamic on the development of competition policy objectives, see below, subchapter II.2.4.

<sup>385</sup> Monti (n 322) 43-44.

<sup>386</sup> See Gerber 2020 (n 36) ch 3.

The above-discussed changes resulted in three major shifts in the existing dynamics of the EU competition policy objectives: delineation between the latter and the other policy considerations, increased attention towards the competition protection objective, and an intensified push (mainly from the Commission) towards the advancement of efficiency/welfare objectives. These shifts are overviewed below.

### *2.2.1. Delineation between competition policy objectives and other policy considerations*

Between 1993 and 2003, the EU saw a significant increase in its subject-matter jurisdiction. Namely, the Maastricht Treaty made culture, tourism, consumer protection, public health and industrial policies stand-alone policy areas of the Union.<sup>387</sup> Later, the establishment of the Economic and Monetary Union added finance-related competences.<sup>388</sup> Finally, the Amsterdam Treaty contributed a new employment title.<sup>389</sup> Consequently, the EU acquired policy-making powers in several fields which it initially addressed by competition framework. The result was an eventual transformation of these objectives into other policy considerations.

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<sup>387</sup> This was preceded by adding economic and social cohesion and R&D as separate policy fields under the SEA and followed by a new employment title under the Treaty of Amsterdam. Rompuy (n 35) 160-162.

<sup>388</sup> Commission, *XXVII Report on Competition Policy* (1998) 5-6; Commission, *XXVIII Report on Competition Policy* (1999) 24-25.

<sup>389</sup> Rompuy (n 35) 162.

The distinction between objectives and considerations is that the former indicate what a particular framework is designed to achieve while the latter are additional factors considered during the framework implementation.<sup>390</sup> The 1990s scholarship warned against the usage of considerations as direct criteria of competition enforcement.<sup>391</sup> This was conditioned by the fear that, while attending them, enforcers would have less room for upholding the core objectives of the EU competition policy. This could render the competition framework ineffective.

A similar sentiment was echoed by the CJEU – despite opening room for them during the 1980s, the court was careful in the application of the other policy considerations.<sup>392</sup> However, the willingness to accommodate the latter to the most possible extent was constantly affirmed, as long as the key competition policy objectives were respected. On certain occasions, where upholding of the other policy considerations was particularly important, the Court was even willing to exclude certain operations from the realm of competition rules in order to enable a sound implementation of the policy under question.<sup>393</sup> This approach, albeit rather ad hoc in nature, further confirmed a special character of the EU competition framework – that it was concerned by more than what might normally be regarded as core objectives of competition policy. Simultaneously, it also shed light on the Union’s perception of this framework – albeit

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<sup>390</sup> *ibid* 8.

<sup>391</sup> See, for example, Alexander Schaub, ‘Working paper 2.VIII’ in Ehlermann and Laudati (eds) (n 32)119-128, 121.

<sup>392</sup> Case C-219/97 *MDB v SPVH* ECLI:EU:C:1999:437, paras 46-47; Joined cases C-115/97 to C-117/97 *BH v SBHB* ECLI:EU:C:1999:434, paras 56-57.

<sup>393</sup> Case C-67/96 *Albany International* ECLI:EU:C:1999:430, paras 59-60.

embedded in a broader economic setting, competition framework was expected to support the development of the internal market competition first (and everything else next, considering its abilities). This way, EU ensured the soundness and effectiveness of the framework.

The considerations that could find their way in competition enforcement have been diverse. For example, since competition results into restructuring and diminution in the number of workplaces, the Commission has been open to employment considerations.<sup>394</sup> Similarly, the CJEU affirmed support to industrial policy consideration (specifically - IP rights), as long as the latter did not go against the objectives of the Treaty competition provisions.<sup>395</sup> Considerations of economic and social cohesion were paid attention in merger appraisals,<sup>396</sup> and so on. This approach proved that the EU competition framework was not operating in a vacuum and paid attention to a wider economic and social development of the Union and its Member States.

### ***2.2.2. Prioritization of the competition protection objective***

Alongside turning objectives of a wider economic policy into other policy considerations in the 1990s, the EU focused more on the core objectives identified during the Formation Phase.

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<sup>394</sup> Commission, *XXVII Report* (n 388) 7.

<sup>395</sup> Case T-76/89 *ITP v Commission* ECLI:EU:T:1991:41, paras 53-56.

<sup>396</sup> EUMR 1989 (n 309) recital 13.

Market integration - a 'fundamental objective' of the Union,<sup>397</sup> strongly featured in the case-law;<sup>398</sup> issues of economic freedom<sup>399</sup> were raised more frequently;<sup>400</sup> consumer-related concerns were continuously acknowledged.<sup>401</sup> Meanwhile, priority fell on the objective of competition protection.

Re-focusing on this objective was connected to the alleged exhaustion of the function of the single market objective. Since 1993, when the Commission started to indicate that integration might not be the driving objective of the competition policy anymore,<sup>402</sup> it was considered logical to use competition protection as a basis of enforcement.<sup>403</sup> This also echoed the sentiment of the time that while the market integration was largely complete, competition was an ongoing process<sup>404</sup> requiring constant attention.<sup>405</sup> Interestingly, focusing on competitive market structures and competitive process was considered to be better for market integration

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<sup>397</sup> Case C-73/95 P *Viho v Commission* ECLI:EU:C:1996:405, para 52.

<sup>398</sup> Case C-338/00 P *Volkswagen v Commission* ECLI:EU:C:2003:473, para 29; Case C-215 Joined cases C-215/96 and C-216/96 *Bagnasco and others v BNP & Carige* ECLI:EU:C:1999:12, para 47; Case C-70/93 *BM v ALD Auto-Leasing* ECLI:EU:C:1995:344, para 20; Case C-266/93 *BKA v Volkswagen & VAG Leasing* ECLI:EU:C:1995:345, para 26.

<sup>399</sup> *BM* (n 398) para 19; *BKA* (n 398) para 24.

<sup>400</sup> Akman 2015 (n 43), 207.

<sup>401</sup> *Volkswagen* (n 398) para 26.

<sup>402</sup> Commission, *XXV Report on Competition Policy* (1996) 11.

<sup>403</sup> Schaub (n 391) 126-127.

<sup>404</sup> Dieter Wolf, 'Working paper 2.IX' in Ehlermann and Laudati (eds) (n 32), 131.

<sup>405</sup> Later, the same sentiments were expressed in terms of market integration objective. See subchapter II.2.3.

purposes as well, in the light of concerns that sometimes the implementation methods of the market integration objective hindered the actual integration process.<sup>406</sup> Thus, competition protection was deemed to be the objective with which the enforcement should be occupied.<sup>407</sup>

In addition, the EUMR 1989 referred to competition protection as one of its primary concerns.<sup>408</sup> According to the CJEU, this regulation was vital for upholding competition protection objective within the internal market even after its completion.<sup>409</sup> As for the Commission, acquisition of a new responsibility obliged it to engage in *ex-ante* protection in the face of possible anti-competitive interventions, in addition to *ex-post* control (where the shift to competition protection objective was evident from working papers).<sup>410</sup> Hence, the enforcer started to pay even closer attention to the relevant market structures across the Union and the transactions that could hinder competitive processes on them.

Attention to the competition protection objective yielded several benefits during the Performance phase. For example, it supported the rationale of allowing follow-up competition damage claims in national courts;<sup>411</sup> validated the argument that the special responsibility of not

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<sup>406</sup> Damien Neven, 'Working paper 2.VII' in Ehlermann and Laudati (eds) (n 32) 111-118, 117.

<sup>407</sup> Schaub (n 391) 122.

<sup>408</sup> Article 2(1)(a).

<sup>409</sup> Joined cases C-68/94 and C-30/95 *SCPA & EMC v Commission* ECLI:EU:C:1998:148, paras 169-170.

<sup>410</sup> Commission White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999] OJ C 132/1 (Modernization White Paper) paras 8 and 24.

<sup>411</sup> Case C-453/99 *Courage v Crehan* [2001] ECLI:EU:C:2001:465, paras 27-28.

distorting competition was held both by dominant and collectively dominant undertakings;<sup>412</sup> and justified the prosecution of activities posing the risk of eliminating market competition without waiting for that risk to materialize.<sup>413</sup> Overall, the objective was used to clarify that protecting the competitive process was important for both competitors and third parties<sup>414</sup> because it engrained the competition culture in the EU. Unsurprisingly, in the late 1990s, academics already talked about the successful establishment of this culture within the Union.<sup>415</sup>

Despite the attention given to the competition protection objective during the Performance Phase, it did not acquire the same level of importance as the market integration objective possessed during the Formation Phase due to several reasons. First, market integration is one of the key objectives of the EU itself, while competition protection is an objective of the EU competition framework specifically. Hence, the influence of the former is always more evident than that of the latter. Next, the competition culture which this objective strived to uphold has slowly been established since the very first years of competition enforcement. Hence, it took less time for it to be fully enshrined once the market integration was more or less complete. Consequently, competition protection objective exhausted one of the key factors of its prioritization relatively quickly. Finally, an intensified focus on economic evidence and a

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<sup>412</sup> Joined cases C-395/96 P and C-396/96 P *Compagnie maritime belge v Commission* ECLI:EU:C:1998:518, paras 37-38, 85.

<sup>413</sup> Case C-333/94 P *Tetra Pak v Commission* ECLI:EU:C:1996:436, para 44.

<sup>414</sup> Case C-185/95 P *Baustahlgewebe v Commission* ECLI:EU:C:1998:608, para 30.

<sup>415</sup> Jonathan Faul, 'working paper II' in Ehlermann and Laudati (eds) (n 32) 506.

gradual shift to the more economic approach starting from the late 1990s contributed to taking the focus away from this objective. Consequently, its prioritization was relatively short-lived. This does not diminish value of the competition protection objective. It just reveals how deeply the changing circumstances affect policy choices for the EU competition framework.

### ***2.2.3. Elaboration of efficiency and welfare objectives***

A more or less satisfactory establishment of the internal market and the competition culture within it, coupled with the accumulated experience and existing critique regarding the harms of too formalistic competition enforcement,<sup>416</sup> prompted the Commission to start considering efficiency and welfare objectives more deeply from the late 1990s. This process, which started with the Modernization White Paper<sup>417</sup> and continued with extensive legal drafting activities in the early 2000s, entailed the introduction of more economic/effects-oriented thinking in the EU competition framework.<sup>418</sup> Two principal reasons for this were the Commission's reflection on efficiency matters<sup>419</sup> and the renewed dedication towards consumers, as (what is now) article

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<sup>416</sup> Damien Neven, Penelope Papandropoulos and Paul Seabright, *Trawling for Minnows: European Competition Policy and Agreements Between Firms* (CEPR 1998).

<sup>417</sup> n 410.

<sup>418</sup> Cseres 2005 (n 105) 104-109.

<sup>419</sup> Commission, *XXVI Report on Competition Policy* (1997) 17; Commission, *XXX Report on Competition Policy* (2001) 19.

12 TFEU turned consumer protection into a must-consider issue in all EU policies - including competition – since 1993.<sup>420</sup>

The above-mentioned reflection and dedication started to be acknowledged in the block exemptions adopted during the late 1990s and early 2000s. For example, the 1999 General Block Exemption Regulation<sup>421</sup> indicated that the efficiency-enhancing effects of the vertical agreements would highly likely result in their clearance in the absence of market power.<sup>422</sup> Similarly, the 2002 Block Exemption on Car Distribution<sup>423</sup> introduced a number of changes which would provide end consumers with a wider choice and improved quality of service.<sup>424</sup>

Despite these changes, the overall enforcement and adjudication practice of the EU did not show a strong bend towards efficiency and consumer welfare objectives during the Performance Phase. However, Commission's extensive drafting activities laid a solid foundation for their later emergence as central objectives of the EU competition policy.

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<sup>420</sup> Parret 2010 (n 44) 356.

<sup>421</sup> Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21.

<sup>422</sup> *ibid*, recitals 6-7.

<sup>423</sup> Commission Regulation (EC) 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector [2002] OJ L203/30.

<sup>424</sup> Cseres 2005 (n 105) 243.

#### ***2.2.4. Challenges of the Performance Phase***

The Performance Phase left at least three questions open in terms of competition framework objectives. First, although the 1990s case law paid significant attention to the competition protection objective, the increased interest of the Commission regarding efficiency and welfare objectives signaled the movement towards another direction. Tension between the two approaches required resolution for the sake of a sound implementation of the competition policy. Meanwhile, as it will be explained in the subchapter II.3.4. below, administrative and judicial interpretations of the competition policy objectives do not always align with each other – while the former always advocate for a more economic approach in policymaking, the latter look to the competition policy objectives from a more wholistic viewpoint, considering the requirements of the entire EU framework. This dichotomy – and resulting disparity of viewpoints regarding the prioritization of competition policy objectives – has become a characteristic feature of the Union competition policymaking. Consequently, the challenge created during the performance phase remain to a certain extent unresolved until today.

Next, the CJEU seemed somewhat unclear about the self-sufficient nature of the competition protection objective. At certain point, the case-law suggested that ensuring the existence of a healthy market structure in the Union was necessary since this upheld the single market objective.<sup>425</sup> This approach complicated the understanding of the exact function of the competition protection objective and thus, required additional clarification.

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<sup>425</sup> Case C-475/99 *Ambulanz Glöckner v LSECLI*:EU:C:2001:577, para 47.

Finally, with the gradual upraising of the efficiency and welfare objectives, the framework had to clarify the role of the other key objectives, such as economic freedom and fairness, which were traditionally aligned to the objectives of market integration and competition protection. In other words, the Union had to figure out how to operate the multi-objective framework so that all of its objectives aligned to each other.

The Union had to address these challenges on the backdrop of significant internal and international shifts occurring in the early and mid-2000s. The latter would lead the EU competition framework into the third (and current) phase of its development and result in reprioritization of competitive policy objectives once again.

### **2.3. 2004 and beyond – Phase III: Efficiency**

2004 saw the largest enlargement of the EU, bringing the membership number to 25.<sup>426</sup> The resulting broadening of the internal market was met by comprehensive elaboration regarding the mechanisms of ensuring its proper functioning, including the rethinking of competition framework implementation. Namely, the necessity of decentralized enforcement was acknowledged<sup>427</sup> and met by readiness from the Member States.<sup>428</sup> Simultaneously, efficiency

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<sup>426</sup> On 1 May 2004, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia became EU members (n 314).

<sup>427</sup> Modernization White Paper (n 410) paras 5 and 7-8.

<sup>428</sup> Gerber 1994 (n 301) 123.

and welfare rationales were given a clear priority in policymaking for the sake of providing a universal economically-rooted implementation benchmarks across the Union.<sup>429</sup>

The decentralization was initiated by a new enforcement regulation<sup>430</sup> which introduced two major changes: 1) shifted part of the enforcement/adjudication burden from the Union to the Member States;<sup>431</sup> 2) abolished the existing notification system, where the Commission assessed the legality of every agreement under Article 101 TFEU.<sup>432</sup> This solved a problem of significant backlog<sup>433</sup> and enabled the Commission to devote more time to in-depth economic analysis and to the investigation of hard-core cartels – as intended according to the modernization package.<sup>434</sup> The 2004 Merger Regulation ('EUMR 2004')<sup>435</sup> further supported this process by introducing SIEC test and focusing on efficiency appraisals in concentrations.<sup>436</sup>

An increased capacity of economic analysis, secured by the two above-mentioned regulations, enabled the Commission to implement its efficiency and consumer welfare-

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<sup>429</sup> David Gerber, 'Two Forms of Modernization in European Competition Law' (2008) 31 *FIntLJ* 1235, 1251-1253.

<sup>430</sup> Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Regulation 1/2003).

<sup>431</sup> Maher (n 267) 730-734.

<sup>432</sup> Rompuy (n 35) 180-181.

<sup>433</sup> Mario Siragusa, 'Working Paper 8.V' in Ehlermann and Laudati (eds) (n 32), 546.

<sup>434</sup> Modernization White Paper (n 410) paras 49 and 78; Cseres 2005 (n 105) 109.

<sup>435</sup> Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1 (EUMR 2004).

<sup>436</sup> *ibid*, recital 29, arts 2(2) and 2(3).

oriented vision by adopting a series of other measures throughout the 2000s and 2010s.<sup>437</sup> This process was also encouraged by intensified economic interactions between the EU and the USA, which revealed both the desirability of the policy convergence for supporting inter-jurisdictional trade<sup>438</sup> and the necessity to have a less strict, more effects based enforcement for retaining the comparative competitiveness of the Union.<sup>439</sup>

In this respect, scholarship points out that the development of the economic thinking in the USA and resulting shifts in the antitrust policymaking across the Atlantic during the second half of the XX century had a belated but significant impact on the Commission's choice of (re)prioritizing the EU competition policy objectives.<sup>440</sup> While the EU met the shift with internal readiness, it is questionable whether the latter would have occurred so quickly without the growing discontent of all involved actors – academics, practitioners, business circles and enforcers – regarding the disparities in enforcement outcomes in several significant (and politically sensitive) competition cases between these two major jurisdictions.<sup>441</sup> The existence of the above-mentioned impact also highlights the relevance of international trade relations for the development of competition policy worldwide. It seems that even powerful supranational

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<sup>437</sup> See subchapter II.3.2.

<sup>438</sup> Akman 2014 (n 43) 185.

<sup>439</sup> Gerber 2008 (n 429) 1253.

<sup>440</sup> For the international impact on domestic policy formation in the EU, see Hubert Buch-Hansen and Angela Wigger, 'Revisiting 50 years of market-making: The neoliberal transformation of European competition policy' (2010) 17 RIPE 20.

<sup>441</sup> For a general overview see Eleanor Fox, 'Antitrust Regulation across National Borders: The United States of Boeing versus the European Union of Airbus' (1998) 16 The Brookings Review 30.

jurisdictions like the EU are not immune when it comes to international pressure to adapt 'domestic' frameworks.

One could argue that a full immunity from such pressure is not desirable either – it may well support further enhancement of competition frameworks. However, this should not happen at the expense of discarding intra-jurisdictional interests. In case of the EU, this was revealed by economic developments of the late 2000s, including the 2008 financial crisis and establishment of the digital single market. The latter demonstrated that the Union needed to guard traditional aspects of the competition policy as well.<sup>442</sup>

The Commission's approach towards efficiency and welfare objectives was supported by the CJEU up to the extent permitted by the EU primary law. The key competition provisions remained substantively unchanged after the Lisbon Treaty.<sup>443</sup> Meanwhile, the latter added energy to the existing policies<sup>444</sup> and gave the EU Charter of Fundamental Rights<sup>445</sup> a binding character.<sup>446</sup> The latter, in turn, affirmed Union's commitment to the key horizontal policy areas (ex. environmental protection,<sup>447</sup> consumer protection,<sup>448</sup> access to the Services of General

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<sup>442</sup> See subchapters II.2.3.1 and II.2.3.2.

<sup>443</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon [2007] OJ C 306/1.

<sup>444</sup> TFEU (n 277) art 194.

<sup>445</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (Charter).

<sup>446</sup> TEU (n 377) art 6(1).

<sup>447</sup> Charter (n 445) art 37.

<sup>448</sup> *ibid*, art 36.

Economic Interest,<sup>449</sup> etc.) which should be considered while implementing all other EU policies. These developments, which were a natural continuation of adding social elements to the EU powers in the beginning of the 1990s,<sup>450</sup> broadened the list of the other policies to be considered during competition enforcement.

The above-discussed changes affected competition policy in at least two ways: 1) consumer-welfare and (to a degree) efficiency objectives became a priority for the enforcers; 2) simultaneously, the enforcement practice affirmed the importance and vitality of other key objectives, which got more aligned to that of consumer welfare.

### *2.3.1. Prioritizing consumer welfare and efficiency objectives*

**The consumer welfare objective** originated in welfare economics and, like efficiency concerns, stemmed from the thinking of Chicago School. Introduced by Robert Bork,<sup>451</sup> the term ‘consumer welfare’ was integrated by the EU competition framework as an implementable version of a wider concept of consumer well-being.<sup>452</sup> The latter, in turn, was derived from one

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<sup>449</sup> *ibid*, art 38.

<sup>450</sup> See subchapter II.2.2.

<sup>451</sup> Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) 11 CLR 133, 142.

<sup>452</sup> Ezrachi 2018 (n 43) 5; see also Joined Cases T-213/01 and T-214/01 *ÖPB v Commission* ECLI:EU:T:2006:151, para 115, implying that the increase of the consumer well-being to be an ultimate objective of competition enforcement.

of the overarching objectives of the Union – promotion of the well-being of its people under article 3(1) TEU.<sup>453</sup> Hence, in order to be in line with the spirit of the primary law, the Union advanced a broader notion of this objective<sup>454</sup> instead of adopting an initial, strictly economic definition.<sup>455</sup> Namely, the term ‘consumer’ was interpreted to refer to consumers in general (including customers),<sup>456</sup> while the term ‘welfare’ encompassed (at least) quality and choice considerations in addition to traditional price benchmark.<sup>457</sup>

Prioritization of the consumer welfare objective resulted in making other key objectives consistent with the latter.<sup>458</sup> For example, apart from being a stand-alone objective, the competition protection was declared as a means of achieving consumer welfare.<sup>459</sup> Similar shift happened to the objective of fairness<sup>460</sup> which during the Formation Phase was more aligned with the competition protection objective.<sup>461</sup> Considering the academic theory regarding

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<sup>453</sup> Ezrachi 2018 (n 452) 5.

<sup>454</sup> Andreas Weitbrecht, 'From Freiburg to Chicago and beyond - the first 50 years of European Competition law' (2008) 29 ECLR 81, 85.

<sup>455</sup> Laura Parret, 'The multiple personalities of EU competition law: time for a comprehensive debate on its objectives' in Daniel Zimmer (ed), *The Goals of Competition Law* (ASCOLA, EE 2012) 81.

<sup>456</sup> Daskalova (n 451)145-147.

<sup>457</sup> *ibid* 147-151.

<sup>458</sup> Ezrachi 2018 (n 452) 4.

<sup>459</sup> Commission, *Report on Competition Policy 2006* (2007) 3 and 13; see also Monti (n 322) 22-23.

<sup>460</sup> Commission, *Report on Competition Policy 2016* (2017) 2.

<sup>461</sup> See above, subchapter II.2.1.2.2.

competition policy objectives,<sup>462</sup> the latter shift was natural – fairness as a secondary objective needed to be interpreted in the light of the primary objective of the day (consumer welfare). The former shift was more controversial though, considering the established primary nature of the competition protection objective. Hence, the CJEU had to affirm the stand-alone character of this objective time and again throughout the Efficiency Phase.<sup>463</sup>

In practice, prioritization of the consumer welfare objective turned consumer harm assessment into an important step in evaluating anti-competitive effects in competition cases.<sup>464</sup> However, such harm did not become a pre-requisite for establishing competition infringements,<sup>465</sup> since the CJEU also focused on an indirect harm to the consumers, resulting from the actions distorting market competition.<sup>466</sup> In general, the Court was reluctant to embrace this objective due to its function to apply Treaty competition provisions in a consistent manner.<sup>467</sup> This is why consumer welfare is currently acknowledged as a leading but not a sole

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<sup>462</sup> See above, Title I, introduction.

<sup>463</sup> For a relatively recent case-law, see Case C-68/12 *PSR v SSE* ECLI:EU:C:2013:71, para 18. The continued support to the competition protection objective is also indicated in Case C-307/18 *Generics (UK) and others v CMA* ECLI:EU:C:2020:28, Opinion of AG Kokott, para 174.

<sup>464</sup> Anne Witt, 'The enforcement of Article 101 TFEU: What has happened to the effects analysis?' 55 CMLR 417, 425.

<sup>465</sup> *Glaxo – CJEU* (n 293) 62-64; Case C-202/07 P *France Télécom v Commission* ECLI:EU:C:2009:214, para 105; Case C-209/10 *Post Danmark v Konkurrencerådet* ECLI:EU:C:2012:172, para 20; Case C-52/09 *Konkurrensverket v TeliaSonera* ECLI:EU:C:2011:83, para 24; Case C-8/08 *T-Mobile and others v RBNM* ECLI:EU:C:2009:343, para 38-39.

<sup>466</sup> *Post Danmark* (n 465) para 20; *TeliaSonera* (n 465) para 24.

<sup>467</sup> For more detailed account, see subchapter II.4.

objective of the EU competition framework<sup>468</sup> - the reverse conclusion would be against the primary law of the Union.

Similar rationale applies to **the efficiency objective**, despite being advanced by the Commission as one of the leading objectives of the EU competition framework<sup>469</sup> (especially within the so called 'more economic approach' – an tactic involving an increased role of effects-based assessments in competition cases).<sup>470</sup> Here, the scholarship has identified a general risk of the inability of incorporating broader policy concerns once the efficiency standard became the sole basis of competition policy.<sup>471</sup> This directly concerns the EU, since the framework is conditioned to incorporate other policy considerations by the primary law.

Meanwhile, the efficiency objective has received an increased attention in recent years, mainly through the works of the Commission. In addition to the traditional role of efficiency appraisals under Article 101(3) TFEU, the post-2004 timeframe reveals a more detailed elaboration on efficiency gains brought by market concentrations.<sup>472</sup> Importantly, the CJEU also seems more willing to accept efficiency justifications in situations where there might be a harm

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<sup>468</sup> Jonathan Galloway, 'The pursuit of national champions: the intersection of competition law and industrial policy' (2007) 28 ECLR 172, 174.

<sup>469</sup> Commission, *XXVII Report* (n 388) 5 (emphasis on allocative efficiency); Commission, *XXIX Report on Competition Policy* (2000) 7 and 19.

<sup>470</sup> Rompuy (n 35) 186-189.

<sup>471</sup> Pera (n 322) 143-144.

<sup>472</sup> Commission, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Horizontal Merger Guidelines)' [2004] OJ C31/5, paras 76-88.

to competitive market structure, as revealed by recent case-law.<sup>473</sup> However, the adjudication in this respect is firmly constrained by a multi-objective legislative framework of the TFEU. This once again highlights the jurisdiction-specific nature of the competition policy and the inevitability of its functioning within the limits of a broader legal, economic and institutional setting.

### ***2.3.2. Reaffirming the importance of the other key objectives***

Considering the above-mentioned limits, the EU institutions do not leave other key objectives unattended while prioritizing consumer welfare. Notably, apart from the Treaty structure, such development is conditioned by the ongoing processes in the Union, revealing the importance of these objectives time and time again.

In case of **the market integration objective**, such processes have included EU enlargements,<sup>474</sup> the 2008 financial crisis and subsequent pressure to relax competition enforcement,<sup>475</sup> and most recently, the necessity to maintain a digital single market.<sup>476</sup>

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<sup>473</sup> Case C-413/14 P *Intel v Commission* ECLI:EU:C:2017:632, para 140 and others. See also Florian Kraffert, 'How the Intel case changed our understanding of the objectives of EU competition law' (2019) 15 *EurCompJ* 136.

<sup>474</sup> Commission, *XXXIII Report* (n 280) 3.

<sup>475</sup> Commission, *Report on Competition Policy 2012* (2013) 5-6.

<sup>476</sup> Commission, *Report on Competition Policy 2014* (2015) 2-6; Commission, *Report on Competition Policy 2016* (n 460) 5; see also Ioannis Lianos, 'Updating the EU Internal Market Concept' (2018) CLES Research Paper No 1/2018 <<https://ssrn.com/abstract=3116384>> accessed 20 March 2018, 26-34.

Consequently, both the Commission and the CJEU have continuously supported the realization of this objective.

Commission's work has been more tacit - the number of cases using market integration objective as the direct source of intervention significantly declined after 2004.<sup>477</sup> However, the recent analysis revealed that the attention devoted to this objective has been steadily increasing over the years, albeit the current enforcement practice achieves market integration by mostly indirect means.<sup>478</sup> In contrast, the CJEU has been directly affirming the relevance of this objective.<sup>479</sup>

The court also explicitly affirmed **the objective of competition protection** as a 'fundamental objective'<sup>480</sup> of the EU competition framework. This affirmation became vital in the aftermath of the financial crisis of 2008. One example of this was competition enforcement in the banking sector that prevented an excessive level of market concentration and subsequent weakening of competitive process.<sup>481</sup> Another example was a firm stance against 'crisis cartels',

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<sup>477</sup> Pablo Ibáñez Colomo and Andriani Kalintiri, 'The Evolution of EU Antitrust Policy: 1966–2017' (2020) 83 MLR 321, 369.

<sup>478</sup> *ibid.*, 369-371.

<sup>479</sup> Case C-551/03 P *General Motors v Commission* ECLI:EU:C:2006:229, paras 67 to 69; Case C-95/04 P *British Airways v Commission* ECLI:EU:C:2007:166, para 106; Joined cases C-468/06 to C-478/06 *Sot. Léloukas kai Sia and others v GlaxoSmithKline* ECLI:EU:C:2008:504, para 65; *Glaxo – CJEU* (n 293) paras 42 and 61-64; Joined Cases C-403 and 429/08 *FAPL and others v QC Leisure* ECLI:EU:C:2011:631, para 139; *TeliaSonera* (n 465) para 24.

<sup>480</sup> Case C-289/04 P *Showa Denko v Commission* ECLI:EU:C:2006:431, para 55; Case C-308/04 P *SGL Carbon v Commission* ECLI:EU:C:2006:433, para 31; Case T-69/04 *Schunk v Commission* ECLI:EU:T:2008:415, para 207.

<sup>481</sup> Albert Foer and Don Allen Resnikoff, 'Competition Policy and "Too Big" Banks in the European Union and the United States' (2014) 59 TAB 9, 11-16.

pointing out that possible efficiency gains did not outweigh the damage to competitive process.<sup>482</sup>

Interestingly, during this period, Commission attributed equal importance to fostering competition culture and enhancing consumer welfare.<sup>483</sup> This might be an additional reason why the objective of competition protection (as the principal enhancer of this culture) was continuously upheld. However, Commission has been reluctant to view competition protection as a stand-alone objective,<sup>484</sup> despite the CJEU affirming it as such,<sup>485</sup> stressing that certain actions are ‘inherently anticompetitive’,<sup>486</sup> emphasizing the importance of protecting competitive process, and presuming consumer harm if this process was distorted.<sup>487</sup> The court

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<sup>482</sup> Contribution from the EU, *Crisis Cartels* (OECD) DAF/COMP/GF/WD(2011)20.

<sup>483</sup> Commission Staff Working Paper Accompanying the Report on Competition Policy 2011 (2012) < <https://op.europa.eu/en/publication-detail/-/publication/addd0705-aa80-4786-9372-8602b3bedfe3/language-en> > accessed 29 November 2020, 3

<sup>484</sup> Commission Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, paras 13 and 33.

<sup>485</sup> *Glaxo - CJEU* (n 293) para 63; *T-Mobile* (n 465) para 38; *BA* (n 479) para 106; Case C-307/18 *Generics (UK) and others v CMA* ECLI:EU:C:2020:52, para 147, where the court declared that damage to the competitive structure of the market amounted to an abuse. See also, Case C-633/16 *Ernst & Young P/S v Konkurrenserådet* ECLI:EU:C:2018:371, paras 41 and 47.

<sup>486</sup> Colomo 2016 (n 6) 721. For the case-law, see for example Case C-209/07 *Competition Authority v BIDS* ECLI:EU:C:2008:643, para 17.

<sup>487</sup> *Glaxo - CJEU* (n 293) 62-64; see also Case T-814/17 *Lietuvos geležinkeliai v Commission* ECLI:EU:T:2020:545, para 79.

also repeated that protecting competition does not amount to protecting inefficient competitors<sup>488</sup> - instead it preserves competitive market conditions.<sup>489</sup>

The perception of **the objective of fairness** evolved significantly. While closely aligned to the competition protection objective during the Formation Phase, during the Efficiency Phase it also conformed to consumer welfare. First, Commission reports started to view fair competition as a basis of generating benefits for both production and consumption sides of the market.<sup>490</sup> Next, consumer benefits of fair competition were noted by the CJEU.<sup>491</sup> This is not surprising, considering the original definition of this objective which refers to both competition and consumers.<sup>492</sup> The focus on the competition side initially left the consumer part of the notion underdeveloped. However, with the rise of consumer welfare vision, the part of the fairness objective connected to consumer equity finally received a proper attention.

Focus on consumer welfare did not diminish the role of fairness for the competition protection objective. Here, the fairness criterion is still used to guarantee equal opportunities for efficient competitors, ensure fair outcomes on the market and consequently, uphold the

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<sup>488</sup> *Post Danmark* (n 465) paras 21-22; reiterated in *Intel* (n 473) paras 133-134; see also Stavros Makris, 'Applying normative theories in EU competition law: exploring Article 102 TFEU' (2014) UCLJLJ 30, 48-49.

<sup>489</sup> David Gerber, 'The Future of Article 82: Dissecting the Conflict', Ehlermann and Marquis (eds) (n 339) 42.

<sup>490</sup> Commission, *Report on Competition Policy 2015* (n 392) 2; Commission, *Report on Competition Policy 2016* (n 460) 2.

<sup>491</sup> Case C-42/07 *LPFP and Bwin International* ECLI:EU:C:2008:560, Opinion of AG Bot, para 245; see also Case C-203/08 *Sporting Exchange v Minister van Justitie* ECLI:EU:C:2010:307, Opinion of AG Bot, para 58.

<sup>492</sup> See above, subchapter II.2.1.2.2.

legitimacy of competitive process.<sup>493</sup> Overall, this objective seems to support the meeting of legitimate expectations of all market participants and ensures that the latter trust the market.<sup>494</sup> Thus, compared to the Formation Phase, it is elaborated more comprehensively, with all of its dimensions addressed in equal measures.

Similarly, the interrelation of the objectives of **economic freedom** and consumer welfare have become clearer in the CJEU case-law, while strong links with the objective of competition protection are still displayed.<sup>495</sup> Here, the key issue concerns the boundaries between freedom and welfare. The principal reason for this seems to be the idea that ‘freedom’ is inherently connected to the Ordoliberal teaching and thus, is hard to align with welfare objectives associated with Chicago School.<sup>496</sup>

While defining these boundaries, the CJEU clarified that the economic freedom of individual operators is respected up to the point where it harms consumers by hindering the free competitive environment.<sup>497</sup> Interestingly, the case-law making this delineation concerned

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<sup>493</sup> Ezrachi 2018 (n 43) 13-15.

<sup>494</sup> *ibid.*

<sup>495</sup> *BA* (n 479) paras 67-68l; Case T-155/06 *Tomra v Commission* ECLI:EU:T:2010:370, para 209.

<sup>496</sup> Akman 2014 (n 43) 184.

<sup>497</sup> Case C-418/01 *IMS Health v NDC Health* ECLI:EU:C:2003:537, Opinion of AG Tizzano, para 62; Case C-418/01 *IMS Health v NDC Health* ECLI:EU:C:2004:257, para 48; Case T-201/04 *Microsoft v Commission* ECLI:EU:T:2007:289, para 646.

the economic freedom of dominant undertakings.<sup>498</sup> Such development corresponds to the reasoning of the Formation Phase, where the economic freedom of non-dominant undertakings was used as a limit to the latter.<sup>499</sup> Hence, it seems that consumer welfare is in conflict with only those expressions of economic freedom that hinder competitive process and result into consumer harm.

To summarize, prioritization of consumer welfare objective has intensified links between the latter and other key objectives of the EU competition policy. Some of the objectives, like fairness, seem to pay more attention to their consumer-related sides which were underdeveloped before. Others, like competition protection and economic freedom, got more specified while included in the consumer effects analysis. Overall, such prioritization seems to have supported a better understanding of what each objective stands for and how they should interrelate in order to ensure the coherence of the EU competition policy. Meanwhile, due to the Treaty structure, the non-hierarchical nature of the EU policy objectives has not been affected. Thus, despite the favoritism of the Commission towards the efficiency/welfare objectives during the Efficiency Phase, other objectives firmly maintain their place within an ever-evolving framework.

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<sup>498</sup> *Microsoft* (n 498). The same rationale is used to assess whether selective distribution systems limiting distributors freedom of choice can fall outside Article 101. See Case T-19/92 *Leclerc v Commission* ECLI:EU:T:1996:190, paras 117-118.

<sup>499</sup> See above, subchapter II.2.1.2.2.

## 2.4. Future of the EU competition policy objectives

As this overview revealed, EU competition policy objectives constantly adjust to the changing market circumstances. This is also true for the modern-day developments, some of which might require their re-thinking and re-prioritization.

One of such changes is the rapid digitization of the economy worldwide. Shifting markets from physical to digital spaces raises multiple issues regarding competitive strategies which undertakings might adopt and effects which this might have on consumers.<sup>500</sup> This process is accompanied by the emergence of big data, with subsequent benefits and risks of its usage for competition purposes.<sup>501</sup> These developments might require re-thinking of competition policy objectives, in order to both (re)define the proper scope of the policy and to figure out the ways of addressing emerging problematic trends by the existing objective toolbox.<sup>502</sup> Although the Commission already indicated that the core objectives will not change,<sup>503</sup> the issue of (re)prioritization seems to be still open.

In particular, the ongoing digitization has revealed the limits of competition framework and its policy objectives. More specifically, the process led to emergence of major online platforms – ‘gatekeepers’ – which entail multiple benefits due to their economies of scale,

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<sup>500</sup> For details, see Ariel Ezrachi and Maurice Stucke, *Virtual Competition* (HUP 2016).

<sup>501</sup> For details, see Maurice Stucke and Allen Grunes, *Big Data and Competition Policy* (OUP 2016).

<sup>502</sup> See Ezrachi 2018 (n 43).

<sup>503</sup> Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (EU Commission 2019) 39-53.

network effects and capability of large-scale data analysis<sup>504</sup> but also pose significant risks due to their capability to affect competition across multiple markets (and spheres beyond markets as well). Such capability equates these gatekeepers to public policymakers to a certain extent.<sup>505</sup> The EU is well-aware of this problem, as evidenced by the recent Commission proposal for regulating the gatekeepers via Digital Markets Act (DMA).<sup>506</sup> The act has already received provisional political support from the Council.<sup>507</sup> Although a significant development, this proposal sheds a light to the boundaries of applying competition policy to the digital space. Namely, many of the actions by digital platforms that have been a subject of antitrust enforcement in recent years – such as self-preferencing,<sup>508</sup> technical tying,<sup>509</sup> and specific unfair dealings with app developers<sup>510</sup> – now might be subject to *ex-ante* regulation by the Union as opposed to *ex-post* control via competition law provisions. Switching from *ex-post* control to

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<sup>504</sup> Christian Rusche and Jan Büchel, ‘On Gatekeepers and Structural Competition Problems’ (2021) 56 *Intereconomics* 205, 205-206.

<sup>505</sup> For details, see Thomas kardi, ‘Digital Gatekeepers’ (2021) 99 *TLR* 951.

<sup>506</sup> Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (DMA Proposal) COM (2020) 842 final

<sup>507</sup> EU Council, ‘Digital Markets Act (DMA): agreement between the Council and the European Parliament’ (2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/>> accessed 15 May 2022.

<sup>508</sup> *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 final. Upheld by GC in relation to finding self-preferencing as an infringing action and fining it. Case T-612/17 *Google v Commission (Shopping)* ECLI:EU:T:2021:763. Currently on appeal at the CJEU - Case C-48/22 P *Google v Commission* (pending).

<sup>509</sup> *Microsoft* (Case COMP/C-3.37.792) Commission Decision 2007/53/EC [2007] OJ L 32/23. Upheld by GC in *Microsoft* (n 457).

<sup>510</sup> *Google Android* (CASE AT.40099) Commission Decision C(2018) 4761 final. On appeal at the GC, Case T-604/18 *Google v Commission (Android)* – pending.

gatekeeper regulation shows that, sometimes, even well-developed and strong competition regimes like the EU cannot (and, perhaps, should not) be required to handle multi-dimensional market-related issues single-handedly – regulatory approach could be preferred instead.

In addition to rapid digitization, emergence of new innovative technologies significantly disrupts existing competitive market structures. For example, 3D printing has been noted to possess a potential to completely change modern-day distribution chains and, consequently, affect market developments and welfare generation/distribution.<sup>511</sup> Re-assessment of the existing policy objectives might be required in order to effectively address the challenges posed by such technological advances.

Another issue which the EU pays attention to is an increased international competition. In recent years, further opening up of the international markets have necessitated the revision of the Union's approach towards industrial strategy.<sup>512</sup> While this approach explicitly acknowledges the importance of competition policy, it also stresses the necessity of supporting enterprise growth for the sake of guaranteeing competitiveness and leadership on global markets.<sup>513</sup> The industrial strategy also notes different policy considerations that should drive the Union into the new era, including taking care of the environment and ensuring

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<sup>511</sup> Michal Gal, '3D Challenges: Ensuring Competition and Innovation in 3D Printing' (2019) SSRN Electronic Journal <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3356891](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3356891)> Accessed 21 November 2020.

<sup>512</sup> See Commission, 'A New Industrial Strategy for Europe (Communication) COM(2020) 102 final' (Industrial Strategy 2020).

<sup>513</sup> Ibid, 3.

sustainability.<sup>514</sup> These developments may mean that the interface between competition and industrial policies, as well as competition policy and other policy considerations, might be revisited once again. It is yet to be seen how this revision will affect EU competition policy objectives.

Finally, while protecting competitive market processes, the EU competition policy might have to face the question of an optimal level of this competition. As recent scholarship reveals that competition sometimes might be so intense that it might lead to suboptimal market outcomes for both competitors and consumers.<sup>515</sup> However, what the exact optimal level of market competition is might be a very difficult question to answer. A balanced approach to various competition policy objectives seems to be the best solution here as well, provided that the balancing exercise is constantly in line with market developments.

## 2.5. Lessons from the History

The overview of the development of the EU competition policy objectives offers at least two lessons from the outsider perspective:

- **Maintaining simplicity in the beginning** – i.e. focusing on a single objective which is in full alignment with the primary aspiration of the jurisdiction in question. EU did this by

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<sup>514</sup> Ibid, 6-7.

<sup>515</sup> For a detailed overview, see Ariel Ezrachi and Maurice Stuke, *Competition overdose: how free market mythology transformed us from citizen kings to market servants* (Harper Business 2020).

prioritizing the objective of market integration for around the first 15 years of its existence. This helped the Union to both achieve an overall aim of completing single market and build the expertise necessary for managing a framework with multiple objectives.

- **Keeping objectives dynamic, contestable and oriented to one's own jurisdiction** – i.e. prioritizing them according to changing political, economic and legal circumstances. In the EU, this was done across all three phases: along with reaching certain milestones (ex. initial market formation), new objectives were built on top of already existing ones, while the latter either shifted their place in the priority list or became other policy considerations. Such dynamism and contestability: 1) guaranteed a continuous attention to the ever-ongoing processes of market integration and competition by upholding respective policy objectives even after the single market was largely completed and competition culture was established; 2) equipped the competition framework with a flexibility to prioritize the most relevant objectives for a particular development phase (ex. market integration objective during the Formation Phase) while still highlighting the importance of the other ones by safeguarding them during the enforcement; 3) ensured that competition framework stayed as an integral part of a wider EU framework by considering various policies to the extent they did not override its core objectives. In addition, dynamism and contestability of the policy objectives enabled the EU to properly balance domestic market needs against the necessity of the international

convergence and, by doing so, further enhance the performance of the competition framework.

### **3. Objectives Today – Overview of Legislative and Soft Law Landscape**

Nowadays, EU competition policy objectives can be explicitly or implicitly identified at all levels of legislative fabric: in primary, secondary and soft law. Analysis of the current provisions through historic prism reveals two interesting trends. First, the primary law – Treaty provisions – did not change in terms of the key competition policy objectives but was enriched by introducing other policy considerations. Next, nowadays secondary and soft law measures explicitly prioritize efficiency and welfare objectives while acknowledging the importance of other key objectives and their links with efficiency/welfare concerns. These measures also touch upon the possibilities of accommodating other policy considerations, albeit in limited circumstances. Both trends are explored below.

#### **3.1. Primary Law**

Principal primary law provisions regulating the competition policy objectives are articles 101 (anti-competitive agreements) and 102 (abuse of dominance) TFEU. The wording of these two provisions remains substantively unchanged since 1958 and, in conjunction with several other Treaty provisions, accommodates all key objectives. Namely:

- **The objective of market integration** stems from both articles, which declare respective infringements incompatible with the internal market. It is further supported by the article 3(3) TEU, which affirms EU aspiration to establish internal market and article 26(1) TFEU, which enables the Union to adopt various measures to ensure the achievement of this aspiration.
- **The objectives of efficiency and consumer welfare** are implied from at least two provisions. First, Article 101(3) TFEU permits competition restrictions resulting into technical and economic progress as well as those benefitting consumers. Second, Article 102(b) TFEU prohibits abuses causing efficiency limitations and consumer harm. In addition, consumer welfare is supported by the article 3(1) TEU which lists promotion of Europeans' well-being as one of the EU objectives and article 169(1) TFEU which obliges the Union to protect economic interests of its consumers.
- **The objective of competition protection** is derived from Article 101(1) TFEU which prohibits agreements harming competitive process in the internal market. It is also implied in the Article 102 TFEU, since the two articles have same objectives.<sup>516</sup> This objective is further supported by the protocol 27 which guarantees a system of undistorted competition within the Union. As the CJEU has affirmed, the protocol has same legal force as the Treaty provisions.<sup>517</sup>

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<sup>516</sup> *Walt Wilhelm* (n 297) paras 4-5; *Continental Can* (n 294) para 25; *Commercial Solvents* (n 297) para 32.

<sup>517</sup> Case C-496/09 *Italian Republic v European Commission* [2011] ECR I-11483, para 60; *TeliaSonera* (n 465) para 20.

- **The objective of fairness** derives from the Article 101(3) TFEU which affords consumers fair share of market-resulting benefits. In addition, it is supported by prohibiting unfair prices and trading conditions under Article 102(a) TFEU and abolishing competitive disadvantages for trading parties by applying dissimilar conditions to equivalent transactions under Article 102(c) TFEU.
- Finally, **the objective of economic freedom** results from the prohibition of total elimination of competition under Article 101(3)(b) TFEU as well as by prohibition of exclusionary abuses under Article 102 TFEU.

As for the other policy considerations, article 7 TFEU obliges the Union to ‘ensure consistency between its policies and activities, taking all of its objectives into account’. Hence, multiple issues including employment (article 9 TFEU), environmental protection (article 11 TFEU), services of general economic interest (article 14 TFEU), economic and monetary policy (article 119 TFEU) economic, social and territorial cohesion (article 174 TFEU), as well as concerns identified under the Charter of Fundamental Rights should be considered during competition enforcement. As the historical overview shows, the list of these concerns has grown over the years. However, the principle of their accommodation to the extent that the key competition policy objectives are not harmed remains unchanged.

### 3.2. Secondary and soft law provisions

EU regulations adopted and/or entered into force in or after 2004 show an increased attention to efficiency and consumer welfare concerns. For example, the current enforcement regulation (Regulation 1/2003), while referring to competition protection as an explicit objective of articles 101 and 102 TFEU,<sup>518</sup> also pays attention to innovation concerns.<sup>519</sup> Similarly, 2004 Merger Regulation takes efficiencies and consumer interests into account<sup>520</sup> alongside the objective competition protection<sup>521</sup> and its importance for internal market development.<sup>522</sup> Finally, possibilities of technical and economic progress, alongside with resulting consumer benefits, constantly feature in Block Exemption Regulations.<sup>523</sup>

Consumer concerns also feature in the EU directives concerned with uniformity of effective enforcement and adjudication of competition law matters in the Member States of the

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<sup>518</sup> Regulation 1/2003 (n 430) recital 9.

<sup>519</sup> *Ibid*, recital 38.

<sup>520</sup> EUMR 2004 (n 435) recital 29 and article 2(1)(b)

<sup>521</sup> *Ibid*, recitals 23 and 24.

<sup>522</sup> *Ibid*, recital 2.

<sup>523</sup> See, for example Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 335/36, recitals 8-10; Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 335/43, recital 6; Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134/4 (effective from 1 June 2022), recitals 8, 10 and 15.

Union, including the Damages Directive 2014<sup>524</sup> and the ECN+ Directive 2019.<sup>525</sup> The former pays attention to the issues of consumer damage recoupment alongside internal market maintenance and competition protection issues.<sup>526</sup> The adoption of the latter is justified by addressing the concerns under almost all key objectives. Namely, the recitals elaborate why the uniformity of competition enforcement across the Union (including enforcement by the National Competition Authorities – NCAs) is relevant for the purposes of maintaining a well-functioning internal market, guaranteeing undistorted competition on merits, upholding fair market environment which generates trust from competitors and consumers, ensuring the existence of innovative goods and services, and protecting consumer interests.<sup>527</sup> The directive does not provide any hierarchy among these concerns but implies that consumers are the ultimate protected entities if the rules are properly applied.<sup>528</sup>

Prioritization of the consumer welfare and efficiency objectives is more evident in the soft law.<sup>529</sup> Namely, a number of documents – including a recently adopted 2022 Guidelines on

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<sup>524</sup> European Parliament and Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1 (Damages Directive).

<sup>525</sup> European Parliament and Council Directive (EU) 2019/1 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, OJ L 11/3 (ECN+ Directive).

<sup>526</sup> Damages Directive (n 524) recital 9, also recital 41.

<sup>527</sup> ECN+ Directive (n 525) recitals 1 and 6, 7.

<sup>528</sup> Ibid, article 1(1).

<sup>529</sup> Horizontal Merger Guidelines (n 472) paras 76-97; Commission, ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (Article 82 Guidance)’ (Communication) [2009] OJ C45/7, para. 7.

Vertical Restraints – explicitly refer to the competition protection as the means of achieving these two objectives.<sup>530</sup> Similarly, maintaining single market is seen as a pre-requisite for the latter.<sup>531</sup> However, other objectives are not left without acknowledgement. For, example, both competition protection and fairness are concerns in 101(3) TFEU appraisals.<sup>532</sup> In the same vein, market integration and competition protection are considered important alongside efficiency and welfare concerns during the assessment of exclusionary abuses under Article 102 TFEU.<sup>533</sup> The latter two objectives also feature in concentration-related guidelines, affirming their importance during the process of *ex-ante* control.<sup>534</sup>

Finally, the secondary and soft law measures pay attention to the other policy considerations as well. For example, according to the EUMR 2004, the industrial policy considerations are welcome as long as they contribute to the efficiencies and do not result into

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<sup>530</sup> Article 81(3) Guidelines (n 484) paras 13 and 33; Commission, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, <<https://ec.europa.eu/competition/antitrust/others/discpaper2005.pdf>> accessed on 17 November 2020, para 4; Commission, ‘Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements’ (Notice) [2004] OJ C101/2, para 5; Horizontal Merger Guidelines (n 472) para 8. Commission, ‘Guidelines on Vertical Restraints’ (Annex to the Communication) C(2022) 3006 final, paras 10-11 and 15. See also para 5 which states that ‘The objective of Article 101 of the Treaty is to ensure that undertakings do not use agreements, whether horizontal or vertical, to prevent, restrict or distort competition on the market *to the detriment of consumers*’.

<sup>531</sup> Article 82 Guidance (n 529) paras 1, 5-7; Guidelines on Vertical Restraints (n 530) para 5.

<sup>532</sup> Article 81(3) Guidelines (n 484) paras 105 and 86 respectively.

<sup>533</sup> Article 82 Guidance (n 529) paras 6 and 19.

<sup>534</sup> For the most recent example, see Commission, ‘Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (Article 22 Guidance)’ (Communication) C(2021) 1959 final, para 6. The objective of competition protection is also implied in Horizontal Merger Guidelines (n 472) para 3.

the ‘lasting damage’ to competition.<sup>535</sup> Similarly, environmental concerns may be accommodated by allowing certain types of agreements aimed at reducing environmental hazard as long as these agreements fulfill the criteria of the Article 101(3) TFEU.<sup>536</sup> However, after adopting a more economic approach, the Commission seems to have a more restricted view regarding using other policy considerations as justifying factors in competition cases.<sup>537</sup>

### 3.3. Lessons from the EU legislative landscape

Observation of the current legislative and soft law landscape of the EU offers another two valuable lessons. **The first lesson relates to the embedment of the policy objectives and other policy considerations at the primary law level.** It reveals the usefulness of structuring ‘constitutional’ provisions in a way which allow identification of multiple competition policy objectives. This way, even though the primary law provisions regarding competition framework might not change over the time, they will still allow the development of different objectives over the years, according to the changing circumstances within the jurisdiction. Similarly, other policy considerations are best to be determined by the highest law of the jurisdiction. Their number might change over the years, but as long as they are indicated in the primary law, it is

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<sup>535</sup> EUMR 2004 (n 435) recitals 4-5.

<sup>536</sup> Commission, ‘Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Horizontal Co-operation Guidelines)’ (Communication) ([2011] OJ C 11/1), paras 149 and 329.

<sup>537</sup> For detailed discussion, see Anne Witt, ‘Public Policy Goals Under EU Competition Law-Now is the Time to Set the House in Order’ (2012) 8 *EurCompJ* 443. However, some call for a more relaxed approach in the light of recent developments. See Kozak (n 58).

easier to establish the exact interrelation between them and the key objectives of the competition policy.

**The second lesson concerns (re)prioritization of the key policy objectives by means of the secondary and soft law measures.** EU has used these measures during the Efficiency Phase to advance efficiency and consumer welfare objectives. Meanwhile, they have continuously upheld other key objectives and indicated the trend of limited application of other policy considerations during the competition enforcement. A positive side of such alignment is that it can change in a relatively short time by the adoption of similar secondary/soft law measures, if the changed market and market-related circumstances require it, and without a necessity to use the far more complicated and slow procedure of Treaty amendment. Some of these measures even are adopted with a built-in time limit (ex. Block Exemptions). This enables reconsideration of their content time and again and presents a possibility to re-align policy objectives, if deemed necessary.

A general nature of primary law provisions, coupled with time-barred nature of some of the secondary law measures and a relative easiness of their amendment, gives EU competition policy objectives both **durability and flexibility** of reprioritization according to the needs of the internal market. These are the qualities which Georgia could aspire to, notwithstanding the number and content of its competition policy objectives.

## 4. Institutional Dynamics

Nowadays, the institutions shaping the EU competition framework include a large number of actors both at the Union and national levels. Switching to the multi-level enforcement at the beginning of the Efficiency Phase affected the process of policymaking – nowadays, actors at different levels might pursue different policy objectives.<sup>538</sup> Meanwhile, competition policy at the Union level still belongs to the exclusive competences of the EU.<sup>539</sup> Here, the two principal actors are the EU Commission and the CJEU. This subchapter overviews the institutional dynamics between the two in order to see how they have affected shaping of competition policy objectives.

Historical overview reveals two principal strings of development in the institutional dynamics. First is the gradual increase in Commission's policymaking and enforcement powers throughout the three phases of the EU competition framework development. The second relates to the eventual transformation of the CJEU from a standard-setter in the field of competition policy to a balancer of Commission's policy choices against the overall fabric of the EU Treaties. In addition, the overview of their general position and tasks within the overall institutional setting of the Union reveals why both bodies have been pro-active and successful in competition policy-shaping. Respective important factors are provided below.

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<sup>538</sup> See, for example, ECN+ Directive (n 525) para 64, mentioning that actors at national and EU levels pursue 'predominantly' same objectives, thus not excluding a divergence to a certain extent.

<sup>539</sup> TFEU, article 3(1)(b).

#### 4.1. EU Commission - gradual increase in policymaking powers

During the first part of the Formation Phase (1958-1972), policymaking powers of the Commission were hardly evident. This could be attributed to a precaution shown by this institution in the years when it was still learning how to administer its competition-related functions. Apart from the novelty of the enforcer, this precaution was conditioned by the novelty of the competition framework (in a modern sense) in Europe. In the 1960s, national competition frameworks were rare. Hence, it took time to explain the essence of the framework to both public and private actors, as well as to make them see its relevance and encourage to comply with competition rules.<sup>540</sup>

Consequently, despite having competition enforcement powers since 1962, the Commission was keener to operate based on various Block Exemptions and informal consultations until late 1960s.<sup>541</sup> The difficulties experienced by the Commission during the process of adopting relevant competition-related regulations reveal that it had to struggle to establish its place as a leading institution in charge of competition framework, as Member States (novel to competition law ideas) were reluctant to give it respective powers.<sup>542</sup> All these factors

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<sup>540</sup> Pinar Akman, 'Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy' (2010) 48 JCMS 111, 115.

<sup>541</sup> Colomo and Kalintiri (n 477) 343. Note that at 348, authors highlight low numbers of enforcement decisions up until 1991.

<sup>542</sup> Akman (n 540) 115-116.

diminished Commission's competition policymaking role during the initial years of internal market establishment.

Events of 1973 altered the status quo. From this time onward, annual competition reports reveal an increased policy activity from the Commission by adopting a large number of rules and standards, inserting its policy vision in enforcement, and actively advocating for adoption of community-wide rules ensuring a more robust implementation of the framework (such as Merger Regulation). During this time, the Commission got expressly acknowledged to be in charge of orienting Union's competition policy.<sup>543</sup> However, this ability was somewhat curbed by at least two reasons.

First, adjudication standards set by the CJEU for justifying infringement decisions got more complex and nuanced throughout 1970s and 1980s.<sup>544</sup> Consequently, although the Commission gradually gained the lead in competition policymaking, it had to persuasively justify the implementation of various policy objectives via infringement decisions both on substantive and procedural grounds, while the latter offered an ever-increasing level of protection for market players.<sup>545</sup> Second, the primacy of market integration objective during the pre-1993 EU deterred the Commission from having a full impact on the process of prioritizing

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<sup>543</sup> Case C-234/89 *Delimitis v Henninger Bräu* ECLI:EU:C:1991:91, para 44.

<sup>544</sup> For details, see subchapter II.4.2. below.

<sup>545</sup> This trend seems to have increased in subsequent years. See Christopher Harding and Alun Gibbs, 'Why go to court in Europe? An analysis of cartel appeals 1995–2004' (2005) 30 *EurLRev* 349, especially at 367 where the authors find that out of the chosen sample of cartel appeals, 28% were not decided in Commission's favour.

competition policy objectives. However, this did not prevent the latter from turning competition framework into a multi-objective area during the second part of the Formation Phase (1973-1992). Additionally, in 1989, the Commission finally succeeded in acquiring *ex-ante* control powers.<sup>546</sup> This situation enabled the Commission to gain more information about the EU markets, engage in comprehensive economic analysis, and better advance its own vision of EU competition policy during the subsequent, Performance Phase (1993-2003).

The key factor contributing to the further advancement of Commission's policymaking powers was the increased necessity of and demand for a more economic analysis in competition law cases since 1990s.<sup>547</sup> Apart from the EUMR 1989, which obliged the Commission to engage in complex *ex-ante* analysis, such demand also stemmed from the CJEU which started to require more economic rationale from the Commission in the assessment of non-hardcore infringements under the Article 101 while upgrading its adjudication standards.<sup>548</sup> Simultaneously, the Commission was very active in enhancing its powers too. Namely, while it required a long time to convince other EU actors about the necessity to adopt legal acts that broadened its mandate (such as EUMR 1989), the supranational enforcer was relatively flexible

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<sup>546</sup> See EUMR 1989 (n 309). For the length and complexity of the adoption process, see Eleanor Morgan, 'A Decade of EC Merger Control' (2001) 8 IJEB 451; see also The Rt Hon Sir Leon and Brittan QC, 'The Future of EC Competition Policy' (1993) EurBLRev 27.

<sup>547</sup> Pera (n 322) 150-152.

<sup>548</sup> See, for example, *Delimitis* (n 543); joined cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services v Commission* ECLI:EU:T:1998:198.

in advancing its own agenda via soft law measures. As the scholarship reveals, it deployed these powers well.<sup>549</sup>

A supporting factor to Commission's power enhancement during the Performance Phase was a comprehensive review of the past work in the field of the EU competition enforcement. By 1993, when the Maastricht Treaty pushed the EU into a new reality, its competition framework was already 35 years old. The accumulated experience, alongside the desire to deploy the developments in economic thinking, presented a rich ground for review and analysis. This resulted into elaboration of the modernization package throughout the late 1990s and early 2000s.<sup>550</sup> This, in turn, created a solid foundation for the Commission to become more informed (and subsequently, more active) in advancing its policy vision.

The changes of 2004 built on the above-mentioned foundation by re-focusing Commission's work in two directions. On the one hand, decentralized enforcement and relief from mandatory pre-assessments under Article 101 TFEU enabled the Commission to let go of many formalities and engage in more cutting-edge cases.<sup>551</sup> On the other hand, the EUMR 2004 encouraged it to delve deeper in economic analysis. Both changes also gave the Commission

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<sup>549</sup> Akman (n 540) 121. On occasions, it has been suggested that the Commission uses its soft law-making powers to expand its enforcement mandate in a way that has not been allowed by the EU legislation. One of the most recent debates on this front concern Article 22 Guidance (n 534), as it uses the referral system to give the Commission *ex-ante* control powers on concentrations that the national enforcers do not have jurisdiction to assess. See Gavin Bushell, 'How Illuminating: the EU Merger Regulation and the brutal operation of power under Article 22 EUMR' (2021) <<http://competitionlawblog.kluwercompetitionlaw.com/2021/04/20/how-illuminating-the-eu-merger-regulation-and-the-brutal-operation-of-power-under-article-22-eumr/>> accessed 31 January 2021.

<sup>550</sup> See Modernization White Paper (n 410).

<sup>551</sup> Colomo and Kalintiri (n 477) 359-360.

more space for prioritizing the policy objectives which it deemed the most relevant, extensively advocate for their implementation by various legal and soft law instruments and find resources necessary for implementing such objectives in practice – for example, gain necessary information for sophisticated economic assessments via its new enforcement powers,<sup>552</sup> increase the number of sector-specific units on competition cases,<sup>553</sup> and hire expert economists who would perform such assessments for competition cases.<sup>554</sup>

To summarize, Commission’s policymaking powers have gradually increased during all three major phases of the EU competition framework. Such increase was conditioned by a number of factors, including maturing of the framework, increase in Commission’s enforcement powers, ability to focus on the most relevant/harmful practices due to decentralization and relief from formalities, equipping itself with necessary resources and so on. External factors, such as international influence (in economic thinking), also played part. However, the Commission also had to show initiative, advocate for a broader mandate, and become more specialized in case-handling. All of these factors also affected policy objectives. Namely, they enabled the Commission to prioritize objectives requiring more economic analysis and to become more capable in their implementation.

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<sup>552</sup> See Regulation 1/2003 (n 430), arts 17-21 that equip the Commissions with a broad range of tools for information procurement.

<sup>553</sup> Martin Carree, Andrea Günster and Maarten Pieter Schinkel, ‘European Antitrust Policy 1957–2004: An Analysis of Commission Decisions’ (2010) 36 *Rev Ind Organ* 97, 103.

<sup>554</sup> Andriani Kalintiri, ‘What’s in a name? The marginal standard of review of “complex economic assessments” in EU competition enforcement’ (2016) 53 *CMLR* 1283, 1305. See also Buch-Hansen and Wigger (n 440) 37.

## 4.2. CJEU – transformation from a standard-setter to compliance-checker

During the first part of the Formation Phase, the CJEU was a leader in competition policy-shaping due to several factors. First, the initial structure of the EU competition framework – broadness and vagueness of the Treaty competition provisions and caution of the Commission in their application – gave the court a lead in defining its basic concepts and principles by the means of judicial interpretation. Such interpretative ability was present even when there were no competition decisions to appeal, due to court’s powers under (what is now) article 267 TFEU, where it clarified Treaty competition provisions for national courts as a part of preliminary ruling procedures. The judicial lead in competition matters was further supported by the initial weak position of the Commission, conditioned by various political complications among the Member States. Finally, the original prioritization of market integration objective played in favor of the CJEU because the objective was well-suited for the development by adjudication.<sup>555</sup>

The picture began to change in 1973, when the court stretched its interpretative powers while adjudicating the *Continental Can* case, applying Article 102 to a merger procedure.<sup>556</sup> This resulted into external calls for less judicial activism in interpretation.<sup>557</sup> Parallel to this, the court came to the internal acknowledgement regarding its limited role in the economic

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<sup>555</sup> Gerber 1994 (n 301) 103-114.

<sup>556</sup> Rompuy (n 35) 148.

<sup>557</sup> Ibid.

assessment of competition cases and constrained its powers to checking procedural correctness, adequateness of reasoning, accuracy of facts statement and manifest errors.<sup>558</sup> Despite these developments, the position of the CJEU was still strong during the second part of the Formation Phase (1973-1992), especially in the face of significantly increased numbers of preliminary ruling applications.<sup>559</sup>

The breaking point for the court seems to have been its transformation to a two-level adjudicatory body right before the beginning of the Performance Phase.<sup>560</sup> Creation of (what is now) a General Court (GC) turned the CJEU into a final appellate body for Commission's competition decisions. This significantly limited the role of the latter in defining wider concepts and principles.<sup>561</sup> It should be noted that, most of the time, the GC decided the cases based on the previous practice of the CJEU – including the practice regarding policy objectives.<sup>562</sup> While good for the legal consistency, this also meant that the court addressed Commission's policy preferences on both levels only when such application was controversial or when a further or novel clarification was required. This was coupled by a (seemingly) decreasing importance of

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<sup>558</sup> *Remia* (n 301) para 34.

<sup>559</sup> According to the search engine of the CJEU, 'InfoCuria - Case Law' <<https://curia.europa.eu/juris/recherche.jsf?language=en#>> accessed 21 November 2020 the number of preliminary ruling procedures regarding competition matters amounted to 16 during the first part of the Formation Phase (1958-1972) and was increased to 74 during the second part of the same phase (1973-1992).

<sup>560</sup> *Carree, Günster and Schinkel* (n 553) 103.

<sup>561</sup> *Gerber* 1994 (n 301) 129-130.

<sup>562</sup> There were a few notable exceptions, though. For example, in *Glaxo – CJEU*(293), the CJEU had to affirm the relevance of the market integration objective and its connection to by-object restrictions, after the GC advocated for a laxer approach.

the market integration objective during the Performance Phase (1993-2003). The objective with an increased focus – the one of competition protection – was already well-adjudicated by the case-law of 1970s and 1980s. Finally, the adoption of Merger Regulation meant that the court had an increased number of encounters with the economic side of the competition law. Hence, without diminishing the importance of legal and policy assessment, the factual side of adjudication had to receive an increased attention.<sup>563</sup>

Consequently, in the Performance Phase the CJEU slowly transformed from a priority-setting institution to the body checking the soundness of Commission's policy vision vis-à-vis the EU legislation, considering both substantive and procedural standards. In addition, as the competition cases started to involve an increased level of economic analysis in line with the Commission's policy choices, the court began to assess whether this analysis corresponded to the requirements established by the soft law measures adopted by the former, alongside the traditional legal assessment in line with the Treaties and the secondary law.

The compliance-checking status of the CJEU solidified during the Efficiency Phase when the Commission became the most active in terms of advancing its efficiency-related policy views through the competition framework.<sup>564</sup> In this respect, the court puts at least three constraints to the policy. First, despite giving the Commission a wide margin of discretion, the court still checks whether the economic assessment of the latter has a sound factual and legal

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<sup>563</sup> The court's readiness for such comprehensive economic assessments has been noted in Laura Parret, 'Judicial Protection After Modernization of Competition Law' (2005) 32 LIEI 339, 365.

<sup>564</sup> Ibid.

basis.<sup>565</sup> In other words, there are judicial checks on whether policy objectives (especially efficiency and consumer welfare) are implemented correctly. Next, the case law allows the Commission to prioritize competition framework objectives but does not recognize any hierarchy among the latter and does not allow total exclusion of the non-efficiency/welfare objectives from consideration. Similar logic applies to the other policy considerations. In other words, the court ensures that the implementation of the competition policy happens harmoniously within the overarching framework of the Union. Finally, the court ensures upholding of procedural rights of the parties, requiring the commission to properly address the economic evidence/rationale presented by the latter while advancing its policy vision in enforcement.<sup>566</sup> As a result, the Commission is required to take a special care while implementing competition policy objectives in order to uphold them both on substantive and procedural grounds.

To summarize, while the policy-dictating powers of the court seem to have gradually diminished, its compliance-checking powers have been steadily increasing all along. This was conditioned by a number of factors, including the evolution of case-law, specification of the court's approach towards its manner of adjudication in competition cases, changes in the institutional structure, and gradual strengthening of an 'adjacent' policymaking institution – the Commission. This affected court's role in shaping of the competition policy objectives.

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<sup>565</sup> Kalintiri 2016 (n 554) 1298-1301. A helpful analysis of the Court's standard of review is also provided in Matteo Bay and Javier Ruiz Calzado, 'Tetra Laval II: the Coming of Age of the Judicial Review of Merger Decisions' (2005) 28 WCLER 433.

<sup>566</sup> *Intel* (n 473).

Namely, while in the early days of the framework, the former was an active interpreter of the Union's policy priorities in the area of competition, nowadays it acts as a balancing institution, ensuring that the competition policy is in line with the overall objectives of the union. This has translated into keeping the multiplicity of competition policy objectives alive and well-implemented in practice, while curbing Commission's desire to focus solely on efficiency and welfare objectives.

### **4.3. Additional observations regarding institutional dynamics**

Overview of the institutional dynamics reveals two additional important factors which affect their ability of shaping competition policy objectives. The first factor relates their embedment within the institutional structure of the EU. The second one concerns the powers held by each of the institution, realization of which does not require their mutual interaction.

Two significant advantages stemming from Commission's institutional embedment are its ability to be an integral part of the EU legislative process and to be well-versed in Union's all other policy areas. The first power has not been significantly diminished even by the creation and subsequent strengthening of the EU parliament, since the Commission still remains the body entitled to elaborate and present legislative proposals. This enables it to advocate its policy choices by various legislative measures. The second power comes from the fact that the Commission deals with the implementation of most of the Union policies. Competition policy is caretaken by one of its divisions – Directorate General of Competition (DG COMP) – which

operates in close cooperation with all others. This enables the DG COMP to engage in information exchange and be aware of the developments in other policy areas. Such embedment supports making more informed policy choices (including the choice of priority objectives).

Two major advantages can be identified for the CJEU as well. First is the ability of the latter to adjudicate matters related to the different actors. In terms of competition policy, this includes rulings about the correctness/incorrectness of implementing various measures by the Member States and preliminary rulings interpreting the EU competition law for the further application by national courts and tribunals, alongside with reviewing Commission's decisions on appeal. Consequently, the court has a say in shaping competition policy at multiple levels of the Union, which guarantees a certain level of consistency in the policy application. The second relates to the fact that CJEU adjudicates on all the matters of the Union policy. Hence, the court is able to consider the issue of competition policy implementation from multiple dimensions and align it better with the other policies of the Union.

The fact that each of the two institutions has powers which can be exercised without interacting to one another also adds to their strength in policymaking. For example, competition cases appealed to the CJEU are only one part of Commission's enforcement activities. Other parts involve cases which did not get appealed, as well as the ones closed with commitment decisions, not to mention a significant amount of work undertaken in the area of market monitoring and informal communications preceding almost any formal procedure

which the enforcer deems to undertake.<sup>567</sup> In addition, although the evolution of the CJEU case law partially affects the content of legislative and soft law measures, the CJEU itself is not involved in the process of their drafting. All of these activities enable the Commission to receive information about markets on an ongoing basis as well as to evaluate the past experience of competition law enforcement in order to make educated policy choices in this area, while not been directly supervised by the court.

As for the CJEU, preliminary ruling procedure has been a powerful tool since it allowed the court to express its views about the implementation of the EU competition policy without waiting Commission's cases for adjudication. It is true that, unlike certain procedures of the Commission, the preliminary ruling cases cannot be started by the court on its own initiative. However, this is an avenue where the CJEU can act without a prior action of the Commission. Such independence has enabled the court to clarify important policy issues in advance and signal the policymaker regarding the boundaries which the latter should respect while re-aligning policy objectives.

#### **4.4. Lessons from the EU institutional dynamics**

The overview of the institutional dynamics in the EU offers the final two lessons. The first lesson concerns **the importance of concurrent and gradual development of the institutions involved in identifying, prioritizing, and interpreting the objectives of competition policy.** This

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<sup>567</sup> For the full overview of these powers see Parret 2005 (n 563).

lesson has several layers – two general and two institution-specific. The first institution-specific layer reveals that the policymaking capacity of administrative institutions tends to evolve alongside the acquisition of experience, enforcement/monitoring powers and resources. The second one suggests the reverse in terms of judiciary. Namely, while judicial interpretations might be leading acts in terms of policy-shaping at earlier stages of competition framework development, experience and an eventual evolution of the enforcer tend to turn the court into a compliance-checker, where the latter ensures that the implementation of enforcer's policy vision is fully aligned to the larger legal framework of the jurisdiction in question. The third layer concerns the benefits of strong embedment within a wider institutional fabric of a particular jurisdiction – this enables both enforcers and adjudicators to correlate with multiple other actors involved in a broader market-related policymaking. Finally, this lesson reveals the importance of having powers exercising of which does not require the involvement of the other key institution. Such powers lay a foundation for a more balanced policymaking.

The second lesson indicates that **objectives requiring an intense economic analysis for implementation purposes are best to be introduced into a more mature framework**. In the EU, this manifested in prioritizing efficiency and welfare objectives during the Market Efficiency phase – i.e. after more than 40 years of competition framework development – despite the fact that economic theory advocated for this since 1970s. The experience of the Union suggests that at least three factors should be satisfied to achieve the administrative readiness for prioritizing and implementing such objectives: (1) sufficient number of enforcing staff, especially economists, who could deal with complex efficiency/welfare assessments of the cases; (2)

experience in studying markets and conducting comprehensive, multi-sided analysis; and (3) access to sufficient data for such analysis, which includes the ability of enforcers to acquire these data when the latter is not readily available elsewhere. Established competition culture and decentralized enforcement also assist this process. Finally, such developments need to be accompanied by matching judicial readiness in handling complexities of competition cases in the light of high procedural standards. EU became ready for this in the mid-2000s, when the internal market was properly established, competition culture was entrenched, and the institutions – the Commission and the CJEU – were experienced and equipped enough to handle complex economic analysis associated with competition cases. Such a maturity made the Union better positioned to implement efficiency and consumer welfare objectives.

## **5. Concluding Remarks**

Managing the multiplicity of policy objectives included in various legal sources has been a workable reality for the EU for several decades now. Its experience in competition policymaking offers several valuable lessons to Georgia. The fact that the latter should keep in mind its own peculiarities while adopting this experience was highlighted at the end of the previous chapter. In addition, there are several key factors related to the Union, which need to be addressed with a necessary precaution.

First, unlike Georgia, the EU has a mature competition framework which developed without major disruptions. Hence, certain features of this framework, despite of the fact of their desirability, might not be implementable in Georgia for the moment. This does not exclude their usefulness for the future. However, when thinking about optimizing Georgian competition policy objectives, attention needs to be given to the experience which can be utilized at present.

Next, a major difference between the two jurisdictions is that, in the EU, maturity of competition framework is accompanied by a firmly embedded competition culture – something still lacking in Georgia. Hence, implementation of policy objectives which require the existence of such culture might prove problematic. Instead, priority should be given to the policy objectives which primarily assist the establishment of such a culture.

As for the market size, unlike Georgia, the Union has a significantly large geographic coverage. Although concentration of market power has been one of the key concerns of the Union, it does not seem to happen as rapidly and frequently as in Georgia. Consequently, attitude towards concentrations might slightly differ between the two jurisdictions – and this might impact the choice of competition policy objectives of the day.

Finally, it should not be forgotten that unlike Georgia, the EU is a jurisdiction consisting exclusively of developed nations and is still primarily oriented around the idea of keeping a single, integrated market alive and going. As this chapter has shown, both of these factors have significantly affected the choice of competition policy objectives (continued focus on market

integration objective, prioritization of efficiency/welfare objectives). These factors also need to be kept in mind while applying the EU experience in Georgia to ensure that competition policy objectives are aligned with the overall objectives of a broader national economic framework – something which might differ a lot depending on the development level of the jurisdiction as well as its nature (whether the latter is a single state or an international organization like the EU).

## Chapter III. Applying EU Experience to Georgian Framework

### Building – Optimizing Objectives

As Chapter I reveals, Georgia's newly established competition framework is affected by at least three factors: 1) historical – it has an under-developed competition culture due to the Soviet legacy and subsequent frequent changes in policy objectives; 2) legal – its policy objectives are partially inconsistent, unclear, and unfeasible; 3) institutional – enforcers and judiciary have limited capacity for policy-shaping. Moreover, Georgia is a small economy, with proneness to market co-operations/concentrations. Finally, as a developing country, it is principally concerned with sustainable economic growth as a general economic policy.<sup>568</sup>

Information provided in Chapter II paints a very different picture for the EU. Here, the competition framework has been established for several decades. The above-mentioned three factors worked in its favour: 1) historically, the Union succeeded in establishing a dynamic, multi-objective competition framework. The objectives are prioritized according to the needs of the Union, non-hierarchically, while paying attention to other policy considerations during the enforcement of competition law; 2) legislature-wise, a practically unchanged wording of the competition provisions in the primary law, coupled with constantly evolving secondary/soft law, ensured both the durability and flexibility of these objectives; 3) institutionally, both

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<sup>568</sup> Ordinance 400 (n 125) 3. This objective of a general economic policy has also been affirmed by Government Program, 2021-2024 'For Building an European State' (2021) <[https://www.gov.ge/files/68\\_78941\\_292978\\_govprogramme.pdf](https://www.gov.ge/files/68_78941_292978_govprogramme.pdf)> accessed 21 January 2022, 3-4. Strengthening of national competition framework has been identified as one of the steps in achieving this objective. See *ibid*, 23-24.

administrative and judicial bodies possess robust policymaking and policy-balancing powers. Also, the EU is a large, developed economy continuously focusing on market integration while currently positioning consumer welfare as a leading objective of its competition policy.

These factors are relevant since Georgia has taken the EU competition framework as a blueprint due to the aspiration to have a deeper trade relationship with the Union. This chapter will analyze how to optimize this blueprint by going through the six key lessons from the EU experience identified in Chapter II and utilizing them for Georgia based on conclusions reached in Chapter I.

## **1. Applying EU Lessons of Historical Development**

As the subchapter II.2.5 revealed, the historical development of the EU suggested: 1) maintaining simplicity at the beginning of the framework development; 2) constantly keeping objectives dynamic, contestable and oriented to one's own jurisdiction.

### **1.1. Simplicity for Starters**

Since the Georgian competition framework is relatively new, utilizing the EU experience would mean focusing on a single objective best aligned with the overarching national economic policy. However, this objective could not be the same one that the EU prioritised initially. Unlike the Union, where the primary concern was the formation of the single 'European' market, Georgia

already created a necessary legal basis for running its 'internal' market throughout the 1990s and early 2000s. The current problem is the legacy of the Stagnation Phase – an underdeveloped competition culture.

The objective of competition protection could counter such a problem. In the Georgian context, this objective could be interpreted as protecting a competitive market process both from public and private infringers. As the historical overview has shown, this process has suffered the most throughout all three phases of the competition framework development. During the Formation Phase, a resembling objective of **establishing and developing a competitive environment within the national market** was included in the legislation. However, due to the focus on more urgent problems, this objective was not developed properly and got equated to protecting competition from state actors only. Hence, during the Stagnation Phase, protecting the competitive market process from private infringers was not even prohibited. Finally, while the Efficiency Phase legislation includes 'competition protection' as one of the overarching objectives under the GLC, the content of the objective and its correlation with other objectives of the day are not elaborated. Meanwhile, the legacy of the first two development phases resulted in the non-development of competition culture on Georgian markets. This trend risks being continued unless protecting the process of market competition is not made a priority policy objective of the Georgian competition framework, at least for the time being.

EU experience is encouraging in this respect since it suggests that the prioritization of the above-mentioned objective coincides with the shift in policymaking focus from market

integration (i.e. internal market formation) to market performance. Unlike in the 1990s, Georgia now could say that its national market is fully formed and supported by multiple complementary frameworks – industrial, tax/financial, consumer protection, etc. The competition framework would coherently fit this broader picture by focusing on the competitive process on relevant markets. Such a focus would clearly delineate the place of this policy vis-à-vis the others. In addition, it would enable the enforcer and judiciary to pay proper attention to market activities which prevent participants from testing the full scale of their individual merits. In the end, this could facilitate the change in the existing culture of interdependency and state protectionism-seeking.

The objective of competition protection, interpreted in the above-mentioned way, could also solve problems associated with the small geographic size of the Georgian market. Namely, it could serve as an outer limit to market concentrations conducted to achieve necessary operational efficiencies. A similar logic could apply to acceptable co-operations between undertakings and exemptions from anti-competitive agreements. An increase in such concentrations and co-operations is inevitable as Georgia attempts to enhance its trade with the EU since this increases the necessity of enhanced performance for national market players. The objective of competition protection could indicate that such a performance is welcome if it does not hamper the competitive process on national markets.

The objective of competition protection is also compatible with the objective of sustainable economic growth - one of the general economic objectives of Georgia.<sup>569</sup> Namely, the competitive process is expected to facilitate a market environment where players reap the benefits of their work without encountering artificial barriers – this should support overall economic growth in the long run.<sup>570</sup> Thus, prioritization of the competition protection objective is logical from the point of national economic policy.

The alignment of the objectives of competition protection and sustainable economic growth invites two questions: 1) Why not make the latter a direct objective of the national competition policy? 2) Alternatively, why not make competition protection an intermediary objective in Georgia (similar to the attempts of the EU Commission to turn competition protection into means of achieving consumer welfare)? For one, the Constitution does not allow for such a development – taking care of the competitive process is considered a stand-alone state obligation. However, even in the absence of this constraint, the above-listed questions should be answered negatively for two reasons.

First, making sustainable economic growth an immediate objective of Georgia's competition framework might open up room for discussion on whether, on certain occasions, such growth can be better achieved at the expense of limiting the process of market competition. Based the Stagnation Phase experience, this could be quite harmful once put into

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<sup>569</sup> Ordinance 400 (n 51).

<sup>570</sup> *ibid*, 23.

practice. In a jurisdiction like Georgia - where both private and public sector representatives still need to internalize the importance of competition culture, while the smallness and developing nature of the economy guarantees the constant push towards quick solutions - making sustainable economic growth a direct objective of competition policy (or an ultimate end of it) inevitably creates a leeway for enforcement solutions which sacrifice the soundness of the competitive process to benefit the economy in the short term. Such a subordination also creates a fertile ground for private lobbying. More specifically, strong market players could attempt to legalize anti-competitive solutions by alleging that the latter support the economic growth of the country. Sometimes, these solutions could support the growth in the short run – however, as the Stagnation Phase experience reveals, such growth is not sustainable. Thus, allowing the objective of economic growth to take the lead specifically within the competition framework creates the danger of repeating the damaging effect incurred by the Georgian economy between 2005-2012/2014.

Moreover, making sustainable economic growth a direct objective of the competition policy may complicate enforcement and adjudication. Although a complex concept, protection of the competitive market process is still an easier objective to apply by institutions with little to no experience in economics, due to its more legalistic nature. In comparison, implementing the objective of sustainable economic growth (similar to protection of consumer welfare) requires a certain level of economic knowledge and preparation. In other words, it is easier to elaborate more precise and legalistic implementation tests under the former objective than

under the latter. Hence, economic growth is not a suitable objective for beginners in competition policy implementation.

Finally, making sustainable economic growth a direct objective of the competition policy would mean that this policy becomes responsible for ensuring such growth in the first place. Stepping on this path might create a danger of a very deformed perception of the competition framework in Georgia, where the latter is still a vague concept for most actors outside the GNCA and a narrow circle of academics. Namely, the policy might generate much higher expectations than one should have for it. This is a general problem for developing and transitioning countries where competition frameworks are perceived as solutions to multiple problems, many of which are best to be dealt with under other policy areas. Such development, in turn, could lead to overburdening the competition enforcer with extra tasks that has nothing to do with competition protection. EU experience warns against this – after going through the 1970s-1980s, when competition framework has been used as a solution for multiple diverse problems, the Union acknowledged that it is better if the competition policy remains more focused. Utilization of this experience would mean focusing on the objective of protecting the competitive process in Georgia and not bringing into picture any other objectives that could significantly disturb this focus. As one commentator noted, competition law cannot (and should not be asked to) ‘save the world’.<sup>571</sup> Similar statement could be repeated towards saving Georgia’s economy. The competition framework is *one of many frameworks* that could support

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<sup>571</sup> Akman 2012 (n 61) 48.

the economy. However, it can perform this function only when adequately focused and delineated from other policy areas.

Due to the above-mentioned considerations, it is better to maintain competition protection as a central objective of Georgia's competition framework for the moment while not making it a means to another end. This does not mean negating the objective of sustainable economic growth. By ensuring the existence of competitive process and entrenching competition culture on Georgian markets, the competition framework will ultimately (although indirectly) serve the latter.

## **1.2. Dynamism, Contestability and Orientation to Georgia's Needs**

Choosing competition protection as a leading objective opens the question regarding the status of the other two objectives identified in the GLC – market liberalization and protection of free trade.

Protection of free trade has a different connotation for the EU than for Georgia. For the former, this objective supports undistorted trade between the Member States. For the latter, it refers to the international trade, as explained in the subchapter I.3.3. Hence, free trade is an 'internal' issue for the EU and an 'external' one for Georgia. Interestingly, the two policies – trade and competition – might have similar objectives but different (and somewhat conflicting)

implementation methods.<sup>572</sup> The EU might be an exception from this rule due to its transnational nature,<sup>573</sup> but Georgia is not. Consequently, having the protection of free trade as a core objective of the competition framework is not desirable for the latter.

An additional risk associated with maintaining the objective of protecting the free trade under the Georgian competition policy is the legacy of the Stagnation Phase. Namely, when this objective comes into the picture, Georgia seems to assume that focusing on it might alleviate the necessity to pay due attention to the protection of the competitive process. In other words, the intensity of international trade might be deemed enough to a certain extent and serve as a disincentive to implement the objective of competition protection properly. The fact that the international trade agreement (AA) has been a primary drive of competition reforms in Georgia further supports this line of thinking.

This has already had implications in practice. As the subchapter on institutional dynamics noted, in 2021, Georgia adopted new anti-dumping legislation and put the GNCA in charge of it. This means that the primary implementer of the national competition policy now also implements an international trade-related framework (anti-dumping). From the policy viewpoint, this was a logical choice – competition policy currently includes an objective of free trade protection. However, considering the limited capacity of the GNCA (31 employees for all

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<sup>572</sup> Neven et al (n 334) 14. See also Daniel Crane, 'Substance, procedure, and institutions in the international harmonization of competition policy' (2009) 10 CJIL 143, 144, indicating that opening up the national market to foreign firms (i.e. addressing the international trade barriers component) is not necessarily the concern of the competition framework, as these problems are better dealt by other frameworks.

<sup>573</sup> Neven et al (n 334) 15.

enforcement and advocacy activities), this development is problematic, as the human resources necessary for competition case handling are deployed elsewhere. In this respect, the fact that the Georgian competition framework is still mainly perceived as fulfilling the duty under the AA amplifies the risk of under-prioritizing competition cases in the face of anti-dumping ones. Consequently, it would be strongly advised not to include protection of free trade as a policy objective under the Georgian competition framework – as the analysis reveals, its presence might automatically result in neglecting the objective of competition protection.

Maintaining market liberalization as a competition policy objective is equally problematic. Creating competitive markets might sometimes require adopting additional regulations (primarily due to the obligations under the AA). This would come in conflict with the above-mentioned objective which, as explained in the subchapter I.3.3, most likely stands for removing regulatory barriers *per se*. Consequently, maintaining it as a core objective of the Georgian competition framework might stretch the latter beyond its limits and harm the competitive process.

This reasoning is supported both by the EU experience in attempting to handle multiple economic objectives under the umbrella of the competition framework (see subchapter II.2.2.1.2.) and by Georgia's own experience in the 1990s and early 2000s, where this framework addressed objectives of related but still distinct policy areas (see subchapter I.2.1.2). In this respect, the situation of contemporary Georgia resembles that of the EU between 1973-1992 (Formation Phase, II part), where there was a temptation to use the competition framework as

a remedy to problems arising in various policy areas. The EU experience warns against this – the competition framework should not be turned into a cure for all economic problems.<sup>574</sup>

Based on the EU experience, the solution would be to turn the above-discussed two objectives into other policy considerations. The latter could be considered during the process of competition enforcement in Georgia, to the extent that the competition protection objective is not jeopardized.

Finally, the lesson of dynamism and contestability requires constant monitoring of whether competition protection should remain the leading objective of the framework and whether the list of other policy considerations should be widened. Optimizing the framework should not be a one-time exercise but an ongoing process based on the sound assessment of Georgia's legal, economic and general policy developments.

## **2. Applying Lessons Learned from the EU Legal Sources**

Overview of the EU legal and soft law landscape suggested another two lessons: 1) a firm embedding of all key policy objectives (and other policy considerations) in the primary law for their durability; 2) (re)prioritization of these objectives and considerations through secondary and soft law measures for their flexibility.

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<sup>574</sup> This line of thinking is further supported by the experience of other developing countries where, once other policy considerations have begun to play key roles alongside the key competition policy concerns, the latter have significantly diminished the importance of competition policy. See Dabbah (n 8) 322.

## 2.1. Durability - Firm Embedding in the Primary Law

The internalisation of the EU experience would suggest embedding competition policy objectives in the Constitution. One could also consider the AA provisions. The latter is not a primary law but is very hard to change since both Georgia and the EU should agree on the amendments - this could support the durability of the policy.

The Constitution implies at least two objectives of competition policy. First, Article 6(2) indicates that the state views competition as a process worthy of protection and enhancement. Second, the placement of the competition provision within Article 6, 'Economic Freedom', suggests that freedom is one of the objectives Georgian policymakers are concerned about. The constitution also touches upon fairness but not only within the realm of competition policy – fairness is a part of general procedural rights both at administrative (Article 18) and judicial (Article 31) levels.

In addition, the Constitution refers to various other policies which could be considered during competition enforcement. Namely, according to Article 4(2), the state is bound by the universally recognised human rights and freedoms as directly applicable law while exercising its authority. These are listed in Chapter II, including freedom of internet access (Article 17), freedom of creativity, containing IP rights (Article 20), freedom of enterprise (Article 24), and rights of health and environmental protection (Articles 28 and 29). All the above-listed rights

and freedoms could be the policies considered during competition enforcement, as long as they do not jeopardise the leading policy objective - competition protection.

As for the AA, the subchapter I.3.2. already clarified that it does not set any direct objectives for the Georgian competition framework. Meanwhile, Article 203 stresses the importance of the 'free and undistorted' competition in the EU-Georgia trade relations, while Article 204(3) considers procedural fairness as one of the crucial factors in competition enforcement. This wording supports the narrative of the Constitution, where freedom and competition protection can be implied as core objectives of the competition framework, while fairness is considered a procedural objective.

Considering the fact that the Constitution is the primary law of the country, the full utilization of the EU experience would suggest amending the latter in two ways. First, if policymakers decide that the framework could benefit from other well-known objectives of competition policy (for example, efficiency and welfare objectives), they should make effort to embed it within Article 6. Next, the most direct way of 'obliging' the competition framework to consider other policies during enforcement is to add these policies to the list of human rights and freedoms under the Chapter II of the Constitution. This is not an uncommon practice. For example, freedom of internet access (Article 17) acquired its place among other freedoms in the Constitution in 2018. However, if using this route is impossible, one could interpret provisions of the AA, which could entail a similar effect.

## 2.2. (Re)prioritization at the Secondary and Soft Law Levels

The lesson of (re)prioritization can be used by Georgia at least in two regards: 1) to amend GLC in order to focus on a competition protection objective; 2) to use the soft law measures in order to ensure its proper implementation.

The amendment of the GLC would change the substance of Article 2. Namely, out of the three objectives mentioned there, two – support to free trade and market liberalization – should be removed. This will leave competition protection as a priority objective of the Georgian framework under the secondary law. Additionally, an extra provision could be added to Article 2, indicating that other policies provided for in Georgian legislation will be considered during the enforcement as long as this does not jeopardize the objective of competition protection. This would open the door for the enforcer to pay attention to the policy considerations contained under Chapter II of the Constitution, as well as in the AA (including free trade protection and market liberalization) during the competition enforcement.

As for the soft law measures, none of those already adopted by the GNCA deal with policy objectives. Meanwhile, GNCA guidelines present a good opportunity for the enforcer to elaborate on how exactly the competition protection objective could be implemented in practice. The Agency is not required to consult any other institution while adopting such measures. This allows it to have the final say regarding implementation methods which would best support the enhancement of competition culture on Georgian markets.

As the EU practice reveals, the objective of competition protection might be interpreted differently by different parties. Hence, the GNCA guidelines should elaborate that protecting the competitive process does not entail protecting weak competitors. In reality, where Georgian markets tilt towards not having many capable players, these measures could also be used to develop standards ensuring a healthy balance between the competitive process and corporate growth necessary for staying on the market. Finally, their usage could allow the flexibility of adapting implementation standards to changing market circumstances without legislative changes.

Soft law measures are essential for policy interpretation since the legislative changes are not expected anytime soon after the 2020 amendments to the GLC. In this respect, GNCA guidelines could be used to prioritize the objective of competition protection (interpreted as protecting the process of competition) and other two other overarching objectives concerning free trade and market liberalization. This could be done in at least two ways. First, the guidelines could explicitly indicate the hierarchy of objectives, as pursued by the GNCA. Second, the Agency could elaborate implementation measures in a way which support the prioritization of competition protection objective but also keep other two objectives in mind.

One of the examples of the latter scenario would be elaborating on the treatment of vertical (distribution) agreements involving foreign suppliers. Sometimes, such agreements have to be exclusive to ensure trade facilitation. For example, large international automobile manufacturers usually have one authorized representative (distributor) in Georgia, as maintaining two or more competing distributors is not a viable strategy due to the small size of

the national market. GNCA could clarify that such exclusive agreements are not anti-competitive since multiple competing automobile brands are represented in Georgia. This interpretation would justify the limitation of intra-brand competition in the face of intense inter-brand competition and simultaneously uphold the objective of supporting free trade. However, the Agency could also clarify that not every exclusive distribution agreement will be treated this way. In other words, characteristics of the relevant market (nature of the product, the existence of intra-brand competition, etc.) should be used as benchmarks for deciding whether exclusivity is allowed. Such an attitude will signal that while the competition framework might indirectly protect free trade, the protection of the competitive process should come first.

### **3. Applying Lessons Learned from the EU Institutional Dynamics**

The overview of the EU institutional dynamics: 1) revealed the importance of concurrent and gradual development of both administrative and judicial institutions for balanced policymaking; 2) clarified that objectives requiring an intense economic analysis need mature frameworks for proper implementation.

#### **3.1. Institutional Development**

As the EU experience reveals, policymaking powers of the enforcer evolve over time, with increased experience, improved enforcement/monitoring powers, and enhanced resources.

Consequently, the limited capacity to exert influence on the competition policy should not be a source of worry for the GNCA at the moment. Instead, the principal focus of the latter should be on shaping itself as an influential policymaker in the long run.

More specifically, as the EU experience shows, GNCA may acquire enhanced capacity in several dimensions, a number of them depending only on itself. One such dimension is the acquisition of experience and information regarding Georgian markets. Recent changes in the GLC are helpful in this respect since they increase the enforcer's market monitoring powers and enhance its capabilities of concentration control. These changes enable the GNCA to acquire more market-related information without engaging in infringement procedures (something enforcers were cautious about at the beginning of the EU framework development). This, in turn, could result in the accumulation of necessary experience and data for active policymaking in the future.

Another such dimension is equipping itself with a sufficient number of staff to handle the existing workload effectively. The 2020 legislative amendments have been helpful in this respect – the Agency will be allowed to decide the number of its own employees from 1 January 2023.<sup>575</sup> This power should be deployed to recruit not only additional case-handlers but also specialists who would work specifically on market inquiries and soft law drafting. This would ensure proper attention towards each task of the Agency and more capability to elaborate the content and correlation of competition policy objectives.

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<sup>575</sup> GLC (n 182) art 18<sup>1</sup>(1)(d).

Following the EU experience in terms of initial judicial developments will be hard for Georgia since judicial activism is an alien phenomenon for the latter. Here, the law allows the judges to dwell on policy objectives only when there are no specific legal norms to apply, while soft law measures are rarely used. Meanwhile, Georgian judges have taken more liberties in one area – interpreting the legal norms based on the international judicial experience. Hence, if the GNCA included the interpretational experience of the CJEU regarding the competition policy objectives in the soft law, judges would be more willing to apply the latter.

The above-mentioned scenario would: 1) enable the enforcer to intelligently adapt the EU policymaking experience while accumulating its own experience; 2) empower judges to contribute to the Georgian competition policy debate. Such a development is desirable since (like in the EU) Georgian courts are well-positioned to analyze competition cases as part of a broader national legal fabric, considering the developmental needs of the entire system.

A good embedding into this fabric seems to be especially vital for the GNCA since it is a relatively new institution. To model the experience of the EU Commission, the latter needs to be active at least in two respects: establishing information channels with the other policymakers and working to acquire a legislative initiative on competition law matters. The first activity entails an intensified interaction with the Government to exchange information with bodies engaged in various parts of Georgia's economic policymaking and raise awareness regarding the importance of a sound competition policy among them. This will enable the GNCA to become an integral part of a larger enforcement framework and support smooth policymaking in the future. The second activity entails closer co-operation with the Parliament. A recently amended

article 16(3) of the GLC could be used as a basis for such cooperation since it makes the GNCA accountable to the former. This entails intensive direct contact with the primary legislator of the country, including via discussion of the Agency's annual reports. The enforcer should use this opportunity to enhance its policymaking powers.

Finally, the EU experience reveals the importance of having adjudication powers not directly linked to the enforcement activity (for example, preliminary ruling powers). The ability of the CCG to appraise the constitutionality of the legal acts represents such a power. Unfortunately, the 2018 amendments curbed the ability of the Court to address competition law matters, while at this initial stage of the framework development, such constitutional rulings are vital for both law and policy development. Hence, putting the pre-2018 powers back in place would be advisable.

### **3.2. Objectives Requiring Intensive Economic Analysis**

As the EU experience suggests, objectives requiring an intense economic analysis for implementation purposes are best introduced into a more mature framework, after it acquires an administrative capacity for implementing such objectives, including: (1) sufficient number of enforcing staff, especially economists, who could deal with complex efficiency/welfare assessments; (2) experience in studying markets and conducting comprehensive, multi-sided analysis; and (3) capability to access sufficient data for such analysis. The existence of an established competition culture also assists this process. Finally, such developments need to be

accompanied by matching judicial readiness in handling complexities of competition cases in the light of high procedural standards.

Utilization of this experience suggests prioritizing national policy objectives slightly differently from the EU. Namely, while the latter currently puts consumer welfare at the center of its competition policy, the circumstances of the former does not allow for this.

For one, GNCA still needs to acquire the administrative capacity discussed in the paragraphs above. While the legal basis for such acquisition already exists, reaping the benefits of its actual usage might require some time. First, despite recent legislative changes giving it more power to obtain market-related information, the Agency still needs time to utilize these powers and gain experience with markets. Next, the current limited number of case handlers within the enforcer poses an additional constraint - the enforcer is not ready administratively to implement complex economic objectives. The same applies to the judiciary, which is still learning how to handle economic assessments in competition cases. Recruitment of more employees from 2023 onward will not automatically solve this problem for the Agency as the incoming specialists will require time to develop the necessary expertise in case handling. Judiciary might require even more time as the number of competition decisions (and respective court appeals) is quite low. This, in turn, hinders the specialization of judges in competition law and policy matters.

The lack of awareness regarding the essence of the consumer welfare objective also poses a threat for Georgia. Namely, since the Formation Phase, consumer-related objectives have

always been associated with upholding the interests of individual consumers. The legacy of the Stagnation Phase did not enable a change in this perception, while activities of the Revival Phase have not addressed it yet. Therefore, the consumer welfare objective is still strongly associated with a consumer protection objective both for the public and private sectors. Such blurring of concepts creates a severe risk from the enforcement perspective if the consumer welfare objective is to be implemented via the Georgian competition framework in the near future. Namely, the GNCA would be pressured to protect the interests of individual end consumers instead of pursuing the welfare of the consumers as a group on the consumption side of the market.

This risk has already materialized. As subchapter I.4.3. revealed, the Parliament designated the GNCA as the implementer of a recently adopted consumer protection legislation. Consequently, the Agency will once again have to enforce both competition and consumer policies under the same umbrella, despite the negative experience of the Formation Phase. In the light of the Agency's relative inexperience, this creates a risk of underenforcing competition law at the expense of the consumer policy since the latter can produce tangible results in the shorter term. In other words, it is easier for the enforcer to show that individual consumer rights have been upheld than to explain how competition enforcement generated consumer welfare. Such a scenario might complicate competition enforcement (and achievement of respective policy objectives).<sup>576</sup>

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<sup>576</sup> This danger has already materialized elsewhere in the EU. See Martyniszyn and Bernatt (n 135) 165-215.

To conclude, despite Georgia's aspirations to approximate its competition framework to the EU, there is no internal readiness to implement consumer welfare objective at the national level. Hence, it would be better if the latter is not treated as a priority objective of Georgian competition policy at the current stage of its development.

## TITLE II. Optimizing Law and Enforcement

Optimisation of competition policy objectives would be ineffective without determining how these objectives can be best realised in practice. As explained in the thesis introduction, this process involves changing both competition law and enforcement to serve the achievement of the pre-determined objectives. This title addresses the parts of Georgian competition law and enforcement that require such a change. It also studies the relevant EU experience to determine how Georgia can utilize it to attain optimal objectives identified in Chapter III.

Several factors shape the above-mentioned analysis, starting with the nature of the three ‘classic’ infringements of competition law. Two out of these infringements – anti-competitive agreements and abuse of dominance – are the *ex-post* control measures. The third – concentration control – requires *ex-ante* assessment. These assessments differ procedure-wise: the former is conducted via investigations, while the latter happens via concentration appraisals. As the investigation procedure of both *ex-post* control (‘antitrust’) measures is somewhat similar, they will be considered together. Consequently, the thesis will address optimization issues related to antitrust, on the one hand, and concentration control, on the other hand.

Next, the discussion about the optimization of Georgian competition law and enforcement cannot happen without acknowledging the importance of the most recent legislative amendments.<sup>577</sup> Undertaken in 2020, these amendments encompass every aspect

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<sup>577</sup> For details, see Szyszczak and Japaridze (n 3).

from substantive legal norms to the procedure and institutional setup of the competition enforcer. Their overview reveals what has already been achieved in terms of optimization and what remains to be done.

In antitrust, three newly adopted GNCA by-laws – Order on Complaint Admissibility ('OCA 2020'),<sup>578</sup> Rules of Case Investigation ('RCI 2020'),<sup>579</sup> and Rules on Leniency Program ('RLP 2020'),<sup>580</sup> significantly enhanced investigation procedure for cases under the articles 6 and 7 of the GLC (equivalents of articles 102 and 101(1) TFEU). First, the Agency now has more discretion in investigation commencement and stronger information request powers for market monitoring (an usual basis for *ex officio* investigations).<sup>581</sup> Further, amendments significantly prolonged investigation deadlines (overall time-limit was increased from 10 to 18 months),<sup>582</sup> amplified GNCA mandate of conducting down raids,<sup>583</sup> and enabled the Agency to accept and

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<sup>578</sup> GNCA, The form of the complaint, rules of its lodging, and the time limits and procedures regarding the admissibility of the complaint (Chairman Order N38, 23/10/2020) (OCA 2020).

<sup>579</sup> Ibid, The approval of investigation rules and procedures (Chairman Order N40, 28/10/2020) (RCI 2020).

<sup>580</sup> Ibid, The rules of applying leniency program to undertakings and wholly or partially relieving them from fine imposition for the infringement of article 7 of the GLC (Chairman Order N33, 22/10/2020) (RLP 2020).

<sup>581</sup> GLC (n 182) art 18(1)(b), (c) and (f)

<sup>582</sup> GLC (n 182) art 25(2) and RCI 2020 (n 579) art 6(2)

<sup>583</sup> GLC (n 182) art 25(6)-(8) and RCI 2020 (n 579) Ch. IV, arts 12-18. In addition, under the GLC, art 18(1)(c) and RCI 2020, art 12, as well as the Administrative Procedural Code of Georgia (Law N2352, 23/07/1999) art 21<sup>70</sup>, the mandatory court procedure for obtaining a down raid permission is now conducted without notifying the undertaking(s) concerned.

enforce commitments.<sup>584</sup> Sanctioning powers were also enhanced across the board.<sup>585</sup> Finally, amendments introduced additional defence rights by upgrading confidentiality rules<sup>586</sup> and enabled investigation parties to comment on draft (non)infringement decisions.<sup>587</sup>

In concentration control, the GLC and another of its new by-laws, Rules on Concentration Notification and Assessment ('RCNA 2020'),<sup>588</sup> significantly extended tightly woven deadlines of concentration appraisal (1 month + 2 weeks for complex cases)<sup>589</sup> by introducing two-phase concentration proceedings (25 working days for Phase I + 90 calendar days for Phase II);<sup>590</sup> considerably improved the data submission provisions by switching from

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<sup>584</sup> See GLC (n 182) arts 18(1)(g<sup>1</sup>), 23(5)-(7), 24(h) and 25(13)-(15); see also RCI 2020 (n 579) art 26

<sup>585</sup> GLC (n 182), arts 25(15) and 32. The fines were established for non-fulfillment of commitments and non-compliance with information requests at the pre-investigation.

<sup>586</sup> See GLC (n 182) art 20; RCI 2020 (n 579), art 4; RLP 2020 (n 580) art 10.

<sup>587</sup> See GLC (n 182) art 25(11)-(12).

<sup>588</sup> GNCA, The approval of rules of lodging concentration notifications and their assessment (Chairman Order N39, 26/10/2020) (RCNA 2020).

<sup>589</sup> GLC (n 182) unconsolidated version, art 11<sup>1</sup>(3). The longest time the GNCA was allowed to work on a concentration decision equated to 50 calendar days from the moment of notification. See GNCA, *ALTA/Eurotechnics* (Order N32, 07/03/2016); GNCA, *Heidelbergbeton/Tbilcement* (Order N67, 09/06/2015). The Agency repeatedly noted the insufficiency of time for comprehensive appraisals. See *Heidelbergbeton/Tbilcement*, 15-16; GNCA, *EVEX/GN Co.* (Order N95, 28/07/2015) 26-27; *ALTA/Eurotechnics*, 14-16; GNCA, *GHG/GPC* (Order N57, 28/04/2016) 16-18; GNCA, *GPC/ABC Pharmacia* (Order N247, 28/12/2016) 10-12.

<sup>590</sup> GLC (n 182) art 11<sup>1</sup>(6) and (9); RCNA 2020 (n 588) arts 7-8.

the voluntary<sup>591</sup> to mandatory information requests<sup>592</sup> and providing various mechanisms (including sanctions) for the failure to comply;<sup>593</sup> replaced the old substantive assessment standard – introduced SIEC test<sup>594</sup> instead of a combination of the latter with the dominance test;<sup>595</sup> allowed the option of clearance with conditions;<sup>596</sup> and introduced effective sanctioning mechanisms for a failure to fulfil several obligations, including the ones of mandatory notification, standstill, and implementation of structural/behavioural remedies.<sup>597</sup> Simultaneously, protection mechanisms for undertakings were enhanced by providing

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<sup>591</sup> GLC (n 182) unconsolidated version, arts 18 and 32; according to these articles, mandatory information requests were envisaged for investigation procedures only. This complicated concentration appraisal for the GNCA since most of the market participants supplied either no or limited information, withholding commercially sensitive data. The Agency noted this problem in its very first concentration decision – *Heidelbergbeton/Tbilcement* (n 589) 17 – and has struggled with its consequences in almost every case. For the most severe examples, see *EVEX/GN Co.* (n 589) 43; *GHG/GPC* (n 589) 30 and 36; *GPC/ABC Pharmacia* (n 589) 7-8 and 19. See also GNCA, *Cement Invest/HeidelbergCement* (Order N04/274, 06/10/2017) 8; GNCA, *ALTA/Metromart* (Order N04/325, 04/12/2017) 7; GNCA, *Medcapital/Madison Holding* (Order N04/144, 08/06/2018) 12-13; GNCA, *Ameritex/Smile* (Order N04/167, 06/07/2018) 7; GNCA, *Georgian Capital/Motorstar* (Order N04/192, 13/06/2019) 6.

<sup>592</sup> GLC (n 182) consolidated version, art 18(1)(b)-(c) and (f); RCNA 2020 (n 588) art 10. RCNA 2020 also determines what constitutes a submission of information (art 11) and what constitutes a failure to do so (art 12).

<sup>593</sup> GLC (n 182) consolidated version, art 18(1)(c) and (f), art 32; RCNA 2020 (n 588) art 13

<sup>594</sup> Meanwhile, under the new regulation, dominance creates a rebuttable presumption of SIEC. See GLC (n 182) consolidated version, art 11(3)-(5); RCNA 2020 (n 588) art 8(9)-(12)

<sup>595</sup> GLC (n 182) unconsolidated version, art 11(4)-(5)

<sup>596</sup> GLC (n 182) consolidated version, art 11(7); RCNA 2020 (n 588) art 14(1)-(9).

<sup>597</sup> GLC (n 182) consolidated version, art 11(9), art 11<sup>1</sup>(13)-(14), art 18(1)(b) and (f) and art 32; RCNA 2020 (n 588) arts 13, 14(13)-(16) and (18), 15(4)-(8). These mechanisms enabled the GNCA to address the past problems of non-compliance that arose in cases such as *Nikora/Nugeshi* (see GNCA, *Annual Report 2016* (2017) 15, where parties implemented the concentration without notification. See GNCA, 'Press Release - National Competition Agency fines undertaking for failing to notify concentration' <<https://competition.ge/media/press-releases/195>> accessed 21 October 2021.

additional safeguards for handling confidential information during concentration proceedings.<sup>598</sup>

As the above-provided overview reveals, amendments resolved many problems concerning the day-to-day implementation of antitrust legislation. However, no amendments are ideal. This research addresses the legislative gaps remaining after 2020 changes that might prevent the achievement of the key objective of the Georgian competition policy due to their magnitude.

Enforcement shortcomings of a similar scale are also analysed. One should note that, at the moment of introducing the 2020 legislative amendments, the GNCA had six years of enforcement experience. This experience included 28 investigations and inadmissibility procedures, handled with significantly limited powers. As the analysis reveals, these limitations prompted the Agency to develop certain problematic enforcement trends. While the post-amendment antitrust procedure creates a basis of unfollowing these trends, whether this will happen is still questionable.

Risks posed by sub-optimal law and enforcement could be significant, considering competition system lifecycles.<sup>599</sup> Namely, performance of the competition framework is not an unstoppably improving process – advancements are usually followed by performance drop for

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<sup>598</sup> RCNA 2020 (n 588) art 2(1). The parties' rights related to submitting confidential information to the GNCA have also become the subject of the soft law activities of the latter in 2020. See GNCA, 'Safeguarding Confidential Information in Competition Proceedings' (Guidelines) (2020) <<https://admin.competition.ge/uploads/43cb8336ff344fcba985006e37cafc25.pdf>> accessed 15 October 2021.

<sup>599</sup> Kovacic and Lopez-Galdos (n 16).

various reasons.<sup>600</sup> If one counts (as they should) recent legislative amendments as a step forward in a competition framework building, then a certain decline should be expected soon. The economic crisis caused by the COVID 19 pandemic might contribute to this decline as well – it has already prompted the GNCA to be extra cautious in its interventions due to increased business vulnerability.<sup>601</sup> This creates a prolific ground for maintaining administrative self-restraint. Meanwhile, such self-restraint might be especially detrimental for the effectiveness of competition framework now, as the crisis might be a prolific ground for sprouting anti-competitive practices.

Keeping all of the above-mentioned in mind, the Title II is broken down into two parts to facilitate an adequate analysis of both existing legislative and enforcement frameworks. The subtitle II.I, titled “Optimizing the law – focus: *ex-ante* control” is devoted to the most pressing legislative shortcomings of the post-2020 concentration framework, while the subtitle II.II, titled “Optimizing the enforcement – focus: *ex-post* control” performs the same exercise for the antitrust framework. Each subtitle follows the three-chapter structure adopted by the Title I. The first chapter of each subtitle identifies relevant problems for Georgia, the second chapter provides respective EU experience and lessons, and the third chapter analyses how these lessons can be utilized in the process of national framework optimization.

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<sup>600</sup> See *ibid*, 112-117, where three possible trajectories of the competition system lifecycles are described: ‘an initial ascent followed by decline; a flat line; and a gradual upward progression’ (112). While the experience of Georgia suggests that the latter is not following the second trajectory – i.e., improvements are detected along the road – the other two trajectories inevitably lead to backstepping at some point after incurring success.

<sup>601</sup> In this respect, 2021 ended with only two administrative procedures – one finalized investigation and one inadmissibility decision.

## SUBTITLE II.I. Optimizing *ex-ante* control (concentrations)

In Georgia, concentrations were assessed already during the Formation Phase. Namely, the initial law – LMAC – mandated so-called ‘anti-monopoly expertise’ in merger cases involving an economic agent with a monopolistic market position.<sup>602</sup> As Chapter I highlighted, the term *monopoly* under LMAC equated to *dominance*,<sup>603</sup> while the term *economic agent* denoted any entity engaged in *commercial activity* – a notion narrower than *economic activity*, covering only registered businesses.<sup>604</sup> Hence, the initial concentration control covered a single type of concentration (mergers), dealt with entities of a specific market standing (dominance), and concerned only certain undertakings (registered business entities). This was control with a considerably limited scope.

The situation worsened during the Stagnation Phase. As explained in Chapter I, the regulation of this phase dealt only with competition infringements by state bodies. Consequently, the law of the day – LFTC – abolished all types of control related to private entities, including a limited *ex-ante* control under LMAC.<sup>605</sup>

The existing framework for concentration control was introduced in 2014, at the beginning the Revival Phase, to meet the requirement of the EU-Georgia AA regarding the

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<sup>602</sup> LMAC (n 85) art 14(1)

<sup>603</sup> See above, subchapter I.2.1.1.

<sup>604</sup> LMAC (n 85) definition of terms: ‘economic agent’ (entrepreneurial entity).

<sup>605</sup> See above, subchapter I.2.2.3.

maintenance of ‘...effective control of concentrations to avoid significant impediment to effective competition’.<sup>606</sup> Consequently, the current law – GLC – incorporated far more elaborated substantive and procedural concentration provisions than LMAC.<sup>607</sup> The legislative amendments of 2020 further enhanced this regulation to support the fulfilment of the AA obligation.<sup>608</sup> Meanwhile, regulatory gaps remain, preventing the attainment of the optimal objective of the Georgian competition framework defined in Chapter III. This subtitle will focus on the most significant (and underrated) gap – the scope of the *ex-ante* control.

In the EU, the establishment and development of concentration control has been a more gradual exercise.<sup>609</sup> The framework is relatively young (as opposed to antitrust). Despite being advocated since 1960s,<sup>610</sup> the relevant jurisdiction was bestowed on Commission only in 1989,<sup>611</sup> in the face of an increased level of cross-border concentrations<sup>612</sup> and the amplified burden of multiple clearances due to more Member States adopting national merger regulations.<sup>613</sup> The

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<sup>606</sup> AA (n 1) art 204(1)

<sup>607</sup> See below, subchapter VII.1.

<sup>608</sup> Parliament of Georgia, ‘Explanatory note to the draft law on the amendments to the GLC’ (2019) 8.

<sup>609</sup> For the history of emergence of concentration control in the EU, see P Bos, Julien Stuyck and Peter Wytinck, *Concentration control in the European Economic Community* (Graham & Trotman 1992).

<sup>610</sup> Jacques Bourgeois and Bernd Langeheine, ‘Jurisdictional issues: the EEC Merger Control Regulation, member state laws, and articles 85 and 86’ (1991) 14 *FIntLJ* 387, 397. See also Piet Jan Slot, ‘A view from the mountain: 40 years of developments in EC competition law’ (2004) *CMLR* 443, 460-461.

<sup>611</sup> EUMR 1989 (n 309).

<sup>612</sup> Morgan 2001 (n 546) 451.

<sup>613</sup> Bourgeois and Langeheine (n 610) 397-398.

framework was designed to guarantee the sound functioning of the internal market by screening transactions with potential negative effects for its integrity while ensuring the most cost-saving procedure for the market participants.<sup>614</sup> There has been no gap in enforcement – just a set of comprehensive amendments in 2004 which, among other novelties, better aligned the *ex-ante* control with the new leading objective of the Union – consumer welfare.<sup>615</sup> Consequently, the EU accumulated a 32-year-long uninterrupted experience in concentration appraisals, effectiveness of which significantly benefitted from constantly evolving scope of the *ex-ante* control.

Nowadays, EU concentration framework is primarily based on the EUMR 2004.<sup>616</sup> This regulation introduced a significant number of substantive and procedural changes in concentration appraisals. However, the core idea remains the same. It is ensuring critical assessment of all transactions that might have a lasting adverse effect on the structure and competitive conditions of the internal market.<sup>617</sup> The correct configuration of the scope of the

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<sup>614</sup> Ioannis Kokkoris, *Merger control in Europe: the gap in the EUMR and national merger legislations* (Routledge 2011) 10; see also Goran Serdarevic and Petr Teplý, 'The efficiency of EU merger control during the period 1990-2008' (2011) 61 *Finance a úvěr* 252, 253; John Vickers, 'Merger policy in Europe: retrospect and prospect' (2004) 25 *ECLR* 455, 457. For the relevance of *ex ante* control for the effectiveness of competitive market structures, see Case T-332/09 *Electrabel v Commission* ECLI:EU:T:2012:672, para 246; see also *CANON/TOSHIBA* (Case M.8179) Commission Decision C(2019) 4559 final, para 68; CASE M.7993 *ALTICE/PT PORTUGAL* (Case M.7993) Commission Decision C(2018) 2418 final, para 37. See also 2021 SWD on Concentration Jurisdiction (n 614) paras 35 and 40.

<sup>615</sup> The principal novelty in this respect was the introduction of the SIEC test for substantive appraisals.

<sup>616</sup> EUMR 2004 (n 435). For the review of the situation that led to the adoption of EUMR 2004, see Nicholas Levy, 'EU Merger Control: From Birth to Adolescence' [2003] *World Competition* 195, 207-216.

<sup>617</sup> EUMR 1989 (n 309) recitals 9, 13, 17, 18 and art 2; EUMR 2004 (n 435), recitals 2, 5, 20, 24 and art 2

*ex-ante* control is a vital part of this process. This is not surprising, considering that the optimally configured jurisdiction enables the enforcer to realise competition policy objectives (alongside with other policy considerations) in practice, thereby supporting the effective functioning of the framework.

The principal problem that the EU faces while configuring the jurisdictional parameters of the *ex-ante* control is the balancing of multiple market-related interests. For one, it needs to ensure that all transactions with possible adverse effects to the competitive market conditions come within the analytical radar of the EU Commission.<sup>618</sup> Such configuration enables the latter to maintain the integrity of the competitive process by verifying an absence of such effects, preventing these effects by imposing corresponding remedies, or (in exceptional circumstances, when prevention is impossible) prohibiting problematic transactions. In contrast, all transactions incapable of generating anti-competitive effects should stay outside this radar. Being exempt from notification obligation enables market participants to implement harmless transactions without further delay and additional administrative burden, thereby maintaining the lively competitive process. Finally, the jurisdictional configuration should enable the EU to guarantee the soundness of competition framework while staying true to its other objectives. For example, the Union has been trying from early on to preserve a competitive internal market environment alongside maintaining competitiveness at the international level.<sup>619</sup> Consequently,

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<sup>618</sup> Kokkoris (n 614) 9, where the author states that “[t]he purpose of merger laws is to capture mergers that may have adverse effects on competition”.

<sup>619</sup> Commission, *Tenth Report on Competition Policy* (1981) 9-11. Currently, an optimal configuration of the *ex-ante* jurisdiction seems to be the main tool to maintain this balance since, despite the desire from various EU actors, competition policy objectives are always override the industrial policy objectives during the process of substantive

the *ex-ante* jurisdiction is configured in a way that enables the consideration of industrial matters alongside the pursuit of competition policy.<sup>620</sup>

The above-described balance can be ensured only if all jurisdictional parameters are correctly configured. Two key parameters can be identified both in Georgia and the EU – qualitative and quantitative ones. The qualitative parameter is the concept of ‘concentration’. The broadness or narrowness of this concept determines the pool of transactions that a particular jurisdiction shall deem necessary to assess *ex-ante*, assuming that they result into a market power consolidation that might harm the competitive process. The proper configuration of this parameter ensures that such transactions do not go unnoticed and unassessed by the relevant administrative body.

Alongside the notion of concentration, both Georgia and EU have a list of exemptions that lift the notification obligation for transactions which have a little to no chance of generating adverse market effects. For example, although the acquisition of control is considered as one of the ways of joining market power, acquisitions by a state body for the purposes of running insolvency procedure could be exempted from the notification obligation, since the purpose of the latter is carrying out an administrative task.<sup>621</sup> As this example shows,

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appraisals. See, for example, Alex Nourry and Dani Rabinowitz, 'European champions: what now for EU merger control after Siemens/Alstom?' (2020) 41 ECLR 116.

<sup>620</sup> For details, see below, subchapter VIII.2.3.3.

<sup>621</sup> EUMR 2004 (n 435) art 3(5)(b); GLC (n 182) art 11<sup>2</sup>(1)(b)

properly configured exemptions relieve the enforcer from assessing transactions that do not constitute power concentrations capable of altering the market's competitive structure.

The quantitative parameter that strikes an optimal balance between notifiable and non-notifiable transactions is expressed in turnover thresholds. More specifically, unless parties possess a particular financial standing (expressed in annual turnovers), it is implausible that their market share will be significant enough to create a possibility of harming competition. Consequently, correct configuration of these thresholds enables the enforcer to maintain a healthy competitive process and effective administrative procedure by assessing only transactions voluminous enough to generate adverse market effects while letting all the other transactions go through without the imposition of additional bureaucratic requirements.

The correct configuration of the above-discussed parameters has been a subject of continuous testing, clarification, and rethinking in the EU.<sup>622</sup> Their importance was highlighted by legislative changes of 1997 – the year when the initial concentration regulation, EUMR 1989, was amended for the first and only time.<sup>623</sup> A vast majority of changes concerned optimizing the scope of the regulation.<sup>624</sup> In addition, the CJEU has played a pivotal role in clarifying the scope and boundaries of the *ex-ante* control, while the Commission has used its soft-law making

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<sup>622</sup> For a brief overview of Commission's efforts in this area, see 2021 SWD on Concentration Jurisdiction (n 614) paras 1-9.

<sup>623</sup> Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings [1997] OJ L180/1 (1997 Amending Regulation).

<sup>624</sup> For a detailed discussion, see Eleanor Morgan, 'EU merger control reforms: An appraisal' (1998) 16 EMJ 110.

powers to systematize the existing interpretations of jurisdictional parameters,<sup>625</sup> clarify its stance regarding their state,<sup>626</sup> and propose further improvements.<sup>627</sup>

To utilize the above-mentioned experience in the process of optimizing *ex-ante* jurisdiction in Georgia, this subtitle adopts a three-step approach. First, the current jurisdictional parameters of the concentration control in the Revival Phase Georgia are overviewed, revealing problems that prevent the latter from attaining the objective of protecting market competition (Chapter IV). Next, the scope of the EU *ex-ante* control is analysed, identifying solutions for regulatory gaps similar to those currently existing in Georgia and drawing lessons from them (Chapter V). Finally, the work elaborates on applying these lessons in Georgian reality to optimize the scope of the national concentration framework (Chapter VI).

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<sup>625</sup> See, for example, Commission 'Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentration between undertakings (CJN)' [2008] OJ C 95/1

<sup>626</sup> See, for example, Article 22 Guidance (n 534).

<sup>627</sup> See for example, Commission, 'Towards more effective EU merger control' (White Paper) COM (2014) 449 final (2014 White Paper).

# Chapter IV. Overview of the scope of the concentration control

## - Georgia

### 1. Introduction

Although the concentration control in the Revival Phase Georgia began in 2014,<sup>628</sup> the effectiveness of the procedure was primarily warranted by the 2020 amendments. The latter substantively changed the notification and appraisal procedure, both by amending the GLC and introducing the new concentration by-law – RCNA 2020 – that replaced its significantly deficient 2014 counterpart.

As already explained, the GLC and RCNA 2020 incorporated comprehensive solutions to several critical problems that the GNCA encountered during the implementation of the concentration framework between 2014-2020.<sup>629</sup> Consequently, the new legislation ensures that once the concentration falls within the GNCA radar, the evaluation and decision-making are conducted by an administrative body equipped with all necessary powers to effectively conduct comprehensive proceedings while being bound by the principle of due process<sup>630</sup> and participatory/defence rights of the undertakings arisen from it. However, the amendments did

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<sup>628</sup> This year, a notification obligation was introduced for concentrations surpassing certain financial thresholds. See GLC (n 182) art 11<sup>1</sup>(1)-(2).

<sup>629</sup> See the introduction of Title II.

<sup>630</sup> The importance of the due process for competition proceedings is not an exclusively Georgian concern. It is paid significant attention in the EU as well. See Cristina Teleki, *Due process and fair trial in EU competition law: the impact of Article 6 of the European Convention on Human Rights* (Brill/Nijhoff 2021).

not address the issue of an optimal configuration of the above-mentioned radar itself. This can partially be explained by the focus of the legal drafters. Namely, they addressed the problems faced by the GNCA in its decision-making process.<sup>631</sup> Consequently, as the Agency did not seem to consider itself affected by jurisdictional issues in any significant way, the legislative shortcomings in this area were either ignored or underprioritized.

This observation is supported by the fact that the 2020 amendments remedied jurisdictional defects identified by the GNCA decisions. For example, notification thresholds were explicitly tied to annual turnovers,<sup>632</sup> eliminating the old rule under which an alternative assets threshold could be used.<sup>633</sup> This change was conditioned by the peculiarities of data procurement at the notification stage of the *ex-ante* control. Namely, while the GNCA uses information from the LEPL Georgian Revenue Service ('GRS') to affirm that the threshold limb of the notification obligation is met, there is no such single source providing information regarding assets.<sup>634</sup> This fact prolonged the party asset evaluation and complicated the jurisdictional assessment. Removing assets threshold solved this problem altogether. Another example was introduction of sanctions – fines and divestiture – for gun-jumping.<sup>635</sup> The change

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<sup>631</sup> Explanatory note (n 608) 1.

<sup>632</sup> GLC (n 182) consolidated version, art 11<sup>1</sup>(1); RCNA 2020 (n 588) art 3(1)

<sup>633</sup> GLC (n 182) unconsolidated version, art 11<sup>1</sup>(1)

<sup>634</sup> Explanatory note (n 608) 11.

<sup>635</sup> GLC (n 182) arts 11<sup>1</sup>(14) and 33(4)

was necessary since gun-jumping was happening in practice<sup>636</sup> while the GNCA was not able to prevent it. The Agency promptly used its newly acquired sanctioning powers in 2021,<sup>637</sup> signalling that it intends to closely monitor all the cases under its jurisdiction. The two above-described examples reveal that whenever the Agency identifies jurisdictional problems and sees them as threatening to the effectiveness of concentration control, it quickly suggests legislative improvements and follows up with respective enforcement measures.

Meanwhile, the 2020 amendments failed to address several critical problems regarding the GNCA jurisdiction that leave many significant transactions beyond its reach. It is doubtful that the legal drafters will become aware of this shortcoming anytime soon, considering the peculiarities of jurisdictional provisions. Namely, unless the transaction is notified, the enforcer (and subsequently, legal drafters) cannot educate itself about the problems arising during its assessment – including the jurisdictional problems. Meanwhile, the current scope of the *ex-ante* control prevents many problematic transactions to even reach the GNCA. This is because such transactions either do not count as concentrations or are exempted from notification for various reasons. Consequently, jurisdictional problems have become blind spots of *ex-ante* control, preventing the latter from the effective pursuit of its optimal objective – competition protection.

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<sup>636</sup> See the information about *Nikora/Nugeshe* concentration at GNCA, *Annual Report 2016* (n 597) 15.

<sup>637</sup> GNCA, Press Release (n 597). Eventually, the case was notified to and cleared by the GNCA. See GNCA, *Geopipe/Sibel* (Order N04/207, 17/10/2021).

This chapter breaks down the above-mentioned blind spots by overviewing the existing legislation and identifying the shortcomings that condition an unsatisfactory configuration of the scope of GNCA's concentration framework. It also reveals the consequences of these shortcomings that have materialized between 2014-2021. Finally, it explains the importance of tackling them at the initial stage of the framework development for the purposes of supporting the optimization process.

## **2. Breaking down the blind spots**

The legislative overview reveals that the GNCA does not possess proper *ex-ante* jurisdiction due to three principal factors. First, the qualitative jurisdictional parameter of *ex-ante* appraisals – concentration – is construed narrowly and formalistically (Problem 1). Next, exemptions are formulated broadly, shielding a large number of transactions from the notification obligation (Problem 2). Finally, the quantitative jurisdictional parameters – turnover thresholds – are set very low. Consequently, notification obligation applies to transactions that are incapable of harming market competition due to their small size (Problem 3). These three issues are addressed separately below.

### **2.1. Problem 1 – Narrowly defined concept of concentration**

The concept of concentration is the first point of reference when deciding whether a proposed transaction is subject to GNCA appraisal. In other words, if parties to the transaction believe

that the latter does not amount to concentration under the GLC, the notification (and, subsequently, *ex-ante* control) does not take place. Despite being such an important concept, concentration is not defined in Georgian competition law. Instead, the GLC lists the types of transactions that constitute concentrations for the purposes *ex-ante* control. These include:

- A merger between two or more independent entities, resulting in creation of a single undertaking (hereinafter – “merger”).
- Acquisition of direct or indirect, partial or total control – via interest/share purchases, contracts or other means – by at least one undertaking (or any entity already controlling at least one undertaking) over another undertaking(s) (hereinafter – “acquisition of control” or “control acquisition”).
- Establishment of a joint venture if the latter performs all functions of the independent undertaking on a long-lasting basis (so-called “full-function joint venture”; hereinafter – “FFJV”).<sup>638</sup>

Absence of the overarching definition of concentration means that its exact scope depends on the broadness/narrowness of the concepts of merger, acquisition of control, and FFJV, as defined by law and/or administrative practice. In this respect, the notion of control acquisition has become problematic for at least two reasons. First, the GLC defines control by associating it with specific formal requirements. Next, the concept of decisive influence – a central determinant of control – has been defined neither by the law nor the decisional practice

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<sup>638</sup> GLC (n 182), consolidated version, art 11(1)(a)-(c).

or soft law instruments. This has conditioned a restricted understanding of this concept, since such understanding is supported by a general setup of national administrative law to which *ex-ante* control provisions belong. Overall, this results into a very narrow understanding of the concept of control for the purposes of Georgian competition law.

### ***2.1.1. Control – formalistic definition***

Under GLC, the concept of control refers to a combination of two factors: (a) a possibility to exercise a direct or indirect decisive influence over the decisions of another undertaking and (b) one of the four powers attributed to the controlling undertaking listed below:<sup>639</sup>

- Owning enough voting shares in a controlled undertaking that enables the appointment of the majority of the governing body members.
- Owning a whole or significant part of operational assets in the controlled undertaking.
- Being a member of the supervisory board or a person entitled to chair and represent the controlled undertaking.
- Having a "significant voting right" on agreements concluded by the controlled undertaking. Such a right exists when the controlling undertaking can influence the outcome of the contract conclusion, either by approving or blocking the transaction under question.<sup>640</sup>

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<sup>639</sup> Ibid, art 3(l).

<sup>640</sup> GNCA, *Guidelines - Basic Obligations of Economic Agents under Georgian Competition Legislation* (2017) 29.

As evident, GLC adopts a form-based approach when defining the concept of control. Namely, the possibility to exercise decisive influence amounts to control only if the latter manifests itself in one of the forms listed in the law. Consequently, transactions creating such a possibility do not always equate to control acquisition under GLC and, hence, may not be subject to *ex-ante* appraisals by the GNCA.

This definition becomes especially problematic if one keeps two statistical facts in mind. First, all but two notified concentrations between 2015 and 2021 concerned acquisition of control.<sup>641</sup> Second, according to the LELP National Agency of Public Registry (hereinafter – “NAPR”) – a government Agency responsible for the business registry in Georgia – during the same period, more than 77% of the transactions that amounted to a market power consolidation happened via acquisitions. This number could be even bigger since the NAPR statistics include only the instances of purchasing 50% or more of voting shares/interests (Table 3). However, as the GNCA practice reveals, control can be established by acquiring voting shares even below 50%.<sup>642</sup> To summarize, in the circumstances where market power consolidation mostly happens via acquisitions, a narrow definition of control guarantees that many such acquisitions are not classified as acquisitions of control (and, consequently, as concentrations) for the purposes of the GLC. This outcome creates a gap in *ex-ante* regulation since it leaves a significant number

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<sup>641</sup> These two cases, *Ameritex/Smile* (n 591) and *ALTA/Eurotechnics* (n 589) concerned creation of FFJVs.

<sup>642</sup> For example, in GNCA, *TSMU/GN Co.* (Order N04/122, 21/08/2020) 2-3, control was acquired by purchasing 40% of voting shares; in GNCA, *GDM Co./Levor* (Order N04/197, 07/12/2021), this happened via acquisition of 44,995% voting shares.

of transactions beyond GNCA’s assessment capabilities due to the absence of the relevant jurisdiction.

**Table 3. NAPR statistics regarding concentrations carried out between 2014-2021<sup>643</sup>**

	<b>Mergers</b>	<b>Acquiring 50% or more of voting shares</b>	<b>Establishing FFJVs</b>	<b>Total</b>
<b>Numbers</b>	5	19223	5660	24888
<b>Percentages</b>	0.02%	77.238%	22.742%	100%

The above-mentioned gap might be perilous for the effectiveness of concentration control, considering that acquisitions seem to be a preferred type of concentration for Georgian market players. In this respect, GNCA practice indicates that sometimes parties engage in the acquisition of control to enable a subsequent merger.<sup>644</sup> To clarify, while all mergers above certain turnover thresholds are notifiable under GLC, this is not the case for all acquisitions. For example, let us imagine that companies A and B would like to concentrate their market power. Upon surpassing relevant turnover thresholds, if the companies resort to a merger, the concentration would be notifiable to the GNCA. However, if company A acquires decisive influence over company B without using one of the forms specified under GLC, the transaction would be an acquisition but *not the acquisition of control under the GLC*. Hence, the parties

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<sup>643</sup> The table was created based on the data provided by the NAPR in response to public information requests. See National Agency of Public Registry (NAPR), *Letter #394943* (1 October 2021).

<sup>644</sup> *GPC/ABC Pharmacia* (n 589) 5.

would not have a notification obligation. Consequently, the narrow definition of control creates a legislative loophole, allowing parties to get creative with the type of transaction they want to implement if they desire to avoid a notification procedure. Such a possibility increases the negative effect of the gap discussed in the paragraph above, threatens the effectiveness of the *ex-ante* control, and prevents the GNCA to pursue the optimal objective of Georgian competition policy – protection of market competition.

### ***2.1.2. Decisive influence – narrow understanding***

Another problem relates to the notion of decisive influence which is a key determinant of control under the GLC. As noted above, control is defined as a possibility of exercising decisive influence expressed in the forms listed in the law. Consequently, even if one of the mentioned forms is present, a narrow definition of the decisive influence can further limit the scope of *ex-ante* control. As the analysis reveals, the current state of law and practice condition such a narrow definition.

More specifically, decisive influence is defined neither in Georgian legislation nor in soft law. In addition, there has been no need to address it at length in GNCA's decisional practice. This is because most acquisitions assessed between 2014-2021 concerned the purchase of the majority (if not all) of voting shares. Four cases of minority share purchase – *TSMU/GN Co.*, *ALTA/Metromart*, *Cement Invest/Heidelbergcement*, and *EVEX/GN Co.* – involved acquisition of 40% and more voting shares in the absence of any majority shareholding. Finally, one case –

*Heidelbergbeton/Tbilcement* – related to purchasing all operational assets (Table 4). In all these cases, acquisition of the possibility to exercise decisive influence was relatively straightforward. This also can be inferred from the GNCA decisions which devote little to no space to elaboration of whether concentration took place. Such an attitude indicates that legal and factual circumstances of the assessed transactions left little doubt regarding control acquisition.

**Table 4. Percentages of shares purchased during the acquisition of control cases assessed by the GNCA**

#	Name of the Case	% of shares purchased
1	<i>Geopipe/Sibel</i>	100
2	<i>GDMC/Levor</i>	44.995 Post-transaction share distribution: 44.9995%- 55.005%
3	<i>MNS/CICC</i>	100
4	<i>TSMU/GN Co</i>	40 Post-transaction share distribution: 50%-40%- 10% <sup>645</sup>
5	<i>Georgian Capital/TGS</i>	80
6	<i>Georgian Capital/BIS - Tbilisi</i>	80
7	<i>Georgian Capital/BGA/BIST</i>	70
8	<i>Georgian Capital/Motorstar</i>	80

<sup>645</sup> *TSMU/GN Co.* (n 642) 2-3.

9	<i>Medcapital/Madisson Holding</i>	100
10	<i>ALTA/Metromart</i>	50 Post-transaction share distribution: 50%-33.33%-16.17% <sup>646</sup>
11	<i>Cement Invest/HeidelbergCement</i>	45 Post-transaction share distribution: 45%-45%-10% <sup>647</sup>
12	<i>GPC/ABC Pharmacia</i>	100
13	<i>GHG/GPC</i>	100
14	<i>EVEX/GN Co</i>	50 Post-transaction share distribution: 50%-50% <sup>648</sup>
15	<i>Heidelbergbeton/Tbilcement</i>	Control established by the purchase of operational assets

However, the above-described practice became problematic in the recently appraised case *GDMC/Levor*. In this conglomerate concentration, GDMC purchased 44.995% voting shares in Levor from its previously exclusive shareholder. Consequently, post-transaction, Levor ended up with two shareholders – a majority and a minority one. In this situation, GNCA

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<sup>646</sup> *ALTA/Metromart* (n 591) 1-3; NAPR, Extract from Registry of Entrepreneurs and Non-Entrepreneurial (Non-Commercial) Legal Entities, Metromart Ltd., Change in registration data (partner's shares) (9 March 2018).

<sup>647</sup> *CementInvest/HeiderberCement* (n 591) 10.

<sup>648</sup> *EVEX/GN Co.* (n 589) 2; NAPR, Extract from Registry of Entrepreneurs and Non-Entrepreneurial (Non-Commercial) Legal Entities, GN Co. Ltd, Change in registration data (partner's shares) (5 August 2015) (5 August 2015).

still found the acquisition of minority shareholding to confer control but did not substantiate this conclusion.<sup>649</sup> Such non-elaboration gives rise to suspicion that the notion of decisive influence is not given a proper, in-depth consideration during the *ex-ante* assessment. Namely, due to the past practice of 40%+ shareholding conferring control, this notion seems to be linked more to the acquisition of a certain large percentage of voting shares than to the analysis of legal and factual circumstances of a particular case. Hence, there is a risk that the notion of decisive influence is becoming a quantitative parameter.

This development is worrisome for two reasons. First, the *ex-ante* control might include transactions involving relatively large voting share purchases that do not translate into control acquisition due to various legal and factual reasons. Second, the enforcer might not pay attention to cases where less than 40% voting shares are acquired even if the legal and/or factual circumstances could suggest the conferral of the possibility of decisive influence. Consequently, if the quantitative understanding of the decisive influence is solidified in practice, the GNCA might end up assessing certain transactions that do not concentrate market power while not paying attention to certain others that do so.

Even if above-mentioned risks do not materialise, the existing situation is still problematic due to the absence of clarity of what exactly the decisive influence stands for. Unfortunately, the GNCA has not provided any guidance not only in its decisions but also via soft law measures. Hence the question arises – when the establishment of decisive influence is

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<sup>649</sup> GNCA, *GDM Co./Levor* (n 642) 2.

not straightforward, should the parties still notify the transaction to the enforcer? The 2014-2021 statistics suggest that the parties answer this question in the negative, while the GNCA does not have any effective tool to persuade them to behave otherwise. The *status quo* is further solidified by the nature of administrative law in Georgia (to which the *ex-ante* control under the GLC belongs). Namely, according to the principle of legality enshrined in the General Administrative Code of Georgia (hereinafter - “GGAC”), the administrative body has powers only explicitly identified in the law (broadly defined, including soft law measures).<sup>650</sup> This means that unless the GNCA clarifies how broadly it interprets the notion of decisive influence, undertakings cannot be held accountable for not notifying borderline cases where possibility of decisive influence cannot be established straight away either from the law or soft law measures applied by the Agency.

Finally, even if the GNCA receives applications regarding the above-mentioned borderline cases, it would be under extreme time pressure to do so. This is because the law mandates that the jurisdictional questions should be decided within the five working days of receiving the completed concentration notification.<sup>651</sup> While this time would be enough to determine whether the transaction amounts to concentration in straightforward cases like the

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<sup>650</sup> General Administrative Code of Georgia (Law N2181, 25/06/1999) art 5 states that the powers of the administrative body should be exercised on the basis of the law. Art 5(1) indicates that the administrative body does not have a right to take any action against the law, while art 5(3) clarifies that any administrative act that is passed while the administrative body exceeds its powers granted by the law shall be null and void. Since concentration decisions count as administrative acts, as defined under the art 2(1)(c) GGAC, the GNCA is not entitled to take any of these decisions while exceeding its assessment powers, including in the area of *ex ante* jurisdiction.

<sup>651</sup> RCNA 2020 (n 588) art 7(9)

acquisition of 100% voting shares, it might be extremely complicated to reach to an educated conclusion in not-so-straightforward cases where a comprehensive analysis is required. This conditions a reality where transactions requiring a deeper jurisdictional analysis do not end up on the GNCA table, while the latter seems reluctant to investigate whether any such case has escaped its attention.

To summarise, the *ex-ante* control jurisdiction of the GNCA is significantly limited at the very first point of reference – the concept of concentration. For one, the most frequently occurring type of concentration in Georgia, acquisition of control, is defined restrictively due to a form-based legal approach to the notion of control. Next, the term decisive influence, a key component of control, is defined neither in law nor in practice (although the latter exhibits a risk to tilt to a quantitative definition), entitling the transaction parties to define it to the narrowest way possible. This further limits the types of transactions that might be qualified as concentrations. These two factors might have conditioned non-notification of a large number of transactions simply because parties did not consider them to amount to concentrations. Before the 2020 amendments, this trend was amplified by the absence of legal sanctions for a failure of notification.<sup>652</sup> However, even now, when the law prescribes the possibilities of fines and divestiture for such a behaviour,<sup>653</sup> the problem remains – the current configuration of the concept of concentration significantly restricts the GNCA jurisdiction in *ex-ante* control.

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<sup>652</sup> See GNCA *Annual Report 2016* (n 597) 15, where the Agency notes this factor as the legal defect of the pre-2020 legislation.

<sup>653</sup> GLC (n 182) arts 11<sup>1</sup>(11)-(14) and 33(4); RCNA 2020 (n 588) art 15

## 2.2. Problem 2 – broadly defined exemptions

Under GLC, a concentration is not notifiable if it qualifies for an exemption. Exemptions represent qualitative parameters, indicating whether the concentration in question would be unlikely to produce harmful effects on the markets. Consequently, they need to be limited to the transactions where the inability to generate such effects is apparent for one reason or another. Georgia seems to be failing on this front, since the configuration of its exemptions allows quite a broad spectrum of transactions to be freed from the notification obligation.

At first look, this seems impossible because the exhaustive list of exemptions under the GLC includes just three entries: concentrations resulting from the insolvency/liquidation procedures,<sup>654</sup> temporary acquisitions of control,<sup>655</sup> and concentrations involving interdependent entities.<sup>656</sup> The first two types of exemptions are not problematic since they refer to the acquisition of control during administrative/judicial procedure, as well as situations where a temporary nature of control cannot result in long-lasting adverse effects to the market competition. However, the third exemption – concentrations between interdependent entities – gives a reason to worry due to its excessively broad scope.

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<sup>654</sup> GLC (n 182) art 11<sup>2</sup>(a)

<sup>655</sup> Ibid, art 11<sup>2</sup>(b)

<sup>656</sup> Ibid, art 11<sup>2</sup>(c)

More specifically, GLC identifies the interdependent entities as ones with a pre-existing special relationship that could influence the conditions or economic outcomes of their activities, or the activities of entities represented by them. This broad definition is supplemented by a list of four situations under which entities become interdependent. Three out of the four situations are less problematic since they relate to certain forms of control existing between parties prior to a transaction. Namely, two entities count interdependent, if the same third entity can control them, directly or indirectly, by:

- Being either a member of the supervisory board or a person entitled to chair/represent both undertakings.
- Having “a significant voting right” in both undertakings.
- Being a member of the supervisory board or a person entitled to chair/represent one of the undertakings while holding “a significant voting right” in the other.<sup>657</sup>

However, GLC also indicates the fourth way of establishing interdependency. Namely, interdependent entities for the purposes of the 2010 Tax Code of Georgia (GTC 2010)<sup>658</sup> count as such for competition law as well. The overarching definitions of interdependency are identical for the tax law and competition law.<sup>659</sup> However, the types of pre-existing special relationships – a key component to interdependency – is far broader under GTC than in the GLC. For example, under the GTC, two entities are considered interdependent if they are:

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<sup>657</sup> Ibid, art 3(j)

<sup>658</sup> Tax Code of Georgia (Law N54, 12/10/2010) (GTC 2010)

<sup>659</sup> See GLC (n 182) art 3(j); GTC 2010 (n 658) art 19(1)

- Founders of one and the same enterprise where they jointly own at least 20% of voting shares.
- Physical entities (persons), while one is a subordinate to the other in terms of the offices they hold.
- Relatives.
- Entities linked by various ways of direct or indirect control. This includes situations where one entity controls the other, both entities jointly control the third entity, or both entities are controlled by the same third entity.<sup>660</sup>

Three additional provisions under the GTC reveal how broad the list of interdependent entities is for the purposes of tax law (and, by default, for the competition law as well). First, GTC employs a much wider definition of control than GLC does. Namely, it defines control as the ownership of 20% or more of voting shares.<sup>661</sup> Save exceptional circumstances, such a low percentage does not lead to the possibility of decisive influence which is a prerequisite to establishing control under the competition legislation. However, it is enough for establishing interdependency and consequently, for exempting entities from the notification obligation under the GLC.

Next, for the purposes of identifying pre-existing special relationships, GTC uses the list of both first-line and second-line relatives. The first-line relatives include spouses, parents,

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<sup>660</sup> GTC 2010 (n 658) art 19(2)

<sup>661</sup> Ibid, art 19(5)

children, and siblings.<sup>662</sup> The second-line relatives include spouses, parents, children, and siblings of the first-line relatives, unless the latter already count as first-line relatives.<sup>663</sup> The terms “parents”, “children” and “siblings” include both relatives-in-blood and relatives-in-law (for example, adopted children and guardians).<sup>664</sup> Inclusion of the family links in the definition significantly broadens the list of exempted concentrations. For example, a concentration between two undertakings where siblings have at least 20% of voting shares is exempted from the notification only because of the family ties of these minority shareholders.

Lastly, for the purposes of tax law, if one of the relatives directly controls an entity, all the other relatives count as indirect controllers of the latter.<sup>665</sup> This definition broadens the exemption pool even further since control includes both direct and indirect decisive influence under GLC, while the transaction between parties where one of them already has direct or indirect control over the other does not usually qualify as concentrations.

A theoretical example below reveals the extent to which the above-described provisions could broaden the pool of exemptions. Let us suppose that undertaking A is purchasing 100% of the voting shares of undertaking B. Under GLC, this transaction easily qualifies as a concentration. However, if 20% of voting shares in undertaking A belong to Mr. X, 20% of

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<sup>662</sup> Ibid, art 19(3)(a)

<sup>663</sup> Ibid, art 19(3)(b)

<sup>664</sup> Ibid, art 19(3)(c) and 19(4)

<sup>665</sup> Ibid, art 19(6)

voting shares of the undertaking B belong to Mrs. Y, and the children of the two are married to each other, the concentration between A and B will be exempted from the notification obligation. This would be because the spouses (i.e., relatives under GTC) will constitute indirect controllers of undertakings A and B due to their parents – Mr. X and Mrs. Y – exercising direct control on the respective undertakings for the tax law purposes.

Such a broad definition of the interdependent entities conditions a reality where, on top of an already narrowed down notion of concentration under GLC, many transactions become exempt from the notification solely because of the personal/family links, even though otherwise they would qualify as acquisition of control. Such an outcome is especially problematic for small economies like Georgia, where family relations in business circles are quite common.

In addition, the current configuration of the exemptions seems to have allowed another legal loophole for the parties that wish to avoid the notification procedure. The principal reason for this is that the term “control” under the tax law is much broader than the one under the competition law. Despite this difference, while the term defined in competition law (i.e., narrower definition) is used to identify the transactions that should be subject to the notification, the one under tax law (i.e., broader definition) is used to identify exemptions via the notion of interdependent entities. This creates a gap in *ex-ante* control, allowing parties to first acquire control for the purposes of tax law without the obligation to notify the respective transaction under competition legislation (for example, purchasing 20% of voting shares in each other), and then proceed to the acquisition of control by the definition of competition law (for example, one of the parties purchasing majority voting rights in another) while being exempted

from the notification obligation based on the fact that they represent interdependent entities. Consequently, the broadness of exemptions under the notion of interdependent entities enables the parties to avoid the process of concentration appraisals if they engage in a long-term corporate strategy of minority cross-share acquisition or in similar conduct that allows them to become interdependent for the purposes of GTC before concentrating their market power.

To summarise, while the list of exemptions under GLC are few in quantity, the definition of the term interdependent entities results in a qualitative broadness of the latter and further narrows down the number of transactions subject to the GNCA appraisal. Because GLC already contains a narrowed-down notion of concentration, a broad list of exemptions constitutes an additional shrinking of the GNCA jurisdiction in terms of *ex-ante* control. Meanwhile, the rationale behind such shrinking is not clear since it mostly happens due to unjustifiable mingling the definitions of the term control under two independent areas of law – tax and competition. This creates a loophole in the system, allowing market participants to avoid the notification procedure and further damages the effectiveness of *ex-ante* control.

As a final note, one should distinguish exempted concentration from the ones that fall under the jurisdiction of sectoral regulators. The principal difference is that the latter are still subject to a notification obligation, albeit they are assessed not by the GNCA but by one of the other three principal regulators:

- Georgian National Energy and Water Supply Regulatory Commission (hereinafter – “GNERC”) – for the sectors of energy and water supply;<sup>666</sup>
- National Commission for Communications (hereinafter – “ComCom”) – for the communications sector;<sup>667</sup>
- National Bank of Georgia (hereinafter – “NBG”) – for certain financial markets.<sup>668</sup>

Concentrations that fall within the three above-mentioned sectors are excluded from the GNCA jurisdiction for one purpose only: they require a specific expertise during the assessment that is better provided by the specialized sectoral regulators. In addition, both competition and sector-specific legislations include provisions enabling the cooperation between the GNCA and sectoral regulators, in case if the latter need assistance with concentration assessment from the competition law point of view.<sup>669</sup> These provisions indicate that while sector-specific concentrations do not fall within the subject-matter jurisdiction of the GNCA, the latter still supports other entities to conduct the assessment process in full accordance with the competition legislation. Finally, the GLC stipulates that the Agency has an

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<sup>666</sup> Law of Georgia on Energy and Water Supply (Law N5646, 20/12/2019) arts 29(m)(d) and 119; GNERC, Approval of Energy Market Monitoring and Reporting Rules (Ordinance N7, 30/03/2021), Chapter VI (arts 38-50)

<sup>667</sup> Law of Georgia on Electronic Communications (Law N1514, 02/06/2005) arts 2(f) and 25; ComCom, Approval of the Rules Governing the Activities of the Georgian Communication Commission (Ordinance N4, amending Ordinance N1, 15/07/2021) Chapter V (arts 45-54)

<sup>668</sup> Organic Law on the National Bank of Georgia (Organic Law N1676, 24/09/2009) art 47<sup>8</sup>; NBG, Approval of the Rules of the Market Analysis, Concentration Notification and Appraisal (Order N68/04, 28/05/2021) Chapters IV-V, arts 12-30

<sup>669</sup> See GLC (n 182), consolidated version, art 31(6); see also Ordinance N7 (n 666) art 9; Ordinance N4 (n 667) art 52

*ex-ante* jurisdiction in regulated sectors (while regulators provide expert support)<sup>670</sup> if: (a) at least one of the parties to the transaction does not operate in any of the regulated sectors; or (b) parties operate in regulated sectors that are overseen by different regulators.<sup>671</sup> Here, it is clear once again that the inclusion or exclusion of sector-specific concentrations from the GNCA jurisdiction happens based on which body is better positioned to assess the concentration. Hence, the absence of the GNCA jurisdiction in certain instances does not create a legal loophole. Instead, it improves the effectiveness of the assessment process.

However, the exemptions identified under the GLC – including exemptions related to the interdependent entities – also apply to the concentrations in regulated sectors. Consequently, the sector-specific regulators face the same constraint in terms of broadly defined exemptions as the GNCA does. Such a setup amplifies the jurisdictional problem of in these sectors since the latter have fewer market participants than non-regulated markets, due to steep entry barriers and necessity of economies of scale and scope. Consequently, the issue with interdependent entities renders concentration control far less effective for these sectors than for those under the jurisdiction of the GNCA.

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<sup>670</sup> GLC (n 182), consolidated version, art 31(5)

<sup>671</sup> Ibid, art 31(2)

### 2.3. Problem 3 – low turnover thresholds

Considering the two challenges analyzed above, the low turnover thresholds should not seem problematic at first glance. This is because these thresholds serve as final qualifiers for the transactions upon deciding whether they require notification. Since the definitions of the control and interdependent entities have resulted in a significant shrinkage in the GNCA's *ex-ante* jurisdiction, one could argue that low turnover thresholds are good because they widen the list of notified concentrations and allow the Agency to gain back some control over the numbers of assessed transactions. However, this argument would be faulty, considering the purpose of the turnover thresholds.

More specifically, turnover thresholds constitute quantitative qualifiers for notifiable transactions. They identify the transactions that are highly unlikely to result in a harmful concentration due to the fact that parties' market power (measured by their market share that, in turn, is assessed based on the annual turnovers) is not sufficiently large to generate adverse effects to competition. Such transactions do not need to be notified since their harmlessness is evident from the outset. Hence, turnover thresholds set a limit below which concentrations are free from notification obligation based on the assumption of their harmless nature for the market.

Turnover thresholds also indirectly guarantee a harmonious co-existence of the competition and industrial policies. Namely, since a vast majority of exempted concentrations constitute transactions between micro, small and medium-sized enterprises (hereinafter –

“MSMEs”), setting optimal thresholds balances healthy competition against necessary industrial restructuring. Namely, the transactions that might affect the market competition are scrutinized to ensure the absence of adverse outcomes for the competitive process while small firms are allowed to combine their market powers without additional administrative burden to become more efficient and better contribute to the market competition. Consequently, setting turnover thresholds at a low level cannot automatically be positive, even in the face of the narrowed-down substantive jurisdiction of the GNCA. In contrast, their correct configuration should be ensured so that the firms with a relatively limited market presence are not hindered from becoming effective competitors by combining their market power. This is especially relevant for Georgia since, as already mentioned in Chapter I, a certain level of market concentration is necessary for the effective functioning of national markets due to the small size of the latter.

In this respect, the thresholds set under the RCNA 2020 are extremely low. The minimum annual joint turnover requirement for the concentration parties amounts to 20 million GEL while a simultaneous individual turnover threshold is 5 million GEL.<sup>672</sup> Same thresholds apply in the energy, water supply and communications sectors.<sup>673</sup> In comparison, NBG has higher thresholds for the undertakings concentrating on financial markets. The numbers are 40 million GEL for the joint annual turnover and 20 million GEL for the individual

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<sup>672</sup> RCNA 2020 (n 588) art 3(1). A general obligation to notify concentrations surpassing relevant thresholds is enshrined in the GLC (n 182), art 11<sup>1</sup>(1)

<sup>673</sup> Ordinance N7 (n 666) art 39(1); Ordinance N4 (n 667) art 46(1)

one.<sup>674</sup> However, even the latter turnover thresholds are problematic, since they capture enterprises not large enough to change competitive conditions of the market.

To clarify how low these thresholds are, one should look at various legal documents adopted in Georgia after the GLC that use financial gradations to differentiate among different enterprise sizes.<sup>675</sup> The most recent one is the SME Development Strategy 2021-2025 by the Government of Georgia.<sup>676</sup> The strategy adopts a unified approach towards SME definition, basing it on two parameters: annual turnover and number of employees (Table 5). According to this definition, the enterprise with an annual turnover up to 12 million GEL is considered small. In comparison, individual turnover threshold for concentration notification under RCNA 2020 is 5 million GEL and joint turnover threshold equals 20 million GEL. This means that in Georgia, the existing *ex-ante* jurisdiction covers concentrations even between two small enterprises. One also needs to keep in mind that RCNA turnover thresholds include not only the enterprises partaking in concentrations but also their controlling and controlled entities.<sup>677</sup> This further reveals how low the current thresholds are set.

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<sup>674</sup> Order N68/04 (n 668) art 12(2)

<sup>675</sup> For the purposes of the ongoing analysis, only the gradations introduced after 2014 (adoption of the AA and beginning of the competition enforcement by the GNCA) are considered. This leaves GTC 2010 out of the scope of analysis. Arts 84 and 88 of the GTC 2010 set upper limits of annual turnover threshold for micro and small businesses at 30 000 GEL and 500 000 GEL respectively. However, all other SME gradations considerably surpass RCNA 2020 thresholds. Hence, the modern tendency seems to be to define higher threshold caps for enterprise/business sizes.

<sup>676</sup> Government of Georgia, Strategy for Georgia's small and medium-sized enterprise development for the years of 2021-2025 and the action plan of this strategy for the years of 2021-2022 (Ordinance N351, 31/07/2021) (SME Development Strategy 2021-2025)

<sup>677</sup> RCNA 2020 (n 588) art 4(3)

**Table 5. Categorizing Enterprises according to the SME Development Strategy 2021-2025<sup>678</sup>**

	Small Enterprise	Medium Enterprise	Large Enterprise
<i>Annual Turnover (in million GEL)</i>	up to 12	12 to 60	60+
<i>Number of Employees</i>	up to 50	50 to 250	250+

The SME Development Strategy does not contain the definition of micro enterprises. However, this can be inferred from the 2016 Law on Accounting, Reporting and Audit ('LARA').<sup>679</sup> LARA includes a 4-category gradation of enterprises for accounting/reporting purposes, whereas I category enterprise is presumed to be large, II category enterprise - medium-sized, III category enterprise - small, and IV category enterprise - micro.<sup>680</sup> Three benchmarks are used to measure the enterprise size: annual revenue, the value of assets, and the number of employees. To fall in a specific category, the enterprise should satisfy at least two out of the three benchmarks (Table 6). To clarify, annual revenue refers to a gross profit including direct taxes,<sup>681</sup> while GLC and RCNA 2020 are silent about the correlation of taxes

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<sup>678</sup> SME Development Strategy 2021-2025 (n 676) annex I, 23.

<sup>679</sup> Law on Accounting, Reporting and Audit (Law N5386, 08/06/2016) (LARA)

<sup>680</sup> LARA (n 679) does not refer to the categories with these names. However, art 3(8)(b) indicates that II and III category enterprises should undertake accounting and financial reporting according to the International Financial Reporting Standards for Small and Medium-sized Enterprises. One might use this article to presume that I category enterprises are counted as large, while IV category enterprises go in the "micro" box.

<sup>681</sup> Ibid, art 2(1)(w)

and annual turnovers. Consequently, the turnover and revenue thresholds might not be identical. However, since the business tax regime in Georgia is quite simple,<sup>682</sup> looking at revenue thresholds gives a good idea of the size of enterprises obliged to notify concentrations to the GNCA.

**Table 6. Categorizing Enterprises under LARA<sup>683</sup>**

	<b>IV Category Enterprise (micro)</b>	<b>III Category Enterprise (small)</b>	<b>II Category Enterprise (medium)</b>	<b>I Category Enterprise (large)</b>
<i>Annual Revenue (in million GEL)</i>	up to 2	2 to 20	20 to 100	100+
<i>Value of the Assets (in million GEL)</i>	up to 1	1 to 10	10 to 50	50+
<i>Number of Employees</i>	up to 10	10 to 50	50 to 250	250+

According to this table, the entities with revenues exceeding 5 million GEL will be defined as IV category (micro) enterprises if their respective assets are worth less than 1 million GEL and the number of employees is less than ten people. This means that, under certain circumstances, notification obligation under the RCNA 2020 also arises for such enterprises.

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<sup>682</sup> In 2020, according to the World Bank rating, Georgia was ranked number 14 among 190 countries worldwide in this respect. See World Bank, 'Doing Business 2020 - Economy Profile: Georgia, 2020', <<https://www.doingbusiness.org/content/dam/doingBusiness/country/g/georgia/GEO.pdf>>, accessed 22 November 2021, 39-44.

<sup>683</sup> See LARA (n 679) art 2(1)(s)-(v)

Consequently, considering LARA gradation, *ex ante* control in Georgia covers concentrations involving even micro undertakings.

Interestingly, Georgia applies the revenue gradation under LARA when issuing financial support to start-ups and MSMEs within the state programme “Enterprise Georgia”. One of the aims of this program is to increase competitiveness of the private sector, including by means of ensuring access to necessary financial means.<sup>684</sup> The programme envisages support to the III and IV categories of enterprises under LARA if they are active in priority industries.<sup>685</sup> In other words, for the purposes of Georgia’s industrial policy, these enterprises require financial assistance to effectively compete on the market. In this light, leaving the turnover thresholds under RCNA 2020 at the level encompassing both III and IV category enterprises goes against the national industrial strategy. It is questionable from the competition policy viewpoint too. Namely, the entities needing financial assistance under “Enterprise Georgia” highly likely are not the ones with enough market presence to generate a negative impact via concentrations, due to their small size and necessity of an outside support to become more competitive.

To summarise, in Georgia, the notification thresholds do not perform their essential function since they bring within the scope of the *ex-ante* control scope not only large enterprises but also MSMEs. This places an unnecessary burden upon the GNCA to spend its limited time and resources on appraising concentrations while being fully aware of the absence

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<sup>684</sup> Government of Georgia, Approval of state program ‘Enterprise Georgia’ (Ordinance N365, 30/05/2014), art 2(1)

<sup>685</sup> Ibid, art 1(b)

of their anti-competitive effects from the very start. A burden is placed upon smaller entities as well. They must go through an additional administrative procedure that takes their time and resources and delays the increase in their efficiencies by postponing the concentration until the moment of inevitable clearance. Meanwhile, if these entities cannot meet the notification obligation due to the lack of awareness or insufficiency of legal resources, they face large sanctions (up to divestiture) that could further complicate their activities and sometimes even result in a financial burden that the latter might not overcome.

As of now, the above-discussed problem has not materialized in practice. However, this does not rule out the possibility of MSMEs being affected in the future, as the obligation to notify transactions still exists for them, while 2020 amendments introduced harsh sanctions for non-compliance. Hence, it is just a matter of time until the GNCA discovers implemented concentrations between such enterprises and (rightfully) uses its sanctioning powers against them. Such actions will be justified from the effective enforcement point of view. The sanctions would be rendered ineffective if the market players saw that the regulator is not able or willing to enforce them against all undertakings, no matter their circumstances. However, it also will be damaging from the industrial policy and effective administration viewpoints. Consequently, the thresholds require upgrade.

### 3. Concluding remarks

Due to sub-optimally configured jurisdictional parameters, concentration notifications between 2014-2021 totals only 17. In comparison, the number of concentrations registered in Georgia just between January and August 2021 equals to 12 564.<sup>686</sup> These two statistics reveal a tremendous gap between implemented and notified concentrations, even in the face of low turnover thresholds.<sup>687</sup>

Fixing of this gap is essential both from the public and the private viewpoints. On the public side, such configuration will enable the GNCA to direct its limited (human) resources towards more complex transactions. On the private side, it will alleviate the notification burden for the transactions that are highly unlikely to disturb the market's competitive environment, thereby making them less costly, swifter and more profitable. Consequently, by configuring the parameters correctly, Georgia will be able to find the right balance between upholding the objective of competition protection while ensuring procedural simplicity and promptness of market transactions – two of the essential ingredients of the sustainable economic growth.<sup>688</sup>

Georgia needs to set all three parameters correctly for at least two additional reasons. First, it would be good to optimally configure GNCA jurisdiction from the very early stage of the Agency's existence since changes become more difficult for mature agencies due to

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<sup>686</sup> See GNCA, Press Release (n 597).

<sup>687</sup> See subchapter VII.3.3 for a detailed analysis of threshold levels.

<sup>688</sup> See Ordinance No 400 (n 125) 5-6.

established practices and path dependencies.<sup>689</sup> Second, apart from safeguarding the competitive process, concentration control is also a valuable tool in becoming more aware of the market environments within a particular jurisdiction. More specifically, while assessing concentrations, agencies have to thoroughly analyze various industries to evaluate and understand the concentration levels, behavioral patterns, and possible problems in particular markets. Hence, having a proper jurisdiction shall enable the GNCA to constantly measure the pulse of national markets, initiate deeper market inquiries where necessary, issue guidelines concerning particular industries, and become more proactive in ensuring a healthy competitive process throughout the country. This, in turn, will further support the attainment of the key policy objective of the national competition framework.

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<sup>689</sup> See Fox 2016 (n 13) 69-70, listing the absence of path dependencies as one of the advantages of a more recently established competition agencies. See also Katalin Cseres, 'The Impact of Regulation 1/2003 in the New Member States' (2010) 6 CLR 145, 164-165, describing the difficulties of overcoming path dependencies.

# Chapter V. Formulating the scope of *ex-ante* control – EU experience

## 1. Introduction

In the EU competition law, the *ex-ante* control jurisdiction is defined alongside two parameters: *concentration* and *Union dimension*.<sup>690</sup> While the former is a qualitative criterion associated with a capability to generate long-lasting effects on the internal market, the latter represents a quantitative measure, identifying the transactions voluminous enough to possess such capability.<sup>691</sup> Due to the one-stop-shop regime, concentrations with the Community dimension are under the exclusive jurisdiction of the Commission, without the necessity of clearance by various Member States, while jurisdictional fine-tuning (via referrals) is enabled on a case-by-case basis.<sup>692</sup> This way, the Union aims to set the least burdensome procedure for the market

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<sup>690</sup> EUMR 2004 (n 435) art 1.

<sup>691</sup> Levy 2003 (n 616) 197.

<sup>692</sup> Leigh Davison, 'Reviewing the EC Merger Control Regulation - examining competing ways forward' (2003) 15 *EurBRev* 297, 297-298. See also Magdalena Laskowska, 'The Control of Community Concentrations under Regulation No. 139/2004, Part I' (2015) *BLRev* 92, 97. The term 'fine-tuning' is borrowed from Eleanor Morgan, 'Subsidiarity and the Division of Jurisdiction in EU Merger Control' (2000) 45 *Antitrust bulletin* 153, 190.

players,<sup>693</sup> so that the excessive bureaucracy of notifications does not hinder the very market dynamics that it desires to preserve.<sup>694</sup>

Within the competition framework, the concentration control is the area which is most influenced by Commission's work. To start with, while the latter had to develop its antitrust framework within the given boundaries of articles 101 and 102 TFEU, it had more freedom while drafting and modifying the text of the EUMR 2004. This setup enables the Commission to adjust the *ex-ante* jurisdiction to the changing market circumstances without changing Treaty provisions. Amendment (or even in some circumstances broad interpretation) of the EUMR 2004 is enough.

The above-mentioned influence is amplified by a relatively limited number of CJEU cases in this area, despite jurisdictional issues being subject to the full judicial review.<sup>695</sup> This happens because of three principal reasons. First, due to an extremely limited number of prohibitions, appeals of concentration decisions and corresponding juridical reviews are relatively rare.<sup>696</sup> Next, when having a choice between judicial review and commitment

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<sup>693</sup> For the overview of the work undertaken by the Commission in this respect, see 2021 SWD on Concentration Jurisdiction (n 614) paras 5-6. For the difficulties faced by companies that do not have a recourse to one-stop-shop evaluation, see 2014 White Paper (n 627) paras 19-20.

<sup>694</sup> While designing a broad jurisdiction of *ex-ante* control, the Commission has always paid attention to have the least burdensome appraisal procedure for the market players. For the most recent work in the area, see Commission, 'Merger control in the EU – further simplification of procedures' <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12957-Merger-control-in-the-EU-further-simplification-of-procedures\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12957-Merger-control-in-the-EU-further-simplification-of-procedures_en)> accessed 27 December 2021.

<sup>695</sup> EUMR 2004 (n 435) arts 16 and 21(2); see also *Electrabel v Commission* (n 614) para 42.

<sup>696</sup> According to Commission, 'Statistics on Merger Cases' <[https://ec.europa.eu/competition-policy/mergers/statistics\\_en](https://ec.europa.eu/competition-policy/mergers/statistics_en)> accessed 27 December 2021, inclusive November 2021, 8347 cases have been notified

decisions without appeal, parties frequently opt for the latter due to procedural swiftness,<sup>697</sup> thereby further decreasing the number of appealed cases. Finally, the concentration control has hardly benefitted from the preliminary ruling procedure.<sup>698</sup> Overall, such a restricted involvement of the CJEU enables the Commission to influence jurisdictional parameters of *ex-ante* control more actively. Consequently, while the Court has a final say in defining the boundaries of the *ex-ante* jurisdiction, this chapter shall heavily rely on the work of the Commission since the latter is the primary engine in configuring the jurisdiction of the EU concentration framework.

To reveal the full complexity of fine-tuning the EU *ex-ante* jurisdiction and its possible relevance for Georgia, this chapter adopts a three-fold structure. First, it breaks down the principal jurisdictional parameters, focusing on the aspects that might be particularly relevant for Georgia. While doing so, it also identifies key lessons for Georgia. Finally, the chapter explains the challenges faced by the EU due to a particular configuration of its *ex-ante* jurisdiction and identifies areas of precaution, as well as pitfalls that Georgia would want to avoid during the process of the above-mentioned optimization.

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to the Commission overall, out of which only 30 cases ended with prohibition decisions. According to the search engine of the CJEU (n 559) (search parameters: Subject-matter = "Concentrations between undertakings"; Court = "Court of Justice, General Court"; Period or date = "Date of delivery"; period= "from 01/01/1989 to 27/12/2021"), the overall number of cases concerning the concentrations amounts to 75 (including the cases initiated on the grounds other than prohibition appeals – for example, preliminary rulings).

<sup>697</sup> See Serdarevic and Teply (n 614) 253.

<sup>698</sup> As of 27 December 2021, the CJEU has delivered only two preliminary ruling decisions regarding concentration cases. See Case C-248/16 *Austria Asphalt v Bundeskartellanwalt* ECLI:EU:C:2017:643 and Case C-633/16 *Ernst & Young* (n 485).

## 2. Breaking down of the jurisdictional parameters of the EU concentration framework

The jurisdictional parameters of the EU concentration control display three key characteristics. First, the subject-matter of *ex-ante* appraisals – concentration – is defined qualitatively and in general terms, accompanied by rich interpretative body of work. Next, exemptions are formulated narrowly and are closely tied to the notion of concentration. Finally, the Union dimension is configured as a combination of high turnover thresholds and a fine-tuning mechanism of referrals. These three factors are discussed in detail below, alongside with the relevant lessons for Georgia.

### 2.1. Concentration

In the EU, concentration is a transaction resulting into ‘a lasting change of control’.<sup>699</sup> Consequently, two key criteria – control shift and longevity – are integral parts of the *ex-ante* jurisdictional assessment. Such configuration enables encompassing all transactions with possible adverse effects to the internal market, notwithstanding the forms these transactions might take according to various national legislations. Hence, the concept is a qualitative one in nature,<sup>700</sup> and broad as well, since it should be flexible enough to cover a wide range of

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<sup>699</sup> EUMR 2004 (n 435) art 3(1)

<sup>700</sup> See CJN (n 625) para 7.

transactions across various national jurisdictions (including the ones originating in the non-EU states but having an EU-wide impact).

The first criterion – control shift – is defined in general terms, enabling the Commission and the CJEU to actively participate in configuring the concept and interpreting it broadly. The second criterion – longevity – is included in the definition since Union’s *ex-ante* control framework is designed for preventing a lasting damage to the internal market via corporate reorganizations.<sup>701</sup> Consequently, the respective jurisdiction extends to the transactions that are either permanent or at least long enough to be capable of generating negative market effects.

### ***2.1.1. Criterion 1 – control shift***

EUMR 2004 equates control to *a possibility to exercise decisive influence* that that can be conferred in multiple ways – by rights, contracts or other means generating the similar impact.<sup>702</sup> The concept is an objective one: the shift in control occurs under certain factual and legal circumstances, notwithstanding the intention of the transaction parties.<sup>703</sup> It is also a field-specific one: notions of control under other legal fields (for example, company or tax law) might

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<sup>701</sup> EUMR 2004 (n 435) recital 5-6

<sup>702</sup> Ibid, art 3(2). Note that control shift might require more than one steps. For example, it can be achieved by two interrelated contracts. For one of the most recent cases, see *WIELAND/AURUBIS ROLLED PRODUCTS/SCHWERMETALL* (Case M.8900) Commission Decision C(2019) 922 final, para 5.

<sup>703</sup> See *Air France/Sabena* (Case IV/M.157) Commission Decision [1992] OJ C272/05, paras 5-16, where the Commission elaborates why Belgian State and Air France hold joint control over Sabena while there was no intention to make the latter a controlling undertaking.

not be relevant for the purposes of the EU concentration framework.<sup>704</sup> Such a configuration enables the Commission to cover a wide variety of transactions. Simultaneously, it prevents parties from shielding their transactions from *ex-ante* evaluation by appealing on their subjective motives or indicating that the control shift has not taken place from the perspective of the other areas of law. Finally, the definition is not qualified or constrained by formalities. This prevents market participants from designing transactions that confer a possibility of decisive influence but do not come within the ambit of 'control'. Consequently, the notion of control shift effectively serves the purpose of the *ex-ante* control since it brings under the Commission's evaluation radar all transactions that could possess negative effects on the functioning of internal market.

### ***Key aspects of the definition – possibility & decisiveness of the influence***

The *possibility* aspect of the definition is relatively straightforward. There is no need for the entity to implement the decisive influence in practice to establish that the shift in control has occurred.<sup>705</sup> Neither is it required to prove that the influence will eventually be used.<sup>706</sup> What needs to be shown, however, is that the possibility is not merely hypothetical.<sup>707</sup> Consequently,

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<sup>704</sup> CJN (n 625) paras 22-23. See also Case C-248/16 *Austria Asphalt v Bundeskartellanwalt* ECLI:EU:C:2017:322 opinion of AG Kokott, para 39.

<sup>705</sup> See Case T-704/14 *Marine Harvest v Commission* ECLI:EU:T:2017:753, para 58; See also, *Electrabel v Commission* (n 614) para 189. See also Morten Broberg, 'The concept of control in the merger control regulation' (2004) 25 ECLR 741, 744-45.

<sup>706</sup> CJN (n 625) para 16.

<sup>707</sup> Case T-282/02 *Cementbouw v Commission* ECLI:EU:T:2006:64, para 58.

the concept of concentration does not cover transactions stipulated in existing contracts that might or might not materialise in the future.<sup>708</sup>

The creation of the above-mentioned possibility (as opposed to its realisation) is the pivotal part from the jurisdictional viewpoint, since it is linked to the arising of the notification and standstill obligations.<sup>709</sup> In general, implementing any transaction that is necessary to establish the possibility to exercise decisive influence is prohibited without obtaining clearance, even if such transaction alone does not confer control.<sup>710</sup> Consequently, Commission's *ex-ante* jurisdiction extends on concentrations that were partially implemented before notification to ensure the effectiveness of the framework.<sup>711</sup> In other scenarios, the discussed possibility might be created before parties complete all the planned transactions. For example, it might arise upon signing a transaction agreement, even if the full implementation is postponed until clearance, provided that the signature confers strong veto rights.<sup>712</sup> Similarly, during multi-step transactions designed to eventually acquire whole or significant part of an undertaking, the

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<sup>708</sup> See Case T-2/93 *Air France v Commission* ECLI:EU:T:1994:55, paras 71-72.

<sup>709</sup> EUMR 2004 (n 435) arts 4(1) and 7(1).

<sup>710</sup> *Ernst & Young* (n 485) paras 43-49, 51 and 59. See also *CANON/TOSHIBA* (n 614) paras 92-94.

<sup>711</sup> Marion Bailly and Christos Malamataris, 'Procedural developments in EU merger control: Gun-jumping and provision of incorrect/misleading information' (2020) 21 ERA-Forum 251, 254-258 and 265.

<sup>712</sup> *ALTICE/PT PORTUGAL* (n 614) paras 59-73. Upheld on appeal. Case T-425/18 *Altice v Commission* ECLI:EU:T:2021:607, especially paras 69-89.

possibility to exercise the decisive influence might be obtained (i.e., notification obligation might arise) before the entire undertaking or its desired part is purchased.<sup>713</sup>

The only exception from the last rule (although not from the notification obligation) concerns situations where the control is conferred during the implementation of the public bid or from stock exchange transactions linked to multiple sellers. In such case, it is allowed to notify the transaction immediately after implementation, provided that the obtained possibility of decisive influence will not be exercised before clearance.<sup>714</sup> This configuration highlights the balance between the effectiveness of the *ex-ante* control and the concern to avoid making it burdensome for undertakings. On the one hand, the public bid/stock exchange transaction are left within the *ex-ante* control jurisdiction. On the other hand, it is acknowledged that their nature complicates deducing the exact moment of the control conferral. Therefore, implementation is allowed to clarify the matter, while a notification obligation remains.

The *decisiveness* aspect of the definition is far more multi-faceted. To start with, each market transaction confers a certain degree of influence, from near-zero up to total.<sup>715</sup> The concept of decisive influence lies between these two extremes. Namely, while it does not equate

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<sup>713</sup> See *Marine Harvest* (n 705) paras 116-117 and 128. The case was upheld by the CJEU. See Case C-10/18 P *Mowi v Commission* ECLI:EU:C:2020:149, paras 46-53. See also *Ernst & Young* (n 485) paras 43-52.

<sup>714</sup> EUMR 2004 (n 435) art 7(2).

<sup>715</sup> See Barry Hawk and Henry Huser, "CONTROLLING" THE SHIFTING SANDS: MINORITY SHAREHOLDINGS UNDER EEC COMPETITION LAW' (1994) 17 *FIntLJ* 294, 296, where the author also identifies cases of no influence, calling them passive investments.

to an absolute control,<sup>716</sup> the decisiveness of the influence is much stricter requirement than merely the significance of it.<sup>717</sup> In other words, the control is established only when the conferred influence goes beyond the capability of protecting one's own economic interest vested in another undertaking<sup>718</sup> and becomes so strong that it can substantively alter the competitive market behaviour of the latter.<sup>719</sup> Whether such strength has been in fact conferred might depend on a combination of legal and factual circumstances, and assessed on a case-by-case basis.

The decisiveness of the influence can be shown in various ways. For example, the transaction might confer the possibility to impact the appointment of company's senior management; empower to affect the composition of the annual budget or a detailed business plan; grant a final say regarding investments that are crucial for operating on a particular market, or regarding the usage of market-specific technologies.<sup>720</sup> Conferral of any of the above-listed powers, either separately or in combination, will be enough to declare that the shift in

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<sup>716</sup> Broberg 2004 (n 705) 742.

<sup>717</sup> See *LIBERTY GLOBAL/ZIGGO* (Case M.7000) Commission Decision C(2018) 3569 final, para 20.

<sup>718</sup> See CJN (n 625) para 66, where decisions related to changing company statute and input of capital, as well as the ones about liquidation are declared not to be enough to qualify as 'decisive' in the sense that is necessary to confer the control over an undertaking. See also *Olympic/Aegean Airlines* (Case COMP/M.5830) Commission Decision C (2011)316 final, para 16, where three entities exercised joint control because their veto rights went "beyond the veto rights usually held by minority shareholders to protect their financial interests".

<sup>719</sup> See Case T-411/07 *Aer Lingus v Commission* ECR II-03691; ECLI:EU:T:2010:281, para 63, where the Court provides an example of such influence – the power to 'impose choices on the other in relation to its strategic decisions'.

<sup>720</sup> CJN (n 625) paras 69-73.

control has occurred, provided that they enable one to affect the commercial policy and/or strategy that, in turn, might translate into a changed market behaviour of an acquired undertaking.

### *Types of Control*

Most of the time, control would be acquired by an entity engaged in the concentration (direct control). However, the transaction party might be a mere device in the hands of another (indirect control).<sup>721</sup> This could be, for example, its exclusive shareholder, that instructed the former to engage in the concentration.

Control (whether direct or indirect) is *de jure* when it can be clearly inferred from a particular legal source – a transaction contract,<sup>722</sup> a company statute, or any other legally binding document. Such control is conferred, for example, when one acquires majority voting rights<sup>723</sup> or minority shares with attached special rights that enable influencing the commercial/business behavior of the acquired party.<sup>724</sup> In contrast, control is *de facto* if it arises in the absence of a direct legal stipulation, out of the factual circumstances of the case.

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<sup>721</sup> Ibid, para 13.

<sup>722</sup> Ibid, para 18.

<sup>723</sup> Ibid, para 56.

<sup>724</sup> See, for example, *SÜDZUCKER/ED&F MAN* (Case No COMP/M6286) Commission Decision C(2012) 3145 final, paras 4-5, where the 24.99% share of the Südzucker accompanied with 'strong veto rights in particular over the annual budget, business plan and appointment of directors' was enough to determine the establishment of control.

If the decisive influence can be exercised by a single entity, then the control is sole.<sup>725</sup>

The most straightforward example of such control is an ownership of 100% of the voting shares or all interests in an undertaking.<sup>726</sup> However, control can also be exercised on a joint basis by several undertakings. This happens when parties need to act consensually for the purposes of decision-making.<sup>727</sup> Clear-cut examples include cases where two or more entities own equal voting shares in a controlled undertaking.<sup>728</sup>

The 100% share ownership is also a good example of positive control – the type of control that enables an entity to adopt strategic market decisions (i.e., to decide what the controlled undertaking *should do*). However, control also can be negative, enabling the blocking of such decisions (i.e., deciding what the controlled undertaking *should refrain from doing*). A frequently met example of the latter is a conferral of veto rights to a minority shareholder related to crucial issues for the undertaking's market presence, such as budgeting, designing business plans, or appointing senior managers.<sup>729</sup>

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<sup>725</sup> Gian Diego Pini, 'Passive - aggressive investments: minority shareholding and competition law' (2012) 23 EurBLRev 575, 582.

<sup>726</sup> For share acquisitions, see, for example, *GOOGLE/FITBIT* (Case M.9660) Commission Decision C(2020) 9105 final, paras 4-5; *AEGEAN/OLYMPIC II* (Case COMP/M.6796) Commission Decision C(2013) 6561 final, para 15; *UPS/TNT Express* (Case COMP/M.6570) Commission Decision C(2013) 431 final, paras 4-5. For interest acquisition, see *TELEFÓNICA DEUTSCHLAND/E-PLUS* (Case M.7018) Commission Decision C(2014) 4443 final, paras 14-15.

<sup>727</sup> CJN (n 625) para 62; see also *Cementbouw v Commission* (n 707) para 42.

<sup>728</sup> See, for example, *INEOS/SOLVAY/JV* (Case M.6905) Commission Decision C(2014) 2984 final, paras 4-12 (joint control by two equal shareholders); *Telefónica UK/Vodafone UK/Everything Everywhere/JV* (Case COMP/M.6314) Commission Decision C(2012) 6063 final, paras 7-11 (joint control by three equal shareholders).

<sup>729</sup> CJN (n 625) paras 65-67.

The above-listed control types may occur in various combinations. For example, if an undertaking owns 100% of voting shares that were acquired due to parent company's market strategy, the control is indirect, *de jure*, sole and positive simultaneously. In contrast, control exercised by a minority shareholder (with no parent company) via strong veto rights stipulated in the acquisition contract is direct, *de jure*, sole and negative. Multiple other variations are possible, each of them constituting control in their own right. Concentration occurs when any of the above-listed control types is established, even if the end goal was different (for example, the parties might intend to confer *de jure* control by multiple transactions but the concentration will occur if and when, in this process, *de facto* control is achieved).<sup>730</sup> Meanwhile, it is important to identify an exact type of control acquired via any transaction, *inter alia*, for a correct assessment of an *ex-ante* jurisdiction for subsequent transactions associated with a particular controlled undertaking(s) – including the ones involving the change in the quality of control.<sup>731</sup>

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<sup>730</sup> See, for example, *Marine Harvest/Morpol* (Case COMP/M.7184) Commission Decision C(2014) 5089 final.

<sup>731</sup> Not all changes in the quality of control constitute concentrations. For example, every change from joint to sole control is a concentration. See, for example, *KLM/MARTINAIR* (Case COMP/M.5141) Commission Decision C(2008) 8458 final, para 5-7. The reverse is only true if the change from sole to joint control concerns the FFJV. See, for example, *Austria Asphalt* (n 698) paras 31-35.

*Complex cases where a qualitative definition of control enables the Commission to establish ex-ante jurisdiction*

For many transactions, the conferral of control is relatively easy to establish. However, certain complex cases require a detailed legal and factual analysis to see whether a transaction at hand constitutes a concentration. Having a qualitative and flexible definition of the concept of control is especially helpful here, since it enables catching transactions taking various forms as long as the latter confer the capability to influence the market-related activities of one or more undertakings.

This work will touch upon the two frequently occurring types of complex cases: (a) control via minority shareholdings and (b) transactions involving state-owned enterprises (SOEs). While this is not the exhaustive list, the discussion will still reveal how the flexible definition of control empowers the administrative body to deal with a wide variety of transactions that could bring lasting change of the competitive market conditions.

*(a) Control via minority shareholding*

In the EU, majority shareholding is not an indispensable element of control<sup>732</sup> but it always confers a certain type of it. However, one cannot automatically assume the same in case of transferring minority shares. Due to the qualitative nature of the concept of control, a minority

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<sup>732</sup> *ELECTRABEL/COMPAGNIE NATIONALE DU RHONE* (Case No COMP/M.4994) Commission Decision C(2009) 4416, paras 20-21.

shareholding equates to concentration if powers attached to the shares are enough to alter strategic market decisions of a controlled undertaking.

This could happen even in the presence of a majority shareholder. Minority control can be *de jure* if legal documents stipulate the existence of special decision-making and/or veto rights. For example, joint control alongside a majority shareholder is possible if founding documents of the company require a supermajority vote for key strategic decisions<sup>733</sup> or if the latter give the minority shareholder a power over directorial/board member appointments and/or business plan formation.<sup>734</sup> The control might also take *de facto* form if the minority shares are accompanied by contractual arrangements about key aspects of the undertaking's market presence (for example, availability of finances) that pressures the majority shareholder to follow the viewpoint of the minority one during the decision-making process.<sup>735</sup>

In the absence of a majority shareholder, control might be jointly exercised by several minority shareholders. For one, such control might be stipulated in a shareholders' agreement.<sup>736</sup> Control also may arise without such an agreement if strategic decision-making

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<sup>733</sup> *Air France/Sabena* (n 703) para 7. Air France possessed control with 37.5% voting shares alongside the majority shareholder (state of Belgium) since the agreement on the business strategy required  $\frac{3}{4}$  of all shareholder votes. See also *Varta/Bosch* (Case IV/M012) Commission Decision 91/595/EEC [1991] OJ L 320/26, paras 1-3.

<sup>734</sup> *BRITISH AIRWAYS/TAT* (Case IV/M.259) Commission Decision [1992] OJ C 326/16, paras 5-9. The shareholders' agreement enabled British Airways (holder of the 49.9% voting shares) to have a final say regarding the appointment of the director/board members, as well as about the business plan.

<sup>735</sup> *KLM/AIR UK* (Case IV/M.967) Commission Decision [1997] OJ C 372/20, paras 8-17.

<sup>736</sup> *LIBERTY GLOBAL/CORELIO/W&W/DE VIJVER MEDIA* (Case M.7194) Commission Decision C(2015) 996 final, paras 12-13. With 50%-25%-25% ownership, the shareholders' agreement included all three parties equally in the decision-making process.

requires combined effort from the minority shareholders. For example, joint control will exist where two minority shareholders together possess the necessary majority for decision making, while the factual circumstances – alignment of interests, strong co-dependency, or other reasons – guarantee their united stance in decision-making.<sup>737</sup> Finally, joint control could be acquired if each shareholder is able to block strategic decisions of a concentrated entity.<sup>738</sup>

A minority shareholder might also acquire sole and positive control on a *de facto* basis when circumstances put it in the majority during the decision-making process.<sup>739</sup> This usually occurs under three cumulative conditions. First, a sizeable difference exists in voting share ownership between the largest minority shareholder and others,<sup>740</sup> while the shares belonging to the latter are widely dispersed.<sup>741</sup> Next, the largest minority shareholder systematically holds a *de facto* majority during the shareholders' meetings due to a voting pattern of a controlled undertaking, characterised by constant absence of a large number of small shareholders<sup>742</sup> (as

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<sup>737</sup> *Hutchison/RCPM/ECT* (Case COMP JV.55) Commission Decision C(2001) 1723, paras 15-16.

<sup>738</sup> *Olympic/Aegean Airlines* (n 718) paras 14-21.

<sup>739</sup> CJN (n 625) para 59. See also *ELECTRABEL* (n 732) paras 41-77. The decision was upheld on appeal. See *Electrabel v Commission* (n 614) paras 43-57.

<sup>740</sup> *STX/AKER YARDS* (Case COMP/M.4956) Commission Decision C(2008) 1693 final, paras 5-9. The largest shareholder, STX, possessed 39.2% of voting shares, while the second largest did not even have 5%. Conversely, in *Outokumpu/INOXUM* (Case COMP/M.6471) Commission Decision C(2012) 7969 final, paras 16-29, the first and the second major shareholders owned 29.9% and 21.7% of voting shares respectively and this did not allow any of them to acquire sole *de facto* control (the analysis did not reveal joint control either).

<sup>741</sup> See for example, *AAC/Lonrho* (Case IV/M.754) Commission Decision 98/335/EC [1997] OJ L 149/21, paras 31-38 and the decisions cited at fn 8.

<sup>742</sup> See for example, *STX/AKER YARDS* (n 740) paras 5-9. Since only 60.44% of the shareholders attended the meetings, the 39.2% of STX shares gave it *de facto* control with 65-66% voting majority. Conversely, in *MAN/SCANIA* (Case COMP/M.4336) Commission Decision SG-Greffe(2006) D/208308, paras 7-9, an anticipated

established by the analysis of past attendance).<sup>743</sup> Finally, no other entity controls the undertaking in question.<sup>744</sup> The Commission might also pay attention to additional factors including: 1) an 'industrial leadership' of the largest minority shareholder (i.e., whether the latter is the only shareholder possessing the expertise in the industry/markets on which the proposed transaction takes place);<sup>745</sup> 2) interests of other minority shareholders in the controlled undertaking (for example, whether these interests are solely financial); and 3) existence of economic or other links with the largest minority shareholder.<sup>746</sup>

The actual percentage of the minority shareholding is less relevant for the purposes of control.<sup>747</sup> In the past, the Commission has found sole positive *de facto* control in cases where the percentage of minority shareholding was below 30%.<sup>748</sup> Negative sole control has been found even when the voting shares were below 15%,<sup>749</sup> while joint control has been achieved

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increase in attendance of the shareholders' meetings (approx. 50-60%) did not confer control to a minority shareholder with 21.6% voting shares.

<sup>743</sup> *Electrabel v Commission* (n 614), paras 45-48. See also *Marine Harvest* (n 705) para 53.

<sup>744</sup> *Pini* (n 725) 583; *Hawk and Huser* (n 715) 306.

<sup>745</sup> See, for example, *ELECTRABEL* (n 732) paras 94-126.

<sup>746</sup> *CJN* (n 625) para 59.

<sup>747</sup> See *Hawk and Huser* (n 715). See also Ariel Ezrachi and David Gilo, 'EC competition law and the regulation of passive investments among competitors' (2006) 26 *OJLS* 336.

<sup>748</sup> For example, 26.51% of voting shares were enough to establish sole *de facto* control in *IFP&C/TOPDANMARK* (Case COMP/M.6957) Commission Decision C(2013)6268 final, paras 4-12. However, the largest minority shareholding does not automatically confer control if one cannot decide on key factors such as company strategy, business plan and/or budget. See *TELIA COMPANY/BBH* (Case M.9064) Commission Decision C(2019) 7985 final, para 17.

<sup>749</sup> See, *KLM/AIR UK* (n 735) para 8. Control was achieved with a financial arrangement while the respective minority shareholder had only 14.9% of voting shares.

below 8%.<sup>750</sup> The fact that the Commission is willing to evaluate possible control shifts in cases with such minority share purchases is a clear example of how control is perceived as a purely qualitative criterion.

The Commission's interest in minority share acquisitions is not surprising, considering the potential negative effects of the latter even in cases where control is not conferred.<sup>751</sup> To clarify, non-controlling share acquisitions do not qualify as concentrations under the EUMR 2004.<sup>752</sup> Consequently, notwithstanding their effect, such transactions are not assessed in the EU due to the absence of respective *ex ante* jurisdiction. Commission attempted to mitigate this gap by scrutinising non-controlling minority shareholdings at the stages of the substantive assessment and remedy imposition when they form a part of broader, multi-step concentrations.<sup>753</sup> However, this cannot help in cases where such acquisitions precede control conferrals which, in turn, do not materialize.<sup>754</sup> Similarly, the Commission is unable to

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<sup>750</sup> See *AVESTA/BRITISH STEEL/NCC/AGA/AXEL JOHNSON* (Case IV/M.239) Commission Decision [1994] OJ C 258/9, paras 9, 11-12. Shareholders' agreement provided joint control for 4 parties, two of which held 7.54% and 7.23% voting shares.

<sup>751</sup> For a comprehensive economic and legal analysis, see Pini (n 725). For a more recent economic analysis, see Wasilios Hariskos, Manfred Königstein and Konstantinos Papadopoulos, 'Anti-competitive effects of partial cross-ownership: Experimental evidence' (2022) 193 *JEconB&O* 399; see also Ezrachi and Gilo (n 747) 330-334; David Gilo, 'The Anticompetitive Effect of Passive Investment' (2000) 99 *MichLRev* 1; Martin Gassler, 'Non-Controlling Minority Shareholdings and EU Merger Control' (2018) *World Competition* 3, 14-37.

<sup>752</sup> Ulrich von Koppenfels, 'A Fresh Look at the EU Merger Regulation? The European Commission's White Paper "Towards More Effective EU Merger Control"' (2015) 36 *TLLRev* 7, 12-23.

<sup>753</sup> See Pini (n 725) 639-640 and 642-653. For relevant case-law, Commission, 'Towards more effective EU merger control (Staff Working Document)' SWD(2013) 239 final (2013 SWD on Concentration Jurisdiction), annex II, 4-10.

<sup>754</sup> *Aer Lingus v Commission* (n 719) paras 65-66.

intervene when non-controlling share acquisitions happen after control conferral, as separate transactions from the former.<sup>755</sup>

Due to their potential damaging effect to the competitive process, merits of *ex-ante* assessing non-controlling share acquisitions has been pointed out by academics on several occasions.<sup>756</sup> However, they have also cautioned against the perils of widening the jurisdiction both for the Commission and market participants and advocated for a restricted approach.<sup>757</sup> The Commission has also been well-aware of these effects and risks, as evident from its numerous working documents.<sup>758</sup> Interestingly, while both academics and the enforcer envision the concentration regime as the most appropriate way to mitigate adverse effects generated by non-controlling minority shareholdings,<sup>759</sup> neither favour the idea of broadening the notion of control due to the dangers of diluting this concept – *inter alia*, diminished legal certainty for undertakings.<sup>760</sup> The latter notion, alongside the effective concentration control, is considered

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<sup>755</sup> 2013 SWD on Concentration Jurisdiction (n 753) 5.

<sup>756</sup> For example, see Pini (n 725); Ezrachi and Gilo (n 747) 344-348.

<sup>757</sup> See, for example Gassler (n 751) especially at 39-42; Nicholas Levy, 'EU Merger Control and Non-Controlling Minority Shareholdings: The Case Against Change' (2013) 9 EurCompJ 721.

<sup>758</sup> See, for example, 2013 SWD on Concentration Jurisdiction (n 753) 8-12 and annexes I and II; 2014 White Paper (n 627) 8-14; Commission, 'Review of Council Regulation (EEC) No 4064/89' (Green Paper) COM(2001) 745 final, paras 106-110; Nicoletta Rosati and others, 'Common Shareholding in Europe' (JRC Technical Report) (POEU 2020).

<sup>759</sup> See 2014 White Paper (n 627) paras 24-58; see also Koppenfels (n 752) 17-18; Ezrachi and Gilo (n 747) 344-348.

<sup>760</sup> 2014 White Paper (n 627) paras 42-58; Ezrachi and Gilo (n 747) 348.

to be a primary purpose of introducing *ex-ante* regulation in the EU.<sup>761</sup> Consequently, any proposed change in legislation/*ex-ante* approach is evaluated against this parameter.

Alternative solutions have been discussed instead, including *ex-post* assessment of passive investments.<sup>762</sup> Another proposal includes a parallel assessment regime that specifically deals with non-controlling share acquisitions under a simplified notification system and gives the Commission more discretion in terms of launching a detailed assessment.<sup>763</sup> Such a regime is expected to maintain a proper balance between protecting the competitive process and ensuring a more flexible procedure that does not excessively increase Commission's *ex ante* assessment responsibilities and does not subject undertakings to a heavier administrative burden than necessary for effective concentration control.<sup>764</sup>

As of today, non-controlling minority acquisitions are still not subject to EU *ex-ante* control. However, the existence of the debate regarding the merits of subjecting them to *ex-ante* appraisals shows both the flexibility and the boundaries of the notion of control. It also reveals that, even in extremely borderline cases, the Commission has a final say of where exactly these boundaries are, while parties should always ask the latter if in doubt. This detail acts as an additional deterrent in situations where parties want to get creative and acquire control by

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<sup>761</sup> Case T-471/11 *ÉOJ v Commission* ECLI:EU:T:2014:739, para 106.

<sup>762</sup> *Ezrachi and Gilo* (n 747) 348-349.

<sup>763</sup> 2014 White Paper (n 627) paras 45-52.

<sup>764</sup> *Ibid*, paras 56-57.

seemingly unorthodox means. Finally, the debate reveals how the EU tries to use jurisdictional parameter of control shift to balance the need of assessing all potentially harmful market transactions against the requirements of legal certainty and administrative effectiveness. As evident, this balance is not always easy to achieve.

*(b) Concentrations involving state-owned enterprises (SOEs)*

The starting point is that the EU does not discriminate between public and private enterprises for the purposes of the concentration control.<sup>765</sup> If the latter constitute undertakings, they are not exempt from the concentration assessment simply because of their public status. Simultaneously, the EU acknowledges that the state itself is not an undertaking. Rather it falls in the category of ‘persons’ that could also partake in concentrations.<sup>766</sup> Combination of these circumstances gives rise to at least two important jurisdictional questions. First, when a SOE engages in a concentration, how should the actual size of this undertaking be determined? Namely, does it include only the enterprise under question, a particular group (for example, a public holding company) to which this enterprise might belong, or all the enterprises owned

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<sup>765</sup> See EUMR 2004 (n 435) recital 22. See also Alan Riley, 'Nuking misconceptions: Hinkley Point, Chinese SOEs and EU merger law' (2016) 37 ECLR 301, 302.

<sup>766</sup> EUMR 2004 (n 435) art 3(1)(b) in combination with CJN (n 625) para 12 and fn 13.

by the state?<sup>767</sup> Second, can a transaction between two or more SOEs be a concentration if these entities are controlled by the same state?

Answers to these questions depend on whether the existence under state ownership automatically makes SOEs into members of the same economic unit or, in contrast, whether despite such ownership, the latter may count as separate undertakings for the purposes of the EU competition law. Interestingly, this issue arises even in cases where the state owns majority voting shares since public sector rules might condition a reality where SOEs act independently from the latter despite such shareholding.<sup>768</sup>

The first thing to remember is that concentrations may have two types of participants: undertakings or persons already owning at least one more undertaking.<sup>769</sup> Undertakings, in turn, may be groups of physical and legal entities with a united market stance.<sup>770</sup> Such groups are called *single economic entities/units*<sup>771</sup> since their synchronized decision-making process

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<sup>767</sup> Note that when only one of the transaction parties is a SOE, then this question is relevant for the purposes of turnover thresholds and not for the purposes of determining whether concentration took place. For the review of respective case law, see Piet Jan Slot, 'The application of the EU merger control rules to state owned enterprises' (2015) 36 ECLR 484.

<sup>768</sup> See Geneviève Lallemand-Kirche, Caroline Tixier and Henri Piffaut, 'The treatment of state-owned enterprises in EU competition law: New developments and future challenges' (2019) 8 Journal of European competition law & practice 295, 296.

<sup>769</sup> EUMR 2004 (n 435), art 3(1); see also CJN (n 625) para 193.

<sup>770</sup> C-97/08P *Akzo Nobel v Commission* ECLI:EU:C:2009:536, paras 54-55. See also Moisejevas Raimundas and Urbonas Danielius, 'Problems Related to Determining of a Single Economic Entity under Competition Law' (2017) 10 YARS 107, 110.

<sup>771</sup> The term single economic entity is usually used in the antitrust law, while the term economic unit frequently comes up in relation to concentration control.

translates into coordinated market performance. Entities forming a part of such economic unit are considered as a single undertaking for the purposes of the EU competition law.

This notion has a decisive importance for correctly determining the boundaries of the Commission's *ex-ante* jurisdiction. Namely, since concentrations happen between previously independent undertakings, transactions between entities having a stand-alone legal status but belonging to the same economic unit cannot be assessed under EU concentration rules. Consequently, identification of the actual size of the undertaking (i.e., finding which entities belong to the same economic unit) is crucial in determining whether the concentration has occurred. If the concentrating entities belong to separate economic units, then a transaction between them will be a concentration. However, if the latter belong to the same economic unit, then the transaction will fall outside of the scope of the *ex-ante* control due to being a simple internal restructuring.<sup>772</sup>

The above-described distinction is relevant for the SOEs. Namely, even though the latter might be controlled by one and the same state, they might not form parts of the same undertaking.<sup>773</sup> The key delineator is whether the state control has been realised in practice<sup>774</sup>

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<sup>772</sup> The issue of a single economic unit is also relevant in terms of SOE turnover calculation for the purposes of the concentration control. See EUMR 2004 (n 435) recital 22.

<sup>773</sup> See CJN (n 625) para 153; see also *PKN Orlen/Grupa Lotos* (Case M.9014) Commission Decision C(2020) 4651 final, para 21.

<sup>774</sup> See, for example, *ROSNEFT/TNK-BP* (Case COMP/M.6801) Commission Decision C(2013)1513, para 7; *EDF/CGN/NNB* (Case M.7850) Commission Decision C(2016) 1596 final, paragraphs 42 and 44; *TELLA COMPANY/BBH* (n 748) paras 17-28. See also *PKN Orlen/Grupa Lotos* (n 773) para 25 and included two step assessment: 1) the existence of control over a particular SOE (i.e. a possibility to exercise a decisive influence); and 2) curbing the decision-making independence of the SOE (i.e. actual exercise of the decisive by the state). See also Raimundas and Danielius (n 770) 115-119.

and consequently, whether the SOEs can independently carry out their commercial activities on the market.<sup>775</sup> In other words, SOEs' affiliation with the same economic unit depends on whether the state has actually exercised the possibility of decisive influence vis-à-vis them in a way that conditions aligning/coordinating of their market activities.

In practice, this is measured by two parameters. First, the SOE needs to show an operational independence from the state. Second, during the concentration of two SOEs controlled by the same state, the latter need to show operational independence from one another. In both scenarios, the Commission will pay attention to the relevant 'economic, organisational and legal links' between the state and SOEs (as well as between the SOEs) to determine whether the concentrating entities belong to the same economic unit.<sup>776</sup>

The operational independence from the state can be shown by various factors. For example, such independence exists where the SOE can autonomously decide regarding the key factors directly affecting its market performance: budget, business plan and company strategy.<sup>777</sup> In addition, independence is visible when, despite the state having control and even exercising some supervisory powers, such exercise does not go beyond protecting of the state interests similar to those possessed by a minority shareholder.<sup>778</sup> This could happen, for example, where

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<sup>775</sup> *NESTE/IVO* (Case No IV/M.931) Commission Decision [1998] OJ C 218/4, para 7.

<sup>776</sup> *PKN Orlen/Grupa Lotos* (n 773), para 18-19. See also Jochem de Kok, 'Chinese SOEs under EU Competition Law' (2017) 40 *World competition* 583, 587-588.

<sup>777</sup> *TELLA COMPANY/BBH* (n 748) para 10.

<sup>778</sup> *EDF/Segebel* (Case M.5549) Commission Decision C(2009) 9059, para 93.

the only involvement of the state in the SOE happens in terms of selling its own shares.<sup>779</sup> In contrast, the independence is absent, when a state affects the decision-making process of the SOE, for example, by obliging directorial board members to vote as instructed by the government<sup>780</sup> or giving the SOE mandatory directives to follow.<sup>781</sup> Similarly, a SOE is not independent from the state, if the latter can adopt decisions in place of the former.<sup>782</sup>

Another set of factors needs to be considered when deciding whether several SOEs under the same state are independent from one another. For example, the Commission might inquire whether same people serve in the director's board of these entities, or whether there are adequate measures in place that prevents sharing commercially sensitive information between them.<sup>783</sup> The independent decision-making regarding market strategies of the SOEs under question could also be examined. Internal documents revealing the varied insider opinions regarding the positive effects of the transaction (including opposition to transaction by one or several members of the management) could also serve as an evidence that the concentrating SOEs indeed belong to the different economic units.<sup>784</sup> Additionally, the existence or absence of the past coordination patterns between such SOEs might be taken into

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<sup>779</sup> *NESTE/IVO* (n 775) para 8.

<sup>780</sup> *ROSNEFT/TNK-BP* (n 774) para 7.

<sup>781</sup> *SOFFIN/HYPO REAL ESTATE* (Case COMP/M.5508) Commission Decision C(2009) 3994, paras 10-16.

<sup>782</sup> *PKN Orlen/Grupa Lotos* (n 773) para 20.

<sup>783</sup> *TELLIA COMPANY/BBH* (n 748) para 10; see also *EDF/Segebel* (n 778) para 93. Absence of these factors cannot be interpreted as a definitive sign of independence though. See *Lallemand-Kirche, Tixier and Piffaut* (n 768) 297.

<sup>784</sup> *PKN Orlen/Grupa Lotos* (n 773) paras 32-34.

account.<sup>785</sup> Finally, the current pattern of the market relationship between the SOEs under question – whether and how vigorously they are competing – will be evaluated too.<sup>786</sup>

To conclude, the qualitative definition of the term concentration stretches wide enough to encompass SOEs if the transaction between them could potentially lead to the negative market changes in the long run. This once again highlights the importance of such a definition, since it enables equal *ex-ante* control in terms of both public and private enterprises, if the mentioned negative effects are anticipated.

### ***2.1.2. Criterion 2 - longevity***

The principal purpose of including the longevity criterion in the definition of concentration is to encompass transactions performed with the aim to bring lasting market change by the *ex-ante* jurisdiction.<sup>787</sup> In contrast, all other transactions – including those supporting the one bringing such change – are relieved from the notification obligation.

This distinction is important for the purposes of multi-step transactions where only the last one is permanent while the others are undertaken temporarily, in support to the latter.<sup>788</sup>

The commission distinguishes three principal scenarios in this respect. The first two scenarios

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<sup>785</sup> *NESTE/IVO* (n 775) para 8.

<sup>786</sup> *EDF/Segebel* (n 778) para 94.

<sup>787</sup> EUMR 2004 (n 435) recital 20 and art 3(1).

<sup>788</sup> CJN (n 625) para 29.

are similar and involve two steps. During the scenario one, one undertaking temporarily purchase another undertaking (step 1), while the acquired undertaking's assets are eventually divided between multiple parties (step 2). The reverse is true for the second scenario – several undertakings engage in a joint acquisition with a purpose to eventually sell it to a single buyer. For the purposes of the concentration control, only the second step (division of assets in scenario one and acquisition of sole control in scenario two) will count as a concentration, provided that (1) the second step is guaranteed by a legally binding agreement and (2) it will certainly happen within maximum a year of taking the first step. Importantly, there should be no possibility to carry out the first step independently from the second one. If these conditions are met, the first step transactions cannot have a lasting change on the competitive conditions of the market. Consequently, they won't come within the jurisdiction of the EU concentration control.<sup>789</sup>

The third scenario involves concentration by usage of an intermediary. More specifically, a target undertaking is initially acquired by a temporary buyer with the ultimate aim to bestow control over the target to another purchaser. In this scenario, the first acquisition is initiated by the ultimate purchaser that usually also bears the risks of both transactions, and the sole purpose of the initial transaction is to enable the final purchase.<sup>790</sup> Like in the previous two scenarios, here the intermediate transactions are free from the notification obligation since they do not result into the lasting change in market circumstances.<sup>791</sup>

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<sup>789</sup> Ibid, paras 30-34.

<sup>790</sup> See, for example, *CANON/TOSHIBA* (n 614) paras 6-37.

<sup>791</sup> CJN (n 625) para 35.

As a final note, EU Commission clarifies that longevity does not mean the change of control permanently. Temporary acquisition of control may also count as concentration, if there is an option to renewal (for example, control is acquired for a definite period via contract that includes a continuation clause) or control lasts long enough to cause a change in the competitive market structure.<sup>792</sup> In the past, Commission has found periods of eight years and above sufficient to declare that the control was established.<sup>793</sup>

### *2.1.3. Defining concentration – A lesson from the EU experience*

A primary lesson learned from the overview of the concept of concentration under the EU competition law is **to define this concept solely by qualitative parameters**. This multifaceted lesson can be broken down into two key aspects. Namely:

- **It is better not to constrain the definition of concentration by formalities.** In the EU, this is achieved by using two cumulative key criteria, control shift and longevity, while leaving any formal requirement out of the equation. Such definition enables the EU to interpret the concept of concentration broadly, bringing under its jurisdictional radar a wide variety of (borderline) transactions with possible adverse market effects. It also

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<sup>792</sup> CJN (n 625) para 30.

<sup>793</sup> See, for example, *DaimlerChrysler/Deutsche Telekom/JV* (Case COMP/M.2903) Commission Decision 2003/792/EC [2003] OJ L300/62, para 12 (a twelve-year contract); *DEUTSCHE BAHN/ECT INTERNATIONAL/UNITED DEPOTS/JV* (Case COMP/M.2632) Commission Decision [2002] OJ C 81/18, para 9 (a four-year contract with five-year renewal option).

disables market participants to invent new forms of agreements that could circumvent the formality list, if one existed under the EU concentration control.

- Meanwhile, **the flexibility of the notion of concentration does not equate the absence of definitional boundaries.** The EU experience reveals that there are points beyond which the key determinant of concentration – control – should not be stretched, even if the Commission believes that a jurisdictional expansion is necessary to maintain an effective *ex-ante* control. A debate regarding benefits and risks of *ex-ante* regulating non-controlling minority shareholdings serves as a proof of this statement. Definitional boundaries are essential for maintaining a clear idea what exactly control is and thereby guaranteeing legal certainty for market participants.

## 2.2. Exemptions

Once the transaction qualifies as a concentration under the EUMR 2004, subject to crossing relevant financial thresholds,<sup>794</sup> it becomes notifiable under the EU competition law. No direct exception is available in this respect – in other words, all concentrations need to be notified. Hence, the only way to avoid the notification obligation is that the transaction should not qualify as a concentration in the first place.

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<sup>794</sup> EUMR 2004 (n 435), art 1(2).

The above-mentioned is possible in two ways. First, one of the components of concentration should be missing: the transaction either should not confer control or should not do so on a long-term basis. This happens, for example, in case of purely internal corporate restructurings – if the transaction parties belong to a single economic unit, the latter will not constitute a concentration since there is no acquisition of control in a sense of the EUMR 2004. Similarly, for joint ventures, notification obligation only arises in case if an FFJV – i.e., an independently operating unit – is created. Otherwise, joint ventures are subject to antitrust rules but not to the concentration appraisals.

Second, transactions are not deemed to be concentrations in certain instances where control is acquired if it is obvious that such control will not be used to affect the process of market competition. The EUMR 2004 lists three such instances in the article 3(5). Namely, there is no concentration where:

- Financial institutions with a function of security trading temporarily acquire such securities for reselling purposes, while they exercise acquired voting rights only to authorise the subsequent sale that takes place within a year.
- State authorities acquire the power to administer public procedures such as, for example, liquidation or insolvency.

- Control is acquired by a holding company that, by its nature, has only financial interest in the acquisition and is never involved in the management of the acquired undertaking.

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The key unifier of these three situations is that, despite the acquisition of control, there is a certainty that the latter won't be used for the purposes of affecting the market behaviour of the acquired undertaking, even on a short-term basis. This certainty liberates such transactions from the notification obligation.

### ***2.2.1. Narrow configuration***

The EU clarifies that the situations where acquisition of control does not amount to concentration should be interpreted narrowly. The motivation behind this approach and the one about defining the concept of concentration broadly are the same. Namely, for the effectiveness of the *ex-ante* control, it is preferred to have a broad jurisdiction, encompassing potentially less harmful transactions that could be cleared by applying simpler procedure, instead of narrowing down this jurisdiction by being generous with exemptions and thereby risking overlooking market activities that could hinder the competitive process.

The narrowness of the exemptions manifests itself in three principal ways. First, the exemptions do not apply if a transaction forms a part of a multi-step concentration where the final acquirer of control does not qualify as one of the entities mentioned in the article 3(5) of

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<sup>795</sup> See CJN (n 625) paras 111-113.

the EUMR 2004 (credit or similar institutions, state bodies acquiring control for liquidation purposes, etc.). Next, they do not apply to the acquisition of control by the means of asset purchase. Finally, acquisitions by investment funds where the usage of voting rights goes beyond the boundaries of defending financial interests and affects the market strategy of a purchased undertaking also do not qualify for exemptions.<sup>796</sup>

### ***2.2.2. The meaning of control for the purpose of exemptions***

Configuration of exemptions is firmly linked to the notion of control, as defined for the purposes of concentration. None of the EU documents reveal the difference in defining control any differently when exemptions are concerned. Conversely, the EU clarifies that the concept of control, as defined specifically in competition law, will be used for the purposes of determining its *ex-ante* jurisdiction – whether this concerns definition of concentrations or exemptions. While acknowledging the existence of other definitions in, for example, tax, environmental or company law, the latter are not used for the purposes of determining which transactions should be exempted from the notification obligation.<sup>797</sup> Such an approach is logical and efficient since it avoids confusion and upholds legal certainty. It also prevents the existence of a legal loophole whereas a broader definition of control for the purposes of exemptions could

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<sup>796</sup> Ibid, paras 114-115.

<sup>797</sup> CJN (n 625) paras 22-23.

allow the concentration parties to achieve the exempted status first and then carry out the transaction that would otherwise be deemed a notifiable concentration.

### ***2.2.3. Distinction between exemptions from notification and exemptions from ex-ante assessment at the EU level***

The exemptions need to be distinguished from another jurisdictional aspect highlighted in the EUMR 2004 – protection of national markets in the process of concentration appraisal. Exemptions exclude application of the EU concentration framework altogether. The necessity to protect national markets enables concentrations under the EU jurisdiction to be referred to the Member States for further consideration at the national level, under specific circumstances identified in the EUMR 2004. However, this does not mean that the notification obligation does not exist for such transactions in the first place.

The above-mentioned scenarios are regulated in two articles of the EUMR 2004. First, article 4(4) allows pre-notification referrals from the supranational to national level upon a reasoned submission from concentration parties. Next, articles 9 creates the legal basis to do the same for the post-notification referrals upon the request from the Member States. The key criterion is that the affected market located in a particular Member State should have ‘all the characteristics of a distinct market’.<sup>798</sup> While the notification obligation is not alleviated for the

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<sup>798</sup> EUMR 2004 (n 435) art 4(4) and art 9(2).

cases falling under these articles, the substantive assessment does not happen at the EU level. This way, the supranational system ensures the integrity of the EU internal market and the undistorted process of competition on it while acknowledging and allowing for the consideration of national market interests that could be at stake during various transactions.

It should be noted, however, that just like exemptions, referrals are used under very narrow circumstances.<sup>799</sup> First, their application is significantly limited already in theory.<sup>800</sup> Next, they are not guaranteed. The Commission has the final say in terms of whether it lets the national regulators consider the substance of the case under its jurisdiction. Finally, referrals have been used in a very restricted manner in practice.<sup>801</sup> This once again highlights that the exemptions from the substantive assessment at the Union level (even in the presence of respective national assessments) are designed in a way that transactions with a potential harmful effect to the competitive process on internal market are highly unlikely to escape the scrutiny under the *ex-ante* regulation of the EU.

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<sup>799</sup> See, for example, Morgan 2000 (n 692) 178, indicating that from the moment of its inception in 1989, Article 9 referrals were supposed to be only in exceptional circumstances. See also Gançalo Machado Borges, 'Scrutiny: The Legitimate Interests of Member States in EC Merger Law' (2003) EPL 345, that reveals the narrow application of article 21(4), even though it does not contain a closed list of national interests.

<sup>800</sup> Morgan 2001 (n 612) 458; Morgan 1998 (n 624) 115.

<sup>801</sup> Morgan 2000 (n 692) 179-185; Commission, 'Statistics on Merger Cases' (n 696) – March 2021 inclusive, out of 8083 total notified cases, only 172 have been allocated to the Member States with the article 4(4) procedure and 170 cases were either wholly or partially referred under article 9.

#### *2.2.4. Defining exemptions – a lesson from the EU experience*

A primary lesson learned from the overview of the exemptions from notification is **to define them narrowly and apply restrictively**. Under the EU law, this involves several exercises.

Namely:

- **The exemptions apply only a limited set of situations where concentration does not arise**, either because one of the components of its definition, control shift or longevity, is absent or because the actual exercise of the existing control is certainly ruled out. This way, transactions are only exempt from the notification obligation if they either do not produce any effect on the market or such effect is not long-lasting.
- Broadening of the exemptions is avoided by **applying the same notion of control across the board** for the purposes of the *ex-ante* control. This approach relieves the Commission from evaluating purely internal transactions (i.e., situations where control already exists). Additionally, it averts the risks of creating jurisdictional loophole that allows market participants to avoid notification obligation.

### **2.3. Turnover Thresholds ('Union Dimension')**

As mentioned, the EU competition law focuses only on the concentrations that are capable to adversely affect the internal market. Consequently, the latter should fall under the Commission's radar only if they are voluminous enough to possess such capability.<sup>802</sup> This is

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<sup>802</sup> Morgan (n 692) 163.

measured by the means of financial strength, i.e. reaching of a certain level of turnover thresholds.<sup>803</sup> These thresholds – also referred as a criterion of Union (or Community) dimension<sup>804</sup> – are ‘a necessarily arbitrary way of defining concentrations which have sufficient impact upon the Community’.<sup>805</sup>

Initially, the above-mentioned thresholds were not based on any calculation. They just represented an outcome of the institutional dynamics between the EU and the Member States. More specifically, upon adoption of the original concentration regulation – EURM 1989 – the Commission proposed 1 billion ECU for the combined worldwide turnover threshold. However, Member States wanted a tenfold increase of this number, fearing that low thresholds would divert cases from national enforcers and give the Commission more power in competition enforcement. The threshold that made it in the law – 5 billion ECU – represented the compromise between these two proposals.<sup>806</sup> However, with the development of the internal market, the latter have constantly required revision and adjustments.<sup>807</sup>

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<sup>803</sup> Bourgeois and Langeheine (n 610) 399.

<sup>804</sup> The term ‘Community dimension’ is the one used in the EUMR 2004 (n 435). The term ‘Union dimension’ is the one frequently used in the literature after the Lisbon Treaty. For the sake of consistency, the latter term is the one used throughout this thesis.

<sup>805</sup> Sir L. Brittan, quoted by Morgan 2000 (n 694) 164.

<sup>806</sup> Simon Bulmer, ‘Institutions and Policy Change in the European Communities – the Case of Merger Control’ (1994) 72 Public administration (London) 423, 434-436.

<sup>807</sup> 2021 SWD on Concentration Jurisdiction (n 614), para 113.

To understand the rationale behind the configuration of the Union dimension, one first needs to understand the policy considerations behind them. The existing thresholds need to be evaluated next, along with the brief explanation of how they have evolved over the years. Finally, the ongoing challenges of defining this parameter need to be identified to see how the EU navigates through them. These issues will be considered in turn below.

### ***2.3.1. Policy aspect of configuring the Union dimension***

Optimally configured Union dimension criterion serve at least two key objectives of the EU competition policy: market integration and protection of competitive process. This parallels the two essential tasks of the EU concentration framework. First, this framework was designed to prevent national champions from artificially dissecting the internal market.<sup>808</sup> Second, it was equipped to counter the emergence European champions, considering that the latter could make the Union face similar competitive problems as the national champions posed for their respective markets.<sup>809</sup> At jurisdictional level, effective performance of these two tasks is ensured by turnover thresholds that take into account both EU-wide and nation-wide strength of concentrating undertakings, as well as cross-border element of notified transactions. Plus, a referral system is put into place, *inter alia*, to uphold a subsidiarity principle – i.e., to guarantee

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<sup>808</sup> Mark Thatcher, 'European Commission merger control: Combining competition and the creation of larger European firms' (2014) 53 EurJPR 443, 444-445.

<sup>809</sup> Sebastian Billows, Sebastian Kohl and Fabien Tarissan, 'Bureaucrats or Ideologues? EU Merger Control as Market-centred Integration' (2021) 59 JCMS 762, 765-766. Cpr Thatcher (n 808).

that ‘...the more appropriate authority or authorities for carrying out a particular merger investigation review(s) the case despite not being initially competent.’<sup>810</sup>

In addition, the determination of turnover thresholds is affected by the Union’s necessity for being a strong player on global markets.<sup>811</sup> This is conditioned by a competitive pressure of the large trading partners such as USA, Japan and more recently, China.<sup>812</sup> That is why the increase in industrial competitiveness has always been considered as one of the positive factors of internal market concentration.<sup>813</sup> The Commission was required to pay attention to this factor from the very early days of concentration control.<sup>814</sup> This translated into an ongoing requirement to balance competition and industrial policies – an exercise which never has been easy for the EU.<sup>815</sup>

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<sup>810</sup> Article 22 Guidance (n 534) para 5; See also Commission, ‘Case Referral in respect of concentrations (Notice)’ (2005) OJ C 56/2 (2005 Referral Notice), paras 5, 8-10.

<sup>811</sup> See, for example Industrial Strategy 2020 (n 512) 3.

<sup>812</sup> See Laskowska (n 692) 92; see also Václav Smejkal, ‘Concentrations in digital sector - a new EU antitrust standard for “killer acquisitions” needed’ (2020) 7 InterEU law east 1, 2, specifically for the concerns in digital sector.

<sup>813</sup> See EUMR 2004 (n 435) recital 4. Same sentiment was mirrored by the EUMR 1989 (n 309) recital 4.

<sup>814</sup> The very first prohibition case – *Aerospatiale-Alenia/de Havilland* (Case IV/M.053) Commission Decision 91/619/EEC [1991] OJ L334/42 – was controversial even within the Commission (not to say anything about Member States), mainly due to the opposition from the Industrial Policy Commissioner. For details, see Levy 2003 (n 616) 204; balancing competition and industrial policies via concentration control has been a recurring theme since. See 2021 SWD on Concentration Jurisdiction (n 614) para 19; Industrial Strategy 2020 (n 512) 5-6.

<sup>815</sup> For general relationship between competition and industrial policies, see Damien Neven, Robin Nuttall and Paul Seabright, *Merger in daylight: the economics and politics of European merger control* (CEPR 1993) 12-13. For outcomes of this balancing, see Anu Bradford, Robert Jackson and Jonathon Zytznick, ‘Is EU Merger Control Used for Protectionism? An Empirical Analysis’ (2018) 15 JELS 165.

Concentration framework has been at the heart of the above-mentioned balancing activity, as a tool that enables an *ex-ante* assessment of the structural changes on the internal market. Turnover thresholds had to reflect this reality. Namely, they were supposed to be (1) low enough to catch all concentrations that could adversely affect internal market competition; (2) high enough to allow an optimal amount of market concentration without engaging market participants in complex assessment procedures; and (3) flexible enough to adjust to the rapidly changing market reality. The latter requirement was especially amplified upon the Union's entry into a digital market era where concentrations involving online gatekeepers pose novel challenges even when the latter do not meet the thresholds currently enshrined in the EUMR 2004.<sup>816</sup> EU has to manage these three requirements on an ongoing basis.

### ***2.3.2. Turnover thresholds – current setting***

EUMR 2004 provides two alternative sets of thresholds for calculating Community dimension (Table 7).<sup>817</sup> These ensure that concentrations fall within the EU *ex-ante* jurisdiction by filtering them at three different levels: (1) worldwide economic power; (2) strength at the Union level; and (3) cross-border (as opposed to purely domestic) character.<sup>818</sup>

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<sup>816</sup> See DMA Proposal (n 506) article 12. This is the first time the Commission might get a possibility to oblige any particular entity to seek approval of any concentration undertaken by it.

<sup>817</sup> EUMR 2004 (n 435) art 1(2)-(3).

<sup>818</sup> See Morgan 2001 (n 612) 456.

**Table 7 – turnover thresholds under EUMR 2004**

*Legend:*

*Combined Turnover* – turnover of all concentrating parties

*Individual Turnover* – turnover of each of the concentrating parties, measured separately

<b>Turnover Denominator (aggregates; in million EUR)/provision of the EUMR 2004</b>	<b>Article 1(2) – Alternative I</b>	<b>Article 1(3) – Alternative II</b>	
<i>Combined Worldwide Turnover</i>	5000	2500	
<i>Individual Community Turnover</i>	250	100	
	No participating undertaking should achieve 2/3 of this turnover in one and the same MS		
<i>Combined State-wide Turnover</i>	----	100	In each of minimum three MS
<i>Individual State-wide Turnover</i>	----	25	

As the Table 7 shows, once the combined worldwide turnover exceeds 5 billion EUR and individual community turnover of each participating undertaking surpasses 250 million EUR (provided that no undertaking makes 2/3 of the latter amount in one and the same Member State), the concentration is considered voluminous enough to come under the Commission’s radar. In such cases, EU does not measure state-wide turnovers, either individual or combined, since the figures already show high market power and cross-border effects. In comparison, if

concentrations fall short of these parameters, but still manage to surpass combined worldwide turnover of 2,5 billion EUR and individual community turnover of 100 million EUR, Commission must additionally measure state-wide turnovers, both individual and combined, to determine whether the transaction is voluminous enough to generate adverse cross-border market effects for the purposes of the EU *ex-ante* control.

The exact level of turnover thresholds has been one of the strongly debated topics in the Union.<sup>819</sup> The original regulation – EUMR 1989 – incorporated only one set of thresholds (the Alternative I under Table 7).<sup>820</sup> However, these thresholds were considered too high, disabling the framework to fulfil its core purpose – cover all transactions with possible adverse effects on internal market.<sup>821</sup> Consequently, the first and only amendments to the EUMR 1989 that took place in 1997 introduced an alternative set of thresholds (Alternative II under Table 7).<sup>822</sup> This change was important both from competition policy and the industrial policy viewpoints. Namely, as the aggregate worldwide and Union-wide turnovers were still set at a high level (2,5 billion and 100 million, respectively) and the required minimum state-wide turnovers were relatively low, more concentrations involving non-EU entities were covered by *ex-ante*

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<sup>819</sup> For an overview, see Jones, Sufrin and Dunne (n 61) 1068 and following.

<sup>820</sup> EUMR 1989 (n 309) art 1(2).

<sup>821</sup> See Commission, ‘Report to the Council on the implementation of the Merger Regulation’ COM(93) 385 final (1993), 6. Here, a worry was expressed about adverse cross-border effects of multi-state concentrations falling below the EUMR 1989 thresholds.

<sup>822</sup> 1997 Amending Regulation (n 623) article 1(b).

control.<sup>823</sup> Hence, the EU got a better possibility to measure the foreign effect on the internal market.

The debate regarding the optimal configuration of turnover thresholds is still ongoing.<sup>824</sup> This is not surprising, considering that the Union dimension is perceived as a dynamic parameter that should reflect the changing reality of the internal market. Consequently, even though threshold-setting happens under an extreme political pressure, the latter are still expected to maintain a proper balance between ensuring healthy competition and maintaining a competitive industry at the EU level.

One of the ways of ensuring this balance is excluding MSMEs from the ex-ante control scope via thresholds. The EU has consistently done this, as evident upon comparing turnover thresholds under EUMR 2004 with the ones used for the EU-wide MSME definition (Table 8).<sup>825</sup> According to this definition, in force since 2005, MSMEs are evaluated by two key parameters: annual turnover/balance sheet total and number of employees. The turnover criterion for the micro, small and medium enterprises amount to 2, 10 and 50 million EUR, respectively. Consequently, these entities never satisfy the criterion of Union dimension since the minimum amount of individual state-wide turnover threshold required by the EUMR 2004 is 75 million

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<sup>823</sup> Morgan 2000 (n 692) 175.

<sup>824</sup> See 2021 SWD on Concentration Jurisdiction (n 614).

<sup>825</sup> The Table is designed according to the data provided in Commission, 'The definition of micro, small and medium-sized enterprises (Recommendation)' (2003) OJ L 124/36, article 1 and Annex I, article 2. See also Commission, *User guide to the SME Definition* (POEU 2015) 10-11.

EUR (25 million EUR in at least three Member States). Such a setup enables MSMEs to concentrate their market power without additional administrative burden, utilize economies of scale and scope provided by such concentrations, present united front on the internal market, and provide significant competitive constraints to larger entities, *inter alia*, for the benefit of EU consumers.

**Table 8. Defining MSMEs in the EU**

	Micro Enterprise	Small Enterprise	Medium Enterprise
<i>Maximum Annual Turnover/Balance Sheet Total (in million EUR)</i>	2	10	50/43
<i>Number of Employees</i>	fewer than 10	fewer than 50	fewer than 250

To summarize, the Union dimension parameter under the EUMR 2004 partially repeats the initial thresholds adopted upon the establishment of the EU concentration control in 1989. However, these thresholds have been subject to changes, as the experience revealed the necessity to lower them. Meanwhile, the key formula of threshold-setting – paying attention to overall strength of the concentrating entities and cross-border effect of the transaction – stayed the same over the years. In addition, the EU has paid attention to industrial policy considerations. Consequently, the thresholds always covered only large enterprises. Meanwhile, question remains whether the current thresholds truly allow the Commission to encompass all transactions that might harm internal market. This is what we discuss next.

### ***2.3.3. Configuring Union dimension – ongoing challenges and possible solutions***

Maintaining the thresholds that equally well address both competition and industrial policy concerns is not an easy exercise. For one, the scholars did not fail to notice that financial dynamics widens the Community dimension parameter naturally, even though the turnover thresholds might remain unchanged on paper. This happens because the thresholds under EUMR 2004 have never been adjusted for inflation.<sup>826</sup> However, the same can be said for the turnover thresholds that are used for defining MSMEs. Hence, the inflation cannot make the transactions between the latter to come under the *ex-ante* control of the Commission. The latter does not seem to object the widening of its jurisdiction on other grounds as well (including due to an ever-increasing number of clearance applications). This is not surprising, considering that the Commission thought the original thresholds were too high anyway.

In fact, whether the thresholds under the EUMR 2004 are still set too high is an issue for continuous evaluation for several reasons. First, they are not always able to encompass transactions in small/niche markets, even though less voluminous concentrations in these sectors might result in creating a dominant position.<sup>827</sup> Consequently, certain markets are not shielded in any way from anti-competitive concentrations. Next, the existing turnover thresholds are not able to catch concentrations where one of the parties does not cross turnover

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<sup>826</sup> Morgan 1998 (n 612) 456-457.

<sup>827</sup> Morgan 2000 (n 692) 164-65; see also Morgan 1998 (n 624) 111.

thresholds under the EUMR 2004 but owns significant assets. This frequently happens in digital markets where concentrations involve start-ups with high market potential (for example, well-developed user base and/or cutting-edge products). Considering their innovative capability, such start-ups represent a shaking force of the market. Meanwhile, their incorporation into larger companies/conglomerates might take their competitive edge away and make digital markets less competitive.<sup>828</sup> To a certain extent, this problem is relevant for non-digital markets as well, since high thresholds might enable certain undertakings to gain significant power via 'salami tactics' – purchasing many small competitors the turnover of which falls below the Union dimension.<sup>829</sup>

The Commission has considered several solutions to the above-mentioned problems. Some of the discussed, but largely negated, options are: (1) lowering the existing turnover thresholds; (2) introducing market share indicators as alternative jurisdictional parameters; (3) choosing cross-border trade effects criterion as a jurisdictional parameter instead of thresholds.<sup>830</sup> These solutions have been opposed for different reasons. Threshold-lowering is not considered an optimal way due to the fear of corresponding increase in notifications that leads to additional costs both for the enforcer and for the concentrating parties. Having market share indicators as an alternative parameter is considered undesirable due to the hardships of

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<sup>828</sup> Crémer, Montjoye and Schweitzer (n 503) 110-116.

<sup>829</sup> Morgan 1998 (n 624) 111.

<sup>830</sup> A comprehensive discussion regarding the unviability of these and other alternative thresholds is considered in detail in Richard Burnley, 'An Appropriate Jurisdictional Trigger for the EC Merger Regulation and the Question of Decentralisation' (2002) *World Competition* 263, 268-275.

defining the latter. Namely, determination of market share indicators requires market definition. The latter, in turn, is a complicated and time-consuming activity, involving significant analytical engagement from the Commission – something the latter does at the stage of substantive analysis. Consequently, unlike the turnover thresholds (which are more straightforward to calculate), these indicators cannot guarantee an adequate level of legal certainty for the market participants, in terms of whether their proposed concentration is notifiable under the EUMR 2004.<sup>831</sup> Finally, encompassing all transactions with cross-border effects is negated, *inter alia*, due to the fluidity of this concept. This fluidity does not sit well with the legal certainty either.<sup>832</sup>

A preferred solution is making a stronger use of the referrals under the EUMR 2004.<sup>833</sup> This solution sits well with the Commission's recent finding that current turnover thresholds are the most cost-effective way of bringing the majority of problematic transactions under the *ex-ante* evaluation regime and hence, should not be changed.<sup>834</sup> The remaining problematic transactions can be pulled in under articles 4(5) and 22.<sup>835</sup> These articles allow the Commission

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<sup>831</sup> See Morgan 2000 (n 692) 165-167; see also Morgan 2001 (n 612) 456.

<sup>832</sup> Richard Burnley, 'The EC Merger Regulation and the Meaning of "Community Dimension"' (2003) EurBLRev 815, 821.

<sup>833</sup> See 2021 SWD on Concentration Jurisdiction (n 614). For digital markets specifically, see Crémer, Montjoye and Schweitzer (n 503) 124. For scholarly discussion, see Smejkal (n 812). Interestingly, taking advantage of the referral system seems to be a preferred method for the Commission as opposed to amending existing thresholds even before the EUMR 2004 (n 435). See Commission, 'Proposal for a Council Regulation on the control of concentrations between undertakings' COM(2002) 711 final (2002), paras 18-33.

<sup>834</sup> 2021 SWD on Concentration Jurisdiction (n 614) para 209.

<sup>835</sup> Magdalena Laskowska, 'The Control of Community Concentrations Under Regulation No. 139/2004, Part II' (2015) BLR 136, 140-141.

and Member States to bypass the criterion of turnover thresholds and make the concentrations appraisable by the Commission without legislative amendments. Consequently, article 4(5) and article 22 referrals allow for inclusion of less voluminous concentrations with cross-border effects under Commission's *ex-ante* jurisdiction without resulting in an excessive inflow of cases anticipated upon threshold-lowering.<sup>836</sup> The practice reveals that the system functions effectively – article 4(5) referrals constitute around 5% of all notified cases,<sup>837</sup> thus capturing a significant number of transactions for the *ex-ante* evaluation. Consequently, the solution is optimal both from competition and from industrial policy viewpoints – it ensures screening of almost all problematic transactions without placing excessive burden to smaller market participants.

Due to the above-described relevance, the referral system has been subject of constant refinements.<sup>838</sup> The most recent change concern the application of article 22 of the EUMR 2004. This article, initially adopted to support the Member States without merger control regimes and expected to become irrelevant over time as all of them introduced *ex-ante* control at national levels,<sup>839</sup> has been increasingly advocated by the Commission as a tool to target problematic

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<sup>836</sup> See Commission, 'Statistics on Merger Cases' (n 696). March 2021 inclusive, 380 referrals have been accepted under Article 4(5) and 38 referrals – under article 22. See also Morgan 2000 (n 692) 190-191.

<sup>837</sup> See 2021 SWD on Concentration Jurisdiction (n 614) para 146.

<sup>838</sup> For the overview of the refinements of the Union dimension parameter over the years, see 2021 SWD on Concentration Jurisdiction (n 614) paras 2-10; 2014 White Paper (n 627) paras 59-75.

<sup>839</sup> Morten Broberg, 'Reforming the Merger Control Regulation's article 22 referral mechanism: on the member states' access to refer mergers to the European Commission' (2012) 33 ECLR 215, 217-218.

concentrations which the latter cannot catch due to high turnover thresholds. Interestingly, while article 22 allows Member States to refer concentrations without Union dimension, it does not specify whether such concentrations should be subject to national *ex-ante* jurisdiction in the first place.<sup>840</sup> Commission recently clarified this issue by Article 22 Guidance<sup>841</sup> that allowed Member States to refer concentrations even when they do not possess relevant jurisdiction.<sup>842</sup> According to the Commission, such solution most effectively deals with the concentrations ‘...where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential’,<sup>843</sup> as opposed to other alternatives such as threshold-lowering, since it avoided the necessity of legal amendments and resulted in the lesser number of better targeted notifications.<sup>844</sup> The Commission was also quick to implement the new approach in practice, as illustrated by the recently launched *Illumina/Grail* assessment.<sup>845</sup>

The new approach encountered criticism on the grounds that it fails to provide a necessary legal certainty to the concentrating parties who, absent the new interpretation of

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<sup>840</sup> See 2005 Referral Notice (n 810) paras 42-44, indicating that article 22 referrals need to satisfy only two criteria: a) cross-border trade effect needs to be shown and b) the transaction should significantly endanger the competitive process at least on one national market within the Union.

<sup>841</sup> Article 22 Guidance (n 534).

<sup>842</sup> Ibid, paras 6 and 11.

<sup>843</sup> Ibid, para 19.

<sup>844</sup> Ibid, paras 9-11.

<sup>845</sup> Commission, ‘Mergers: Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina’ (Press Release) (2021) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_3844](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3844)> accessed 31 January 2022.

article 22, might not have any obligation to notify their transactions either at the national or supranational level.<sup>846</sup> The fact that the Article 22 Guidance enabled referrals within the six months of the implementation of a transaction under question only amplified the criticism,<sup>847</sup> as this has effectively turned an *ex-ante* control tool in an *ex-post* one. The new approach is already under the consideration of the CJEU.<sup>848</sup> This story shows that the fine-tuning the Union dimension parameter is an extremely complicated exercise that requires weighing multiple factors and even after a very careful consideration, the outcome might not be easily implementable in practice.

To summarise, even after 32 years of refinements, the Union dimension parameter still faces challenges of optimal configuration. The parameter is affected by multiple factors, including the maintenance of proper balance between competition and industrial policies, upholding of the principle of subsidiarity, and guaranteeing legal certainty for market participants. So far, the EU has opted for relatively unchanged and high turnover thresholds in combination with frequently applied referral mechanism. Even though this combination has proven its usefulness so far, upholding it does not seem to be an easy exercise, sometimes even leading to the interpretations that are viewed as too drastic and intrusive. This once again shows that there is no perfect solution – just a constant process of adjusting the discussed parameter to ever-changing market reality.

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<sup>846</sup> See Bushell (n 546).

<sup>847</sup> Article 22 Guidance (n 534) para 21.

<sup>848</sup> Case T-227/21 *Illumina v Commission* – pending.

#### *2.3.4. Configuring Union dimension – A lesson from the EU Experience*

A primary lesson learned from the overview of the Union dimension is to **design it in a balanced and adjustable way**. Under the EU law, this involves two principal exercises. Namely:

- **Thresholds balance competition and industrial policies.** First, by identifying voluminous transactions that could impede market competition, the administrative resources of the EU Commission are allocated optimally. Next, by excluding transactions incapable of producing adverse market effects, the EU relieves smaller entities from the extra burden, allowing them to join their market power easily and become more competitive on the internal market. This is one of the reasons that turnover thresholds never cover MSMEs, as defined for the EU purposes.
- **Fine-tuning mechanisms are maintained** to keep up with the changing market reality and catch all transactions that might be harmful for the competitive conditions of the market. In the EU, this is managed by the system of referrals. The latter encompasses smaller but still potentially harmful transactions, allowing the Commission to have an optimal jurisdiction without frequent legislative changes. Simultaneously, such fine-tuning upholds the subsidiarity principle on a case-by-case basis, enabling the assessment by the administrative body (either national or supranational) that is the most fit for the purpose.

### 3. Concluding remarks

The overview of jurisdictional parameters of the EU *ex-ante* control enables to draw several general conclusions. First, the broad configuration of the jurisdiction seems to be welcomed by the Union as an effective way to prevent harmful concentrations of power on the internal market. Simultaneously, such configuration puts the Union against a dual challenge. First, the concentration framework must effectively manage an extensive and constantly widening inflow of applications resulting from the broad configuration of jurisdictional parameters.<sup>849</sup> Second, it needs to ensure consistency in their application to guarantee a necessary legal certainty.

In the first respect, the key task of the framework is to ensure that the Commission has enough time and resources to handle *ex-ante* assessment while market participants are not deterred from pro-competitive concentrations due to prolonged and overburdening procedures. This is achieved by various tools, such as contacts at the pre-notification stage,<sup>850</sup> simplified notifications for less suspicious concentrations,<sup>851</sup> two-phase investigations where most of the

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<sup>849</sup> See Morgan 2001 (n 612) 353-354, where the author provides statistical analysis of concentration notifications, noting that the inflow of the cases has been far significant than expected.

<sup>850</sup> Laskowska (n 835) 136. See also 2021 SWD on Concentration Jurisdiction (n 614) para 52, suggesting that this option is frequently used by the parties. For the benefits of pre-notification, see Ioannis Kokkoris and Howard Shelanski, *EU merger control: a legal and economic analysis* (OUP 2014), 82; see also Serdarevic and Teply (n 614) 255.

<sup>851</sup> See 2021 SWD on Concentration Jurisdiction (n 614), *inter alia*, paras 5 and 40.

transactions are cleared during the first stage due to their non-problematic nature,<sup>852</sup> restricted time-limits of decision-making,<sup>853</sup> and structural/behavioural remedies allowed to save largely pro-competitive transactions from outright prohibition.<sup>854</sup> Commission's work regarding the procedural simplifications is constantly ongoing.<sup>855</sup> Such a setup guarantees that, despite broad *ex-ante* jurisdiction at the EU level, a vast majority of notified concentrations gets cleared at the initial stage while only a marginal number of transactions gets prohibited. This highlights the principal function of jurisdictional parameters – they serve as the measures of precaution, not as the thresholds beyond which transactions are always condemned. Meanwhile, their broad configuration allows Commission to keep a close eye to the concentration trends of the internal market, have a good awareness of its dynamics, and when necessary, adjust proposed transactions via remedies so that the latter bring promised efficiencies while leave these dynamics unharmed. In this respect, optimal configuration of an *ex-ante* jurisdiction is a front-line safety net that ensures the effectiveness of next steps and guarantees the sound functioning of the entire system.

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<sup>852</sup> The appraisal procedure according to these phases are laid down in EUMR 2004 (n 435) arts 6 and 8, respectively. See also Commission, 'Statistics on Merger Cases' (n 696) - as of 21 December 2021, only 288 cases made it to the II phase out of 8367 notified concentrations.

<sup>853</sup> See EUMR 2004 (n 435) art 10.

<sup>854</sup> See *ibid.*, arts 6(2) and 8(2).

<sup>855</sup> See, for example, Commission, 'A simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (Notice)' [2013] OJ C 366/5. For more recent developments, see Commission, 'Merger policy package of 26 March: Evaluation and follow-up actions' (2021) <[https://ec.europa.eu/competition-policy/public-consultations/2021-merger-control\\_fr](https://ec.europa.eu/competition-policy/public-consultations/2021-merger-control_fr)> accessed 31 January 2022.

In the second respect, the legal certainty is an essential element for every action taken by the EU while (re)defining its *ex-ante* jurisdiction. Current developments surrounding the novel interpretation of the article 22 of the EUMR 2004 indicate that even when the proposed solution to Union's jurisdictional problems is logical and cost-effective in every other way, an absence/lack of the legal certainty might put the norm/practice under fire. One could argue that legal certainty acts as an outer boundary for the jurisdictional parameters of *ex-ante* control. Although considered at the example of the EU concentration framework, this statement could easily apply outside the borders of the Union as well.

The final noteworthy issue is the importance of the subsidiarity principle while defining EU's *ex-ante* jurisdiction. In the Union, concentration control functions are divided between the national and supranational levels according to the one-stop-shop principle. This gives the EU concentration framework a somewhat unique setup, parts of which cannot be replicated by any national framework. The clearest example is the system of referrals which are an EU-specific feature of the concentration control. Consequently, while the basic principles of the jurisdiction configuration can be learned from the Union, adoption of particular parameters requires a tailored approach.

## Chapter VI. Applying EU Experience – Optimizing *ex-ante* Control

As Chapter IV reveals, the concentration framework established in Georgia at the beginning of the Revival Phase was substantially amended and approximated to the respective EU framework in 2020. However, a significant gap remains in configuring jurisdictional parameters for the *ex-ante* control. This is expressed in three principal ways: 1) the notion of concentration is very narrow and formalistic; 2) exemptions from notification obligation are too broad; and 3) turnover thresholds are so low that they encompass concentrations involving small enterprises. These problems have become blind spots for the national law/policymakers since the latter are primarily concerned with legislative problems that put the principal enforcer – the GNCA – in a difficult position in its daily practice. In contrast, the suboptimal configuration of the *ex-ante* jurisdiction has resulted in an extremely low level of concentration notifications for the past eight years. This seems not to be considered as a particularly problematic trend by the relatively new and understaffed Agency that has multiple other functions. Meanwhile, ‘fixing’ the jurisdictional parameters is desirable both from enforcement and market effectiveness viewpoints, while delaying of action in this respect makes changes harder (due to path dependency) and deprives the GNCA a chance to be better aware of the competitive situation on national markets.

Chapter V provides a significantly different picture for the EU. Here, the concentration framework has been effectively functioning for 32 years, while its jurisdictional parameters

have been constantly adapted to changing market realities. More specifically: 1) the concept of concentration is configured broadly and qualitatively; 2) exemptions are configured narrowly and applied restrictively; 3) turnover thresholds are set considerably high. Consequently, they never encompass MSMEs, while the fine-tuning is enabled via the system of referrals. The configuration of the jurisdictional parameters reflects a number of important factors in the Union, such as the balance between competition and industrial policies, upholding the principle of subsidiarity, and ensuring legal certainty for market participants. Overall, the scope of the *ex-ante* framework is designed as a safety net rather than a set of parameters leading to inevitable prohibition of notified transactions. This requires a careful configuration of the jurisdictional parameters and constant adjustment according to the changing market realities. The latter proves to be a dynamic but quite difficult process even after more than three decades of framework-building.

The experience summarized above, albeit sometimes EU-specific and non-transferable, is still relevant for Georgia since it helps to identify three key lessons for configuring the parameters of the *ex-ante* jurisdiction. First, it is better to define the concept of concentration solely by qualitative parameters. Next, exemptions work best when they are defined narrowly and applied restrictively. Finally, turnover thresholds should be drafted in a balanced and adjustable way. This chapter will analyze how Georgia can utilize these three lessons, considering the peculiarities of the national framework identified in Chapter IV.

# 1. Applying a lesson on the concept of concentration

As the subchapter V.2.1.3 revealed, the EU experience suggested to **define control solely by the quantitative parameters**. This lesson has two aspects: (1) the definition should not be constrained by formalities; (2) the flexibility of the notion of control should not translate into the absence of definitional boundaries.

## 1.1. The definition should not be constrained by formalities

Since Georgia does not have an overarching definition of concentration, the first step in utilizing the EU experience would be adopting one. This could be done by introducing an amendment to the article 3 of the GLC (titled ‘definition of terms applied in the law’) and using the EU definition – change in control on a long-lasting basis – as a blueprint.

Namely, the EU experience reveals that the definition of concentration is best to be drafted in general terms. Similarly, the legal definition of control works effectively if the latter equates to a possibility of exercising decisive influence without any additional formal qualifiers. In Georgia, both aspects can be internalized by removing the list of four specific forms through which a decisive influence should be exercised from the article 3(1) of the GLC.

Having an overarching definition of concentration and absolving the notion of control from formalities is especially relevant for Georgia for closing the existing legislative loophole, whereas market participants can avoid notification obligation by acquiring decisive influence without using any process explicitly listed in article 3(1). The statistics of low notification

numbers, coupled with the general ability of business entities to use the legislative landscape for their own benefits, gives enough ground to assume that this possibility has been and will be actively used to avoid the procedure of *ex-ante* assessment. However, once the notions of concentration and control are defined purely qualitatively, transaction creating the possibility of decisive influence will be counted as a concentration notwithstanding their form. This will actively encourage undertakings to notify their transactions to avoid substantially harsh consequences (including fines and concentration reversals) that have been introduced by the legislative amendments of 2020.

Making the above-mentioned concepts qualitative raises the issue of their proper interpretation. As explained, due to the nature of the Georgian administrative law, if such interpretations are not provided by legal (including soft law) measures, the undertakings have a discretion to interpret legal provisions in their favour, even if this means avoiding notifications. This problem can be solved by following the EU experience in soft law making. Namely, the key elements of concentration, such as control and decisive influence, should be elaborated in the GNCA guidelines.

This is especially important for a country like Georgia, where *ex-ante* control is relatively new and consequently, market participants require significant guidance in terms of identifying notifiable transactions. Such guidance can be provided by the GNCA and include detailed explanation regarding the concept and types of control, as well as ways of establishing the latter. Considering Georgian practice, two key factors to be covered by this guidance would be the determination of decisive influence and treatment of certain borderline cases such as

control via minority shareholding. In addition, treatment of SOEs for the purposes of concentration would be an issue to consider since Georgia, due to its Soviet legacy, still operates a large number of such enterprises.

The above-mentioned guideline will be useful for the GNCA as well because, as of today, it seems to be struggling with the issues of properly defining whether transaction constitutes a concentration. This was exemplified by the *GDMC/Levor* case, where the acquisition of large minority shareholding was deemed to be a concentration, even though a majority shareholder was also present and there was no explicit evidence of joint control. This case reveals that sometimes, even the Agency struggles with definition of the concept of concentration in the absence of respective guidelines, even resorting to over-regulation – i.e. exercising the *ex-ante* control for transactions such fall outside of its jurisdiction.

Finally, without adopting the guidance clarifying the notion of concentration, Georgia might end up with blind spots in its jurisdiction again. Namely, the presence of broad definitions of relevant terms (concentration and control), coupled with the absence of administrative interpretation and uncertainty of the Agency in this respect, will highly likely result in diverse interpretations among market players, while most of such interpretations would tend to favour the position of notifying parties. Clarifications provided by the administrative guidance document would discourage such practices.

As for the notion of longevity – another aspect of the concept of concentration in the EU – Georgian lawmakers need to determine whether it should be one of the criteria for

counting a transaction as a concentration. In this respect, the country can choose between two possibilities. First, it could maintain the *status quo*, according to which this criterion does not form a part of the notion of concentration but is used to exempt certain concentrations from the notification obligation. Second, it could adopt the EU approach where longevity, alongside the control shift, is an essential element of concentration. In this scenario, the notification obligation does not arise since temporary control shifts are not considered concentrations at all. Both scenarios finish with the same outcome – parties do not have to notify their transactions. However, it seems that the EU approach has a slight advantage. More specifically, in Georgia, concepts of concentration and longevity are determined separately. Hence, even if the parties are sure that their transaction constitutes a concentration, they are left free to interpret what longevity means and decide the issue of notification accordingly. In contrast, since the EU approach makes longevity an essential element of concentration, parties are encouraged to notify the transaction in borderline cases as well, where they have doubt whether one of the parameters (control shift or longevity) are present. This gives the enforcer more control over *ex-ante* jurisdiction – something the GNCA direly needs now.

Several factors should be kept in mind while turning the notion of control from a formalistic to a more qualitative parameter. First, as the EU experience reveals, the qualitative definition of control is quite broad and the resulting scope of *ex-ante* control catches far more cases than initially expected.<sup>856</sup> However, such widening should be welcome since it will make

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<sup>856</sup> Morgan 2000 (n 692) 162.

the Georgian concentration framework more effective. Unlike now, the latter will be able encompass and assess every transaction with a capability to alter competitive conditions of the market. Consequently, the GNCA will better uphold the key competition policy objective – protection of market competition as a process. Meanwhile, according to the EU experience, an increased case inflow resulting from a qualitative definition of the concept of concentration could be balanced by various procedures, including pre-notification consultations, simplified notifications and differentiated (one and two-phase) assessments. The GNCA already possesses majority of this tools after 2020 amendments. Consequently, they will mitigate the administrative burden placed on the Agency, while the benefits of qualitative definition will outweigh the costs of remaining workload.

Georgia also does not need to worry about the fact that broadening the pool of notifiable transactions might increase the number of prohibited transactions. First, the EU experience reveals that broad jurisdiction does necessarily translate in lots of prohibitions.<sup>857</sup> In fact, in its 32-year experience, the Commission prohibited only 30 out of 8367 notified concentrations.<sup>858</sup> This indicates that having a wide jurisdiction is just a means of a more effective market screening, while prohibitions are the last resort for extremely problematic transactions that cannot be ‘saved’ by remedies. Such prohibitions are a necessary requisite of an effective control. Hence, their occurrence needs to be viewed as a necessary means of upholding market

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<sup>857</sup> Billows, Kohl and Tarissan (n 809) 769.

<sup>858</sup> Commission, 'Statistics on Merger Cases' (n 696).

competition. After all, the fact of having a zero-prohibition result is not a positive sign just in itself – it rather means that the concentration framework is not doing its job properly.

Another issue to be kept in mind is a level of uncertainty that the qualitative definition brings in terms of identifying notifiable transactions. Even if the GNCA issues explanatory guidelines, a comprehensive legal and factual assessment will be required on a case-by-case basis to establish whether notified transactions really amount to concentrations. For the Agency, this means increase in workload in the process of assessing jurisdictional issues. This might be especially problematic since the law only allows five working days for determining *ex-ante* jurisdiction. For the market participants, this means notifying all transactions that could possibly amount to concentrations, to avoid sanctions for gun-jumping. However, these difficulties do not outweigh the benefits of qualitative definition of concentration. Namely, the latter allows to identify all transactions where decisive influence could lead to distortion of the competitive structure of the market. In this respect though, it would be advisable to revoke the above-mentioned five-day rule. As the EU experience reveals, jurisdictional issues might be quite complicated and hence, require more time for assessment.

Finally, a qualitative definition of concentration is a preferred way to go since it empowers the enforcer, as indicated by the EU experience. For one, the latter becomes a leading body determining the boundaries of the *ex-ante* jurisdiction since it gets the final say in borderline cases whether notified transactions are subject to substantive assessment. Next, the qualitative definition evolves over time and is easily to adjust to new challenges posed by the markets. This gives the the enforcer more control over the jurisdictional boundaries since the

latter is the one interpreting the notion of concentration via its soft law tools. Finally, a qualitative definition helps the enforcer to pay more acute attention to the markets by screening more cases. While most of these cases might be cleared, the *ex-ante* framework still serves as a precautionary net, catching and substantively evaluating all transactions that could have a long-lasting negative impact on the market. Overall, such empowerment supports the effectiveness of the enforcer and the concentration framework at large, while the misuse of power is excluded via judicial review. This arrangement, that has been working effectively in the EU for the past 32 years, is also desirable for Georgia.

## **1.2. Notion of concentration should have its boundaries**

This aspect is especially relevant in the process of drafting relevant GNCA guidelines. In Georgian context, carefulness around these boundaries is already required in cases involving minority share purchases. As the EU experience indicates, while such purchases may well amount to the acquisition of control, they should be assessed carefully on a case-by-case basis, considering their factual and legal circumstances. Union's experience also reveals that while it is easier to show control acquisition above certain amount of share purchases, the exact percentage beyond which such acquisitions constitute concentrations does not exist. Georgia seems to be going in an opposite direction, as exemplified by *GDMC/Levor* case. Namely, if the minority purchase is large enough (here 45.99%), acquisition of control is assumed even in presence of a majority shareholder and simultaneous absence of special minority rights enabling the decisive influence. Such outcome goes against the logic of qualitative definition of

concentration – the latter is linked to the acquisition of a possibility to exercise such influence: something that should always be critically assessed in borderline transactions. That is why the EU experience indicates that there are points beyond which the concept of concentration should not be stretched, even if the Commission believes that a jurisdictional expansion is necessary to maintain an effective *ex-ante* control (for example, in cases of non-controlling minority shareholders). Definitional boundaries are essential for maintaining a clear idea what exactly control is and thereby guaranteeing legal certainty for market participants. This statement is especially relevant for Georgia since the novelty of the qualitative definition of concentration will already bring certain level of uncertainty regarding the scope of *ex-ante* control. Hence, creating additional uncertainties should be avoided to guarantee a sound functioning of the entire framework.

In this respect, it would be also beneficial if GNCA could pay more attention to elaborating on various notions related to jurisdictional matters while assessing concentration notifications. As the EU case-law reveals, atop of legal definitions and soft-law clarifications, Commission decisions always devote a certain amount of time and space to the identification of why particular transaction under assessment constitutes a concentration, and what type of concentration it is. This happens even in cases where the existence of concentration is straightforward. In borderline cases, the analysis is far more detailed and nuanced. It would be advisable if the GNCA also makes such analysis as a part of its decisional practice. This would both help avoiding mistakes in determining proper jurisdiction and help the enforcer to build

its own case-law regarding the problematic issues of delimiting the proper scope of concentration control in Georgia.

## **2. Applying a lesson regarding exemptions**

According to the subchapter V.2.2.3, the EU experience reveals that the **exemptions should be defined narrowly and applied restrictively**. This lesson has two aspects: (1) exemptions should apply only to a limited set of situations where the concentration does not arise and (2) broadening of the list of exemptions should be constrained by adopting a uniform approach towards the definition of control for the purposes of the concentration framework.

### **2.1. Exemptions should apply only to a limited set of situations where the concentration does not arise**

The idea behind narrow definition of exemptions is to ensure that they apply only to those transactions where the acquiring party does not intend to use its powers for the purposes of operating on a particular market via the acquired company – i.e. control is not acquired with the aim to affect the market in any way. That is why EU exempts, for example, temporary acquisitions or those by state bodies for the purposes of carrying out their administrative duties.

Georgia has largely utilised this experience, unless one considers the treatment to interdependent entities, as defined by the GLC. The latter exemption is problematic on multiple

grounds. However, the most pressing issue is the absence of explanation why concentrations between such entities are exempt, as the key component of exemptions – absence of the aim to affect the market – is not present. Quite the opposite, concentration between the interdependent entities is a transaction between two or more market participants that most of the time do not count as parts of a single economic entity. Consequently, removing of this exemption altogether would be a welcome step.

## **2.2. Same notion of control should be applied across the board**

The EU documents note more than once that the term control, as defined for concentration appraisals, might exhibit significant differences from the same term used for corporate, tax, environmental, and other types of law. Hence, it is advised to separate these definitions from each other completely and do not use definitions of control under other areas of law during concentration appraisals. Utilisation of this experience would be immensely beneficial for Georgia since it would close a major jurisdictional gap existing in the GLC today. Namely, as explained in Chapter IV, Georgia currently uses its own (narrower) definition of control for the purposes of identifying which transactions are concentrations. Meanwhile, due to the wording of the term interdependent entities, a (broader) definition under the tax law is used to determine some of the exemptions. This creates a legislative loophole, allowing parties to first acquire control for the tax law purposes and achieve the exempted status, while planning to

concentrate their power next and thus avoid notification obligation. Usage of the same definition of control across the board would solve this problem altogether.

The situation described above should be distinguished from instances where a particular type of strong interdependence makes the concentrating entities part of a single economic unit. As the EU experience indicates, such transactions should not be notified because they are purely internal restructurings and do not amount to acquisition of control. Distinction between these two situations is conditioned by the difference between the notion of interdependent entities as defined by GLC and the notion of single economic unit as defined under the EU decisional practice. While the former encompasses a large group of connected persons and enterprises, including family links, the latter represents a unit comprising of several legally separate entities that are represented on the market by a single economic/business strategy. The level of interconnection between the parts of such entity is so strong that for the purposes of competition law, they already represent a single unit/undertaking. Transactions within this unit do not amount to a concentration since they represent a change of form instead of a substance – the outward market behaviour of the unit and benefits/risks it poses for the market remain the same. Adoption of this definition would be beneficial for Georgia since this would once again affirm the importance of control shift in determining whether proposed transactions amount to concentrations. In addition, such a definition would not widen the list of exemptions unnecessarily.

### **3. Applying a lesson regarding turnover thresholds**

According to the subchapter V.2.3.3, the lesson learned on the basis of the EU experience is to **draft these thresholds in a balanced and adjustable way**. The lesson can be broken down into two aspects: (1) thresholds should keep a healthy balance between competition and industrial policies and (2) fine-tuning mechanisms should be maintained to keep up with the changing market reality.

#### **3.1. Keeping a healthy balance between competition and industrial policies**

As the EU experience reveals, the turnover thresholds indicated in the 2004 Merger Regulation are far higher than the thresholds below which EU institutions deem entities to constitute MSMEs. Such a configuration serves a double purpose. First, the concentration assessment conducted by the EU Commission and resulting prohibition decisions concerned truly major mergers, with a strong potential to significantly impede the effective competition (although, the practice has seen a significant number of clearances as well). Second, it also supported EU Industrial Policy in terms of encouraging MSME creation and market participation. Here the EU acknowledged that these entities need to be flexible in transactions where they require to unify their market power to achieve better market outcomes. Moreover, while concentration appraisals might not be a significant burden to large corporations, it might constitute an important financial and economic strain on smaller entities. Hence, the thresholds are set in a way to both allow smaller market participants to get stronger by uniting their market power

and make sure that this power does not become so vast that it impedes competition on the relevant market.

Georgia could use the same experience in its own threshold setting. In this respect, the current thresholds are set in a way that they do cover MSMEs. Interestingly, the GLC does not set the thresholds – the power of doing so is delegated to the GNCA. The latter has maintained low thresholds under a recently adopted concentration by law – RCNA 2020. This configuration is problematic since the Agency obliges itself to assess the concentrations that are so small that could not amount to any meaningful change on the market, let alone cause SIEC.

Consequently, utilisation of the EU experience suggests raising the existing thresholds up to the level where, at least, they would not cover MSMEs. Under the current Georgian legislation, this would mean to set individual turnover thresholds above 50 million GEL and combined turnover thresholds above 100 million GEL – i.e., at the point where a large enterprise is created according to LARA standards. This could be done by the GNCA itself since the amendment of the RCNA 2020 does not require an external approval. In addition, such an increase would be logical from both competition and industrial policy perspectives, since it would enable parties of the small national market to concentrate their market power enough to be effective in the first place.

One could argue that setting high thresholds in the EU was conditioned by its desire to have large market participants and hence, be competitive on the international level – something which is impossible to achieve for Georgia due to its small market size. However, setting of the

turnover thresholds higher should not necessarily have the same rationale in both jurisdictions. Important thing is that Georgia needs to use higher thresholds for its own purposes, to encourage emergence of strong competitors on the market. Following the EU example in high thresholds setting helps to achieve this objective.

### **3.2. Maintaining fine-tuning mechanisms to keep up with the changing market reality**

Being a member of a global market, Georgia sooner or later must face all the problems associated with digital era, including killer acquisitions and usage of ‘salami tactics’ by larger market participants. However, it is clear from the outset that the EU experience in fine-tuning will not be applicable in a national setting. Namely, the referral system, which is an efficient way of bringing in additional problematic concentrations under the Commission’s radar cannot be used by the GNCA which does not have multi-level system of competition enforcement. Meanwhile, it still has regional markets that could be monopolized easily if the turnover thresholds under the RCNA 2020 are set too high. Hence, the EU experience of having significantly high turnover thresholds balanced by referrals will not work in Georgian reality – an alternative mechanism needs to be found instead.

The first step will be not to set thresholds too high. 100 million GEL – a point at which enterprise is considered to become large, seems like an appropriate joint turnover threshold. Meanwhile, once the concentration creates a large enterprise or enables it to enlarge its size

(including by killer acquisitions), the resulting concentration might significantly affect competition on national market. Hence, surpassing of 100 million GEL threshold could be deemed enough to render the transaction notifiable under the RCNA 2020, notwithstanding the individual turnover thresholds of the transaction parties. This way, Georgia could address the problem of killer acquisitions that the EU solves via referrals.

The second step will be to consider effects of competition on regional markets. Players on these markets rarely reach the turnover of 100 million GEL. Hence, some form of concentration control is still necessary for medium-sized enterprises that might have significant market power in certain parts of Georgia. For these purposes, the RCNA 2020 could also introduce an alternative set of thresholds and control concentrations where joint turnover threshold is between 50 and 100 million GEL. In these instances, however, protection of micro and small enterprises from excessive notification burden is necessary. Hence, setting of the individual thresholds is advised in a way that the latter are not covered. This would mean that for concentrations with joint annual turnover between 50 and 100 million GEL, an individual turnover threshold for each participant should be 20 million GEL and above. Simultaneously, considering the fact that such configuration would extend *ex-ante* control on medium-sized enterprises, GNCA could introduce a simplified notification procedure which will no be burdensome for the latter. This way, the Agency would effectively balance a public need to ensure healthy market competition via *ex-ante* control and a private need of market participants to operate within a system with less bureaucracy.

The above-mentioned two-step configuration captures the essence of EU experience in threshold setting and fine-tuning, since it enables the GNCA to appraise larger enterprises harsher while giving more leeway for smaller ones due to the fact that concentrations between them cannot substantively affect the competition on Georgian national market. The final advantage that the GNCA possesses is the ability to freely adjust these thresholds by its own by-law. This way, the Agency will always be able to monitor market situation and alter the thresholds accordingly.

## SUBTITLE II.II. Optimizing the enforcement: focus – *ex-post* control

The first antitrust provisions introduced by LMAC (1996) instantly became an enforcement focus in Georgia - the combined caseload of antitrust cases made up around 44% of the nationwide enforcement portfolio.<sup>859</sup> The Stagnation Phase (2005-2014) halted this trend, as the law of the day – LFTC – equated competition law infringements exclusively to state actions. The Revival Phase (2014-present) reinstated antitrust regulation via the current law – GLC. However, the enforcement experience lost during the Stagnation Phase had to be learned from scratch.

Substantive antitrust provisions of the GLC are almost identical to the EU blueprint. Namely, article 6 GLC (abuse of dominance) mirrors Article 102 TFEU, while articles 7 (anti-competitive agreements) and 9 (exemptions) GLC correspond to Article 101 TFEU. The apparent difference is that while Georgia focuses on infringements happening on the national market, the EU is concerned with protecting internal market competition. As for procedural law, GLC and its antitrust-related by-laws<sup>860</sup> include all major enforcement tools applied by the EU under Regulation 1/2003.<sup>861</sup> Naturally, legal provisions are not identical since the national legal framework requires adjustments to incorporate competition provisions transplanted from

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<sup>859</sup> Lapachi 2001 (n 81) 378.

<sup>860</sup> OCA 2020 (n 578); RCI 2020 (n 579); RLP 2020 (n 580)

<sup>861</sup> Regulation 1/2003 (n 430).

a supranational jurisdiction. Nevertheless, the updated legislation creates a solid basis for effective antitrust enforcement on Georgian markets in line with the AA obligation.<sup>862</sup>

However, well-written legislation does not automatically guarantee optimal enforcement, as laws leave significant room for administrative discretion. The latter is a valuable tool for competition enforcers, considering the complexity of antitrust cases and the peculiarity of their handling. Meanwhile, this discretion might also curb the optimized legislation from achieving competition policy objectives. Hence, optimal legal rules need to be coupled with an optimally exercised administrative discretion to guarantee effective antitrust enforcement.

Learning how to apply administrative discretion properly is a gradual exercise involving a significant amount of trial and error.<sup>863</sup> In this respect, Georgia has been active from the very start. It took less than eleven months for the newly established GNCA to issue its first antitrust decision<sup>864</sup> and slightly more than a year to establish the first major infringement.<sup>865</sup> This situation left no room for slow and gradual learning. The necessity to engage in enforcement from the start was coupled with the legislative shortcomings of the initial framework. These included the obligation to conduct a full admissibility procedure on every application and

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<sup>862</sup> AA (n 1) art 204(1)

<sup>863</sup> Kovacic and Lopez-Galdos (n 16) 110-111.

<sup>864</sup> GNCA, *Tskaltubo Spa Resort – Article 6* (Order N31, 04/03/2015). Note: GNCA was established on 14/04/2014.

<sup>865</sup> *Fuel Companies I – Article 7* (n 161)

complaint lodged to the GNCA,<sup>866</sup> relatively short time limits for investigation procedure (from three to ten months),<sup>867</sup> and ineffectively designed investigation tools such as dawn-raids notifiable to the undertakings.<sup>868</sup> Finally, the Agency faced strict judicial review, as revealed by the reversal of its first large-scale infringement decision.<sup>869</sup> A combination of these factors incentivized the enforcer to self-restrain in antitrust enforcement. By 2020 amendments, such self-restraint already counted six years, and there was no guarantee that the ongoing legal optimization would automatically change the established negative trends.

The difficulty of changing established enforcement trends is a familiar problem for the EU too. However, as the Union's antitrust framework has been operating for more than six decades now, the latter is better experienced in solving enforcement-related problems. Unlike in Georgia, the Union had more time to (gradually) implement competition legislation according to its core policy objectives. Meanwhile, it also suffered from path dependencies. To start with, the Commission was careful in its initial enforcement activities – it did not issue infringement decisions until 1966 and was also more gradual in picking up the enforcement pace later on. This approach allowed it to develop the enforcement strategy in a less restricted

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<sup>866</sup> GLC (n 182) unconsolidated version, arts 23-24

<sup>867</sup> Ibid, art 25(1)-(2)

<sup>868</sup> Ibid, art 25(7)-(8) obliged the GNCA to obtain a court order for dawn raids. These orders were obtained according to the standard judicial procedure that mandated informing the addressee (i.e., the undertaking) about the possible inspection. Hence, the raid did not have a surprise element which overrode its purpose.

<sup>869</sup> The decision – *Fuel Companies I – Article 7* (n 161) was overturned by the appellate court on procedural grounds. GNCA was ordered to re-examine the facts. The resulting decision significantly reduced the scope of the established infringement and fines. See GNCA, *Fuel Companies II – Article 7* (Order N04/117, 10/05/2018) 4-5.

manner via both decisional practice and a large number of soft law provisions. The process also immensely benefited from the involvement of the CJEU. While holding the Commission to its usual strict standards of judicial review, the latter provided a wealth of interpretative material via its judgments and preliminary rulings.<sup>870</sup> Meanwhile, as particular enforcement/interpretation trends got established, they proved very hard to change. For example, once the Commission started to expand the list of by-object restrictions under Article 101 TFEU in the late 1980s/early 1990s, it took almost 25 years for the CJEU to curb this trend and re-affirm the restrictive approach toward the concept of anti-competitive object.<sup>871</sup> Consequently, the EU has been well aware of the difficulties of proper usage of interpretation and discretionary powers in antitrust enforcement. The experience of handling these difficulties is especially valuable for Georgia now, as a newly adopted legislation requires a shift in existing enforcement trends to achieve the key competition policy objective, as defined in Chapter III.

To utilize the above-mentioned experience, this subtitle first overviews GNCA's enforcement practice and identifies the areas where self-restricted usage of the enforcer's discretionary powers creates risks or has already resulted in suboptimal investigation outcomes (Chapter VII). Next, the EU enforcement practice is analyzed, using both Commission decisions and CJEU case law, to identify how the Union coped with similar problems and derive specific

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<sup>870</sup> As of 6 February 2022, the search engine of the CJEU (n 559) identifies 324 preliminary ruling cases under the criteria: Subject-matter = 'Dominant position, Agreements, decisions and concerted practices'; Court = 'Court of Justice'; Procedure = 'Reference for a preliminary ruling'.

<sup>871</sup> For a detailed discussion, see subchapter VIII.2.2.1. below.

lessons from its experience (Chapter VIII). Finally, these lessons are applied to Georgian reality to identify how their utilization could optimize the national antitrust enforcement (Chapter IX).

# Chapter VII. Overview of the antitrust enforcement - Georgia

## 1. Introduction

As of February 2022, antitrust enforcement of the Revival Phase counts twenty-eight GNCA decisions, half of which were taken after full investigations<sup>872</sup> and the remaining half concerned inadmissibility. Out of the former, only three decisions established the infringement: two cases concerning article 7 of the GLC<sup>873</sup> and one related to article 6 of the same law<sup>874</sup> (Table 9). At first glance, this does not look like ineffective enforcement, considering the novelty of the GNCA and the legislative problems that were remedied only by the 2020 amendments.

*Table 9. Statistics of Antitrust Enforcement – Revival Phase*

		2015	2016	2017	2018	2019	2020	2021	Total
Article 6 (abuse of dominance)	<i>Inadmissibility</i>	0	0	1	2	3	3	1	10
	<i>Investigation</i>	4	1	1	0	0	1	0	7
	<i>Infringement Decision</i>	0	0	0	0	0	1	0	1
Article 7 (anti- competitive agreements)	<i>Inadmissibility</i>	0	3	1	0	0	0	0	4
	<i>Investigation</i>	3	1	1	1	0	0	1	7
	<i>Infringement Decision</i>	1	0	0	0	0	0	1	2

<sup>872</sup> This statement counts the two procedures – *Fuel Companies I – Article 7* (n 161) and *Fuel Companies II – Article 7* (n 869) as a single case, as these two separate proceedings are pre- and post-judicial appraisal of the same infringement.

<sup>873</sup> Ibid; GNCA, *Audit Service Group – Article 7* (Order N04/31, 09/03/2021).

<sup>874</sup> GNCA, *Geverse Development Ltd. – Article 6* (Order N04/44, 19/02/2020).

However, the quantity of investigated cases does not automatically equate to the high quality of their assessment. On the contrary, an overall high number of incoming cases (antitrust and other areas combined),<sup>875</sup> coupled with the novelty of the enforcer and the deficiency of the procedural legislation, made mistakes inevitable. As the learning by the trial-and-error process is an integral part of a healthy competition lifecycle,<sup>876</sup> the primary task of this chapter is to identify key shortcomings in antitrust enforcement between 2014-2021 that could hinder the attainment of the optimal policy objectives, as identified by the Chapter III.

This chapter addresses the enforcement aspects that go or should go beyond the black-letter law. These aspects are (usually) left open deliberately to enable administrative discretion and the flexibility of substantive evaluation during the investigation process. For example, the legislation prescribes the procedure of investigation commencement. However, the discretion to choose cases could be left to the enforcer, depending on their relevance and magnitude and the existing administrative capacity for their effective investigation. Similarly, the GLC includes substantive provisions prohibiting agreements with an anti-competitive object or effect. However, interpreting the notions of ‘object’ and ‘effect’ is left to the enforcement practice,

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<sup>875</sup> According to the GNCA website, as of 6 February 2022, the overall number of decisions (including inadmissibility ones) stands at 86. These cases include all six areas of the law that form part of *ex-ante* (concentration control, state aid evaluation) and *ex-post* control (anti-competitive agreements, abuse of dominance, unfair competition, infringement of the competition law by state bodies). Antitrust decisions (totaling 28) represent only around 32.56% of the overall GNCA caseload. GNCA, ‘Decisions’ (2022) <<https://gnca.gov.ge/>> accessed 15 April 2022.

<sup>876</sup> Kovacic and Lopez-Galdos (n 16) 110.

subject to judicial review. Hence, the current analysis concerns the GNCA choices of using its interpretation/discretionary powers that can significantly affect the enforcement effectiveness.

More specifically, this chapter evaluates whether the pressure of being a young enforcer, coupled with an intensive enforcement activity and a defective enforcement legislature until 2020, has prompted the GNCA to develop self-restraining enforcement trends via administrative interpretation and discretion. It also analyzes how these trends might harm the entire enforcement process. Such an analysis complements the one conducted in the previous subtitle. Namely, while the former was concerned with the shortcomings of black-letter law, the latter evaluates the enforcement deficiencies that legislative amendments cannot remedy. In other words, this chapter identifies the practices that require shifts in the GNCA attitude (as opposed to the legislative amendments) to implement the already optimized legislative provisions effectively.

## **2. Problematic trends in antitrust enforcement (2014-2021) – breakdown**

The enforcement practice of the GNCA suffers from at least two major shortcomings that threaten the effective implementation of the 2020 legislative amendments. First, the Agency limits the scope of complaint-based investigations by administrative discretion (Problem 1). Next, actual anti-competitive effects are essential to establishing all antitrust infringements (Problem 2). These practices are addressed separately below.

## 2.1. Problem 1 – self-limiting the scope of complaint-based investigations

Nowadays, the GLC includes two possible bases for starting an antitrust investigation: GNCA's own initiative and complaints.<sup>877</sup> The Agency bases self-initiated investigations either on the findings of a market monitoring (Georgian equivalent of market enquiries) or on the application submitted by any entity that possesses the information/evidence of the infringement of Georgian competition legislation.<sup>878</sup> In contrast, complaint-based investigations are initiated when an undertaking that believes it has suffered direct material damage from such infringement submits a formal complaint to the enforcer.<sup>879</sup> Consequently, the latter always involves an entity (complainant), claiming that an anti-competitive agreement or an abuse of dominance has worsened its market position.

Reasonable doubt that a particular anti-competitive action has occurred triggers both investigation types. However, the pre-investigation procedure for them differs in several aspects. First, there are no time limits for self-initiated investigations to create reasonable doubt. The GNCA is not time-barred in market monitoring, which may take several years and morph into an investigation whenever the Agency obtains enough evidence.<sup>880</sup> Similarly, there is no

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<sup>877</sup> RCI 2020 (n 579) art 5(1)

<sup>878</sup> GLC (n 182) arts 3(m) and 22(1)

<sup>879</sup> GLC (n 182) arts 3(n), 22(2) and 23; OCA 2020 (n 578) art 13(2)(a)

<sup>880</sup> Between 2014-2021, the GNCA conducted nine market monitorings. See GNCA, 'Decisions - Market Monitoring' <<https://competition.ge/decisions/market-monitoring>> accessed 7 May 2022. The most recently concluded monitoring concerned pharmaceutical industry and lasted around three years. See GNCA, *Report of the*

time limit to assess the information received via applications. In contrast, complaint-based investigations are preceded by a 30 working-day admissibility procedure,<sup>881</sup> in line with the general standards of administrative complaint admissibility in Georgia.<sup>882</sup> A reasonable doubt should be created within this time.<sup>883</sup> Otherwise, the GNCA is obliged to adopt an inadmissibility decision.<sup>884</sup>

Party engagement at the pre-investigation stage also differs. Self-initiated investigations do not necessarily involve a damaged party. In contrast, the admissibility stage of the complaint-based investigations mandatorily involves one or several allegedly damaged parties – complainants. Consequently, apart from creating reasonable doubt regarding alleged infringement(s), the GNCA needs sufficient evidence of the damage caused to these entities to greenlight the investigation.<sup>885</sup>

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*Pharmaceutical Market Monitoring* (2021) 3. The only monitoring which created a reasonable doubt of infringement concerned the relevant market of hotel online booking platforms. However, market participants stopped the problematic practice during the process of enquiry, upon the Agency request. Hence, the investigation was not initiated. See GNCA, 'Report on monitoring of the market for the hotel online booking platforms' (2019) 15-16.

<sup>881</sup> GLC (n 182) art 23(1) and OCA 2020 (n 578) art 7(1). Note: the procedure could be prolonged by 15 days for complex cases.

<sup>882</sup> GACG (n 650) art 100(1) establishes one month deadline for any administrative complaint-based procedure.

<sup>883</sup> OCA 2020 (n 578) art 13(1)

<sup>884</sup> Ibid, art 13(2)(b)

<sup>885</sup> GLC (n 182) art 24(a) and (c); OCA 2020 (n 578) arts 13(3)(a) and (c). The GNCA will not commence a complaint-based investigation if the complaint is not lodged by the party that has allegedly suffered a direct material damage from an antitrust infringement or if this party does not provide additional evidence (upon GNCA request) that is necessary to create a reasonable doubt of infringement.

The distribution of the burden of proof also differs for the two procedures. For self-initiated investigations, this burden rests on the GNCA – the latter should gather enough evidence to satisfy the threshold of reasonable doubt and move to the investigation stage.<sup>886</sup> For complaint-based investigation, the burden rests on the complainant as the latter is considered a party to the proceeding.<sup>887</sup> Consequently, the GNCA bases the (in)admissibility decision of a complaint on the information supplied by the complainant and the alleged infringer(s). In contrast, self-initiated investigations may be based on evidence procured from multiple sources. This difference is logical from the viewpoint of administrative effectiveness as:

- In self-initiated investigations, the Agency is not restricted in the sources of evidence since it has unlimited time for establishing a reasonable doubt of infringement.
- In complaint-based investigations, the Agency focuses on the information supplied by the complainant and an alleged infringer (defendant) since it has little to no time to gather evidence by other means.

Hence, by placing the burden of proof on the complainant, the GNCA can commence an investigation in a relatively short timeframe, provided that the complainant possesses strong evidence of infringement. This saves the Agency resources from searching for such evidence under extreme time pressure.

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<sup>886</sup> See, *inter alia*, GLC (n 182) art 22(1). GNCA will use the information provided by an application to commence a self-initiated investigation if this information creates a reasonable doubt of the infringement.

<sup>887</sup> GLC (n 182) art 22(2)

The final difference concerns GNCA's role at the pre-investigation/admissibility stage. For self-initiated investigations, the Agency leads the evidence-gathering process. In contrast, it becomes an evaluator during the admissibility procedure for the complaint-based investigations. In other words, while the pre-investigation stage for self-initiated antitrust investigations sees the Agency in its enforcer mode, for complaint-based investigations, the latter assumes the role of a neutral arbiter, assessing the competition dispute between the complainant and the defendant.<sup>888</sup> If the complainant fails to create a reasonable doubt, this arbiter will not commence the investigation. The same will happen if the defendant cannot override the created doubt with an objective justification of its alleged anti-competitive behaviour. The role of the Agency is to reach an educated (in)admissibility decision based on the information supplied from both sides.

As revealed, the two bases of investigation commencement differ significantly on multiple grounds. However, there are no separate legal procedures for conducting self-initiated and complaint-based investigations.<sup>889</sup> In addition, unlike during the admissibility procedure, the legislation mentions a complainant very rarely in provisions concerning the actual investigation. According to these provisions:

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<sup>888</sup> See *ibid*, art 24. Legal provisions under this article clearly indicate the neutral arbiter function of the GNCA. Namely, it can refuse to commence investigation based on a complaint, *inter alia*, because it has already reached the decision in a previous case *between the same parties on the same subject matter* or if it has already passed an inadmissibility decision in a previous case *between the same parties on the same subject matter* while there is no additional evidence provided (emphasis added).

<sup>889</sup> See *ibid*, art 25 and RCI 2020 (n 579)

- The complainant should be notified about the investigation commencement<sup>890</sup> and every prolongation of its initial deadline;<sup>891</sup>
- It has the rights to present its position during oral hearings<sup>892</sup> and to offer its views regarding the proposed commitments;<sup>893</sup>
- It is entitled to receive the draft decision (along with the case file) and to present its position regarding the conclusions reached therein;<sup>894</sup>
- It is allowed to withdraw the complaint at any stage of the investigation.<sup>895</sup>

However, the investigation rules do not oblige the GNCA to restrict its analysis by the evidence of the complainant. The law is also silent on the issue of the complainant's burden of proof at the investigation stage.<sup>896</sup> Finally, the Agency is entitled not to close the case upon the complaint withdrawal if there is evidence proving a significant restriction of competition.<sup>897</sup> Consequently, while the legislation enables the complainant to participate in the investigation

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<sup>890</sup> GLC (n 182) art 23(4)

<sup>891</sup> Ibid, art 25(3); RCI 2020 (n 579)

<sup>892</sup> RCI 2020 (n 579) art 24(4) and 28(5)

<sup>893</sup> Ibid, art 26(2) and (5)

<sup>894</sup> Ibid, art 27(1)

<sup>895</sup> Ibid, art 2(2); GLC (n 182) art 25(9)

<sup>896</sup> GLC (n 182) art 22, clarifies this issue for admissibility stage only.

<sup>897</sup> GLC (n 182) art 25(9); RCI 2020 (n 579) art 2(2)

process, it does not explicitly give the latter a leading role, unlike during the admissibility procedure.

The above-mentioned situation leaves room for administrative interpretation regarding the complainant's role in the investigation process, with two explicit alternatives:

- 1) The GNCA could keep the complainant as a burden-of-proof-bearer during both admissibility and investigation procedures. Such development would put complainants at the forefront of antitrust investigations as they will have to prove both the infringement and damages beyond a reasonable doubt. Consequently, complaint-based investigations would become substantively different from the self-initiated ones since the scope and direction of the former would be determined by the complainant, not the GNCA.
- 2) The Agency could shift the complainant's role upon commencement of the investigation procedure. Namely, while the latter would still bear a burden of proof for damages, the enforcer should prove the infringement (as it does during self-initiated investigations). Consequently, the self-initiated and complaint-based investigation would be substantively the same, while the latter would also include an undertaking that aims to prove damages.

While both options are possible, the second one better aligns the legal provisions of the GLC and its by-laws, as they contain a single set of rules for both investigation types. However,

the GNCA has opted for the first option,<sup>898</sup> thereby significantly limiting the scope of complaint-based investigations.

This limitation has three dimensions. First, the investigation scope is restricted by the complainant's admissibility stage choices. For example, the GNCA will only assess whether the infringement in question has been committed by a particular undertaking(s) identified by the complainant during the admissibility process.<sup>899</sup> This approach already proved problematic in *Duty Free Georgia*<sup>900</sup> – a case concerning alleged abuse of dominance on the relevant market of filtered cigarettes in duty-free zones of Georgia.<sup>901</sup> During this complaint-based investigation, Duty Free Georgia Ltd. – a distributor on the relevant market – claimed that its supplier, JSC Tbilisi Tobacco, abused dominance by terminating the supply contract and forming an exclusive supply agreement with its sole competitor. The case resulted in a non-infringement decision because the GNCA could not establish the dominance of the respondent (JSC Tbilisi Tobacco). However, the Agency indicated that the actions of the complainant's sole competitor - Duty Free Alliance Ltd. – could also constitute abuse. Namely, this undertaking could have formed an exclusive supply agreement with the producer due to its (possible) dominance at the distribution level and excluded its only competitor (complainant) from the downstream market. The Agency also indicated a possible anti-competitive nature – object or effect – of the exclusive

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<sup>898</sup> GNCA, *Geverse Development Ltd. – Article 6* (874) 27-28. See also *Citroen Georgia Ltd. – Article 7* (n 256) 41.

<sup>899</sup> *Geverse Development Ltd. – Article 6* (n 874) 28.

<sup>900</sup> GNCA, *Duty Free Georgia – Article 6* (Order N43, 28/03/2016).

<sup>901</sup> For the relevant market definition, see *ibid*, 39-48.

agreement. However, since the complainant explicitly argued about the abuse of dominance from the cigarette supplier, a possible abuse from a competing distributor and the existence of an anti-competitive agreement were not analysed. According to the GNCA, such analysis was outside the ongoing investigation scope.<sup>902</sup>

Next, as the GNCA puts a burden of proof on the complainant both during the admissibility and investigation procedures,<sup>903</sup> this burden exists equally for infringement and damages. This situation raises the question: will the investigation lead to an infringement decision if the complainant proves the former but not the latter? The GNCA seems to answer this question negatively, as revealed by very first antitrust case – *Tskaltubo Spa Resorts*.<sup>904</sup> The case revolved around two markets: (1) a monopolized (via a 25-year statutory licence) upstream market of underground spa-mineral water; (2) a downstream market of healing/recreational baths where this water represented an essential input. The alleged infringement concerned refusal to supply from the upstream monopoly operator (JCS ‘Balneoservice’) to a downstream competitor (‘Sanatorium Georgia’ Ltd) despite the inability to use a significant amount of existing water supply for its own purposes. The Agency adopted a non-infringement decision because ‘Sanatorium Georgia’ Ltd could not prove direct material damages – before case commencement, the company sold the property within the territory of the spa resort to another undertaking, while having such property was necessary to operate on the downstream market

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<sup>902</sup> Ibid, 9-11, 39-48, 53-57.

<sup>903</sup> *Geverse Development – Article 6* (n 874) 27-28; *Citroen Georgia – Article 7* (n 256) 41.

<sup>904</sup> *Tskaltubo Spa Resort – Article 6* (n 864).

and, consequently, be directly damaged by the refusal. The case indicates that this action might have damaged a new owner of the property though, who was involved in the investigation as one of the addressees of an information request. However, since the new owner was not a complainant, the Agency did not pursue the issue further.<sup>905</sup>

To clarify, the *Tskaltubo Spa Resorts* case was an application-based investigation (pre-2020 legislation allowed such investigations alongside complaint-based ones. Meanwhile, applicants, unlike complainants, did not bear a burden of proof at any stage of antitrust proceedings). However, it set a precedent to approach complaint-based investigations similarly – i.e., adopting non-infringement decisions if complainants could not prove damages, even though the case might lead to another party being damaged by the same investigated action. Such interpretation is concerning as it equates complaint-based investigations to private antitrust litigations. In doing so, it discards the public enforcement nature of the GNCA proceedings that should serve to maintain a healthy competitive process on relevant markets in general (and not only vis-à-vis a particular complaining undertaking).

Lastly, GNCA's interpretations limit the complaint-based investigations at the stage of sanction-setting. More specifically, a recent decision in the *Geverse Development*<sup>906</sup> case suggests that the benchmarking of fines happens according to the damages suffered by the complainant instead of those caused to the entire competitive process on a particular relevant

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<sup>905</sup> See *ibid*, 8-9, 14-16, 18, 19-20, 25-29, 33.

<sup>906</sup> *Geverse Development – Article 6* (n 874).

market. This case concerned a competition infringement by Outdoor.Ge Ltd. – an entity that held an exclusive 12-year permit of outdoor advertising granted by the Tbilisi City Hall in 2009 through an open auction. This permit enabled two activities: 1) sub-permitting parts of it to other undertakings that desired to offer outdoor advertisement services to end-consumers (‘upstream market of advertisement permit-issuing services’); 2) directly offering the same outdoor advertisement services (‘downstream market of outdoor advertisement services’). As an exclusive permit-holder, Outdoor.Ge Ltd. was dominant on the upstream market while it also operated downstream. The alleged abuse consisted in the refusal to grant a sub-permit to Geverse Development Ltd. – a downstream operator – causing its inability to competitive entry on the downstream market. The GNCA confirmed the abuse – refusal to deal – and imposed the fine of 32 358 GEL<sup>907</sup> (around 8 000 GBP). The Agency noted that the maximum fine could have been higher, as GLC allows fines up to 5% of the annual turnover for the first-time antitrust infringements.<sup>908</sup> Therefore, a lengthy rationale was provided, justifying the fine calculation. As this rationale reveals, the complaint-based character of the investigation strongly influenced the final amount of the fine.

More specifically, the GNCA determined the level of the fine, *inter alia*, on the basis that the infringement caused relatively minor damage.<sup>909</sup> Interestingly, this was done by approaching the concept of damage differently for the purposes of the investigation and fining

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<sup>907</sup> Ibid, 30-51, 64, 71-115 and 121.

<sup>908</sup> GLC (n 182) art 33(1)

<sup>909</sup> *Geverse Development – Article 6* (n 874) 118-119.

stages. While establishing the infringement, the Agency considered the damages inflicted to the overall competitive process. For example, it analysed the stagnant nature of the downstream market and the deterrence effect of the refusal to deal on other possible competitive entries. In contrast, during fine-setting, the Agency put individual damage suffered by the complainant on the forefront. It justified this decision by the fact that the evaluated infringement directly affected only a single undertaking desiring the permit for outdoor advertisement on a single property. Interestingly, the case facts show that the complainant was not the only undertaking foreclosed from the entry – at least one other undertaking suffered the same fate in the past.<sup>910</sup> This did not affect the level of the fine.

As this analysis reveals, the GNCA benchmarks antitrust fines against the damage inflicted on the complainant instead of the damage caused to the relevant market. The complaint-based nature of the investigation directly contributes to this factor. Namely, by placing a burden of proof on the complainant, the GNCA focuses on infringements and damages vis-à-vis these particular undertakings, as opposed to the market damage at large. In the *Geverse Development* case, such focus resulted in setting a significantly low fine.

To summarize, differentiating between *ex officio* and complaint-based investigations via administrative interpretation affects the enforcement process by (1) restricting its scope; (2) narrowing down the infringement cases to the ones where there are proofs of both the anti-competitive activity and the damage caused to a particular complainant; and (3) lessening the

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<sup>910</sup> Ibid, 26, 77-81, 118-119.

amount of imposed fines. This finding is dismaying considering that between 2014-2021, complaint-based cases made up roughly 1/3 of the antitrust investigations.<sup>911</sup> This means that the GNCA conducted investigations in a self-limited manner in one out of three instances.

Interestingly, while the 2020 amendments improved the antitrust enforcement procedure, they might also cause the continuation of the above-listed practices. This may happen because, nowadays, the GNCA is better empowered to conduct self-initiated investigations. Under pre-2020 legislation, the Agency could not fully deploy one of the main tools that enabled the commencement of the *ex officio* investigations. Namely, it did not have proper information request powers under the market monitoring procedure and heavily depended on the voluntary supply of information regarding alleged infringements. In contrast, now the GNCA has the same information request powers during such monitoring as it has for antitrust investigations.<sup>912</sup> This change further liberates the Agency in the choice of its investigations, enables it to create a list of priorities, and apply its limited resources accordingly. While an improvement, this situation might strongly incentivize the GNCA to sideline complaint-based investigations as the latter do not necessarily coincide with the above-mentioned priorities. Self-limitation of the scope of such investigations could be seen as one of the tools to achieve such sidelining. Hence, it is unclear whether the 2020 amendments will

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<sup>911</sup> Out of the fourteen completed investigations, four were initiated based on complaints. See *ibid*; see also GNCA, *Poti Port – Article 6* (Order N04/91, 21/04/2017); *Duty Free Georgia – Article 6* (n 900); *Citroen Georgia – Article 7* (n 256).

<sup>912</sup> GLC (n 182) art 18(1)(b)-(c) and (f)

end the above-discussed trend, nor is it evident that the GNCA will be willing to do so in the near future.

## **2.2.Problem 2 – Over-reliance on effects analysis in infringement-finding**

Antitrust investigations are expected to involve effects analysis to a varying degree. However, just like their EU counterparts (articles 101 and 102 TFEU), articles 6 and 7 of the GLC are silent regarding a particular type and degree of such analysis for the purposes of establishing infringements. This is not surprising as these provisions are drafted in broad terms to allow the flexibility of their application on a case-by-case basis. The broad and general nature of articles 6 and 7 of the GLC gives the GNCA significant discretion regarding what type and how much effects analysis to undertake in the antitrust investigations. As the case analysis reveals, this discretion has resulted in another negative trend in *ex-post* control – an over-reliance on actual market effects for infringement-finding.

The evolution of the *Fuel Companies* saga is perhaps the principal ‘culprit’ for such focus. The saga began with *Fuel Companies I* case that concerned the relevant market of automobile fuels (petrol and diesel). The GNCA, for which this case was the first major investigation, established several horizontal and vertical collusions, including a concerted practice between the five key importers (‘the five’) of automobile fuels that also operated at wholesale and retail levels of the relevant market.<sup>913</sup> However, on appeal, the court was dissatisfied with the

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<sup>913</sup> *Fuel Companies I – Article 7*(n 161) 76-112, 148-179, 195.

economic analysis of the Agency, annulled the decision and referred the case for reconsideration. A novel evaluation of evidence under the resulting *Fuel Companies II* case led to the finding that the concerted practice between the five did not take place and resulted into the annulment of 50 million GEL fine imposed by the initial decision.<sup>914</sup> The effects of this saga were paramount on the decision-making practice of the GNCA. Namely, the Agency began to pay a strong attention to the effects analysis in its infringement decisions.

Analyzing the actual effects of allegedly infringing activity is not a negative occurrence *per se*. In cases where the direct evidence is insufficient to establish the infringement, effects analysis may be used as a complementary tool to assess whether an alleged anti-competitive activity actually occurred. This is exemplified by GNCA's *Citroen*<sup>915</sup> decision - a case concerning an alleged bid-rigging in public tenders on new automobiles. Here, the evidence about communication between competitors was insufficient to prove anti-competitive collusion. Hence, the Agency analyzed relevant market situation in detail – both statistically (i.e., across multiple public bids) and individually for selected bids that raised doubts of collusion. As neither type of analysis revealed anti-competitive effects, the infringement was not established.<sup>916</sup> This example reveals that (non)existence of actual market effects might be a

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<sup>914</sup> *Fuel Companies II – Article 7* (n 869) 4-6, 44-70, 76-78.

<sup>915</sup> *Citroen Georgia – Article 7* (n 256).

<sup>916</sup> *Ibid*, 26-50.

helpful factor for the GNCA to reach an educated conclusion about whether a particular anti-competitive action has occurred.

However, an over-reliance on the actual market effects might also be unnecessary or misleading. For example, the Agency might conduct a full-blown effects analysis even if the conduct exhibits an inherent harmful nature towards market competition. Similarly, it might issue a non-infringement decision because it did not establish an existing anti-competitive effect of the investigated conduct, while the evidence might point towards potential adverse effects. Both scenarios pose problems from the enforcement viewpoint as they might result in ‘false negatives’<sup>917</sup> and, hence, adversely affect the effectiveness of the antitrust enforcement.

The first above-mentioned problem is exemplified by the *Audit Service Group*<sup>918</sup> case. The investigation concerned a series of anti-competitive agreements (bid-rigging) in the dining services industry. Parties acknowledged cooperation and exchange of sensitive bidding information. Hence, the anti-competitive object was present. However, the GNCA still engaged in prolonged market analysis, statistically assessing several dozens of tenders and the pattern of participation in them that proved the market-sharing arrangement. Naturally, the infringement was established, and respective fines were imposed.<sup>919</sup> However, the Agency had to prolong investigation several times to complete both object and effect analysis.

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<sup>917</sup> In competition enforcement, ‘false negative’ refers to a situation where the enforcer does not find an infringement of competition law whereas the investigated activity leads to market foreclosure/consumer harm. Whish and Bailey (n 71) 203.

<sup>918</sup> *Audit Service Group – Article 7* (n 873).

<sup>919</sup> *Ibid*, 41-62, 112.

Considering that object analysis was enough to establish this infringement, *Audit Service Group* case raises the question: does the Agency follow a practice whereby agreements with an anti-competitive object cannot be prohibited without assessing their actual (i.e. already materialized) anti-competitive effects? The answer seems affirmative at the moment. This is a dangerous trend, especially if one considers limited human resources of the GNCA in competition case-handling.<sup>920</sup> If the Agency analyses anti-competitive effects in every antitrust case, it will have to deploy its scarce staff in prolonged antitrust investigations and, hence, investigate fewer cases. In addition, the scarcity of resources might also lead to a sub-optimal effects analysis in cases where such analysis is essential. Both scenarios would be harmful for the overall state of antitrust enforcement.

The problems resulting from the focus on actual (as opposed to potential) effects were revealed by the *Poti Sea Port*<sup>921</sup> case. This case is noteworthy as least in two respects. First, it reveals that when choosing between the different theories of harm, the GNCA is inclined to follow the one which requires a more robust effects analysis. Second, the Agency strongly relies on the actual effects analysis to find antitrust infringements. Case details are provided below.

This investigation focused on Poti Port Company ('PPC') – a dominant undertaking in charge of Poti Sea Port – and its attempt to introduce an integrated tariff, enabling the latter to

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<sup>920</sup> See subchapter I.4.3. and Table 2 provided therein.

<sup>921</sup> *Poti Port – Article 6* (n 911). A useful case summary is provided in Nino Kobadze, 'Black Sea Port in Georgia Scrutinised by the Georgian Competition Authority Relying upon EU Case Law as Plans for Expansion Rejected' (2018) 9 JECL&P 176.

offer a combination/package of several services belonging to different relevant markets. The separation of relevant service markets in question was conditioned by the Geographic peculiarities of the Poti Sea Port ('Port'). Due to a relatively small perimeter, the quays of the port do not have terminals directly attached to them (as is customary for the vast majority of the ports worldwide). Instead, terminals are located on the land near the port ('off-dock' terminals). PPC is in charge of the Poti Port territory and also operates its own terminal nearby, alongside sixteen competing terminals. Such a configuration creates a necessity to offer three separate services to the undertakings engaged in container shipping upon the entry in the Port:

- Embarking/disembarking services within the Port territory, exclusively offered by the PPC as an undertaking in charge of the Port
- Transportation services for cargos from the Port to the Terminals (or vice-versa); and
- Terminal-related services, including the storage of goods and performing necessary customs procedures.<sup>922</sup>

Since terminals are outside the port territory and operate independently from the PPC, each of the three above-listed services requires separate contracts, and is performed in exchange for a separate fee, by a separate set of undertakings. Hence, the GNCA defined them as separate relevant service markets. The Port was also deemed a separate geographic market. As PPC holds an exclusive right to offer (dis)embarking services in the Port, the GNCA found it a dominant

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<sup>922</sup> *Poti Port – Article 6* (n 911) 94-101.

undertaking on this relevant market. Dominance was not established on the relevant markets of two other services – transportation and storage.<sup>923</sup>

In Summer 2016, PPC announced a plan to implement a mandatory integrated tariff that combined (dis)embarking, transportation and storage services under a single umbrella. Shipping companies should either accept the tariff or find an alternative port for conducting their business. Considering that one of the services – (dis)embarking – was offered only by PPC, such a tariff effectively prevented all transportation companies and terminal owners (other than PPC itself) from conducting transportation and storage services at the port territory. In other words, once PPC charged a customer for all three services, the latter would not pay extra to have transportation and storage served separately, nor would this be possible due to customs logistics. Consequently, a mandatory integrated tariff threatened the livelihood of all PPC's competitors on the relevant markets of cargo transportation and storage services.<sup>924</sup>

The case hints that, upon elaborating on the theory of harm, the GNCA considered two options – tying and refusal to supply. This can be deduced from the EU decisional practice used as reference points throughout the decision. Namely, on various occasions, the Agency relied on *Microsoft*<sup>925</sup> and *Sea Containers v. Stena Link*<sup>926</sup> cases to justify its decision. However, as the

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<sup>923</sup> Ibid, 94-107, 110-116.

<sup>924</sup> Ibid, 116-143.

<sup>925</sup> *Microsoft* (n 457). The case is discussed at ibid, 91-94.

<sup>926</sup> *Sea Containers v. Stena Sealink – interim measures* (Case IV/34.689) Commission Decision 94/19/EC [1994] OJ L15/8. The case is discussed at ibid, 117-118.

text of the decision devotes a considerable time to the elaboration of indispensability issues, it is clear that the choice was made in favour to the refusal of supply analysis. This detail is noteworthy, since in the EU, tying represents a *prima facie* abuse while refusal to supply requires an extensive effects analysis (see subchapter VIII.2.2.2. below). Hence, by choosing the latter theory of harm, the GNCA obliged itself to a full effects assessment of the allegedly anti-competitive unilateral conduct at hand.

An overfocusing on effects analysis did not stop there. Namely, the GNCA approached the case from a dual perspective. On the one hand, it noted that if the combined tariff was implemented in practice, this would be an abuse of dominance by PPC. On the other hand, the Agency did not establish the infringement, as the case commenced after the tariff announcement, but its implementation was prevented throughout the antitrust investigation by a court order. As the tariff was never implemented (and never yielded anti-competitive effects), the GNCA concluded that the infringement never occurred. The tariff announcement was declared an attempt to abuse dominance – this is not a violation of Georgian competition legislation.<sup>927</sup>

The above-mentioned decision reveals the paramount importance that the GNCA places on establishing actual effects for the purposes of finding infringements. This, in turn, significantly complicates the enforcement process due to a required extensive effects analysis. Such focus makes it impossible to establish abuse of dominance in cases where the effects are

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<sup>927</sup> *Poti Port – Article 6* (n 911) 144-147.

highly likely but have not materialized yet. Quite possibly, it also might lead to ‘false negatives’ in cases where actual effects exist as the latter are very hard to establish.

To summarise, the GNCA pays strong attention to the establishment of actual effects in the process of assessing alleged infringements. This trend, in turn, has resulted in ‘a false negative’ in the *Poti Sea Port* case. However, even if the over-usage of the effects analysis does not lead to these extremes, it might still unnecessarily prolong and complicate antitrust investigations. This especially concerns the cases where the Agency could establish an object infringement (such as the *Audit Service Group* case). Overall, such development endangers the effectiveness of the investigation procedure.

Legislative amendments of 2020 might have further encouraged this trend. For example, prolonged investigation deadlines enabled the Agency to prolong the *Audit Service Group* investigation for thirteen months. In contrast, it had to be concluded within ten months under the old regulation. This indicates that the GNCA might use new (extended) deadlines to conduct extra effects assessment even when the latter is not necessary for establishing the infringement. Additionally, the amendments significantly empowered the Agency to procure the necessary information for investigations. This may incentivize the GNCA to engage in the effects analysis in every case to make good use of newly acquired powers. Consequently, if the Agency continues to over-rely on effects analysis in antitrust cases, usage of the amended enforcement provisions might harm the effectiveness of the competition enforcement instead of supporting it.

### 3. Concluding Remarks

Antitrust enforcement provisions are a central means of both preventing undertakings from harming the process of market competition and sending signals of caution for those considering engaging in such activities in the future. Detecting infringements via optimally configured pre-investigation and investigation procedures are at the heart of this process. They remind undertakings that there are actual consequences associated with the infringement of competition law. However, the desired outcome (prevention and deterrence of anti-competitive actions) could not be achieved if the enforcer engages in strict self-limitations.

Turning complaint-based investigations into quasi-private litigation proceedings harms the enforcement process, as it does not allow the GNCA to fully address all the problematic issues that the case facts might reveal. In addition, such a development conditions a sub-optimal application of fines – this could further damage the effectiveness of the enforcement process. To clarify, finding infringement and setting high fines are not end goal in themselves. However, it is in the public interest to investigate every aspect of an alleged infringement (and not just the ones highlighted by a particular complainant). Similarly, sanctions should always correspond to the gravity of the infringement. The latter, in turn, should be understood as an action harming the competitive process on the market (and not just a particular competitor that decided to lodge a complaint). Such focus is important to maintain a public nature of the

investigation procedure and ensure its effective deployment for the purposes of achieving competition policy objectives.

Similarly, while the effects analysis is an important feature of the antitrust proceedings, it should be deployed in an optimal way. As the *Audit Service Group* case revealed, on certain occasions such analysis might not be necessary to establish an infringement. In those situations, the choice to undertake a full effects assessment unnecessarily prolongs the investigation process. It also engages the scarce human resources of the GNCA while the latter could be used for additional investigations that require such an analysis. On other occasions, overfocusing on effects analysis might lead to ‘false negatives’ when the Agency is not able to establish actual effects of the investigated activity. In this respect, while the precaution of the GNCA is understandable (especially in the light of the *Fuel Companies* saga), shielding itself from the future judicial annulments/case referrals by reaching non-infringement decisions is not a way forward. A balanced approach needs to be found instead that will allow the Agency to effectively defend its decisions in the court and do not overuse the effects analysis at the same time.

# Chapter VIII. Ensuring Effective Antitrust Enforcement – EU

## Experience

### 1. Introduction

Although the EU antitrust enforcement dates back to the 1960s, its current state has been significantly conditioned by the Efficiency Phase (2004-onward) developments. Three changes deserve highlighting: decentralization of enforcement, a more economic approach, and the increased application of the Commission's fine-setting powers.

The decentralization – a process enabling national competition agencies and courts to complement the Commission's enforcement efforts<sup>928</sup> – allows redistribution of the antitrust caseload between national and supranational levels in the EU. Such redistribution significantly affected the Commission's prioritization of the antitrust caseload.<sup>929</sup> More specifically, as national enforcers can deal with a significant number of 'smaller' cases, the former engages in more voluminous investigations. This development is also reflected in the complaints procedure.

The more economic approach halted the so-called 'object box' expansion that accelerated during the 1990s.<sup>930</sup> One result of this otherwise positive development was the increase of a

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<sup>928</sup> Commission, 'Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (Complaint Handling Notice)' [2004] OJ C 101/65, para 9.

<sup>929</sup> Complaint Handling Notice (n 928) paras 12-18.

<sup>930</sup> See subchapter VIII.2.2.1. below.

responsibility to pursue a detailed effects analysis<sup>931</sup> – something that could be a time-consuming and burdensome exercise for the Commission, especially in the light of the new and nuanced standards of evidence collection in effects-related cases.<sup>932</sup> In this light (and unsurprisingly) the Commission still pursues large-scale cases involving object infringements under Article 101 TFEU. A *per se* approach is also maintained under Article 102 TFEU.

Finally, the Efficiency Phase Commission has increasingly used its sanctioning powers in antitrust cases.<sup>933</sup> This move was enabled by re-focusing on major infringements<sup>934</sup> and a more detailed case analysis required by the current legislative framework. The latter obliges the enforcer to assess the gravity and breadth of anticompetitive conduct in more detail and has led to the accumulation of more evidence suggesting the necessity of higher fines. The Commission experience also suggests that once used, the fines are benchmarked against the harm of the entire competitive process, even in cases where a complaint of an individual damaged party (or several parties) triggers the antitrust investigation.

This chapter overviews the above-listed developments in detail to reveal their utility for Georgia and elaborates on the lessons that would help to internalize the EU experience.

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<sup>931</sup> See Pablo Ibanez Colomo, *The shaping of EU competition law* (CUP 2018).

<sup>932</sup> Andriani Kalintiri, *Evidence standards in EU competition enforcement: the EU approach* (Hart 2019) 34.

<sup>933</sup> Ibid, 1-2. For the dynamics of sanctions, see Commission, ‘Statistics on Cartel Cases’ (2021) <[https://ec.europa.eu/competition-policy/cartels/statistics\\_en](https://ec.europa.eu/competition-policy/cartels/statistics_en)> accessed 14 January 2022.

<sup>934</sup> Regulation 1/2003 (n 430) recital 3.

## 2. Selected parts of enforcement experience – breakdown

The overview of the EU experience in antitrust enforcement leads to two important findings. First, complainants are relevant but not essential actors in investigation procedures. Next, while effects analysis has gradually gained importance in antitrust proceedings, the EU still maintains object/*per se* infringements that are deemed harmful to the competitive process, notwithstanding their effects. These trends are outlined below, alongside relevant lessons for Georgia.

### 2.1. The role of the complainant in antitrust proceedings

Complaints play a vital role in antitrust infringement identification<sup>935</sup> and are one of the sources of commencing antitrust investigations (alongside Commission's *ex officio* proceedings).<sup>936</sup> The EU defines the notion of complainant broadly, comprising any entity with a legitimate interest.<sup>937</sup> Such interest can be shown by two types of entities: a) those who have suffered direct negative consequences as a result of the infringement and b) those who represent the first type

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<sup>935</sup> Commission, Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Regulation 773/2004) [2004] OJ L123/18, recital 5.

<sup>936</sup> Regulation 1/2003 (n 430) art 7(1); Commission, 'Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (Notice on Best Practices)' [2011] OJ C308/6, para 9. Complaint Handling Notice (n 928) para 40.

<sup>937</sup> Regulation 1/2003 (n 430) art 7(2); Complaint Handling Notice (n 928) para 33; Notice on Best Practices (n 936) para 10; See also Regulation 773/2004 (n 935) art 5(1).

of entities, albeit not on a *pro bono* basis.<sup>938</sup> Hence, to become a complainant, one does not have to prove that it suffered direct material damage due to an alleged antitrust infringement. Consequently, apart from the damaged parties, the definition also encompasses associations of such undertakings, consumer organizations, individual consumers/customers, and the Member States.<sup>939</sup> This allows the EU to increase a pool of entities who could supply relevant information regarding antitrust infringements via official complaints. Meanwhile, the rights of complainants are somewhat limited due to a public interest nature of the EU proceedings.

### ***2.1.1. Complainants v parties - differentiation***

The EU allows complainants to be closely connected to the antitrust proceedings<sup>940</sup> without awarding them a party status. Commission documents explicitly refer to parties, complainants and the third parties as separate categories engaged in antitrust proceedings.<sup>941</sup> Parties are the alleged infringers<sup>942</sup> - ones to whom the Statement of Objections is addressed.<sup>943</sup>

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<sup>938</sup> Complaint Handling Notice (n 928) paras 34, 38-39.

<sup>939</sup> Ibid, 35-37.

<sup>940</sup> Regulation 1/2003 (n 430) art 27(1); Notice on Best Practices (n 936) para 104; Regulation 773/2004 (n 935) recital 8.

<sup>941</sup> See, for example, Regulation 1/2003 (n 430) art 27, titled 'Hearing of the parties, complainants and others'.

<sup>942</sup> Notice on Best Practices (n 936) para 19.

<sup>943</sup> Commission, 'Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (Notice on Accessing Commission File in Antitrust Cases)' [2005] OJ C 325/07, 7.

In contrast, while the status of the complainant guarantees ‘certain procedural rights’,<sup>944</sup> these rights do not match to rights held by the parties. The bilateral (Commission v infringing parties) nature of the antitrust proceedings means that complainants never become its central figures.<sup>945</sup> Their status has been shaped this way since the conception of the EU antitrust framework.<sup>946</sup>

The above-described differentiation stems from the public interest nature of the EU antitrust proceedings.<sup>947</sup> More specifically, the Union distinguishes between public and private competition enforcement. The former, conducted by the Commission and national enforcers, serves the general market interest by detecting, stopping, and sanctioning conduct that hinders the competitive market process.<sup>948</sup> The latter, overseen by the national courts, enables individuals to seek damages suffered by various competition infringements.<sup>949</sup> Such a delineation empowers the courts as protectors of the individual interests of the damaged entities. In contrast, Commission upholds public interest by focusing on the overall effects of the infringement instead of the individual damages suffered by particular complainants.

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<sup>944</sup> Notice on Best Practices (n 936) para 10.

<sup>945</sup> For the bilateral nature of the antitrust proceedings, see Katalin Cseres and Joana Mendes, 'Consumers' access to EU competition law procedures: Outer and inner limits' (2014) 51 CMLR 483, 502.

<sup>946</sup> Ibid.

<sup>947</sup> Complaint Handling Notice (n 928) para 27.

<sup>948</sup> Cseres and Mendes (n 945) 483 and 489.

<sup>949</sup> Regulation 1/2003 (n 430) recital 7; See also Complaint Handling Notice (n 928) paras 12-13; *Courage* (n 411), paras 26-27.

Consequently, the Commission assumes a prosecutorial role in every antitrust investigation, notwithstanding whether the proceeding is complaint-based or *ex officio*.<sup>950</sup> Making a complainant a party to the proceedings and bearer of the burden of proof would threaten this function. However, leaving it without any procedural rights is also undesirable as this might disincentivize the complainant from supplying important infringement-related information. Hence, the EU chose a middle ground – complainants are involved in the proceedings but are not equipped with rights or obligations reserved exclusively for the parties.

This solution upholds the homogeneity of the antitrust infringement procedure. No matter the basis of the investigation, Commission bears a burden to prove that the infringement took place.<sup>951</sup> The EU documents are silent about the complainant's burden of proof in establishing the infringement, implying that the latter does not have any. Consequently, while complainants assist the Commission with valuable information, they do not replace the latter as a burden-bearer at any stage of the antitrust investigation.

The legitimate interest in antitrust proceedings and the value brought to the investigation in terms of supplied information entitle complainants to certain rights.<sup>952</sup>

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<sup>950</sup> Note though the mixed role of the Commission as a prosecutor and adjudicator. For detailed analysis see Wouter Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 *World competition* 201; see also Wouter Wils, 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker' (2014) 37 *World competition* 5, discussing the role of the CJEU in neutralizing any bias arising from Commission's dual role. The term 'ex officio' is borrowed from Notice on Best Practices (n 936) para 11.

<sup>951</sup> Regulation 1/2003 (n 430) recital 5 and art 2.

<sup>952</sup> See, for example, *ibid*, para 149. See also Complaint Handling Notice (n 928) para 59.

However, since the investigation is not a dispute between the complainant and alleged infringers,<sup>953</sup> the former's rights are significantly limited compared to those enjoyed by the latter.<sup>954</sup> A non-exhaustive list of differences is provided below.

- Complainants do not have full access to the file.<sup>955</sup> Their rights are limited to receiving non-confidential versions of the Statement of Objections<sup>956</sup> and, in case of complaint rejection, accessing the materials that conditioned the rejection decision,<sup>957</sup> provided that confidential information of the parties is not shared.<sup>958</sup>
- The right to attend oral hearings is limited – complainants require Commission's approval to engage in them. The approval is issued upon a written request where complainants need to declare specific interest regarding the outcomes of the case.<sup>959</sup>
- Complainants' right to attend interim investigatory meetings is also limited. Namely, they are usually invited to triangular meetings held at the early stages of the

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<sup>953</sup> Complaint Handling Notice (n 928) para 59. "...the proceedings of the Commission in competition cases do not constitute adversarial proceedings between the complainant on the one hand and the companies which are the subject of the investigation on the other hand."

<sup>954</sup> Notice on Accessing Commission File in Antitrust Cases (n 943) para 30. See also Cseres and Mendes (n 945) 502-503.

<sup>955</sup> Ibid, paras 3-4 and 29.

<sup>956</sup> Regulation 773/2004 (n 935) art 6(1). See also, Complaint Handling Notice (n 928) para 64.

<sup>957</sup> Notice on Accessing Commission File in Antitrust Cases (n 943) para 31. Complaint Handling Notice (n 928) para 69; Regulation 773/2004 (n 935) art 8(1). Cpr Notice on Best Practices (n 936) para 92 that discusses party's access to files.

<sup>958</sup> Complaint Handling Notice (n 928) para 67.

<sup>959</sup> Regulation 773/2004 (n 935) art 6(2); Complaint Handling Notice (n 928) para 65; Notice on Best Practices (n 936) paras 105-108.

investigation and help the Commission clarify any contradictory factual statements central to the investigation.<sup>960</sup> In contrast, they cannot attend State of Play meetings – direct verbal communication between the alleged infringers and the Commission aimed to increase the case handling efficiency and the transparency of the investigation.<sup>961</sup>

- Finally, complainants have a right to appeal the decision on complaint rejection to the CJEU.<sup>962</sup> However, they have no such right in terms of the non-infringement decision.

An overview of these differences once again reveals the public interest nature of antitrust investigations. Here, while being valuable participants of the antitrust proceedings, complainants have those rights that are necessary to support the overall effectiveness of the investigatory process.

### ***2.1.2. Benefits of differentiation***

The above-mentioned distribution of roles gives considerable procedural liberties to the Commission during the antitrust procedure. These liberties concern, *inter alia*, the time limits for initiating a complaint-based case, decisions about complaint rejection, the definition of investigation scope and parties, the reduced number of obligations towards complainants as

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<sup>960</sup> Notice on Best Practices (n 936) paras 65-67.

<sup>961</sup> Ibid, paras 60-65.

<sup>962</sup> Complaint Handling Notice (n 928) paras 64-71, 77.

opposed to the parties, and the liberties of fine-setting in the infringement decision. In each situation, the extent of the complainants' rights is determined based on the need to conduct an effective infringement procedure,<sup>963</sup> as shown by the overview provided below.

### ***Flexible time limits for investigation commencement***

The Commission is obliged to initiate a complaint-based case 'within a reasonable time' – a time limit determined on a case-by-case basis.<sup>964</sup> Such a decision-making process involves up to three stages. First, the Commission evaluates whether the complaint is worth a deeper pursuit. Next, it evaluates the sufficiency of grounds for investigation commencement and asks the complainant for further substantiation if in doubt. Finally, based on the information received, and after more-or-less clearly defining the investigation scope, the Commission decides on the case (non)initiation.<sup>965</sup> A provisional, non-binding four-month time limit exists to undergo all four stages. However, if the case is complex, four months might be required for the first stage alone.<sup>966</sup> Such a lax approach is logical. Although complainants trigger the admissibility procedure, the Commission is the body that should substantiate the investigation

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<sup>963</sup> See Helene Andersson, *Access and cartel cases: ensuring effective competition law enforcement* (1st edn, Hart&Bloomsbury Publishing 2020) 125.

<sup>964</sup> Complaint Handling Notice (n 928) para 60.

<sup>965</sup> Ibid, paras 55-57, 72-73. See also Notice on Best Practices (n 936) para 17.

<sup>966</sup> Complaint Handling Notice (n 928) para 60-62. See also Notice on Best Practices (n 936) para 16.

commencement decision. Consequently, it is allotted enough time to make an educated decision.

### *Ability to reject complaints*

While the Commission must consider every complaint,<sup>967</sup> it is not obliged to initiate proceedings based on every single one of them, as long as the rejection is substantiated.<sup>968</sup> Here, the Commission enjoys a margin of discretion – it is entitled to prioritize complaints to implement EU competition policy effectively.<sup>969</sup>

The Commission is entitled to three principal grounds for rejecting complaints. The first two – lack of competence and lack of evidence<sup>970</sup> – are common under various administrative procedures. The lack of competence arises where the action described in the complaint cannot be qualified under either Article 101 or Article 102 TFEU (for example, the inter-state trade component is missing).<sup>971</sup> Here, the complainant is expected to submit ‘a minimum of *prima facie* evidence’ proving that all elements of a particular infringement are in place.<sup>972</sup> Lack of

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<sup>967</sup> Commission, *Antitrust Manual of Procedures: Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (Antitrust Manual of Procedures)* (POEU 2019)

<sup>968</sup> Complaint Handling Notice (n 928) paras 8, 41 and 75-76.

<sup>969</sup> Ibid, paras 27 and 41-42. See also Antitrust Manual of procedures (n 967) ch 21, para 42.

<sup>970</sup> Complaint Handling Notice (n 928) para 47-52. See also Notice on Best Practices (n 936) para 135.

<sup>971</sup> Complaint Handling Notice (n 928) para 46-52.

<sup>972</sup> Antitrust Manual of procedures (n 967) Ch 21.3.1.2. see also Notice on Best Practices (n 936) para 137.

evidence is used as a ground for rejection where the information provided by the complainant, in combination with the information obtained by the Commission, is not enough to substantiate the investigation commencement.<sup>973</sup>

Sometimes, when the complaint falls within Commission's competence and is accompanied by enough evidence to create a suspicion regarding the infringement, it might still be rejected (either at the admissibility or the investigation stage) if the Commission does not deem it as an investigation priority. This is done via the third and the most important ground of rejection – 'lack of Union interest'.<sup>974</sup> Two instances of such rejection are worth noting in the framework of the ongoing analysis.

First, the Commission may not take up the case after it evaluates (on a case-by-case basis) the level of detriment caused by the alleged infringement, the probability of proving that this infringement happened, and the extensiveness of investigative measures necessary to ensure effective enforcement.<sup>975</sup> This ground of rejection highlights the public nature of the antitrust proceedings, where the general interest associated with the case handling is weighed more than the private interest that a particular complainant might have in pursuing the case in question.

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<sup>973</sup> Notice on Best Practices (n 936) para 137; Antitrust Manual of procedures (n 967) para 56.

<sup>974</sup> Complaint Handling Notice (n 928) paras 28 and 45; Notice on Best Practices (n 936) para 135.

<sup>975</sup> Complaint Handling Notice (n 928) paras 11 and 44. See also Notice on Best Practices (n 936) paras 13 and 136. Antitrust Manual of procedures (n 967) ch 21, para 43.

Second, the Commission is entitled to reject the complaint if the same case is considered by a national competition authority or a court.<sup>976</sup> It might also reallocate the case to the national authority at the early stage of the proceedings if the latter is better placed to deal with it.<sup>977</sup> This development is a direct result of the Efficiency Phase decentralization, whereby national and supranational actors are able to share the overall antitrust enforcement workload, depending on the determination of which body is the best positioned to deal with a particular antitrust case.<sup>978</sup> For example, the Commission will be better positioned if the case affects at least three MS markets, is a matter of further developing Union's competition policy, or concerns a new type of competition infringement.<sup>979</sup> In contrast, it will reject the complaint based on the lack of Union interest if the infringement affects one national market or the complainant might be better off by initiating private antitrust proceedings.<sup>980</sup> Hence, the rejection does not leave the latter without alternative avenues to protect its interests.

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<sup>976</sup> See Regulation 1/2003 (n 430) art 13; see also Complaint Handling Notice (n 928) paras 25 and 44; Notice on Best Practices (n 936) para 138; Antitrust Manual of procedures (n 967) ch 21, paras 36-40 and 50.

<sup>977</sup> Antitrust Manual of procedures (n 967) ch 21, paras 22-35.

<sup>978</sup> See Commission, 'Notice on cooperation within the Network of Competition Authorities (ECN Notice)' [2004] OJ C101/43, paras 8-15.

<sup>979</sup> *Ibid*, para 14.

<sup>980</sup> Notice on Best Practices (n 936) para 38; Antitrust Manual of procedures (n 967) ch 1, para 50.

### *Defining the investigation scope and parties*

The Commission considers the scope and alleged infringers named in the complaint as a starting point. However, EU antitrust rules do not bind the enforcer to commence an investigation with the exact scope and vis-à-vis the same parties as indicated in the complaint.<sup>981</sup> Again, this is due to the public nature of the proceedings. While evaluating the merits of starting an investigation, the Commission gathers information from multiple sources. Due to this, the complaint-based investigation might be of a broader or narrower scope and might involve a larger or smaller number of parties than the complainant intended. Notably, the Commission can change both of these parameters (scope and parties) both during the admissibility and the investigation stages.<sup>982</sup> While the complainant should be informed about these changes, it does not have a decisive say in them.<sup>983</sup> Such a configuration enables the Commission to pay attention to broader concerns related to the investigated markets alongside the private interests of the complainants.

### *Flexibility in setting fines*

Complainants do not lead the process of the fine-setting in the EU antitrust proceedings. This is logical, considering the public nature of the fines – they are not payable to the private individuals participating in the proceedings. This factor distinguishes fines from damages that

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<sup>981</sup> Notice on Best Practices (n 936) para 12.

<sup>982</sup> Ibid, para 23.

<sup>983</sup> Ibid, para 23.

are awarded during private enforcement.<sup>984</sup> Fines are designed primarily as a deterrence mechanism, not as compensation.<sup>985</sup> Hence, the fine-setting rules and procedures are configured around the deterrence function.

The Commission has broad discretion when it comes to fines.<sup>986</sup> The case-specific calculation considers both the duration and the gravity of the infringement.<sup>987</sup> In addition, the Commission pays attention to the sufficiency of the deterrence effect. For example, if the infringing undertaking is particularly large (i.e. has a significant turnover, even non-related to the market where the infringement occurred), this might be reflected in the fine calculation.<sup>988</sup>

Consequently, antitrust fines are not benchmarked against the direct material damages suffered by the complainant alone. Nor is there any obligation to prove such damages to set fines in the first place, although infringement decisions might assess the harm caused to the market/consumers. For some hardcore infringements, such as price-fixing, market-sharing and bid-rigging cartels, Commission might set exceptionally high fines, notwithstanding their materialized effects (or absence thereof).<sup>989</sup> In other cases, it may establish the infringement

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<sup>984</sup> For this and other benefits of private litigations in competition, see Complaint Handling Notice (n 928) para 16.

<sup>985</sup> Fine setting guidelines, para 4.

<sup>986</sup> See Regulation 1/2003 (n 430) art 23(1)-(2), 'The Commission may by its decision impose ... fines...'. See also Commission, 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Fining Guidelines)' [2006] OJ C210/2, para 2.

<sup>987</sup> Regulation 1/2003 (n 430) art 23(3); Fining Guidelines (n 986) paras 2 and 5.

<sup>988</sup> *Ibid*, paras 4 and 30.

<sup>989</sup> *Ibid*, para 23. See also Statistics on Cartel Cases (n 933).

without imposing a fine<sup>990</sup> or impose both fines and remedies.<sup>991</sup> The substance of the complaint and the complainant's viewpoints are not decisive in this process. Additionally, the fact that the material damage has been suffered only by the complainant is not a mitigating circumstance.<sup>992</sup> Such an arrangement also affirms the public function of the fines.

To conclude, although the complainant's role is significant in the EU antitrust proceedings, its rights and obligations are significantly limited. Such an arrangement is conditioned by the necessity to maintain the public status of the enforcement process within the Commission. Limitation benefits to the Commission in several ways in terms of ensuring effective enforcement. Simultaneously, decentralization and task-sharing allow the protection of private rights at the national level.

### *2.1.3. Complainants in antitrust proceedings – A lesson from the EU experience*

The primary lesson learned from the overview of how the EU treats complainants in antitrust proceedings is to **maintain the public interest nature of these proceedings, notwithstanding the basis of their initiation**. Under the EU law, this lesson encompasses two key aspects:

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<sup>990</sup> Regulation 1/2003 (n 430) recital 11; art 7(1).

<sup>991</sup> Ibid, recital 12; art 7(1).

<sup>992</sup> Fine setting guidelines, para 29, lists the following mitigating circumstances – ceasing of infringement soon after Commission's intervention, infringing the law negligently, having a limited involvement in an anti-competitive practice throughout its duration, cooperating with the Commission, proving that the conduct has been approved or supported by the Member State.

- **Complainants do not have the same status as parties do.** Most importantly, while they have a vested interest in the outcome of antitrust investigations, they do not bear the burden of proving infringements. This lessens the dependence of the investigation scope and outcomes on the complainants and clearly distinguishes the public investigation process from the private competition litigations. Meanwhile, this situation does not foreclose alternative avenues of protecting complainants' interests, such as court proceedings.
- **Complainants have enough rights to guarantee their proper engagement and contribution to the overall investigation process.** This ensures keeping them incentivized to supply valuable investigation-related information to the Commission. By granting them these rights, Commission ensures upholding their interests alongside the public nature of the antitrust proceedings.

## **2.2. The role effects analysis in substantive assessment**

Effects analysis is an integral part of the EU antitrust proceedings. First, the capability to negatively affect the process of market competition is an inalienable feature of both Article 101 and Article 102 TFEU infringements. Next, these infringements do not fall under the EU jurisdiction unless they produce inter-state trade effects. Pro-competitive effects play a significant role in exempting alleged infringing conduct from prohibition. Propositions that ensure mitigation of suspected anti-competitive effects of a scrutinized activity may result in

commitments decisions.<sup>993</sup> Finally, the evaluation of already materialized effects plays a role in setting fines and awarding private damages.<sup>994</sup>

Meanwhile, the EU case law follows at least two significant trends that qualify the scope of effects analysis in antitrust cases. First, effects analysis is not necessary to establish the infringement in every case – sometimes, effects can be safely implied due to the inherent harmful nature of the scrutinized activities. Second, the EU does not wait for the materialization of the actual effects to find an infringement – the existence of potential/likely effects suffices for prohibition decisions. These three trends are briefly overviewed below.

### ***2.2.1. Implied anti-competitive effects***

The possibility of finding an infringement without analyzing its anti-competitive effects is provided by the wording of Article 101 TFEU. This article prohibits ‘all agreements between undertakings, decisions by associations of undertakings and concerted practices ... which have as their *object* or *effect* the prevention, restriction or distortion of competition within the internal market’ (emphasis added). While interpreting this provision, the CJEU consistently affirmed that an anti-competitive object and an anti-competitive effect are alternative

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<sup>993</sup> For details, see Niahm Dunne, ‘Commitments Decisions in EU Competition Law’ (2014) 10 JCL&E 399, 402-411.

<sup>994</sup> Case T-14/89 *Montedipe v Commission* ECLI:EU:T:1992:36, para 264; *T-Mobile* (n 465) para 31; Case C-32/11 *Allianz Hungária v GVE* ECLI:EU:C:2013:160, para 38.

requirements.<sup>995</sup> This means that while the agreement might have both of them,<sup>996</sup> the establishment of only one of them suffices to find an infringement.

No such distinction exists under the text of the Article 102 TFEU. However, as the legal scholarship points out, the CJEU still distinguishes between the abuse cases where effects analysis is required and those where it is not necessary.<sup>997</sup> The first include, for example, refusal to deal, margin squeeze, and selective price cuts – here, the legal tests are formulated in a way that makes effects analysis inevitable.<sup>998</sup> The second include, for example, tying, predatory pricing, and exclusive dealing. Legal tests of these conducts indicate that they are considered *prima facie* abusive. Hence, they might be prosecuted without showing their actual anti-competitive effects, unless objectively justified.<sup>999</sup> In other words, it is possible to have ‘by object’ abuses under Article 102 TFEU.<sup>1000</sup>

Due to a broad formulation of these articles, the exact line between object and effect infringements strongly depends on administrative and judicial interpretations. The same statement applies to the legal tests of *prima facie* and other abuses. As the analysis below reveals,

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<sup>995</sup> *Société* (n 282), 249; *Glaxo - CJEU* (n 293) para 55.

<sup>996</sup> For a detailed explanation, see Case C-228/18 GV v *Budapest Bank and Others* ECLI:EU:C:2019:678, Opinion of AG Bobek, paras 18-36. See also Case C-228/18 GV v *Budapest Bank and Others* ECLI:EU:C:2020:265, paras 33-44.

<sup>997</sup> Colomo (n 6) 712.

<sup>998</sup> *Ibid*, 718-720.

<sup>999</sup> *Ibid*, 714-718.

<sup>1000</sup> Whish and Bailey (n 71) 205-206.

these interpretations are, in turn, affected by the changing prioritization of the EU competition policy objectives. Details for Articles 101 and 102 TFEU are provided separately below.

### *Article 101 TFEU*

A general distinction between the anti-competitive object and the anti-competitive effect stems from the difference in the ‘degree and depths’ of required economic analysis during antitrust investigations.<sup>1001</sup> Such analysis is not required for anti-competitive object because agreements in question are ‘by [their] very nature ... injurious to the proper functioning of normal competition.’<sup>1002</sup> In contrast, proving an anti-competitive effect requires showing that an agreement in question harms (potential) market competition to an appreciable extent<sup>1003</sup> while taking ‘the actual structure’ of the market in question as a benchmark<sup>1004</sup> and comparing the market situation with and without an agreement in question.<sup>1005</sup> Considering the complexity of

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<sup>1001</sup> *Budapest Bank – Opinion* (n 996) para 32.

<sup>1002</sup> Case T-148/89 *Tréfilunion v Commission* ECLI:EU:T:1995:68, para 79; *Glaxo - CJEU* (n 293) para 55; *T-Mobile* (n 465) paras 29-30; *BIDS* (n 486) para 16; *PSR* (n 463) para 17; Case C-439/09 *Pierre Fabre v PAMEIE* ECLI:EU:C:2011:113, Opinion of AG Mazak, paras 25-6; *FAPL* (n 479) para 34; *Allianz* (n 994) para 35; Case C-67/13 P *CB v Commission* ECLI:EU:C:2014:2204, para 50; Case C-373/14 P *Toshiba v Commission* ECLI:EU:C:2016:26, para 26. See also *Budapest Bank* (n 996) para 35; *Generics (UK)* (n 485) para 67.

<sup>1003</sup> *Société* (n 282) 249; Case T-328/03 *O2 Germany v Commission* ECLI:EU:T:2006:116, para 68; *BIDS* (n 486) para 15; *FAPL* (n 479) para 135. Case C-7/95 P *John Deere v Commission* ECLI:EU:C:1998:256, para 77; *Allianz* (n 994) para 34; Case C-238/05 *Asnef-Equifax v Ausbanc* ECLI:EU:C:2006:734, para 50; *Budapest Bank* (n 996) para 38; *Generics (UK)* (n 485) para 66.

<sup>1004</sup> *European Night Services* (n 548) para 136; *O2 Germany* (n 1003) para 66.

<sup>1005</sup> See *John Deere* (n 1003) para 76; *General Motors* (n 479) para 72; *O2 Germany* (n 1003) para 71; *Budapest Bank* (n 996) para 55. See also, *Generics - opinion* (n 463) para 127, where the Advocate General clarifies which particular market situations count as the situations with agreement and without agreement in question.

a latter type of analysis, the Commission and the CJEU assess the existence of anti-competitive object first. A comprehensive effects analysis takes place only in the absence of the former.<sup>1006</sup>

Such differentiation does not equate to the easiness of proving the anti-competitive object. Instead, it means that, before assessing effects, the enforcer should consider *the agreement's wording/content and objectives* within the legal and economic context of its formation and implementation.<sup>1007</sup> The extent of such contextual analysis depends on the essence of the alleged infringement in question.<sup>1008</sup> To prove a 'by-object' restriction, this assessment should reveal that a collusive practice under scrutiny is *inherently and sufficiently deleterious/harmful to market competition* – this relieves the obligation of anti-competitive effects assessment.<sup>1009</sup> Inherent and sufficient harmfulness means that the investigated practice contains severe restrictions and displays a particularly strong capacity to generate anti-competitive effects.<sup>1010</sup> In *T-Mobile*, Advocate General Kokott has provided an easily

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<sup>1006</sup> *Glaxo - CJEU* (n 293) para 55; *BIDS* (n 486) para 15; *T-Mobile* (n 465) para 28. See also *Budapest Bank* (n 996) paras 33-34.

<sup>1007</sup> See *General Motors* (n 479) para 66; *Glaxo - CJEU* (n 293) para 58; *BIDS* (n 486) paras 15-16 and 21; *T-Mobile* (n 465) paras 27-28; *FAPL* (n 479) para 136; *CB* (n 1002) para 53; *Toshiba* (n 1002) para 27; Case C-179/16 *Hoffmann-La Roche II v Commission* ECLI:EU:C:2018:25, para 78.

<sup>1008</sup> C-469/15 *FSL v Commission* ECLI:EU:C:2017:308, para 100.

<sup>1009</sup> *Consten* (n 281) 342; *BIDS* (n 486) para 15. See also *CB* (n 1002) paras 49 and 51-52; *Toshiba* (n 1002) para 26; Case C-345/14 *Maxima Latvija* ECLI:EU:C:2015:784, para 20; *Hoffmann II* (n 1007) para 78. *T-Mobile* (n 465) para 28. *Budapest Bank* (n 996) paras 36-37. See also *Generics (UK)* (n 485) paras 64 and 67. *FAPL* (n 479) paras 34 and 135.

<sup>1010</sup> See Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission* [2009] ECR I-09291 ECLI:EU:C:2009:409, Opinion of AG Trstenjak, para 90, referring to a 'special capability' to generate anti-competitive effects; see also Joined Cases C-403 and 429/08 *FAPL and others v QC Leisure* ECLI:EU:C:2011:43, Opinion of AG Kokott, para 244, referring to the 'liability' of the agreement to restrict competition, with the word 'liable' used in a way to refer to a near certainty of the by-object agreement to cause anti-competitive effects. See also *Allianz* (n 994) paras 42-43, referring to 'a particularly significant restrictive potential' of certain agreements.

understandable parallel to the criminal law – object restrictions in competition law resemble the prohibition of drunk driving. The latter is prohibited due to its inherent danger to society, notwithstanding the materialization of particular harm.<sup>1011</sup> The experience suggests that certain agreements (for example, price-fixing<sup>1012</sup> and market sharing<sup>1013</sup>) are harmful precisely this way.<sup>1014</sup> However, object analysis is not confined to hardcore restrictions,<sup>1015</sup> despite a significant overlap.<sup>1016</sup>

It should be noted that case law distinguishes the aims of the parties from the anti-competitive object of the agreement. The latter might be present even if the parties pursued either different<sup>1017</sup> or additional legitimate aim(s),<sup>1018</sup> did not intend to restrict competition or

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<sup>1011</sup> Case C-8/08 *T-Mobile and others v RBNM* ECLI:EU:C:2009:110, Opinion of AG Kokott, para 47.

<sup>1012</sup> Case T-472/13 *Lundbeck v Commission* ECLI:EU:T:2016:449, para 341 and *Budapest Bank* (n 996) para 36.

<sup>1013</sup> *Toshiba* (n 1002) para 28.

<sup>1014</sup> *Glaxo - Opinion* (n 1010) para 91; *T-Mobile – Opinion* (n 1011) para 46; *Case C-32/11 Allianz Hungária v GV* ECLI:EU:C:2012:663, Opinion of AG Villalón, para 65; see also *CB* (n 1002) para 51.

<sup>1015</sup> Case C-209/07 *Competition Authority v BIDS* ECLI:EU:C:2008:467, Opinion of AG Trstenjak, para 47. The term ‘hardcore restrictions’ is not mentioned neither in the Article 101 TFEU nor in Block Exemptions. It is only provided in the Guidelines on Vertical Restraints (n 531) subchapter 6.1., where EU approach on various such restrictions is discussed. Since object assessment happens on a case-by-case basis, hardcore agreements are subject to this assessment too. See Case C-439/09 *Pierre Fabre v PAMEIE* ECLI:EU:C:2011:649, para 32.

<sup>1016</sup> *Allianz - Opinion* (n 1014) para 79; *Glaxo - Opinion* (n 1010) para 89.

<sup>1017</sup> *BIDS* (n 486) para 21. See also *Generics - opinion* (n 463) para 133.

<sup>1018</sup> *General Motors* (n 479) para 64; *IAZ* (n 301) para 25; *BIDS* (n 486) para 21. According to the latter case, the pursuit of other legitimate objectives may be taken into account during the assessment of pro-competitive effects under Article 101(3). See also *Budapest Bank* (n 996) para 52.

were not aware of the infringing nature of their actions.<sup>1019</sup> However, the anti-competitive aims of the parties might be considered as additional evidence.<sup>1020</sup>

The importance of maintaining object restrictions should not be underestimated from the enforcement viewpoint. First, their prohibition without the necessity to prove anti-competitive effects serves as a preventive measure – it stops such effects from materializing.<sup>1021</sup> Next, such prohibition saves resources for both Commission and the CJEU.<sup>1022</sup> In particular, once an anti-competitive object is established, the enforcer is not obliged to review/disprove the evidence regarding the absence of anti-competitive effects provided by parties.<sup>1023</sup> Such development is beneficial, considering the strict evidentiary standard applied in competition cases.<sup>1024</sup> Finally, the designation of an agreement as a ‘by-object’ restriction signals market participants not to

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<sup>1019</sup> *General Motors* (n 479) para 77. *BIDS - Opinion* (n 1015) para 44.

<sup>1020</sup> Article 81(3) Guidelines (n 484) para 22 and the case law cited therein. See also *General Motors* (n 479) para 78; *Glaxo - CJEU* (n 293) para 58; *Allianz* (n 994) para 37; *CB* (n 1002) para 54; *Budapest Bank* (n 996) para 53.

<sup>1021</sup> *Allianz - Opinion* (n 1014) para 64.

<sup>1022</sup> *T-Mobile - Opinion* (n 1011) para 43; see also Case C-67/13 P *CB v Commission* ECLI:EU:C:2014:1958, Opinion of AG Wahl, paras 28 and 35; Case C-373/14 P *Toshiba v Commission* ECLI:EU:C:2015:427, Opinion of AG Wathelet, para 58.

<sup>1023</sup> See, for example, Joined cases C-403/04 P and C-405/04 P *Sumitomo v Commission* ECLI:EU:C:2007:52, paras 42-46.

<sup>1024</sup> See Case T-90/11 *ONP v Commission* ECLI:EU:T:2014:1049, paras 53-54 and the case law cited therein.

engage in it and helps them to abstain from clearly anti-competitive market practices. This benefits legal certainty<sup>1025</sup> and guarantees deterrence.<sup>1026</sup>

Meanwhile, there is not, and there cannot be, an exhaustive list of ‘by-object’ restrictions under Article 101 TFEU.<sup>1027</sup> Hence, there is no definite list of agreements that do not require effects analysis. The absence of such a list is problematic if one considers the repercussions accompanying the finding of object restrictions. First, the CJEU has observed that by-object restrictions tend to be punished more severely than by-effect ones.<sup>1028</sup> In addition, while Article 101(3) still applies to the former,<sup>1029</sup> it is extremely difficult to satisfy the conditions of either individual or block exemptions in practice.<sup>1030</sup> Considering these severe consequences, several Advocate Generals have cautioned against defining anti-competitive object broadly due to the associated risk of chilling the very competition that the Article 101 TFEU is designed to preserve.<sup>1031</sup> Meanwhile, it is also understood that an overly narrow approach toward object restrictions will decrease the effectiveness of Article 101(1) TFEU enforcement.<sup>1032</sup>

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<sup>1025</sup> *Glaxo - Opinion* (n 1010) para 91; *T-Mobile - Opinion* (n 1011) para 43; *CB - Opinion* (n 1022) para 35; *Toshiba - Opinion* (n 1022) para 58.

<sup>1026</sup> *CB - Opinion* (n 1022) para 35.

<sup>1027</sup> *BIDS* (n 486) para 23.

<sup>1028</sup> *Budapest Bank* (n 996) para 41.

<sup>1029</sup> *BIDS - Opinion* (n 1015) para 39; *Budapest Bank - Opinion* (n 996) para 34.

<sup>1030</sup> See *Budapest Bank* (n 996) para 41, where court indicates that Article 101(3) is more difficult to apply to by-object restrictions than to by-effect ones.

<sup>1031</sup> *T-Mobile - Opinion* (n 1011) para 44; *Allianz - Opinion* (n 1014) para 64; *CB - Opinion* (n 1022) para 54.

<sup>1032</sup> See, for example, *T-Mobile - Opinion* (n 1011) para 44; *Toshiba - Opinion* (n 1022) para 59.

In practice, the delineation between ‘by-object’ and ‘by-effect’ has been changing across the different phases of EU competition policy development and alongside the priority policy objectives of the day. For example, during the **Formation Phase**, a strong focus on the market integration objectives conditioned to declare agreements prohibiting parallel imports as by-object restrictions.<sup>1033</sup> This trend continues to date due to the ongoing relevance of the internal market project.<sup>1034</sup> The **Performance Phase**, which prioritized competition protection objective, was characterized by an increasingly legal approach and widening of the ‘object’ box.<sup>1035</sup> However, focusing on efficiency and welfare objectives during the **Efficiency Phase** made the CJEU reconsider this direction and return to the restrictive interpretation of the anti-competitive object.<sup>1036</sup>

More specifically, recent case law limits object restrictions to the cases where long-standing experience proves sufficient harm to the competitive conditions of the market. Here, the non-evaluation of effects is justified from the procedural economy viewpoint.<sup>1037</sup> The concept of ‘experience’, in turn, refers to the established economic findings proven via enforcement and adjudication.<sup>1038</sup> While not precluding the establishment of by-object

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<sup>1033</sup> *Consten* (n 281).

<sup>1034</sup> For recent cases, see *Glaxo – CJEU* (n 293) para 59; *FAPL* (n 479) paras 39 and 139-140.

<sup>1035</sup> For the concept of the ‘object’ box and its development, see Whish and Bailey (n 71) 125, 132-134.

<sup>1036</sup> *CB* (n 1002) para 58. *Maxima Latvija* (n 1009) para 18; *Budapest Bank* (n 996) para 54; *Generics (UK)* (n 485) para 67.

<sup>1037</sup> *CB - Opinion* (n 1022) paras 55-56.

<sup>1038</sup> *CB - Opinion* (n 1022) para 79; *Budapest Bank – Opinion* (n 996) para 42.

restriction in certain novel and complex cases,<sup>1039</sup> such a definition still narrows down the list of object restrictions primarily to hardcore infringements.

The Efficiency Phase developments also suggest that (a limited) effects analysis might still occur in non-hardcore object restriction cases, where they involve ‘atypical or complex’ agreements object restrictions.<sup>1040</sup> Although it has been pointed out that this analysis should not equate to a full-blown evaluation under the ‘effects’ box, the parameters suggested for the analysis closely resemble the ones deployed for finding anti-competitive effects.<sup>1041</sup> Consequently, the line between non-hardcore object assessments and effects assessments under Article 101 TFEU is unclear, as CJEU Advocate Generals acknowledge.<sup>1042</sup>

The most vivid example of the Efficiency Phase impact is perhaps a novel approach to assessing the pro-competitive effects within Article 101(1) TFEU. Traditionally, effects analysis under this provision has been confined to establishing anti-competitive effects, even if the agreement displayed pro-competitive effects too. The CJEU has been clear that there is no rule of reason analysis within Article 101(1)<sup>1043</sup> – the balancing exercise between pro and anti-

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<sup>1039</sup> See, for example, *Allianz* (n 994) para 43; *Budapest Bank* (n 996) para 80.

<sup>1040</sup> *Toshiba - Opinion* (n 1022) paras 74 and 89-91.

<sup>1041</sup> See, for example, *Lundbeck* (n 1012) para 344; *Hoffmann II* (n 1007) para 80; *Budapest Bank* (n 996) para 51; *Generics (UK)* (n 485) para 68.

<sup>1042</sup> See, for example, *Budapest Bank - Opinion* (n 996) paras 40-51.

<sup>1043</sup> *O2 Germany* (n 1003) para 69.

competitive effects occurs under Article 101(3).<sup>1044</sup> Meanwhile, a recent *Generics (UK)* judgement clarified that the magnitude of pro-competitive effects might impact the analysis under Article 101(1) TFEU if their nature casts doubt on the inherent harmfulness of the activity in question.<sup>1045</sup>

The above-mentioned case concerned pay-to-delay agreements in the UK pharmaceutical sector that generated certain consumer benefits. Hence, the question arose whether the agreement with established pro-competitive benefits could be characterized as an object restriction.<sup>1046</sup> CJEU once again affirmed its traditional ‘no rule of reason’ formula. However, it also noted that if the pro-competitive effects stemmed from the alleged anti-competitive agreement, were relevant, and were sufficiently significant to cast doubt on the inherent harmfulness of the agreement, then the latter could not have an anti-competitive object and should be subject to full effects analysis. The agreement at hand likely failed to satisfy these criteria.<sup>1047</sup>

The approach taken in *Generics (UK)* implies that if parties demonstrate pro-competitive benefits in Article 101(1) TFEU proceedings, the Court should examine their relevance, their firm link to the agreement, and sufficiency of their significance, to confirm whether the

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<sup>1044</sup> Case T-65/98 *VBF v Commission* ECLI:EU:T:2003:281, para 107 and case law cited therein.

<sup>1045</sup> *Generics (UK)* (n 485).

<sup>1046</sup> *Ibid*, paras 19-21.

<sup>1047</sup> *Ibid*, paras 19-21, 104, 107 and 108-110.

agreement still satisfies the threshold of sufficient harmfulness and thus, could qualify for object analysis. Here, a certain type of (even though not complete) effects analysis becomes unavoidable. The court did not have an opportunity to clarify whether this exercise concerns hardcore infringements. So far, it seems that this is not the case, as *Generics (UK)* concerned a non-hardcore agreement where there was no long-standing experience proving the inherent harmfulness of the collusion in question. However, this development highlights that prioritising efficiency and consumer welfare objectives has significantly affected the traditional analysis of object restrictions.

To summarize, Article 101(1) TFEU guarantees the preservation of a limited pool of agreements that do not require effects analysis due to their inherent harmfulness to the competitive process. Such an approach is justified both from legal certainty and procedural economy viewpoints. While the line between object and effect restrictions changes in line with the priority policy objectives of the day, complete erasing of the ‘object’ box is neither anticipated nor desired.

### ***Article 102 TFEU***

Unlike Article 101 TFEU, which contains an overarching definition of anti-competitive agreements (i.e. those that exhibit anti-competitive object or effect), there is no general definition of the abuse under Article 102.<sup>1048</sup> Instead, over the years, the CJEU case law has

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<sup>1048</sup> *Hoffmann* (n 323) para 91 states that abuse is ‘an objective concept’ relating to dominant firm’s behaviour. To establish an abuse, the court needs to find that such undertaking resorted to competitive methods ‘different from

identified an unexhaustive list of activity types that could constitute abuses.<sup>1049</sup> Each type of abuse is established based on a separate set of criteria (legal test). These tests have been elaborated by the court and systematized by the Commission in its guidance on Article 102 TFEU enforcement priorities.<sup>1050</sup> The analysis of these legal tests reveals that, in practice, the EU distinguishes between *prima facie* abusive conducts and those that can be found harmful only if their anti-competitive effects are proven.<sup>1051</sup> In other words, ‘by-object’ abuses exist.<sup>1052</sup>

The above-mentioned situation conditions the Commission to perform a sorting exercise – i.e. determine exactly which legal test it will deploy while assessing a specific unilateral activity. Sometimes, such ‘sorting out’ might require identifying a novel abuse and elaboration of a separate legal test. For example, self-preferencing by dominant online platforms emerged as a distinct type of abuse as a result of a *Google Search (Shopping)* case.<sup>1053</sup>

The choice of a legal test is one of the critical junctures in the enforcer’s decision-making process since the type of abuse determines the basis of a necessary effects analysis for a particular case. For example, if the investigated activity is qualified as predatory pricing or tying, there is

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those which condition normal competition’ and by doing so, further limited the level of market competition which was already weak by the sheer fact of its presence. However, the above-mentioned methods vary greatly case-by-case. Hence, there is no overarching legal test that would be deployed to assess the existence of the abuse.

<sup>1049</sup> The fact that the list is unexhaustive has been affirmed by the court. For one of the most recent affirmations, see *Lietuvos geležinkeliai* (n 487) para 85.

<sup>1050</sup> Article 82 Guidance (n 529).

<sup>1051</sup> For details, see Colomo (n 6).

<sup>1052</sup> Whish and Bailey (n 71) 205-206.

<sup>1053</sup> *Google Search (Shopping)* (n 508); *Google v Commission (Shopping)* – GC (n 508).

no need to show their anti-competitive effects – these activities are *prima facie* prohibited for dominant undertaking, unless the latter has an objective justification for them.<sup>1054</sup> However, if the activity at hand is qualified as a refusal to supply (refusal to deal) or a margin squeeze, then the analysis of anti-competitive effects becomes necessary.<sup>1055</sup>

To demonstrate the impact of the above-mentioned choice on the antitrust case-handling, this thesis will compare two types of abuses – tying and refusal to supply. Up to date, tying is considered a *prima facie* abuse. This means that, although the Commission has indicated a desire to incorporate a consumer harm evaluation in the assessment of this abuse as a part of its Efficiency Phase policy,<sup>1056</sup> the establishment of such harm is not a part of a legal test elaborated by the CJEU. Finding the tying abuse only requires proving the following criteria: (1) existence of at least two separate but interrelated relevant markets;<sup>1057</sup> (2) operation of a dominant undertaking on all of these markets and having a dominant position on at least one of them<sup>1058</sup> (the market where dominance exists is called ‘tying market’, and other markets are

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<sup>1054</sup> Colomo (n 6) 715-717.

<sup>1055</sup> Ibid, 717-719.

<sup>1056</sup> In this respect, Article 82 Guidance (n 529) para 49 states that dominant undertaking ‘can *harm consumers through tying or bundling by foreclosing the market* for the other products that are part of the tie or bundle (referred to as the tied market) and, indirectly, the tying market.’ (emphasis added) The formulation implies that the Commission considers market foreclosure anti-competitive due to its effects on consumer welfare.

<sup>1057</sup> See, for example, *Tetra Pak* (n 413) paras 24-27; *Microsoft* (n 497) paras 912-944. Case T-30/89 *Hilti v Commission* ECLI:EU:T:1991:70, para 68 (three separate markets).

<sup>1058</sup> *Tetra Pak* (n 413) para 31.

called ‘tied markets’);<sup>1059</sup> (3) engagement in the practice of tying by various (ex. contractual<sup>1060</sup> or technical<sup>1061</sup>) means; and (4) capability of such practice to foreclose the market.<sup>1062</sup> Once these elements are established, the analysis of the anti-competitive effects of tying is not necessary.<sup>1063</sup>

In contrast, anti-competitive effects analysis is an inseparable part of the refusal to supply abuse. To start with, even dominant undertakings are allowed to enjoy the freedom of choosing contractual partners.<sup>1064</sup> Consequently, a refusal by a dominant undertaking to enter into a contractual relationship with its competitors *is not abusive by default*, as the absence of such obligation might be necessary to encourage innovation and investment from dominant undertakings and avoid free-riding from competitors.<sup>1065</sup> Consequently, the Commission has noted that it would take extra care when analyzing the harmful nature of such refusals.<sup>1066</sup>

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<sup>1059</sup> Article 82 Guidance (n 529) para 50 and fn 3.

<sup>1060</sup> *Hilti* (n 1057).

<sup>1061</sup> *Microsoft* (n 497); *Google Android* (n 510).

<sup>1062</sup> In this respect, *ibid* (n 497) para 867 notes that ‘capability’ of restricting competition is what matters in abuse cases. Compare this to Article 82 Guidance (n 529) para 50, which indicates that it will consider intervention when the activity in question is ‘likely’ to product foreclosure effect.

<sup>1063</sup> However, on occasions, the Commission might still engage in it, if the market peculiarities do not allow it to say that the capability of foreclosure exists. See *Microsoft* (n 497) para 857.

<sup>1064</sup> Article 82 Guidance (n 529) para 75.

<sup>1065</sup> *Ibid*. See also Case C-165/19 P *Slovak Telekom v Commission* ECLI:EU:C:2021:239, paras 46-47. See also Niahm Dunne, ‘Dispensing with Indispensability’ (2020) 16 JCL&E 74, 76.

<sup>1066</sup> Article 82 Guidance (n 529) para 75.

The first difference between tying and refusal to supply is in the market definition for the purposes of these cases. More specifically, while both abuse types require the establishment of more than one market, refusal to supply cases concern ‘upstream’ and ‘downstream’ markets. These are either actual or hypothetical markets where the upstream product (supplied by a dominant undertaking) is needed as an input to enable operation on the downstream market.<sup>1067</sup> This input might have a form of, for example, raw material<sup>1068</sup> or various facilities/infrastructures.<sup>1069</sup>

Overview of the case law reveals that refusal to supply cases require effects analysis at least at three levels. First, Commission needs to analyze the effects of refusing to supply a particular product/input in question (indispensability criterion).<sup>1070</sup> Next, the analysis should concern the level of competition that will be foreclosed by such refusal (criterion of eliminating all effective competition). Finally, the effects of the refusal on consumers should be assessed (consumer harm criterion).<sup>1071</sup> These criteria are briefly elaborated on below.

The **indispensability** criterion implies that the refusal should concern an objectively necessary input for operation on the downstream market.<sup>1072</sup> Namely, the enforcer should prove

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<sup>1067</sup> Article 82 Guidance (n 529) para 76. For hypothetical markets, see *IMS Health* (n 457) para 44.

<sup>1068</sup> See, for example, (n 297) para 22.

<sup>1069</sup> A comprehensive list of such infrastructures is provide in Whish and Bailey (n 71) 739-741.

<sup>1070</sup> Dunne 2020 (n 1065) 81-83.

<sup>1071</sup> Article 82 Guidance (n 529) para 81.

<sup>1072</sup> *Ibid.*

physical or legal impossibility (or extreme economic hardship/unviability) to duplicate a particular input or facility in question.<sup>1073</sup> The analysis is highly context-specific.<sup>1074</sup> To clarify, objective necessity should not be mistaken with mere strong desirability of the input usage, nor with the subjective inefficiency of the downstream competitor. However, it does not equate to the absolute unavailability of substitutes for the refused input.<sup>1075</sup> Few exceptions where an intensive analysis might not be required (i.e. indispensability might be assumed) include, for example, situations where state measures already mandate the access.<sup>1076</sup> Such mandating is not uncommon, especially where the essential input has been acquired by privatising former state monopolies instead of building it from scratch.<sup>1077</sup>

The criterion of **eliminating all effective competition** further implies that abuse cases are not limited to the factual circumstances where all downstream competition is eliminated. The refusal might lead to the situation where downstream competitors are marginalized and maintain their operations on an extremely limited part of the market. Such scenarios will also

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<sup>1073</sup> Examples are numerous. For physical indispensability, see *Slovak Telekom* (n 1065); for legal indispensability, see Joined cases C-241/91 P and C-242/91 P *RTE & ITP v Commission (Magill)* ECLI:EU:C:1995:98; for economic inviability, see *IMS Health* (n 457).

<sup>1074</sup> See, for example, Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) 53 *Revue juridique Thémis* 33.

<sup>1075</sup> Dunne 2020 (n 1065) 80-81.

<sup>1076</sup> *Slovak Telekom* (n 1065) paras 57-60.

<sup>1077</sup> *Lietuvos geležinkeliai* (n 487) para 95.

be considered abusive since the EU is interested in maintaining a healthy competitive process, not just its imitation on a smaller/insufficient scale.<sup>1078</sup>

Finally, according to the CJEU, the **consumer harm** criterion requires the analysis of the nature of the downstream product, which cannot be produced as a result of the refusal. Namely, refusal will be abusive if it prevents the emergence of a new product that the consumers might desire.<sup>1079</sup> A similar approach has been taken to substantively innovated/upgraded products.<sup>1080</sup> The Commission, in turn, highlights that the consumer harm might emerge when the refusal to supply stems from a regulated (price-wise) upstream operator that would like to receive extra financial benefits from the unregulated downstream market.<sup>1081</sup>

Depending on which type of abuse – tying or refusal to supply – the Commission decided to investigate, the level of effects analysis differs dramatically. Such difference is especially noteworthy, considering that certain forms of tying may be expressed in the refusal to supply. However, Commission clearly distinguishes the two types of abuses – the ones where the dominant undertaking refuses to supply to customers unless they mandatorily purchase other/additional product(s) from them are exclusively dealt with under the umbrella of

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<sup>1078</sup> See *Microsoft* (n 497) para 563.

<sup>1079</sup> *Magill* (n 1073) para 54; *IMS Health* (n 457) paras 48-49.

<sup>1080</sup> *Microsoft* (n 497) paras 643-47.

<sup>1081</sup> Article 82 Guidance (n 529) para 88.

'tying'.<sup>1082</sup> Here, the intensive effects analysis (for example, finding indispensability) is not required.

It should be noted that the existence of *prima facie* abuses does not always exclude effects analysis from the picture. This is because Article 102 TFEU does not have separate provisions for anti-competitive and pro-competitive effects analysis, resembling Article 101(1) and 101(3) TFEU. Hence, the efficiencies analysis takes place alongside the presumption or evaluation of anti-competitive effects. For example, in tying cases, the Commission might consider whether offering two or more products leads to cost savings that could be trickled down to consumers.<sup>1083</sup> However, dominant undertakings might or might not make efficiency claims in abuse cases. Similarly, the Commission might consider that specific market characteristics (for example, on technology markets) require a deeper analysis to determine whether tying has occurred.<sup>1084</sup> However, this does not mean that it has to undertake a similar analysis for every case that involves tying practices.

To summarize, Article 102 TFEU (similar to Article 101 TFEU) acknowledges that, on certain occasions, a comprehensive effects analysis is not necessary to establish abuse. Such acknowledgement does not equate to the easiness of proving *prima facie* infringements. Instead, like in anti-competitive object cases under Article 101 TFEU, it requires different analytical

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<sup>1082</sup> Ibid, para 77.

<sup>1083</sup> Article 82 Guidance (n 529) 62.

<sup>1084</sup> For example, such analysis was undertaken in *Microsoft* (n 497).

approaches to handling such infringement cases. While doing so, the Commission is also cautious to distinguish genuinely *prima facie* conducts (such as tying) from those requiring extensive effects analysis (such as refusal to supply). This maintains legal certainty in Article 102 TFEU application and ensures that an extensive analysis does not overburden the enforcer in cases where the existence of the infringement is more straightforward.

### ***2.2.2. Potential anti-competitive effects***

As already explained above, by-object infringements under Article 101 TFEU and *prima facie* abuses under Article 102 TFEU do not require the establishment of their actual anti-competitive effects. For these conducts, the capability to negatively affect the competitive market process is assumed.<sup>1085</sup>

Proving actual market effects might not be required for other ('by-effect') infringements. For example, while analyzing agreements with anti-competitive effect under Article 101 TFEU, the infringement will be found if the investigated conduct either already has or will – in a reasonably foreseeable way – affect the competitive conditions of the market<sup>1086</sup> by causing a

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<sup>1085</sup> However, if such conducts have been present on the market for a while without the materialization of anti-competitive effects, parties might use this argument as evidence to prove that their actions do not infringe competition law. For details, see Pablo Ibanez Colomo, 'Anticompetitive effects in EU competition law' (2020) 17 JCL&E 309, 321-323.

<sup>1086</sup> *John Deere* (n 1003) para 77; *Glaxo - Opinion* (n 1010) para 94; *Asnef-Equifax* (n 1003) para 50.

foreclosure.<sup>1087</sup> Similarly, Article 102 TFEU case law suggests that abuse could be established if the Commission proves actual or likely anti-competitive effects.<sup>1088</sup>

The above-mentioned approach is beneficial because it does not oblige the enforcer to wait for the actual market/consumer harm to engage with the anti-competitive practice. By introducing potential effects analysis in antitrust investigations, the EU can address the harmful practices at the early stage of their existence, even before implementation, and prevent them from materializing. This way, the competitive market process is better preserved.

Meanwhile, the assessment of the potential anti-competitive effects also has its boundaries. Namely, it can be applied when the practice in question has been recently implemented or has not been implemented yet. In other words, potential effects analysis happens when the allegedly infringing activity has not yet had a practical possibility of revealing its anti-competitive effects. In contrast, if the practice has been implemented for some time, the Commission cannot avoid assessing the actual effects. This is necessary to avoid abstract evaluations and ensure that antitrust analysis pays proper attention to market reality.<sup>1089</sup> Such interpretation is especially important for dominant undertakings engaged in practices that are deemed *prima facie* abusive. Namely, if these practices have been implemented for a while, parties might produce verifiable evidence that they have not yielded any adverse market effects

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<sup>1087</sup> *Maxima Latvija* (n 1009) para 30.

<sup>1088</sup> *TeliaSonera* (n 465) para 64; see also *Microsoft* (n 497) para 32 and the case law cited.

<sup>1089</sup> Colomo 2020 (n 1085) 323-326.

during their existence. The Commission/CJEU is obliged to assess such evidence. Hence, alleged *prima facie* abusers might be able to prove that they did not infringe competition law.<sup>1090</sup>

To summarize, the EU does not mandate actual effects analysis even for the cases where the antitrust case does not concern by-object restrictions or *prima facie* infringements. Proving likely effects suffices. However, such a possibility should not be abused. Namely, potential effects analysis should be confined to cases where actual effects could not have been materialized due to a non-implementation or a recent implementation of the practice in question. In contrast, competition assessment should still reflect the market reality and not establish infringements where, despite a long-term presence, the investigated activity has not yielded any anti-competitive market effects.

### ***2.2.3. Approaching effects analysis – A lesson from the EU experience***

The primary lesson learned from the overview of how the EU treats effects analysis in antitrust cases is **to adopt a balanced approach toward effects assessment**. This lesson encompasses at least three aspects:

- **There is no necessity to conduct effects analysis in cases concerning inherently harmful infringements.** For anti-competitive agreements, such cases are called by-object restrictions. For abuse of dominance cases, these are called *prima facie* abuses. The experience and economic evidence suggest that these cases will most probably result in

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<sup>1090</sup> See, for example, *Intel* (n 473).

competitive harm while yielding little to no pro-competitive benefits. Identification of a group of such cases supports effective enforcement since it saves administrative resources and guarantees legal certainty for market competitors. However, the question of the delineation between such cases and the ones which require effects analysis is not a settled issue – the line might change according to the leading competition policy objective of the day, which might advocate for more (or less) economic analysis. In any case, the existence of anti-competitive object/per se abuses does not negate the importance of effects analysis – it might still be necessary to calculate fines.

- **Competition enforcers should choose the legal theory of harm carefully.** Depending on a particular fact of the case, the investigated infringement might be hard to qualify in terms of whether it requires effects analysis. For anti-competitive agreements, these are borderline cases between ‘by-object’ and ‘by-effect’ infringements. For abuse of dominance, this might be two (partially) resembling practices if one of them qualifies as a prima facie abuse and the other one does not – for example, tying and refusal to supply. The enforcer should pay due attention to the case qualification since this choice will decide how much effects analysis it will have to undertake.
- **Potential effects are important too for infringement-finding.** The enforcer does not have to wait for actual effects to materialize to establish the infringement. In this respect, early deterrence better maintains healthy market competition. Hence, potential effects could also be a cause for establishing an infringement. This does not mean that the enforcer is free from analyzing actual effects if they have already occurred. However,

negating the relevance of potential effects altogether shall significantly limit the effectiveness of antitrust enforcement.

### **3. Concluding remarks**

Discretion in prioritizing antitrust cases is an essential tool for the enforcer to ensure the effectiveness of the competition framework. Meanwhile, one should keep in mind that the level of discretion in case handling also depends on the overall framework within which a particular enforcer operates. In case of the EU, this is a decentralized framework where antitrust-related tasks are divided between national and supranational enforcers. Hence, just because the latter does not pursue a particular case, this case does not automatically stay unattended. National frameworks outside the EU do not enjoy this benefit. The above-described nature should be kept in mind when internalizing the experience related to the complaint handling procedures. In this respect, the difference in approaches is justified as long as the public nature of competition enforcement procedure is respected.

Changes in policy objectives significantly affect the enforcement process. In the EU, this is evident from the overview of recent developments in substantive analysis. As the efficiency/consumer welfare objectives are at the forefront of the Union competition policy, the enforcement has become more oriented on economic analysis. For the Article 101 TFEU, this has resulted in returning to a restricted approach of defining by-object restrictions and introducing a limited effects analysis in borderline cases. For the Article 102 TFEU, this translated into a stronger push to transform certain prima facie abuses into those analyzed based

on their effects.<sup>1091</sup> These developments should be kept in mind when one decides to use EU enforcement experience as a basis for national competition framework implementation. Sometimes, different objectives might require slightly different approaches in enforcement practice.

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<sup>1091</sup> See, for example, Colomo 2016 (n 6) analysing why tying should be evaluated not as a *prima facie* abuse.

## Chapter IX. Optimizing *ex-post* control – analysis

As Chapter VII revealed, GNCA suffers from the self-restraint problems that affect enforcement at least in two significant ways. First, by awarding party status to complainants via administrative interpretation, the Agency has significantly differentiated *ex officio* and complaint-based investigations, making the latter resemble to a private litigation. Such differentiation, in turn, significantly limits the GNCA in configuring the scope of the investigation, makes the complainant as a principal burden-bearer in antitrust proceedings, and negatively affects the reasoning of setting fines. Next, by overfocusing on the effects analysis after the judicial overhaul of its first major case, the Agency spends more than necessary time and resources on investigating clear-cut (by-object/*prima facie*) infringements, while the analysis deployed in other cases leads to false negatives. As explained, the legislative amendments might not remedy these problematic trends in the short term and might even amplify them to a certain extent.

Chapter VIII offers a different story for the EU. First, complainants are important but not essential actors in antitrust proceedings. Notably, they never bear a burden of proving an infringement – the latter always rests on Commission. Such configuration allows the latter to maintain a public interest nature of the antitrust investigations, while engaging complainants up to the level necessary for the effective enforcement. Next, despite prioritization of the efficiency/consumer welfare objectives and injecting more economic approach in the substantive analysis of antitrust cases, the Union still acknowledges the infringements where

effects analysis is unnecessary due to an inherently harmful nature of the investigated activities. Similarly, potential effects are taken into account, provided that the activity in question did not have sufficient time to produce actual anti-competitive effects on the market.

The overview of the above-mentioned experience allowed to identify two multifaceted lessons for Georgia. According to the first lesson, it is best to maintain the public interest nature of antitrust proceedings, notwithstanding the basis of their initiation. According to the second lesson, effective enforcement is ensured the best by adopting a balanced approach towards effects analysis. This chapter explains how these lessons can be utilized in Georgian practice.

## **1. Applying the lesson regarding a public interest nature of antitrust proceedings**

As subchapter VIII.2.1.3 clarifies, this lesson has two dimensions: (1) not giving complainants and parties equal status under the investigation; and (2) equipping complainants with enough rights to incentivize their participation in antitrust proceedings. Georgia could utilize both dimensions with certain modifications.

### **1.1. Distinguishing complainants from the parties**

As subchapters VII.2.1 and VIII.2.1 reveal, Georgia and EU treat complainants very differently both during the complaint admissibility and investigation stages. For the

admissibility stage, such disparities are conditioned by legal provisions. Namely, unlike the EU, Georgian competition legislation explicitly awards the complainant a party status during admissibility proceedings. This means that the complainant has a burden to raise reasonable doubt both regarding the existence of the infringement and the direct material damages suffered from it. However, the disparity in approaches toward the complainant's status at the admissibility stage could be both logical and desirable, considering the different administrative settings in which the two evaluated jurisdictions operate.

More specifically, due to the requirements of the national administrative law, Georgia cannot have lengthy admissibility procedures like the EU does. In this respect, the requirements of competition legislation are aligned with the general national time limits allotted to administrative bodies for responding to complaints. Additionally, Georgia (unlike the EU) does not operate in a decentralized competition framework. Hence, it cannot refuse admissible and substantiated complaints because the latter might be better dealt with by another national Agency (although the law allows for damage litigations in competition cases without having an official infringement decision from the GNCA).<sup>1092</sup> Consequently, Georgia cannot enjoy the lengthy time-limits or broad discretion for complaint refusal without contradicting a broader national administrative framework. These disparities set a logical ground for differentiated treatments toward antitrust complainants at the admissibility stage.

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<sup>1092</sup> GLC (n 182) art 28(1)

To clarify, it is logical that the Commission bears the burden of proof for antitrust case initiations in the EU. This happens because the latter has sufficient time to conduct admissibility stage procedures, a wide pool of information sources, and broad discretion in complaint rejection. In contrast, in Georgia, time limits for complaint admissibility are pressing, the information is provided principally from the complainant, and grounds of complaint rejection are narrower. Consequently, it makes more sense for the complainant to be a central figure in the admissibility procedure. This way, the GNCA is relieved from the extra burden and enabled to initiate proceedings only when the complainant provides solid arguments and evidence for case commencement. In comparison, the Agency still bears a burden of proof for *ex officio* case initiation since it does not have time constraints, sources of information are more diverse, and the choice of case commencement is totally up to the enforcer.

Due to the above-explained disparities in administrative settings, it is preferable for Georgia to have two complementary pre-investigation procedures: (1) *ex officio* procedure - with no prescribed time limits for initiating an investigation, ability to procure evidence from multiple sources, and free choice of which case to pursue; (2) complaint-based procedure – with a 30-day time-limit to commence the case, ability to procure evidence mainly from the complainant, and an obligation to commence the case if the complaint is substantiated. It is also logical for the GNCA to bear a burden of proof in the first scenario and the complainant to do the same in the second one. This way, *ex officio* investigations are complemented by those that commence based on solid evidence produced by a damaged party. In a certain sense, this could be an additional and a relatively easy possibility for the Agency to establish infringements and

thus, support the effective antitrust enforcement. Such configuration also benefits complainants who suffer direct material damages from infringing actions, have evidence to prove this, and would like to make the infringement stop via a relatively quicker administrative procedure, as opposed to lengthier court litigation.

In contrast, the existing Georgian setting where the complainants are equated to parties due to an administrative interpretation and bear a burden of proof *at the antitrust investigation stage* does not seem logical. To start with, Georgia (like the EU) considers the competition infringement cases as public interest proceedings. Next, the national competition legislation does not contain separate rules (as opposed to investigation *commencement* rules) for *ex-officio* and complaint-based investigations. Yet, the current GNCA practice artificially divides this procedure into two types:

- A genuine public interest (*ex officio*) procedure where the infringement is determined according to the resulting harm to the competitive market conditions.
- A private litigation-like (complaint-based) procedure between the damaged party and the alleged infringer of competition.

As Chapter VII revealed, such differentiation limits the scope of the investigation, makes its outcome dependent on proving both infringement and individual damages, and affects the process of fine-setting. Utilizing the EU experience could solve all these problems and restore the true public nature of antitrust investigations in Georgia.

A proposed way forward is the following: while complainants should maintain a central role in the admissibility procedure, the GNCA should relieve them from the party status (and, subsequently, a burden of proving an infringement) once the antitrust investigation commences. This could be done via procedural by-laws that the Agency is entitled to adopt or (preferably) by soft law measures that do not require a formal adoption procedure, and are more flexible and detailed in their reasoning. Such interpretation would end an artificial division between *ex-officio* and complaint-based investigation procedures and equip the Agency with equal powers in both instances. Namely, the GNCA will be able to broaden or narrow the scope of the investigation and increase or reduce the number of responding parties (alleged infringers) without seeking the complainant's approval. It would also be able to establish an infringement even if the complainant cannot prove individual damages (which, even if proven, cannot be compensated by the GNCA via the infringement decision anyway). Finally, the Agency would empower itself to benchmark the fines against the damages caused to the market at large/competitive process in general, instead of the damages suffered by the complainant.

The above-mentioned approach will benefit complainants too. Namely, the latter will only be responsible for creating a reasonable doubt regarding alleged infringement/damages at the admissibility stage, while the burden of proving an infringement will be entirely on the GNCA. Such distribution would relieve complainants from the extra burden. To clarify, the latter would still have to prove direct material damages. However, this requirement will not apply during the GNCA antitrust investigations. Instead, complainants would be able to better focus on supplying relevant information regarding the infringement to the latter and save their

resources for damage-proving at a later stage – in follow-on private litigations. Such re-focusing would improve the probability of ending the proceedings with infringement decisions and give complainants a better chance for subsequent damages compensation.

The proposed approach would not go against the general spirit of the EU integration either. Scholars have noted that even within the EU, complaints are handled differently in different Member States depending on their national settings.<sup>1093</sup> Georgia could use a similar approach. This way, it would stay tuned with the requirements of a broader national setting and take advantage of the EU experience as well.

## **1.2. Incentivizing complainants to participate in the antitrust proceedings**

Relieving complainants from the burden of proof – and subsequently, a party status – during the antitrust proceedings comes with one caveat. Namely, complainants would not enjoy the rights guaranteed to the parties anymore. This could disincentivize some of them from engaging with the GNCA in the first place (even for the purposes of investigation commencement). To avoid such an outcome, Georgia could utilize the EU experience of equipping complainants with certain rights that do not equate them to parties but put them in a considerably better position than third parties associated with the proceedings.

Such rights could be elaborated via soft law measures. They could include at least a right to present evidence in infringement proceedings, a (limited) right to access the file and attend

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<sup>1093</sup> Cseres 2010 (n 689) 158-160.

meetings, and a right to receive and comment on a draft decision. These rights will enable complainants to be involved in the process to the extent relevant for upholding their interests – especially in relation to preparing in advance regarding possible follow-on damage litigations.

Equipping complainants with the above-mentioned rights is also beneficial for the enforcement effectiveness. For one, the GNCA would be able to receive better input from complainants if they are guaranteed certain rights to participation, as listed above. Next, it would alert the parties regarding possible follow-on damage claims and make them more willing to engage in commitments procedures to avoid such litigations. This would, in turn, save the time and resources of the Agency. Finally, such an arrangement could increase the trust of damaged parties toward infringement proceedings as it would show that the enforcer cares about private interests while conducting public interest investigations. Such trust-accumulation is especially important for a young Agency such as the GNCA to garner business support and utilize it in antitrust enforcement.

## **2. Applying the lesson regarding a balanced approach towards effects analysis**

As subchapter VIII.2.2.3 reveals, this lesson can be broken down into three parts: (1) acknowledging the unnecessary of effects analysis in cases concerning inherently harmful infringements; (2) carefully choosing theories of harm in antitrust investigations; (3) taking into

account potential effects for the purposes of establishing infringements. The ways of utilizing this experience in Georgia are provided below.

## **2.1. Unnecessity of effects analysis – inherently harmful activities**

As the EU experience reveals, effects analysis is unnecessary for establishing infringement in by-object cases under Article 101 TFEU and *prima facie* abuses under Article 102 TFEU. Georgia could easily internalise the first experience since it already has a legal basis for counting certain agreements as inherently harmful. First, article 7 of the GLC, like article 101 TFEU, differentiates between the by-object and by-effect infringements. Second, article 8(1) of the same law indicates that price-fixing and market-sharing agreements do not benefit from the *de-minimis* exemption. This means that the legislator considers price-fixing and market-sharing agreements so harmful that, no matter the market standing of the participating undertakings, these agreements are deemed inherently harmful for Georgian markets. However, price-fixing and market-sharing might encompass a large number of collusive arrangements. Here, GNCA guidelines could provide a helpful clarification for market participants regarding the most widespread types of these arrangements, highlighting their ‘strictly prohibited’ nature.

Such guidelines are essential since the competition regime in the country is relatively young. Hence, many market participants are still not aware of how broadly price-fixing and market sharing can be interpreted. Others, especially MSMEs might still not know about the existence of the competition law as such due to an absence of dedicated legal staff. *Audit Service*

*Group* case exemplifies these problems well. Here, all the participating undertakings were small enterprises, unaware that their long-established practice of co-operation in submitting public bids was infringing competition legislation. Due to this unawareness, they acknowledged the infringement themselves in the process of the antitrust investigation.

*Audit Service Group* exemplifies a broader problem. Namely, a certain number of agreements with anti-competitive objects still occur because (smaller) businesses are not aware of what exactly particular hardcore infringements stand for. As a result, unless the GNCA clarifies the concept and content of such agreements via guidelines, it might find itself investigating many more minor and less impactful cases. An optimal alternative would be to raise awareness among the MSMEs regarding the hardcore agreements. In this respect, the guidelines would ensure legal certainty for market participants and support deterrence. The latter part is especially true for MSMEs that (at least in Georgia) carefully observe regulations as non-compliance might significantly impact their financial standing. GNCA could use this careful approach to its advantage. Namely, as it increases awareness among MSMEs regarding the repercussions of hard-core cartels, it could significantly lessen the possibility of anti-competitive activities among such entities and, subsequently, the number of potential complaints regarding small cases. This should give the Agency more time and resources to engage in more impactful investigations.

Meanwhile, it would be naive to assume that guidelines will eliminate hardcore agreements on Georgian markets. Hence, investigations in this respect could be expected in the future. For such situations, GNCA should do its best to prove infringements based on direct and

indirect evidence and avoid extensive effects analysis. Here, the recent legislative amendments might prove helpful. Namely, prolonged investigation deadlines, enhanced information procurement powers (including via dawn raids), and an upgraded leniency program could be used to gather the necessary evidence. Effects analysis could still be used as a complementary tool, but only for those cases where the factual evidence is insufficient to establish the infringement beyond a reasonable doubt. Meanwhile, effects analysis should not become an excuse for the Agency to avoid using its newly acquired enforcement powers due to the established trend of self-restraint.

As for non-hardcore cases, GNCA could deploy the method used in the EU – analysing the wording/content and objectives of the agreement in the light of the legal and economic context of its formation and interpretation. Full effects analysis should be deployed as a very last resort. In this respect, analysing the pro-competitive effects of the agreement that cast doubt on the by-object nature of the latter (the example of the CJEU *Generics (UK)* case) could be problematic to implement in Georgia at this stage. As the market participants are still learning the basic concepts of the competition law, it would be good to clearly delineate the different analysis stages - finding an anti-competitive agreement and exempting it. Hence, pro-competitive effects should be assessed exclusively under article 9 of the GLC (Article 101(3) TFEU equivalent). This will be a better approach for a novel enforcer who naturally tilts to effects analysis in every case and for the market participants who need to understand the inherent harmfulness of the by-object infringements and avoid them at any cost.

A situation is harder for the abuse of dominance case. Article 6 of the GLC (like article 102 TFEU) does not differentiate between object and effect abuses in its text. However, the EU approach of separating *prima facie* and other abuses could be a helpful experience. A separate set of guidelines could be welcome in this respect. However, one should keep in mind that the most recent EU guidelines on article 102 TFEU were drafted with the consumer welfare (as a priority objective) in mind. Hence, when using these guidelines as a blueprint, alignment with the optimal objective of the Georgian competition framework (competition protection) needs to be ensured. This could mean not making consumer harm a mandatory element of specific legal tests. In other words, the establishment of the exclusionary abuses should be possible because they foreclose markets, without a necessity to prove consumer harm on top.

## **2.2. Choosing theories of harm**

*Poti Sea Port* case is an excellent example of complicating an antitrust investigation by applying a theory of harm that requires extensive economic analysis. As the case facts indicate, the disputed activity concerned combining three different services under an integrated, single tariff (price) and presenting consumers with a choice of either purchasing all three services together or finding an alternative port for handling their business activities. The case exhibited every element of tying, as defined by Commission guidelines: it concerned three separate yet interrelated service markets; the investigated undertaking – PPC – operated on all three markets and was dominant on one of them (a market for ship embarking/disembarking services); PPC

combined three separate services under a single price tag; it refused to liaise with consumers that did not want to purchase all three services altogether. Consequently, the case concerned a particular type of tying expressed in the refusal to supply customers unless they agreed to the tying arrangements. Hence, the GNCA could have advanced this theory of harm and proved a *prima facie* abuse, instead of engaging in comprehensive effects analysis regarding indispensability, foreclosure effects, and consumer harm. The case text indicates that the Agency was aware of this option. However, it opted to address the discussed activity as a refusal to supply, thereby subjecting itself to a more complicated investigation process.

The above-mentioned example is not provided to urge the enforcer to choose to establish *prima facie* infringements in every single case, notwithstanding the case facts. For example, it is counter-effective to investigate the case based on the legal test of predatory pricing when the facts clearly indicate the existence of margin squeeze. The rationale is simple – such analysis will be faulty, waste time and resources of the enforcer, and will not stand any proper judicial review. Additionally, it is not implied that proving *prima facie* abuses is easy. For example, some of the tying cases considered by the Commission, such as *Microsoft* and *Google (Android)*, are incredibly complex and require detailed legal and factual analysis. Instead, the *Poti Port* case shows that if GNCA stays overfocused on effects analysis in every case, it could end up using wrong legal tests for abuse of dominance assessment. Such usage, in turn, could significantly increase its workload and decrease the effectiveness of the enforcement.

Making the wrong choice regarding the legal test also increases the chances of overturning the decision via judicial review. GNCA already experienced this once during the

*Fuel Companies* saga. The conducted effects analysis was not enough to prove the infringement back then. Since then, the Agency seems to avoid another judicial overhaul by injecting effects analysis in every case (almost as a self-defense mechanism), even if it means disregarding the case facts which point toward *prima facie* abuse. However, no matter how extensive and nuanced this analysis is, if the underlying legal test is incorrect, the court could easily repeal the decision. Hence, the correct approach would be to make the right choice regarding the legal basis of the analysis. This basis could well be a *prima facie* abuse. Using legal tests of such abuses (for example, tying) should not be negated just because they do not involve as much effects analysis as the other abuses (such as refusal to supply) do.

Considering the relative ‘youth’ of the GNCA, it is also acknowledged that sometimes incorrect choices might result from a lack of experience. In this respect, adopting the guidelines on article 6 of the GLC would enable the enforcer to further research various types of abuses and increase (first of all) its own awareness regarding different legal tests. Such guidelines will also help market participants abstain from *prima facie* abuses and better substantiate their complaints if they are subjected to such infringements.

### **2.3. Paying attention to potential anti-competitive effects**

The EU experience suggests that an enforcer should not wait for the adverse market effects to materialize to establish an antitrust infringement. In contrast, the identification of likely adverse effects receives proper attention during antitrust investigations. Such an attitude is

understandable and desirable since, on certain occasions, it stops anti-competitive activities from ever harming the market by prohibiting them before or shortly after their implementation.

A similar approach is even more necessary in Georgia, a small market with a weak competition culture and fragile competitive processes. As explained in Chapter I, the small size of the national market sometimes justifies the existence of several large players for the sake of efficiency gains. This means that many markets are highly concentrated and have dominant undertakings. In some instances (including *the Poti Sea Port* case), a single undertaking might monopolize the entire market. These characteristics make the national market more vulnerable to adverse effects – the latter spread quicker and cause lasting harm easier. Detecting and prohibiting potential effects via antitrust investigations would better ensure that such harm does not materialize and hence, support the achievement of the competition protection objective.

Additionally, paying attention to potential anti-competitive effects alongside actual ones will ensure that the investigation process does not lead to ‘false negatives’. One way of ensuring proper attention to such effects is to determine the starting point of the infringement correctly. As the *Poti Port* case illustrates, for abuse of dominance cases, Georgia considers this point to be the beginning of implementing the abusive conduct. However, this approach fails to consider the adverse effects that might materialize between announcing the conduct and the moment of its actual implementation. Such effects would have been present in the *Poti Port* case if, at any time between the integrated tariff announcement and its implementation, customers decided

to terminate their contracts with PPC's competitors. They could have done so to sign a new contract with the PPC before the new tariff introduction and avoid delays in receiving port-related services. However, as GNCA counts the conduct abusive only from the moment of its implementation (i.e. the day when the integrated tariff enters into force), the above-described harm would not be associated with the latter, despite being a direct consequence of it. This example reveals why it is important to follow the EU experience and consider both actual and potential effects for infringement-finding in antitrust cases.

## Conclusion

Proper development of a competition framework is not an easy exercise, especially for small, developing and transitioning economies. Georgia has not been the exception. Hardships of the transitioning from the regulated to the free-market economy conditioned the country to deploy the newly created framework to solve short-term problems without elaborating on its long-term benefits (Formation Phase). Such deployment resulted in an improper understanding of the framework, which led to its total abolition for around a decade starting in the mid-2000s (Stagnation Phase). Increased possibilities of deeper economic integration with the EU put an end to this harmful trend and served as an impetus for re-introducing classic competition provisions in Georgia (Revival Phase). While this is a positive step forward, it should be remembered that competition frameworks are necessary not only for a better engagement in international trade but also to develop robust and competitive markets at home. However, a framework cannot perform this function properly if it is not rooted in the national market reality. Hence, 'copy-pasting' the experience of the others is not a way forward. Instead, a proper balance needs to be found between adopting best international practices and fine-tuning them to the local reality.

Here, the EU experience comes in handy. The Union has had more than six decades of uninterrupted experience in operating its own 'domestic' framework. The development of this framework has not been easy, and debates around its proper scope and functions continue up to this day. However, the Union managed to turn its initial challenges into benefits. Namely, it

firmly tied the competition framework to its core function – market integration – and ensured the gradual development of the framework to support competition on its internal market, despite encountering continuous internal and international pressures. In this respect, the lessons learned from its experience are especially valuable for Georgia. If desiring to have an effective framework, the latter should learn how to match and balance its internal market needs with international trade and integration requirements.

As the thesis identified, lessons can be offered for all three pillars of the competition framework – policy, law and enforcement. In the policy dimension, the EU experience suggests to: (1) start with a single policy objective and gradually develop a multi-faceted framework by keeping its policy objectives dynamic and contestable; (2) ensure both durability and flexibility of the framework by embedding general provisions at the constitutional level and constantly adjust their interpretation to the changing needs of the domestic market; (3) ensure the emergence and development of strong institutions – both enforcing and adjudicating ones – that would ensure the sound implementation of the framework. The ‘umbrella’ message from all these lessons is to be well-aware of what the framework exactly stands for within a particular jurisdiction and ensure the fulfilment of its tasks by capable institutions. This message is especially relevant, considering recent developments in Georgia where, once again, the competition framework seems to be turning into a cure to all problems. Such a development benefits neither the framework nor the market economy it needs to serve. Hence, a proper debate on its long-term policy objectives is long overdue. This thesis suggested such an objective to be the protection of a competitive market process, considering the current problems that

Georgia faces (especially the absence of a competition culture). By doing so, it hopes to facilitate the above-mentioned debate and thus, contribute to both academic and practical developments of competition policy in Georgia.

In the legal dimension, the thesis has shown how a sub-optimal configuration of *ex-ante* jurisdiction might harm the effectiveness of the optimal policy implementation. The discussed EU experience revealed the importance of properly defining all jurisdictional parameters – the concept of concentration, the list of exemptions, and relevant turnover thresholds. However, this lesson should not be limited to the *ex-ante* jurisdiction alone. Having a proper ability to investigate (possibly) harmful market conducts – both *ex-ante* and *ex-post* – is a vital precondition for using the law effectively. In other words, no matter how well the substantive and other procedural provisions are formulated, the competition enforcer will not be able to protect market competition if it is precluded or limited by the law to engage in the analysis of harmful market practices. Georgia needs to be careful in this respect – otherwise, a sub-optimally configured jurisdiction might hinder the realization of optimal policy objectives.

Finally, in the enforcement dimension, this thesis has revealed that even if the law is well-configured, the possible harmful effects of enforcement self-limitation by deploying administrative discretion in competition proceedings should not be underestimated. EU lessons suggest curbing such limitations by focusing on antitrust proceedings' public interest nature and investigating infringements that do not require an extensive effects analysis. These lessons are essential in light of recent amendments that equip the GNCA with strong market investigation and monitoring powers. The key overarching message that the EU experience

unveils is to deploy these powers adequately and ensure a sound enforcement process while respecting the rights of those participating in it. This balance is not easy to find, especially for a novel Agency that seems to be constantly wary of the reaction to its decisions by the judiciary. However, this should not preclude the latter from effectively performing its enforcement duties.

This work has attempted to convey the above-listed messages and provide a set of suggestions (lessons) that could help Georgia better utilize the EU experience in the future. Meanwhile, the author has always kept in mind that, like the competition framework development, the development of competition scholarship is a dynamic process. Hence (and hopefully), this thesis is not a final say on the topic of optimizing Georgian competition framework. Additional discussions in this area are highly desirable – this could be one way to facilitate the debates about the long-term developments of the Georgian competition policy in line with its domestic needs and international obligations.

The author again acknowledges that writing this thesis would not have been possible without a solid pre-existing scholarship regarding the peculiar nature of (the EU) competition framework and the challenges of effectively transplanting it from one jurisdiction to another. In turn, this work will hopefully benefit future researchers as well. More specifically, it might be valuable for scholars working in three broad research areas. First, the research might benefit scholars who analyze any particular pillar of the Georgian competition framework – policy, law, or enforcement. The information presented in the thesis will enable them to have a more holistic view of the framework and approach their specific research questions with a good

understanding of the big picture. Next, the work might also be helpful for the scholars working on the issues of transplanting the EU competition framework outside its borders. Up to now, such research seems largely one-dimensional. Namely, the transposition of the EU competition framework is mostly advocated because the latter works effectively in its 'domestic' setting. However, as this research has revealed, such transposition might have limitations, especially when small, developing, and transitioning countries are concerned. Knowing about this perspective might help scholars evaluate the transposition process differently and suggest better-tailored solutions for recipient jurisdictions. Finally, this research could be helpful for the scholars working on the competition law matters of the developing, small and transitioning economies. Some of them might even be researching how to optimize their domestic frameworks based on best international practices. The latter practice does not always have to be the EU one. For example, developing countries of Latin America might favour the US model. Similarly, emerging economies in Asia could aspire to approximate their frameworks to the Japanese one to facilitate trade with the latter. However, principles deployed in this work could be freely utilized by these scholars and might be helpful in evaluating the benefits and limits of transplanting any foreign competition framework in their domestic systems.

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