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# Competition Law in Georgia

*Comparative research prepared for Transparency International on the implementation of an effective enforcement regime*

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# 1 - INTRODUCTION

## I OUR MANDATE

1. Georgia has initiated a far-reaching reform of its competition law. As part of that process, it seeks to create a new competition authority that will have greater powers of investigation and enforcement than its predecessor. We have been asked to produce a comparative report on international best practices of competition regulation, focusing in particular on four areas: the institutional models of competition regulation adopted by various jurisdictions; the powers and competencies of competition authorities, including their ability to impose fines and other penalties; the relationships between the competition authority, the judiciary and other institutions, including the legislature and any sector-specific agencies; and the detection and punishment of cartels, including an overview of leniency programmes.

## II STRUCTURE OF THIS REPORT

2. We begin in **chapter 2** with a discussion of four issues that form the groundwork for the remainder of the report. First, we discuss the economic challenges that have been recognised in small economies. Second, we discuss in general terms the different policy objectives that a competition regime may adopt. Third, we provide an overview of the main roles of competition authorities and the types of behaviour they might regulate. Fourth, we proceed to discuss how domestic competition law fits into a wider international arena, focusing in particular on the threats that developing countries and small economies face in a globalised world. Finally, we consider the policy objectives that might be best suited to the conditions of economies like Georgia in light of the institutional constraints they might face.
3. **Chapter 3** discusses enforcement. Here, we consider in more detail the institutional models that a new competition regime might adopt, comparing models found in a number of jurisdictions, including the EU, UK, Germany and the USA. We assess how limited resources, both financial and institutional, can create challenges for a new authority. Second, we consider the role of the authority in relation to the judiciary. We weigh the benefits and disadvantages of administrative

and judicial approaches to competition enforcement, considering in each case the particular challenges facing emerging markets. Third, we discuss the powers of inspection and investigation. Fourth, we develop an account of the best practices of an effective competition regime. Finally, we assess briefly what considerations may have a particular impact on the establishment of an enforcement regime in Georgia.

4. **Chapter 4** provides a detailed account of sanctions and remedies. We begin by distinguishing between sanctions, which may involve fines or other penalties, and remedies, which can consist of orders to do or not to do something, or divestment packages. Second, we stress the role of competition advocacy as a preventive tool which can reduce or eliminate the potential administrative costs of imposing remedies. Third, we consider the efficiency and effectiveness of particular sanctions and remedies, assessing how a competition authority can determine which sanctions and remedies are most appropriate in a given scenario. Fourth, we discuss the potency of sanctions and remedies in signalling the views of the competition authority and thus deterring anticompetitive behaviour. Fifth, we contrast various models of sanctions and remedies, including individual sanctions and structural and behavioural remedies. Sixth, we provide an overview of sanctions and remedies in the EU and US. Finally, we try to contextualise some of the key information from this section.

5. Finally, **chapter 5** discusses the regulation of cartels, assessing the economic conditions that may facilitate the creation of cartels, including US and EU regulatory responses to these conditions; and the role of leniency programmes, including the necessary features of a successful leniency programme and special considerations for small economies. We conclude with a note on advocacy and its implications for Georgia.

## III METHODOLOGY

6. In compiling this report, we have drawn on the full breadth of work that has been undertaken by organisations like the International Competition Network (ICN), the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Co-operation and Development (OECD) and by leading academics in the field of competition law. We have distilled this work into

what is essentially a guidebook, offering an insight into the major issues that affect the creation of a new competition enforcement regime.

# 2 - THE COMPETITION REGIME

## I COMPETITION LAW IN SMALL AND DEVELOPING ECONOMIES

1. Small economies – that is, economies with small populations and a degree of political and geographic isolation – face unique challenges. Perhaps the most important is the difficulty of achieving economies of scale.[1] Other consequences of small size include supply constraints, the specialisation of the economy in a few areas and a culturally homogenous society leading to diminished incentives to compete.[2] Small economies are typically also characterized by higher concentration levels, meaning that there are fewer market participants.[3]
2. In addition to the challenges faced by small economies, developing economies may face further institutional hurdles in implementing a competition regime. Issues that are unique to developing economies 'include educating the public in the basic principles of competition policy as well as creating the proper agencies and granting them the power necessary to enforce the law'.[4] It is important for a new competition law to take these fundamental considerations into account.[5]
3. The ICN identified six main enforcement challenges facing nascent competition authorities: (a) inadequate legislation, (b) incoherent government policies, (c) limited capital resources, (d) limited experienced human resource capacity, (e) untrained judiciary, and (f) a lack of a competition culture.[6] Taking these considerations into account, this chapter of the report will look at the various policy objectives that a new competition regime can adopt, and the challenges it will face in doing so.

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[1] 'Economies of scale' refer to the optimum level of output that allows manufacturing costs to stay low. Michal S. Gal, 'Market Conditions Under the Magnifying Glass: General Prescriptions for Optimal Competition Policy for Small Market Economies' (2001) New York University Center for Law and Business Working Paper #CLB-01-004, 14-16 <http://papers.ssrn.com/paper.taf?abstract_id=267070> accessed 10 February 2013.

[2] ibid 16-18; Maher M. Dabbah, 'Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Regime' (2010) *World Competition* 33, no. 3, 457-475, 469-70.

[3] Michal S. Gal, 'Market Conditions Under the Magnifying Glass: General Prescriptions for Optimal Competition Policy for Small Market Economies' (2001) New York University Center for Law and Business Working Paper #CLB-01-004 18-22, 25-27.

[4] ibid 13.

[5] See for example Michal S. Gal and A. Jorge Padilla, 'The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy' (2010) 76 Antitrust Law Journal 899, 903-04.

[6] ICN, 'Competition Policy Implementation Working Group – SubGroup 2: Lessons to be Learnt from the Experience of Young Competition Agencies' (2006).

## II POLICY: THE AIMS OF COMPETITION LAW

4. Competition law seeks to ensure that firms or economic entities do not restrict or distort competition in a way that undermines the optimal operation of the market. Beyond this, competition law can be founded on a number of goals, each with its own justifications. The list of policy aims provided in this section serves two purposes. First, it provides a general rationale for instituting a competition regime. Second, it sets out the policy objectives that a country seeking to develop its competition law can choose to adopt.

### a) Objectives

*i) Economic objectives: efficiency and welfare*

5. The rationale behind a free market economy is the understanding that competition within markets delivers better outcomes than state planning. The 'invisible hand' of competitive markets is said to bring economic benefits in the form of efficiencies and welfare.

6. Efficiencies can take three forms. The first is allocative efficiency, which arises where goods and services are allocated between customers according to the price they are prepared to pay. In the long run, the price should equal marginal cost.[7] The second is productive efficiency, which occurs when goods and services are produced at the lowest cost possible. Finally, dynamic efficiency ensures that producers innovate and develop new products in order to attract customers.

7. Welfare is a measure of a market's performance. Competition law can promote two types of welfare: total welfare and/or consumer welfare. Total welfare is the sum of producer surplus and consumer surplus,[8] whereas consumer welfare is generally understood to be concerned only with the transfer of surplus from producers to consumers. However, this nomenclature is not free from difficulty[9] and controversy over whether competition law does and/or should serve total welfare or consumer welfare persists.[10] Even amongst those who share the core value of protecting

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[7] The change in cost associated with one additional unit of output. Marginal cost helps to determine the level of production at which a firm will achieve economies of scale.

[8] Consumer surplus refers to the difference between the price consumers are prepared to pay for goods or services and the price they actually pay. Producer surplus is the difference between the price of the good sold and the amount the producer would have been willing to sell it for.

[9] C Salop, 'Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard' (2010) 22 Loy Consumer L Rev 336.

[10] C Salop (n 9). See also (generally) D Ginsburg, 'Judge Bork, Consumer Welfare and Antitrust Law' (2008) 31 Harv JL & Pub Pol'y 449 esp at 453-454; and (advocating a consumer welfare approach) R H Lande, 'Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust' (1989-1990) 58 Antitrust LJ 361.

consumer welfare, differences emerge as to the exact meaning of the term and the best ways of achieving it. While consumer welfare has been equated with consumer surplus in both the US and the EU in recent years, consumer surplus has been viewed by some as an improper proxy for consumer welfare.

*ii) Protecting competitors and fair competition*

8. Competition law might seek to decentralise and disperse private power as a means of protecting individual freedom.[11] The argument is that governments should use competition policy to nurture small businesses and promote a society in which citizens are encouraged to be entrepreneurial.[12] However, there are particular dangers of pursuing such a policy objective in small economies, which are discussed below.

*iii) Socio-political policies*

9. Competition law may also be used to promote social, employment, industrial, environmental and regional policy, even where such policies are inconsistent with economic objectives.[13] For example, a government might choose to create monopolies in the provision of certain essential services to make use of economies of scale. Such an approach, however, may shift the competition regime away from the acceptable core values of competition enforcement and may be controversial.

*iv) Productivity and growth*

10. One goal of competition law could be to encourage economic growth through the promotion of dynamic efficiency. Innovations in products, processes and management techniques can result in decreased production costs, higher quality goods and the creation of new goods and services. This can lead to greater value delivered to consumers, and can also result in decreased prices for consumers or higher margins for firms. This view is much broader than consumer welfare, since

[11] Scherer and Ross, 'Industrial Market Structure and Economic Performance' (3rd edn, Houghton Mifflin, 1990) 18.
[12] See for example early case law under the US Sherman Act, which was seen as protecting competitors rather than competition: *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911)
[13] Roger J. Van Den Bergh, Peter D. Camesasca, E*uropean Competition Law and Economics: A Comparative Perspective* (Intersentia, 2001) 3-4.

it focuses on the growth of overall economic productivity, which benefits firms and consumers alike.[14]

*v) The EU perspective*

11. In the European Union ("EU"), an overarching goal of competition law is to facilitate single-market integration.[15] This goal is unique to the European context, but the fact that it plays such a large role in shaping EU law highlights the significance that non-economic objectives can have in competition policy.

**b) Conclusion**

12. It is important to note that these objectives are by no means self-executing and can come into conflict. For instance, there may be a trade-off between efficiencies and consumer welfare. Further, agreement on the objectives of a competition policy does not necessarily lead to agreement about the vigour with which they should be pursued – some countries have more faith in the self-correcting power of markets than others.

13. Competition policy in a small economy should have clearly and consciously defined goals. The most important of these is economic efficiency. Firms operating in small economies face challenges in achieving economies of scale. In some sectors, this is fatal, since the survival of a domestic manufacturer depends on its ability to produce a good at a cheaper price than it would cost to import that good. Additionally, firms that cannot achieve economies of scale are forced to charge more for products or operate with lower margins, which can have consequences for growth. Therefore, pursuing goals other than efficiency may impose additional costs on the economy. It is suggested that 'social goals should be given little or no independent weight in formulating competition policy'.[16]

14. Arguably, competition policy in small economies should not be overly concerned with high market concentration as such, because concentration is likely to have beneficial consequences for the economy. Achieving economies of scale is particularly difficult in small economies and competition law should not exacerbate

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[14] M Porter, 'Competition and Antitrust: a Productivity-Based Approach' in Weller (ed), 'Unique Value: Competition Based on Innovating Creating Unique Value for Antitrust, the Economy, Education and Beyond' (Innovation Press, LLC, 2005).

[15] Joaquín Almunia, 'Beyond the integration of Markets' <http://europa.eu/rapid/press-release_SPEECH-12-742_en.htm> accessed 1 March 2013.

[16] Michal S. Gal, 'Competition Policy in Small Economies' (OECD, 2003) <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2486919.pdf>.

this problem. This point also relates to the types of sanctions and remedies that a competition authority might pursue – this will be discussed in chapter 4.

15. Finally, small economies tend to be less capable of eroding a dominant position because high concentration levels are reinforced by high barriers to new entry.[17] At the same time, dominance may have much greater effects on a small economy than on a large one in relative terms. In some jurisdictions there is a tendency to regulate monopolies themselves, without considering whether they actually lead to anticompetitive effects. This approach 'assumes much in the ability of courts or government agencies to set correctly the price, output and other trade terms of the dominant firm',[18] and caries a significant risk of distortionary effects. It might not be an advisable policy for a jurisdiction with less robust institutions.

## III COMPETITION REGULATION

16. Competition can be regulated in a number of ways. First, the regulatory framework can include a competition law to provide control over the competitive process in general. It can also involve the creation of sector-specific regulators to monitor the activities of firms in those sectors[19]. The most common model of competition regulation involves the statutory creation of a single competition authority at the national level. This can be complemented by the judiciary and/or by other authorities that play complementary roles in the enforcement process. These structural features will be discussed in detail in chapter 3. This section will provide an overview of some of the special roles of competition authorities in small and developing economies, and outline the key features of a competition regime.

### a) Special considerations in small and developing economies

*i) Competition advocacy*

17. Violations of competition law often entail transfers of wealth from one category of individuals (usually consumers) to another (usually the owners of firms).[20] In

[17] Michal S. Gal, *Competition Policy for Small Market Economies,* (Harvard University Press, 2009) 93

[18] Michal S. Gal (n 3) 52.

[19] Gunter Knieps, Sector Specific Market Power Regulation versus General Competition Law: Criterion for judging Competitive versus Regulated Market, in Fereidoon P. Sioshansi, Wolfgang Pfaffenberger (eds), *Electricity Market Refom: An International Prespective,* (Elsevier, 2006) 49.

[20] See eg William Landes, 'Optimal Sanctions for Antitrust Violations' (1983) *U Chi L Rev* 652. From a Chicago School of economics perspective anticompetitive behaviours entail a loss of efficiency (ie less quantity produced) and therefore they entail damages to general wealth and consequently to every single member of society (that clearly just the infringers will be able to compensate to their own benefit).

substance, some behaviours, such as price-fixing or bid rigging, do not differ from stealing. But while human beings would agree that stealing is wrong, they may not fully understand the wrongfulness of restricting competition.[21] Indeed, a UK survey showed that only 15% of respondents considered price-fixing to be equivalent to either fraud or theft.[22] Such a bias in perception of wrongfulness clearly depends on education that may be lacking even in the most advanced and "competition-aware" economies.[23]

18. Additionally, "competition" may mean different things in different jurisdictions. In some jurisdictions, it might mean using particular tactics to eliminate competitors and achieve dominance. Some might hold the view that competition is an unnecessary constraint on growth.[24] It may also be the case that the merits of competition will be felt less strongly by a population accustomed to state-owned monopolies. These views will make the implementation of a competition regime difficult. Further, government policy can contribute to harming market competitiveness where the law is incorrectly drafted.[25] Therefore, a culture of competition is regarded as a pre-condition for competition law to work effectively.[26] Indeed, promoting competition culture may be 'the most significant task of competition authorities in developing countries'.[27]

19. Competition advocacy seeks to promote such a culture among government agencies, the judiciary, market actors and the public at large.[28] Any educational effort should target both entrepreneurs and consumers. Associations of consumers often play an essential role in detecting violations of competition law, especially when these have clear effects on prices, so it is important that an advocacy strategy targets a broad range of market participants.

20. According to the ICN, competition advocacy consists of 'those activities conducted by the competition authority related to the promotion of a competitive

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[21] Caron Beaton-Wells and Christine Parker, 'Justifying Criminal Sanctions for Cartel Conduct: a Hard Case' (2012) *J Antitrust Enf* 1-22.
[22] Anreas Stephan 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' < http://competitionpolicy.ac.uk/documents/107435/107587/ccp07-12.pdf> accessed on 28 February 2013
[23] Beaton-Wells (n 21).
[24] Maher M. Dabbah (n 2) 470.
[25] Allan Fels and Wendy Ng, 'Paths to Competition Advocacy' in *Research Handbook on International Competition Law,* Ariel Ezrachi (ed) (2012) 186
[26] ICN (n 6) 38.
[27] Michal S. Gal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries' (2004) New York University Law and Economics Research Paper Series Working Paper No 02-03, 8 <http://ssrn.com/abstract=665181> accessed 10 February 2013.
[28] Allan Fels and Wendy Ng (n 25) 186; see also generally 196-199.

environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition'.[29] This definition identifies the modes through which advocacy is exercised. One way is through the promotion of competition within the government. The competition authority must play an active role in ensuring that governmental rules and regulations are "competition-friendly". Another way in which competition advocacy is practised is through interaction with the general public and the creation of a broader "competition culture".

21. Competition authorities can promote competition culture through the distribution of reports, newsletters, guidelines and other publications; making effective use of the mass media; organising seminars, conferences and workshops; publishing market studies;[30] and creating programmes that educate firms and ensure compliance.[31]

22. In countries implementing a new competition law, it is important that the authority commits effort towards educating economic actors about competition law and encouraging firms to compete. During the implementation period, it may be difficult for market participants to understand the meaning and objectives of competition rules.[32] Indeed, advocacy is thought to be particularly important in transitional and developing countries for three reasons.[33] First, these countries often undergo far-reaching privatisations; at this stage, developing competition rules is important to ensure that the privatised firms continue to operate efficiently. Second, the liberalisation of trade and investment might have pushed certain market actors to pursue lobbying activities to try to reinstate their former market position. Third, new competition authorities will lack the resources and expertise to properly enforce competition law, so engaging in advocacy as a preventive tool is crucial.

*ii) Developing expertise*

23. Small developing countries should strive to attract and train qualified lawyers and economists to work in the competition authority and judiciary. Indeed, this

[29] International Competition Network, 'ADVOCACY AND COMPETITION POLICY. Report prepared by the Advocacy Working Group ICN's Conference Naples, Italy, 2002. ' (2002) <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf> accessed 10 February 2013.

[30] See Chapter 3, part IV.

[31] Allan Fels and Wendy Ng (n 25) 188

[32] ibid.

[33] ICN (n 29)

staffing aspect is crucial and will be discussed in more detail in chapter 3. Developing countries should also support the creation of an institutional memory (ie retention of staff with sufficient experience) within the competition authority. Some of the negative effects of an initial lack of expertise may be alleviated by avoiding the involvement of those without sufficient expertise in the process, for example by creating specialist courts, or if cases are referred to general courts, creating specialist panels on the generalist courts.[34]

*iii) Matching capabilities and commitments*

24. In this area, it is crucial to 'match commitments and capabilities'.[35] In general, developing economies are well advised to institute only such competition rules that may realistically be expected to be applied as intended. The extent to which competition rules are applied appropriately will depend on the particular local institutional constraints. For example, jurisdictions lacking in critical economic expertise will face difficulties in applying rules which require advanced economic analysis. The adoption of an EU-style prohibition of abuse of dominance within an institutional framework not capable of applying it may bring more harm than benefits.[36] Chapter 3 discusses some of the ways in which these problems can be overcome.

**b) Nature of the conduct regulated**

25. The conduct is necessarily defined in the legislation and normally covers anticompetitive agreements, the abuse of market dominance and mergers that can lead to the creation of dominance. Generally, determining the legality of any conduct requires the precise definition of the relevant market in its product, geographic and possibly temporal dimensions.[37] Some jurisdictions also require the identification of a functional market, which identifies the vertical stages of production to determine whether products sold at different levels of the distribution chain can serve as competitive constraints.[38]

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[34] Gal (n 27) 427-28.
[35] ibid 428.
[36] Gal and Padilla, 'The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy' 76 Antitrust Law Journal 899 (2010) 907-10.
[37] For EU law, see Case 27/76 *United Brands v Commission of the European Communities* [1978] ECR 207.
[38] International Competition Network 'Report on Merger Guidelines' (2004) <http://www.internationalcompetitionnetwork.org/uploads/library/doc562.pdf> accessed 10 February 2013.

*i) Anticompetitive agreements*

26. Anticompetitive agreements are agreements that undermine the goals set by competition law. These gradate in severity from vertical agreements between undertakings[39] operating at different but complementary levels of the market (for example producers and distributors), to cartel agreements that actively seek to expel competitors from a given market. Due to the variety of forms these agreements can take, the correct identification of the market is necessary. In EU law, the rules on anticompetitive agreements are found in Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU"), which states:

> **Article 101 TFEU**
>
> 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

27. Article 101 of the TFEU distinguishes between infringements that have as their "object or effect" the prevention, restriction or distortion of competition. Restrictions of competition by object unlawful without the need to prove their effects. Infringements with the "effect" of distorting competition need to be assessed in accordance with market characteristics, which involves market definition.

28. Article 101(3) establishes exemptions to Article 101(1). The general exception is where the agreement contributes to improving the production or distribution of goods or promotes technical or economic progress, while allowing consumers a fair share of the resulting benefit.

[39] Note that in EU law, an undertaking is any entity engaged in economic activity.

29. In the US, anticompetitive agreements are dealt with by Section 1 of the Sherman Act:

> **Section 1, Sherman Act § 1, 15. U.S.C. § 1:**
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

*ii) Abuse of dominance*

30. Regulating abuse of dominance is often more complex than regulating anticompetitive agreements. Generally, the identification of an abuse involves three steps. First, the relevant market must be defined according to the criteria discussed above. In the EU, failing to identify a market is fatal to a finding of abuse.[40] Second, an assessment needs to be made as to whether an undertaking can exercise market power within that market; this involves a determination of barriers to entry, actual and potential competition, market shares, countervailing buyer power and factors like brand loyalty and consumer preferences.[41] Third, the behaviour needs to be assessed to determine whether it is abusive. In practice, many of these assessments are made using complex quantitative analysis that looks at prices, consumer preferences and other relevant factors. In the EU, the law on abuses of dominance is found in Article 102 TFEU:

> **Article 102 TFEU**
> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
> Such abuse may, in particular, consist in:
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[40] For EU law, see Case 6/72 *Europemballage Corpn and Continental Can Co Inc v Commission* [1973] ECR 215 [32].
[41] See European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings* OJ [2009] C 45/7.

31. In the US, the law dealing with monopolisation and attempted monopolisation is found in Section 2 of the Sherman Act:

> **Section 2, Sherman Act § 1, 15. U.S.C. § 2:**
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

*iii) Mergers*

32. Merger control is justified by the possibility of the creation of a dominant position that would undermine competition in a given market. This requires, first, an identification of a relevant merger situation. In EU law, a 'concentration' can include a merger of two entities or a change of control on a lasting basis resulting from 'the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.'[42] The competition authority may impose a notification requirement on undertakings seeking to merge. In the EU, this is an *ex ante* requirement – notification must occur before the merger is concluded – and in the UK the requirement is for *ex post* notification.

**c) A note on capacity**

33. The literature on competition policy in small economies suggests that whether and to what extent a policy will have beneficial effects is highly dependent on the expertise of competition authorities and the judiciary, the resources available to them and their dedication to the pursuit of the goal of market efficiency (as opposed to private interests, for example). Potential harm caused by an ill-conceived or wrongly applied competition policy is much greater in a small economy than in a large one. As a result, it is preferable for a competition authority with limited means to refrain from punishing behaviours that it does not have the full capacity to investigate. Accordingly, a new authority would be expected to focus on the most pernicious violations, including hard core

[42] Council Regulation (EC) No 139/2004 of 20 January 2004 *on the control of concentrations between undertakings (the EC Merger Regulation)* Official Journal L 24, 29.01.2004, Article 3(1)(b).

restrictions (eg horizontal agreements with price fixing, market allocation or output control mechanisms) and cartels. For the authority to be able to fulfil its function properly, its task must be to regulate well-defined behaviours within the confines of a particular policy goal.

## IV NATIONAL COMPETITION LAW IN A MULTINATIONAL ENVIRONMENT

### a) The international phenomenon

34. Internationally, markets are characterised by interconnectedness and the presence of large multinational enterprises that affect multiple economies. Because of this, countries need to guard against anticompetitive behaviour by both domestic and international undertakings.

### b) Particular implications for developing countries

35. International trade and globalisation have exposed emerging and developing economies to the detrimental impact of international cartels and the abuse of dominance by foreign firms.[43] These countries, which may lack established competition regimes or face institutional barriers to effective enforcement, might be seen as "easy targets" for firms contemplating anticompetitive behaviour. The anticompetitive effects of international mergers and international cartels have had a disproportionate impact on developing economies.[44]

36. This is largely caused by the so-called "enforcement deficit"[45] in the global economy. Domestic competition authorities naturally act in their own self-interest. They have little incentive to intervene in international cartels, cross-border mergers or foreign abuses of market power which lead to a net increase in domestic wealth, even where these may have a detrimental impact on competition in other economies.[46]

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[43] McMahon, 'Competition Law and Developing Economies: Between "Informed Divergence" and International Convergence' in Ezrachi (ed), 'International Research Handbook on Competition Law' (2012).
[44] Julian L Clarke and Simon J Evenett, 'The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel' (2003) 48 Antitrust Bulletin 689; Margaret Levenstein and Valerie Suslow, 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy' (2004) 71 Antitrust Law Journal 801' UNCTAD, 'The effects of anti-competitive business practices on developing countries and their development prospects' (UNCTAD, 2008), <http://www.unctad.org/en/docs/ditcclp20082_en.pdf> accessed 10 February 2013.
[45] McMahon (n 43).
[46] ibid.

37. Further, the presence of international competition within a developing market may make it difficult for domestic undertakings to compete. This may create incentives to support "national champions" (ie large corporations, often in strategic sectors of the economy, encouraged to promote the interests of its home country abroad) in developing countries through foreign ownership requirements or tariffs. National champions may develop the size necessary to compete in the international arena. However, it is questionable whether firms that lack competitive pressure domestically will develop the skills necessary to succeed internationally,[47] and the European Commission has opposed the creation of national champions by Member States.[48]

## V IMPLICATIONS FOR GEORGIA

38. The implementation of a competition policy regime in Georgia must be based on a careful consideration of local context. We have seen that reforms not suited to the economic and institutional environment of a small economy might bring more harm than good. As discussed earlier, the size of an economy is an important determinant of competition enforcement priorities. Other characteristics that will affect the implementation of competition goals include:

- political risks, including corruption, the use of public office to pursue private interests, the danger of political influence on the actions of administrative agencies and the phenomenon of short-lived governments, which may render decision-making less effective;[49]
- the level of public trust in the judiciary and executive;
- public opinion on anticompetitive market behaviour, especially relating to cartel agreements and the abuse of public office; and
- the level of expertise in competition economics available to the judiciary and competition authority.

39. Due to the absence of an established competition culture in Georgia, there is a possibility that some of the above factors could act as constraints on an attempt to introduce an effective competition regime. As a result, the design of a new

[47] Richard Whish and David Bailey, *Competition Law* (7th edn, Oxford University Press, 2012), 814.
[48] See, eg, Case M 3440, *ENI/EDP/GDP*, decision of 9 December 2004, OJ [2005] L 302/69.
[49] Maher M. Dabbah (n 2) 464-5.

competition policy for Georgia should be guided by the goal of achieving as much as is realistically possible, while at the same time recognising significant limitations on what can be achieved in the short term. It is of fundamental importance that a new competition policy defines clear, transparent and realisable goals. At the same time, until adequate analytical and economic capacity is established, it should avoid the implementation of doctrines that are difficult in application and highly controversial.

40. In part II of this chapter, we outlined a number of goals that a competition authority can choose to adopt. In implementing a new competition law, it is important to consider which goal will serve as the focal point. This report suggests that an optimal goal must be to realise economic efficiency, and not to promote social or political ends. This flows from the recognition that the pursuit of non-efficiency goals could chill competition and stunt growth in a market that already faces challenges in achieving economies of scale. This would harm consumers in the long term.

# 3 - ENFORCEMENT

## I MODELS OF COMPETITION ENFORCEMENT

### a) Introduction

1. There are three basic models of competition enforcement. The first is administrative or public enforcement subject to effective judicial review. The relevant public authority is responsible for the enforcement of competition rules and its decisions can be reviewed by a judicial body, which may uphold or reject the authority's decision. The second model is that of private litigation. Here, competition rules are enforced through litigation between private parties. Finally competition may be enforced by the judiciary, in which case competition authorities and private individuals are required to initiate proceedings for a breach of competition law with the relevant court. In reality many countries adopt a mixture of all three models, and an examination of various countries produces a striking diversity of institutional designs.[1]

2. Any institutional regime must address five fundamental questions: (1) who investigates and initiates proceedings; (2) to what extent should investigations and other enforcement activities be undertaken by the government, and which branch of the government is responsible; (3) what body adjudicates contested competition proceedings – a branch of the enforcement authority or an independent body; (4) to what extent is there judicial review of competition decisions; and (5) to what extent can elected officials play a role in reviewing competition authority decisions.[2]

### b) Institutional framework: EU

3. To a large extent, the development of EU competition law is driven by public enforcement. In particular, it is shaped by the interplay between the European Commission, with its role of investigator, prosecutor and decision-maker, and by the European courts, which provide a means of external review.

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[1] Michael J Trebilcock and Edward M Iacobucci, 'Designing Competition Law Institutions' (2002) 25 *World Compet* 361- 62.

[2] Harry First, Eleanor M Fox, and Daniel E Hemli, 'Procedural and Institutional Norms in Antitrust Enforcement: The US System' in Eleanor M Fox & Michael J Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press 2013).

4. Council Regulation (EC) No 1/2003 ("Regulation 1/2003") has created a prominent role for national competition authorities ("NCAs") and national courts.[3] Under the decentralised system both national courts and NCAs have the power to apply both Articles 101 and 102 of the TFEU in their entirety.[4] The Regulation enables the Commission and NCAs to cooperate with one another in conducting investigations. This is called the "European Competition Network". Under Article 15(1) of the Regulation a national court can request information or an opinion from the Commission. Article 15(3) enables the Commission and national competition authorities to make observations to national courts. Article 16(1) provides that where national courts rule on a matter which has already been the subject of a Commission decision, they cannot reach conclusions running counter to that of the Commission.[5] All of these measures help ensure the consistent application of competition rules.[6]

5. The Commission can require undertakings to end any infringement of competition rules and to impose structural and behavioural remedies.[7] The Commission's main powers of investigation allow it to request information and to carry out inspections, including surprise inspections known as "dawn raids".[8] Undertakings have powerful incentives to suppress evidence of their anticompetitive activities; therefore strong investigative powers are particularly important in any competition law regime.

6. Articles 23 and 24 of Regulation 1/2003 empower the Commission to impose fines and penalties. The importance of fines within an effective enforcement regime lies in their deterrent effect on anticompetitive behaviour.[9] Fines are discussed in more detail in chapter 4. All Commission decisions are subject to judicial review, with the European courts having exclusive competence to decide whether the Commission's actions are lawful.[10] While private enforcement in the EU has historically been of much less importance than public enforcement, it has moderately increased in significance in recent years. Member States have an

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[3] Council Regulation 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.
[4] ibid, Articles 5 and 6.
[5] See also *C-344/98 Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369.
[6] Recital 21 of Regulation 1/2003 refers to the importance of the consistency of competition rules and the consequent need to establish arrangements for cooperation between the Commission and the national courts.
[7] ibid Article 7.
[8] ibid Articles 18, 20, 21.
[9] *Guidelines on the method of setting fines imposed pursuant to Article 23(2(a)) of Regulation 1/2003* OJ [2006] C 210/2, para 4.
[10] Case C-344/98 *Masterfoods* [2000] ECR I-11369, [2001] 4 CMLR 449.

obligation as a matter of EU law to provide a remedy in damages where harm has been inflicted as a result of the infringement of EU rules.[11]

**c) Institutional framework: UK**

7. In the UK, enforcement is entrusted primarily to two bodies: the Office of Fair Trading ("OFT") and the Competition Commission ("CC"), which are in turn supported by a number of sectoral agencies. The OFT currently enforces prohibitions of both anticompetitive agreements and abuse of dominance. It also decides whether to refer mergers to the CC for a more in-depth investigation or prohibition, and whether to refer entire markets to the CC for detailed review.[12]

8. However, following consultations the government has decided to create the new Competition and Markets Authority ("CMA") and transfer the functions of the CC and the competition functions of the OFT to it. It was felt that this will achieve more coherence in competition practice, a more streamlined approach in decision-making and more flexibility in resource utilisation.[13] It has been noted that the success of this consolidation will depend on the extent to which the institutional cultures can be integrated, and in particular on the preservation of the reputations of both institutions, including their experienced staff.[14]

9. Private enforcement is also possible by means of an action for damages on the basis of loss caused by breaches of competition rules. This is utilised with less intensity than in the US.[15]

**d) Institutional framework: Germany**

10. In Germany, the Act Against Restraints of Competition ("ARC") is enforced primarily by the Bundeskartellamt (Federal Cartel Office, "FCO"). The FCO has extensive investigatory powers under sections 57 to 59 of the ARC. The FCO takes its decisions through 12 decision divisions, which decide independently from one another. Apart from the FCO there are also competition authorities on the level of the different Bundesländer (federal states). The respective Bundesland prosecute

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[11] Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297.
[12] Enterprise Act 2002, Part 4, Chapter 1.
[13] 'Growth, Competition and the Competition Regime: Government Response to Consultation' (*UK Department for Business, Innovation and Skills*, March 2012) <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response.pdf> accessed 5 November 2012; Peter Freeman, 'The Competition and Markets Authority: can the whole be greater than the sum of its parts?' *Journal of Antitrust Enforcement* (2012) 4.
[14] Freeman (n 13) 13-16.
[15] *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130, [1983] CMLR 43; Barry J Rodger, 'Why not court? A study of follow-on actions in the UK' *Journal of Antitrust Enforcement* (2012) 21-25.

infringements, the effects of which are limited to the specific Bundesland in question. In addition, the Bundesnetzagentur (Federal Network Agency), an independent regulatory authority, is responsible for preventing any practice amounting to an abuse of a dominant position in the telecommunications, post, electricity, gas and railway sectors.

11. While the ARC is enforced primarily by the FCO there has been legislative action to increase the number of civil proceedings.[16]

**c) Institutional framework: US**

12. The role of private enforcement is particularly important to an understanding of US antitrust law. Many of the antitrust cases filed in the US are brought by private individuals, not by government, and many of the key antitrust decisions were articulated in actions for damages.[17]

13. Responsibility for federal antitrust enforcement in the US is shared between the Federal Trade Commission ("FTC") and the US Department of Justice Antitrust Division ("DOJ"). The DOJ must bring formal complaints before and seek remedial relief from the courts. The FTC's structure follows the integrated agency model where the competition authority investigates and adjudicates all violations internally; however, its decisions can be appealed to a federal circuit court.[18] The federal antitrust statutes grant authority to file civil suits to four classes of plaintiffs: the FTC, the DOJ, state governments and private citizens. The federal statutes grant authority to file criminal charges to the DOJ.

**d) Leniency programmes**

14. Competition authorities often face considerable difficulties in detecting cartels. One way of responding effectively to this problem is the introduction of leniency programmes. Leniency programmes encourage cartel members to 'blow the whistle' to the relevant competition authority in exchange for lower fines or immunity. This policy has proved extremely successful in the US in prosecuting cartels and can be seen in the EU competition regime as well as within the regimes of many of

[16] An example of this is new rules introduced by the seventh amendment of the ARC to enforce private litigation, especially in cartel cases.
[17] William Blumenthal, 'Models for Merging the US Antitrust Agencies' (2012) *J Antitrust Enforcement* (forthcoming).
[18] H First, E Fox and D Hemli, 'Procedural and Institutional Norms in Antitrust Enforcement: The US System' in Eleanor M Fox & Michael Trebilcock, (eds) *The Design Of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press 2013) at 8 (forthcoming).

the EU member states.[19] Leniency programmes are discussed in more depth in chapter 5.

## II THE ADMINISTRATIVE APPROACH

### a) Analytical approach

15. One advantage of an administrative system focused on a competition authority is its capacity to take into account the effect of policy and enforcement on markets and help promote a more analytical approach to the development of competition law.[20] The administrative system can be more dynamic; it can evolve and adapt swiftly to new conditions. This brings great benefits to firms and consumers.[21]

### b) Independence

16. A further factor that impacts the effectiveness of a competition authority is its independence from political and private interests. A competition authority that makes decisions by taking into account external interests is more likely to reach a subjective or incorrect decision, and therefore may prove ineffective in preventing anticompetitive behaviour.[22] In order to ensure independence, the institutional status of the administrative body should be considered, ie whether an independent public sector body may be preferable to a branch of a ministry.

### c) Separation of powers

17. Particular difficulties can arise where the administrative body acts as both investigator and decision-maker. The stronger the separation between the investigator and decision-maker, the more balanced and correct the decision is likely to be.[23] Confirmation bias often arises from the natural tendency of a case

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[19] Major cases in the US such as Vitamins, Citric Acid and Sotheby's/Christies all came to light as a result of whistleblowing; Commission notice on immunity from fines and reduction of fines in cartel cases OJ [2006] C298/17; in Germany see Leniency Notice (Bekanntmachung Nr 9/2006 - Bonusregelung); in UK see Leniency in cartel cases (OFT 436).

[20] Joaquín Almunia, 'Due process and competition enforcement' (Vice President of the European Commission responsible for Competition policy, SPEECH/10/449, September 2010) <http://europa.eu/rapid/search-result.htm?sort=eventDate&page=11&direction=DESC&subQuery=45&locale=EN&format=HTML&type=SPEECH&size=10> accessed 17 February 2013.

[21] ibid 2.

[22] OECD, 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation' (*Working Party on Regulatory Managgement and Reform*, January 2005) <http://www.oecd.org/site/govgfg/39609070.pdf> accessed 19 February 2013.

[23] P Buccirossi, L Ciari, T Duso, G Spagnolo and C Vitale, 'Measuring the deterrence properties of competition policy: the Competition Policy Indexes (September 2009)

investigator to favour evidence that supports his belief that a competition infringement has been committed.[24] One way of achieving the appropriate degree of separation of powers between the prosecutor and the adjudicator is to allot the power of investigation to an independent public body and the decision-making power to a court. Such a system is adopted in the US but not in the EU.

18. Another way involves making certain aspects of authority staffing independent of the government. In India, the presence of a substantial number of public sector firms necessitated an impartial competition regime that would not be biased in favour of the state-owned sector. A ruling by the Indian Supreme Court resulted in legislation that gave the Indian Chief Justice the task of appointing the chief of the Competition Commission. This was seen to strengthen the independence of the authority. Since 2009, the authority has made over 20 orders against state-owned enterprises.[25]

19. Other models have been discussed in part I of this chapter, and include a model where the decisions are taken by the authority and are subject to appeal by specialist tribunals or general courts.

**d) Procedural safeguards**

20. Any administrative authority must ensure that it can guarantee the same procedural safeguards as a court in its investigative or adjudicative function. Fundamental procedural rights, including rights of privacy, the right to a fair and impartial hearing, and confidentiality of business secrets, are a prerequisite for an effective competition policy. Compliance with procedural safeguards ensures that competition policy is implemented in an objective fashion and that the competition authority is accountable, thereby enhancing its credibility with the public.[26]

**e) Multiple agencies**

21. In the case of public enforcement, there is a possibility of adopting a multi-agency approach or a single agency approach. In the USA, UK and Germany more than

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<http://www.learlab.com/pdf/competition_policy_indexes_final_sept09_2_1296464280.pdf> accessed 19 February 2013.

[24] Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function' (2004) 27 *World Competition: Law and Economic Review* at 215.

[25] On India, see *Brahm Dutt v Union of India*, AIR2005SC730; Competition Commission of India 'Orders of the Commission' <http://cci.gov.in/index.php?option=com_content&task=view&id=150> accessed 19 February 2013.

[26] OECD, 'Judicial Enforcement of Competition Law' (Seminar on Judicial Enforcement, 1996) <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf> accessed 19 February 2013.

one authority carries out public enforcement. Several countries have recently consolidated their competition law enforcement agencies. Brazil has recently merged three agencies into one,[27] the UK has begun a process that will soon consolidate its two agencies into one[28] and the Netherlands is completing a process of consolidating its competition authority with certain sectoral regulators.[29]

22. Systems of competition enforcement that involve multiple agencies can result in the duplication of effort and costs.[30] Multiple competition agencies require each authority to coordinate their workflow and policy direction. Coordination imposes costs that can divert time and focus away from the essential work of the authority.[31] However, a counter argument can be made that the presence of multiple competition agencies insures against the possibility that any single enforcement entity may fail to execute its responsibilities (eg, through corruption, poor management or flawed institutional design).[32] Further, dual enforcement arguably results in competition between authorities. This is viewed by some as beneficial because a monopolist supplier of a government product can behave in ways that resemble the performance of a monopolist supplier of goods or services, ie producing quantities below optimal levels, failing to reduce costs and failing to innovate.[33]

## III THE JUDICIAL APPROACH

23. The role of the court in competition enforcement may be multifaceted or restricted to a narrow area of operation. For example, the role of the court in any given jurisdiction may be: (a) to support administrative enforcement; (b) to judicially review decisions of competition agencies; (c) to hear and adjudicate on private litigation; and/or (d) to decide whether an infringement has actually occurred.

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[27] Law No 12,529/11 (Brazil) <www.planalto.gov.br/CCIVIL_03/_Ato2011-2014/2011/Lei/L12529.htm> accessed 20 February 2013.

[28] UK Dep't For Business, Innovation and Skills, Growth, Competition and the Competition Regime: Government Response to Consultation (2012) <www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response.pdf> accessed 20 February 2013.

[29] Netherlands Competition Authority, 2011 Annual Report (March 2012), <www.nma.nl/en/images/2011%20NMa%20Annual%20Report23-198298.pdf> accessed 20 February 2013.

[30] Antitrust Modernization Commission, *Antitrust Modernization Commission Report and Recommendations* 129 (2007).

[31] The process by which mergers are allocated in US has been criticised in particular. Lauren Kearney Peay, 'The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord' (2007) 60 *Vand L Rev* 1307, 1332.

[32] William E Kovacic, 'Downsizing Antitrust: Is it Time to End Dual Federal Enforcement?' (1996) 41 *Antitrust Bull* 518.

[33] ibid 510.

These roles are not mutually exclusive and can be built upon gradually as the judicial system evolves.

24. In each case, the judiciary is an important stakeholder in competition policy and reporting, as it is responsible for shaping the outcomes of competition policy.[34] It is highly important to have a judiciary that has a sound understanding of the policy goals, concepts and instruments relating to competition law.[35] An understanding of economics may be especially useful.[36] In fact, in a recent International Competition Network (ICN) survey, the challenge mentioned most often by interviewees was the perceived lack of specialised knowledge of competition issues by the judiciary.[37]

25. Initially, the most important issue is likely to be the ability of the court to review the administrative decisions of the competition authority. If it can, an issue arises as to whether the judiciary will be empowered to make a substitute decision when it finds error in the initial administrative decision made by the competition authority, or whether it must refer the decision back to the authority.[38] A questionnaire addressed to 18 competition authorities from 17 developing economies – representing 20% of ICN members – has produced the following statistics regarding existing competition law regimes in various jurisdictions and the decision-making power of the courts: for 47.1% of the interviewees, the judiciary has the authority to make a decision, in 23.5% of the responding jurisdictions the judiciary has to refer the decision back to the competition authority and for 29.4% the judiciary can choose either to take a decision or refer the decision back to the competition authority.[39] In all of the interviewee countries, the competition authority could appeal a decision of a lower level court to a higher-level court when required.[40] Lastly, and importantly, 83.3% of the responses indicated that the relevant competition authority decision is enforceable immediately, without necessity of any additional procedure.[41]

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[34] Competition Policy Implementation Working Group: Sub group 3, 'Competition and the Judiciary, A report on a survey on the relationship between Competition Authorities and the Judiciary', International Competition Network 2006, 15.
[35] ibid; Competition Policy Implementation Working Group, Subgroup 2, 'Lessons To Be Learnt From The Experiences Of Young Competition Agencies', International Competition Network 2006, 36.
[36] International Competition Network 2006 (n 34) 2.
[37] ibid 15.
[38] ibid 5.
[39] ibid.
[40] ibid.
[41] ibid 7.

**a) Institutional divide**

26. Generally, both competition authorities and courts play a role in enforcing competition law. However, the roles and powers of each vary considerably between jurisdictions. In some systems (eg the US), the competition authority brings enforcement actions before the court, which acts as final decision-maker. In other systems (eg the EU), the competition authority has power to make infringement decisions and the courts provide an appeal mechanism or review function.

**b) The court**

27. Internationally, there are wide variations in judicial institutional arrangements for reviews of competition authority decisions. One of the main questions to be decided in relation to judicial institutional arrangements is whether cases should be heard by the general civil courts, the administrative courts or by a specialised competition tribunal, eg the UK Competition Appeal Tribunal. When competition law is enforced or reviewed through the ordinary court structure, there is a possibility that generalist courts will apply its provisions incorrectly, particularly in cases requiring complex economic analysis.[42] This issue can be addressed by the provision of judicial training in competition law. Further assistance to judges can be provided through use of expert judicial advisors in competition cases, or the temporary appointment of competition experts as judges.[43] Alternatively, specialised courts (or specialised chambers within general courts) can be put in place.[44]

**c) Procedural enforcement**

28. Judges are well placed to balance procedural and substantive principles in competition enforcement. Assuming that they are independent from the executive and legislative branches of government, judges are capable of an impartial and consistent interpretation of the law. Judges are also experienced in discerning the underlying purposes of the law and reconciling these goals with the need for fair

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[42] OCED, 'Procedural Fairness: Competition Authorities, Courts and Recent Developments' (Competition Policy Roundtables, October 2011). <www.oecd.org/daf/competition/ProceduralFairnessCompetition%20AuthoritiesCourtsandRecentDevelopments2011.pdf> accessed 20 February 2013.

[43] ibid 11.

[44] ibid 12.

procedural application of the law.[45] Finally, judges have considerable expertise in imposing measured and appropriate sanctions and remedies for violations of the law.[46]

**d) Expertise**

29. One of the main issues with a judicial system relates to a perceived lack of familiarity of judges with the concepts of competition law. One consequence of this is frequently diverging views between judges and the competition authority on the interpretation of competition rules. The problem is particularly acute where there is no specialised competition tribunal or panel of judges, or where judges lack competition expertise. These issues can be addressed by organising seminars and joint workshops with the judiciary and the competition authority to improve competition expertise amongst the judiciary and ensure the proper application of competition law.[47]

**e) Private enforcement**

30. Private enforcement of competition law is usually taken via the courts. This type of enforcement can be an important complement to public enforcement. It can act as an added deterrent to potential malfeasance[48] as well as providing victims of competition law infringements with compensation. Competition authorities have limited resources and are unable to investigate every alleged infringement; therefore, enforcement by private litigants within courts can help ensure consistent enforcement.[49] In addition a rival may be in the best position to discern whether a firm is engaged in an unlawful practice and may have better access to relevant evidence because, being in the same industry, it knows what information to ask request. The European Commission has been encouraging private litigation as an enforcement mechanism for competition law, recognising that the threat of litigation can be powerful in deterring potential infringements.[50]

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[45] OECD, 'Judicial Enforcement of Competition Law' (Seminar on Judicial Enforcement, 1996) <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf> accessed 19 February 2013.
[46] ibid 10.
[47] ICN, 'Competition and the Judiciary' (Case Studies, Moscow, 2007). <http://www.cade.gov.br/Internacional/ReportontheCompetitoinandtheJudiciary.pdf> accessed 20 February 2013.
[48] David Robinson, 'The Rise of Private Antitrust Enforcement in Europe', Chambers Magazine Issue 25 2008, <www.chambersmagazine.co.uk/Article/The-Rise-of-Private-Antitrust-Enforcement-in-Europe> accessed 22 February 2013; Whish, *Competition Law* (6th edn, OUP, 2009), 290.
[49] Richard Whish, *Competition Law* (6th edn, OUP, 2009) at 290.
[50] (n 47).

31. However, claimants will be disinclined to take cases to courts where excessive hurdles, whether procedural or otherwise, stand in their way.[51] Costs rules, legal costs and levels of damages awarded may be particularly significant factors influencing potential litigants. These issues must be addressed if private enforcement is to become a viable means of enforcing competition law.

32. A key issue in private enforcement is the need to create economies of scale large enough so that groups of businesses or private citizens are able to come together and bring a viable claim. This can be achieved in two ways. First, through a representative action where a central body, for example a consumer or trade association or the authority, brings the claim on behalf of a group of interested people; or second, through a collective action (also known as a class action), where individual claims are grouped together for the purposes of litigation, without a representative body leading the action.[52]

33. However, it should also be noted that the success of any private litigation measures or steps to encourage private enforcement will generally be jurisdiction-specific and will be closely interrelated to the culture and level of development in the country concerned. For example, while the European Commission has been encouraging private enforcement, this has not led to a steady growth in this method of enforcement in all Member States. Portugal is one example. There, it has been accepted that private enforcement cannot be feasibly implemented for some time.[53] Only a few actions have been brought privately in EU Member States, mainly due to the prohibitive costs of such litigation and also because the perceived outcomes of such litigation are uncertain.[54]

34. Thus, while private enforcement is no doubt a pillar of competition law enforcement in the US,[55] it is not always possible or desirable to simply import or transplant such laws or procedural changes into the laws of other nations with the same level of success. An alternative structure could combine models of public and private compensation. After a finding of infringement has been made, the

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[51] ibid.
[52] ibid.
[53] ibid.
[54] ibid.
[55] William Blumenthal, 'Models for Merging the US Antitrust Agencies' (2012) *J Antitrust Enforcement* (forthcoming); Stephen Calkins, 'Competition Law in the United States of America', Reproduced from *Competition Law Today: Concepts, Issues, and The Law In Practice* Oxford University Press, Wayne State University Law School Legal Studies Research Paper Series 2007, 13 <www.ssrn.com/link/Wayne-State-U-LEG.html> accessed 19 February 2013.

competition authority could have the power to impose fines and additionally to award compensation to individuals or a class of injured parties.[56]

**f) Consistency between judicial and public enforcement**

35. Effective and consistent application of competition law between institutions is key to a successful competition regime. A lack of consistency in application can lead to uncertainty and confusion amongst firms. One way of addressing this challenge is to give competition authorities a power, or indeed a duty, to provide expert advice to the court in competition cases. This approach can ensure consistency between public and private enforcement.[57]

**g) Effective judicial review**

36. Judicial review can play an important role in civil law jurisdictions where the competition authority is the primary decision-maker.

*i) Benefits of judicial review*

37. There is widespread agreement that independent regulators are at the centre of regulatory governance in liberalised economies and a globalised world economy.[58] For example, the United Nations Conference on Trade and Development (UNCTAD) Model Law on Competition is based on the assumption that the most efficient type of administrative authority for competition enforcement is one that is quasi-autonomous or independent from the government, with strong judicial and administrative powers for conducting investigations and applying sanctions. The possibility of recourse to a higher judicial body for review of the administrative decision is an essential feature of an efficient enforcement system.[59] Any system of judicial review should seek to be independent and effective.[60]

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[56] Ariel Ezrachi and Maria Ioannidou, 'Public Compensation as a Complementary Mechanism to Damages Actions: From Policy Justifications to Formal Implementation' *Journal of European Competition Law & Practice* (21 June 2012) 2.
[57] OCED, 'Procedural Fairness: Competition Authorities, Courts and Recent Developments' (Competition Policy Roundtables, October 2011). <www.oecd.org/daf/competition/ProceduralFairnessCompetition%20AuthoritiesCourtsandRecentDevelopments2011.pdf> accessed 20 February 2013.
[58] UNCTAD secretariat, 'Independence and Accountability of Competition Authorities', OECD 2008, 3-4; Working Party on Regulatory Management and Reform, 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation', OECD 2005 <www.oecd.org/site/govgfg/39609070.pdf> accessed 19 February 2013.
[59] ibid.
[60] Competition Policy Implementation Working Group: Sub group 3, 'Competition and the Judiciary, A report on a survey on the relationship between Competition Authorities and the Judiciary', International Competition Network 2006, 2; Competition Policy Implementation Working Group, Subgroup 2, 'Lessons To Be Learnt From The Experiences Of Young Competition Agencies', International Competition Network 2006, 35.

38. There are several reasons why judicial review is perceived to be such an important aspect of any system of administrative enforcement. First, lawyers have conceived judicial review to be the means by which universal values are safeguarded.[61] Second, economists have propounded the function of judicial review as fundamentally fulfilling the goal of promoting economic welfare; the argument is that flawed decisions will have detrimental effects on overall economic welfare.[62] Third, political scientists have argued that the rationale behind judicial review is ultimately to ensure accountability.[63] Regardless of which of these perspectives is adopted, the key point is that judicial review is of the utmost importance in any legal system, and that it is a key tool for correcting errors which may have been made in the decision-making process. Judicial review might also be seen as an efficient alternative to other error correction mechanisms, such as increasing the budget of regulatory agencies or implementing advisory or appeals committees.[64] In the field of competition law, academic commentators have argued that judicial review can greatly contribute to reducing the likelihood of false positives in competition proceedings.[65]

*ii) Disadvantages of judicial review*

39. Some have stressed that generalist courts may lack the information and expertise required to review regulatory decisions, particularly in the area of competition law where economic expertise is important.[66] US academics have recently presented empirical evidence that complex competition law cases may prove too complicated for generalist judges to review effectively.[67]

## IV POWERS OF INSPECTION AND INVESTIGATION

### a) Power to investigate

40. A competition law generally allows competition authorities to launch investigations when a complaint has been made and on the authority's own motion (*ex officio*

[61] Damien Geradin and Nicolas Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment', Tilburg Law and Economics Centre Discussion Paper, 2011, 4 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698342> accessed 20 February 2013.
[62] ibid.
[63] ibid.
[64] ibid.
[65] ibid.
[66] ibid.
[67] ibid. Citing Michael R Baye and Joshua D Wright, 'Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals' (2009) Journal of Law and Economics, 1-37.

investigations). Generally all that is required to launch investigations is a reasonable suspicion of a breach of the competition law. This may be established, for example, by a complaint, a cartel participant blowing the whistle, first-hand observation of a breach (eg an employee of the authority observing exclusive dealing or third line forcing in their daily life) or a tip-off.

41. Competition authorities in many jurisdictions also have the responsibility of conducting market studies to ascertain the competitive "health" of particular sectors. This could lead to recommendations to improve the functioning of certain markets, enforcement, or the provision of factual support for follow-up actions by the authority.

42. In the UK the OFT has a statutory duty to conduct market studies to understand how particular markets operate.[68] This duty is found in section 5 of the Enterprise Act 2002. In its guidance, the OFT states that the purpose of market studies is to ensure that consumer interests are protected and that businesses are competitive. Markets are chosen on the basis of several factors, including complaints from businesses, consumers, consumer welfare groups, and the OFT's own research.

43. Market studies are conducted either where a market problem has been identified but there is no breach, or where enforcement action may be impractical or less effective than an analysis of the underlying market problems. Many market studies, notably the studies of airport, local bus and credit card services markets, led to more rigorous market investigations by the Competition Commission ("CC"), some of which resulted in findings of infringement. In many cases recommendations were also made by the OFT. These recommendations can be made to the government, sectoral regulators, undertakings or other bodies that can affect the market conditions.

**b) Power to obtain information**

44. Most competition laws give the authority the power to obtain information. Without these powers, it would be extremely difficult for the authority to carry out investigations and bring successful prosecutions. The most common formal powers available to authorities are: (a) to compel the production of documents; (b) to

[68] On UK market studies, see generally Pickering, 'UK Market Investigations: An economic perspective' (2006) 5 Competition Law Journal 215; Office of Fair Trading, 'Market studies: guidance on the OFT approach' <http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft519.pdf> accessed 3 March 2013.

compel oral testimony; and (c) to search premises (so-called "dawn raid" powers).[69] There is usually a threshold question before the authority can request information – eg the authority must have reason to believe that a person has information about a possible contravention of the competition law. Further, there is generally a relevance limit on what information can be requested – i.e. documents must be relevant to the inquiry. Likewise, the authority must generally ask for specific documents rather than going on a "fishing expedition". Authorities are generally given power to request information from persons other than those under investigation, such as suppliers, consumers and competitors. All parties are usually given access to a legal advisor throughout the inspection and investigation process.

45. Search powers are generally used when a request for information would be inappropriate because there is a risk of destruction of documents or urgency in obtaining the documents. This is particularly the case when the investigation relates to cartels or other serious violations of the law. Search powers are also a useful way of catching cartel participants in the act. Some jurisdictions require search powers to be exercised only with a warrant issued by a court.

**c) Confidential information**

46. It is important that there be sufficient protection of certain confidential information. This includes: deliberations of government, business secrets, the identity of informants and privileged documents.[70] Business secrets must generally be handed over to the authority, but the authority should take care not to disclose them. Privileged documents are not generally compellable. What is subject to privilege will vary between jurisdictions, but legal professional privilege is the main privilege that is protected.[71] Many jurisdictions also protect the privilege from self-incrimination to some extent.

47. In the EU the Commission is empowered to request statements from and interview consenting firms or individuals for the purpose of collecting information relating to the subject-matter of an investigation. When complying with a decision of the Commission, undertakings have a right of silence only to the extent that they would be compelled to provide answers which might involve an admission on their part of

[69] Example Ch V of Regulation 1/2003 (EU), and particularly Arts 20 and 21.

[70] Art 9(II), United Nations Conference on Trade and Development, *Model Law on Competition* (Geneva, 2000). See, for eg, Art 28 of Regulation 1/2003 (EU).

[71] This is protected in the EU and US: eg *AM & S Europe Ltd v Commission* [1982] ECR 1575. EU legal professional privilege is fairly limited – it does not extend to in-house lawyers and only applies to some communications between lawyers and their clients.

the existence of an agreement, which it is incumbent upon the Commission to prove.[72] However, undertakings are obliged to answer factual questions and to provide documents, even if this information may be used to establish against them, or against another undertaking, the existence of an infringement.[73] This is known as the "limited right against self-incrimination".

**d) Penalties for non-compliance**

48. To ensure compliance with investigative procedures competition laws usually provide penalties for non-compliance.[74]

## V BEST PRINCIPLES FOR AN EFFECTIVE COMPETITION AUTHORITY

49. This section draws on the structure and practice of competition agencies around the world to distil a set of best principles. This topic should not be overshadowed by the legitimate focus on the competition laws themselves. Indeed, the design of a country's administrative structure can have a profound influence on the type and quality of policy outcomes achieved, since 'a body of competition laws is only as good as the institutions entrusted with their implementation.'[75]

**a) Activities of a competition authority**

50. There are four principal activities of competition authorities: (1) law enforcement; (2) advocacy; (3) education; and (4) research.[76] At times, the focus of agencies is on the first of these, while the other activities are an afterthought, or something to consider if the budget permits. However, each activity is important. Best principles in relation to each activity are considered below.

51. The most important and obvious function of a competition authority is law enforcement. The precise role of the authority depends on the particular competition regime, and the pros and cons of different regimes have been analysed in chapter 2 above.

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[72] Case T-112/98 *Mannesmannröhren-Werke AG v Commission of the European Communities* [2001] ECR II-729.
[73] Recital 23 of Regulation 1/2003 (EU); note also Articles 3 and 4, Regulation 773/2004, which deal with the Commission's power to take statements and ask questions during inspections, and Case 374/87 *Orkem v Commission* [1989] ECR 3283.
[74] Art 10 of the Model Law; Chapter VI of Regulation 1/2003 (EU).
[75] William E Kovacic and DeCourcey Eversley, *An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them* (International Competition Network Competition Policy Implementation Working Group, 23 May 2007) 1.
[76] ibid; Art 9(I) of the Model Law.

52. Competition authorities have a key role to play in advocating law reform to governments.[77] Governments are more likely to listen to competition authorities than to external bodies and international organisations because they are the principal bodies in charge of competition law. Because of their unique role, authorities generally advocate for legislative reform and improving competition-relevant government practices (eg licensing, state aid, trade policies, etc).

53. Educating the public about competition laws is important, especially in countries with relatively new competition laws. Education can be achieved in a number of ways.[78] First, online resources can provide a vast body of information. Second, the authority may conduct public lectures, lectures at industry association events, or in-house sessions for large firms. Third, authorities can establish info lines or advice clinics where advice about competition law will be available. Fourth, the authority can engage in media campaigns. The Australian Competition and Consumer Commission ("ACCC") provides a useful example of each of these educative functions. Its website is easy to use, contains large amounts of information and has easy to read fact sheets.[79] The ACCC conducts public seminars, has an info line, and recently ran a "know your rights" media campaign.

54. Undertaking research is often an under-appreciated role of a competition authority.[80] Sector-specific research can be an invaluable resource in building expertise in particular areas and providing a source of information when enforcing the law. Research can build upon similar studies conducted at the international level, or undertaken by other competition regulators or academics.

**b) Structuring and staffing a competition authority**

55. Most competition agencies have operational units dealing with international affairs, legislative relations, management and operations, personnel, media relations and public education.[81] Precise units differ from authority to authority.

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[77] William E Kovacic and DeCourcey Eversley, *An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them* (International Competition Network Competition Policy Implementation Working Group, 23 May 2007).
[78] ibid.
[79] See ACCC, 'ACCC Website' <www.accc.gov.au> accessed 19 February 2013.
[80] William E Kovacic, *Achieving Better Practices in the Design of Competition Policy Institutions* (Speech, Seoul Competition Forum, 20 April 2004); International Competition Network, *Agency Effectiveness Project* (Report, Kyoto, April 2008).
[81] William E Kovacic and DeCourcey Eversley, *An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them* (International Competition Network Competition Policy Implementation Working Group, 23 May 2007) 10.

56. Staffing principles will generally be in line with recruitment in other departments. The legislation usually specifies how the head of the authority (and potentially other senior staff) are appointed, and the qualifications required for those positions.[82] Beyond these issues, the authority will need to consider the use of training programmes. It is useful to have a comprehensive induction programme and continuous training throughout a person's time at the authority. Training should cover not only the competition law, but also issues such as confidentiality, procedures and dealing with inquiries from the media and external parties.[83]

57. There are three questions that are worth considering with respect to staffing. First: what role should economists play in the organisation?[84] In many regimes (eg the US), lawyers run the authority and economists are used as experts to assist at specific stages of the process. In others (eg Australia), economists are an integral part of the whole process and provide input at all stages including, at times acting as chairperson of the competition agency. What is important is that economists are utilised to ensure that authorities are requesting the right information, presenting the right arguments and investigating and prosecuting the right matters. Generally speaking this is easier to achieve when economists are integrated into the whole process.

58. Second: what role should external consultants play? If the authority operates in a court-based jurisdiction, will it prosecute its own cases (eg the US) or will it hire external legal counsel (eg Australia)? Will it rely on its own economic (and other) experts or hire external experts when appropriate?[85]

59. Third: how will the authority recruit and retain talented individuals? Usually it is difficult to compete with the salaries offered by the private sector. This problem is exacerbated by the value to the private sector of hiring employees with experience working for the competition authority. However, other ways of retaining staff may be utilised – rigorous training programmes, sponsoring of further study, flexible working conditions, exchange programmes with regulators in other countries (eg

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[82] Art 8 of the Model Law.

[83] International Competition Network, *Agency Effectiveness Project* (Report, Kyoto, April 2008).

[84] ibid.

[85] William E Kovacic and DeCourcey Eversley, *An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them* (International Competition Network Competition Policy Implementation Working Group, 23 May 2007).

the Australia/Canada exchange programme), opportunities for promotion, the unique and interesting nature of the work, etc.[86]

**c) Setting goals and strategic objectives**

60. Setting goals serves multiple purposes: it guides the direction of the organisation, it allows for effective reviewing and monitoring of progress, and it makes best use of scarce resources. Obviously competition law itself constrains the extent to which the competition authority can set its own goals and strategic objectives. However, there is generally residual discretion left to the authority. Goals should go beyond issues like the amount of fines imposed, the number of cases investigated, and the number of cases prosecuted, etc,[87] because while these issues are important, they do not give an adequate picture of how effective enforcement works in practice. Looking at outcomes on a sector-by-sector basis, and an offence-by-offence basis is also important. While difficult to measure, it is worth trying to value the gains to consumer welfare (as the DOJ does in its annual reports).[88]

61. It is worth briefly considering examples of goals and strategic objectives in each of the three main areas in which competition authorities work: merger approvals, law enforcement and other functions (education, advocacy, research, etc).

62. For mergers, an authority may wish to use any discretion it has not to review mergers below a certain financial or market share threshold (as the US and EU do).[89] This is an effective way of ensuring the authority is not clogged with mergers that will never have an effect on competition. This can be done while still retaining discretion to review any merger, even one below the threshold (as the US does).

63. For enforcement, an authority may choose to focus on specific industries (eg telecommunications) or specific behaviours (eg cartels) for a set period of time.[90] This is common practice in many jurisdictions including in the US and the EU.[91] Some regulators choose to announce these strategic objectives to the public (eg the UK and Australian regulators) while others do not. It is also possible to set market share thresholds in respect of law enforcement (as the EU does), but this is

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[86] ibid.

[87] International Competition Network, *Agency Effectiveness Project* (Report, Kyoto, April 2008).

[88] William E Kovacic and DeCourcey Eversley, *An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them* (International Competition Network Competition Policy Implementation Working Group, 23 May 2007).

[89] International Competition Network, *Agency Effectiveness Project* (Report, Kyoto, April 2008).

[90] ibid.

[91] See for example European Commission, *Guidance on Article 102 Enforcement Priorities*.

considerably more complex than in merger cases. Obviously the authorities consider the likelihood of success and the cost of obtaining it when choosing to proceed further with an investigation or prosecution.

64. For other functions, an authority may decide to run a media campaign, or focus on advocating for law reform.[92] Again, it may choose to focus on particular industries or particular practices.

**d) Reviewing and monitoring progress**

65. No competition authority or competition regime is perfect. It is therefore important that competition authorities take time to evaluate their own performance.[93] Such monitoring enables the competition authority to make necessary adjustments and improvements, which will result in more effective enforcement in the future. For example, problems identified in an internal evaluation could result in the authority shifting resources to different areas of enforcement or changing its staffing policies. The US DOJ conducts such an evaluation on an annual basis. It is often difficult for authorities with new competition regimes to find the time and resources to undertake reviewing and monitoring. One way around this difficulty is to allow academics, NGOs or international organisations to evaluate the performance of the authority.[94]

66. To review and monitor effectively, it is necessary for the authority to collect data from investigations and merger clearances.[95] When built up over time, this can give an authority a good sense of the areas on which it should focus, and the areas where it needs to improve. It can also provide the basis for benchmarking against other competition authorities and can be used as part of the authority's educative function.

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[92] William E Kovacic and DeCourcey Eversley, *An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them* (International Competition Network Competition Policy Implementation Working Group, 23 May 2007).

[93] International Competition Network, *Agency Effectiveness Project* (Report, Kyoto, April 2008).

[94] As an example of these reports, see OECD *Country reviews of competition policy frameworks,* <http://www.oecd.org/regreform/sectors/countryreviewsofcompetitionpolicyframeworks.htm> accessed 3 March 2013.

[95] William E Kovacic and DeCourcey Eversley, *An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them* (International Competition Network Competition Policy Implementation Working Group, 23 May 2007).

**e) Transparency**

67. Transparency helps to encourage good decision-making and provides checks and balances on the work of a competition authority. It also has a signalling function that helps establish the credibility of the competition authority.[96]

68. The Internet has made transparency significantly easier to achieve. Most regulators publish details of cases, including relevant official documents, on their websites. This allows the participants in the case, the media and the public to gain a greater understanding of the authority's decision-making process and of how to engage with the authority.[97]

69. Many authorities create summaries of important decisions and cases, which will be of benefit to those who lack the time to read the entire decision (eg the media and practitioners). Authorities often publish annual or periodic reports on their work.[98] Also, since many authorities compile statistics for internal purposes, they make such information available to the public as well.

70. Finally, transparency requires a consistent and predictable process to be applied in all cases. Generally, competition authorities draft forms that cover key areas, such as applications for merger approval.[99] These can often be based on forms utilised by overseas authorities, which are generally available online. Likewise, authorities usually provide extensive guidance notes on their enforcement priorities, forms to be used, timelines, supporting documents, processes, etc. This is common practice in the EU and other jurisdictions. Forms and guidance notes are beneficial to the authority and the public alike, because they streamline the process and ensure consistency.

**f) Building and maintaining relationships**

71. Competition law does not exist in a vacuum. It exists within a suite of regulations, and affects a range of individuals in government and the private sector. It is important that a competition authority maintain good working relationships with

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[96] International Competition Network, *Capacity Building and Technical Assistance* (Report for the ICN 2nd Annual Conference, Merida, 23-25 June 2003) 45.

[97] William E Kovacic and DeCourcey Eversley, *An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them* (International Competition Network Competition Policy Implementation Working Group, 23 May 2007).

[98] International Competition Network, *Agency Effectiveness Project* (Report, Kyoto, April 2008).

[99] Art 9(I) of the Model Law.

other parts of government with which it must interact (eg the public prosecutor, the treasury, etc).[100]

72. It is also useful for the authority to maintain a good working relationship with relevant overseas bodies, which can be an invaluable source of expertise and assistance.[101] For example, USAID has run assistance programmes with competition regulators in many countries. Bilateral relations outside formal programmes are also important – for example, the Indonesian competition regulator was assisted by Germany, the World Bank, Japan and the US.[102] UNCTAD engages in extensive capacity building and support a number of emerging competition regimes. Also noteworthy is UNCTAD's COMPAL programme which not only supports the local competition agencies and courts, but also facilitates collaboration between jurisdictions.[103] Membership of professional networks, like the ICN, can also provide an excellent forum for knowledge-sharing.

**g) Conclusion**

73. The above are just some of the main principles of best practice that competition authorities around the world aim to achieve. Of course, care needs to be taken to consider local laws and circumstances, but by and large these principles are applicable across all jurisdictions.

## VI IMPLICATIONS FOR GEORGIA

74. Considering that Georgia's legal system faces a number of institutional and social constraints, several factors need to be taken into account in designing the new competition authority. First, it is important that the authority adopts a strong educational and signalling role. The first step in achieving this is to establish clear rules and well-defined goals. The second is to ensure transparency in their application. Competition law tends to be highly technical. This is particularly true in more economically controversial areas (broadly speaking, in abuse of dominance cases). For competition law to be accepted as an important and legitimate control

[100] William E Kovacic, *Achieving Better Practices in the Design of Competition Policy Institutions* (Speech, Seoul Competition Forum, 20 April 2004).
[101] International Competition Network, *Capacity Building and Technical Assistance* (Report for the ICN 2nd Annual Conference, Merida, 23-25 June 2003).
[102] ibid 55.
[103] See <http://www.unctadxi.org/templates/Startpage____1529.aspx>.

mechanism it should avoid the risk of being perceived as complex in practice and arbitrary in application.

75. Second, there is a need to maintain an adequate separation of powers between the executive and the competition authority. The credibility of the competition authority in most nascent regimes is functionally related to the degree of its independence from the government. The importance of this escalates in a country with a volatile political environment, where political risk creates commercial uncertainty. If a government has, or is seen as having, the capacity to exert influence on the activities of the competition authority, that uncertainty could contaminate the authority's credibility.

76. Third, Georgia is likely to face difficulties in enforcement due to its size. Certain abuse cases will require the competition authority, and any courts involved in the enforcement process, to possess considerable investigatory resources and economic expertise. In many jurisdictions, some of these functions are fulfilled by private structures, for example agencies that monitor consumer buying habits, which provide information crucial to the process of market definition. Where these elements are lacking, it is crucial that a new competition regime refrains from punishing all abuses that require complex economic analysis. European courts often misapply complex analyses, but the consequences of misapplication could potentially be greater in Georgia because of the concentrated nature of the market; chilling competition in a market with few participants can have much greater economic costs than doing so in a market where risk is dispersed among many participants. Therefore, rules prohibiting abuses requiring such analyses should be phased in gradually as institutional expertise grows; an overly ambitious project runs the risk of failure.[104]

77. Related to this is the importance of hiring specialist staff to work in the competition authority. The new Georgian authority may need to invest heavily in its recruitment process to ensure that it identifies the most qualified candidates for the job. It may have to hire international candidates. Additionally, it would be advisable for the Georgian authority to cooperate with jurisdictions having well established competition regimes. Joint training sessions could quickly provide the requisite knowledge to the new authority. Indeed, hiring trained staff may be the

[104] Maher M. Dabbah, 'Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Regime' (2010) 33 World Competition 457, 474.

most considerable challenge in trying to establish a new competition authority as a credible and reputable institution, so these measures might be crucial.

78. Finally, a comment can be made about private litigation. In developing countries, the capacity (mainly financial) of private litigants to effectively prosecute is limited. The competition authority will be much better placed to initiate proceedings. The absence of competition culture might also make enforcement through private litigation more difficult than in mature regimes, since private parties might be less likely to identify abuses in the first place.

79. Indeed, a key aspect of this debate hinges on differences in legal culture. Deciding whether competition authorities or courts are to play a stronger role in competition enforcement, or indeed what their respective powers should be, requires an understanding of local context. Where the court process is perceived as corrupt, inefficient or somehow biased, claimants will be deterred from relying on the judiciary. But where public institutions are seen to face the same problems, the opposite may be true. In the case of Georgia, the lack of a strong competition law regime suggests that there will be institutional weaknesses both at the level of the authority and the judiciary, not least from a lack of prior experience in competition law enforcement. But this weakness can be turned into a strength. A new competition authority could have the power to work closely with courts to build knowledge within the system as a whole. This would increase the credibility of the judiciary while boosting the experience of the competition authority.

# 4 – SANCTIONS & REMEDIES

## I INTRODUCTION

1. This chapter deals with sanctions and remedies. "Sanctions" refer to the penalties imposed on economic actors for non-compliance with the law. "Remedies" refer to behavioural or structural interventions.[1] Additionally, damages may be available to the victims of a breach. Damages will be discussed in parts VI and VII dealing with EU and US law.
2. A careful consideration of sanctions and remedies is crucial in a new competition regime. The imposition of sanctions and remedies for breaches of competition law can potentially impact entire sectors of multiple economies.[2] More than that, imposing excessive sanctions, or employing inefficient or ineffective remedies, could have a harmful effect on the economy.[3]

## II COMPETITION CULTURE

3. Before considering the range of remedies available one should recall the importance of competition advocacy in establishing the groundwork of effective enforcement. A competition authority with the power to impose remedies or sanctions engages in public advocacy to reinforce its reputation. The authority must be recognised for its economic expertise, and be trusted in its commitment to defending the public interest. A lack of confidence in competition authorities among businesses and members of the public can be fatal to the effectiveness of sanctions and remedies, since these might be perceived as arbitrary.
4. One way to develop a culture of trust is to engage in public consultations. The authorities' consultations should be based on two themes: first, how sanctions that are particularly harsh would be perceived by firms; and second, whether such sanctions would have any adverse effect on the internalisation of competition values. Wrong or unjust decisions, especially when connected to punitive sanctions, could further social aversion to competition instead of promoting it.

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[1] See for example Alison Jones and Brenda Sufrin, *Eu Competition Law* (4th edn, OUP 2011) 970 ff; the distinction between behavioural and structural remedies is discussed in part VI, below.
[2] With reference to the global dimension of antitrust see Einer Elhauge and Damien Geradin, *Global competition law and economics* (2nd edn, Hart 2011).
[3] For the policy consequences of misapplication of antitrust remedies see Massimo Motta, *Competition Policy* (CUP 2004).

5. Advocacy may represent the most important step in creating a reliable sanctioning and remedial system in a new competition regime. Once competition values are internalised by market participants, sanctions and remedies can be calibrated according to the level of the competition regime's development, taking into account the economic principles below.

## III SANCTIONS, REMEDIES AND DAMAGES

6. Sanctions and remedies can be applied both to firms and to their representatives. Damages are generally paid out by the infringing firm to victims of competition violations following a private claim in court. The following section provides a summary of the sanctions, remedies and damages that can be imposed on firms for breaches of competition law.

### a) Sanctions

*i) Fines*

7. Fines can be criminal or administrative in nature. The distinction is procedurally significant, because imposing fines for criminal conduct might require the authority to satisfy a higher standard of proof. Also, fines can be targeted at individuals or firms. In the EU (part VI), fines are administrative. The US (part VII) imposes criminal fines for breaches.

8. In principle, fines have a strong potential for deterrence when calibrated for maximum efficiency and effectiveness[4]. One of the main advantages of fines is that they have a strong signalling power. Since they are expressed as numbers, they are easily comparable. As a result, fines may be considered the most important tool for the authority to communicate its enforcement priorities.

9. Nonetheless, some of their effect is likely to be diminished by the consequences of the separation between corporate ownership and control. At times, the fine can be translated into price increases, or into a reduction in dividend payments to shareholders (or alternatively in a lower capital gain when dividends are not distributed). In other words, this externality means that those who pay are not those who are responsible for the infringement. The significance of this externality is that it may limit the deterrent effects generated by fines. This reality is one of

[4] For the opposite view see for instance John Coffee, 'Corporate Crime and Punishment: a Non-Chicago View of the Economics of Criminal Sanctions' (1979-1980) 17 Am Crim L Rev 419; the methods of determining optimum fines is discussed in part IV, below.

the main arguments supporting direct sanctions and punishment of directors and managers in competition law, as many regimes now do.[5]

*ii) Imprisonment*

10. Criminal sanctions have proved effective in deterring violators. They are imposed directly on the infringer, overcoming the agency problems connected to the separation of corporate ownership and control. Indeed, in terms of deterrence, imprisonment may be the most effective enforcement measure.[6] . Imprisonment can only work properly when enforcement authorities have the capacity and willingness to prosecute, and there is sufficient trust in the judiciary to render the deterrent credible.

11. In economies lacking an established competition culture, it may be advisable to intensify advocacy efforts before imprisonment is introduced.[7]

*iii) Director disqualification*

12. The potential ineffectiveness of fines, coupled with the high costs associated with imprisonment, has raised the profile of director disqualification.[8] The threat of disqualification – in particular the loss of income and reputation[9] – may create an incentive for directors to monitor the behaviour of their subordinates and ensure that the firm is not acting in an anticompetitive manner.[10] This regime was adopted in the UK, where a director of a company that commits a breach can be disqualified for up to 15 years from acting in a managerial capacity in any company. Disqualification requires the firm to have committed a breach, and the director's behaviour to have been unsuitable for the management of the firm. In assessing the director's behaviour, courts will consider whether the director contributed to the breach; whether the director did not contribute to it but, where he had reasonable grounds to suspect the breach, did not take steps to prevent it; or where the director did not know but should have known that the company's conduct was

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[5] See for instance Donald Baker, 'The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging' (2000-2001) 69 *Geo Wash L Rev* 693, at 713.

[6] For a more critical view see: Caron Beaton-Wells and Christine Parker, 'Justifying Criminal Sanctions for Cartel Conduct: a Hard Case' Journal of Antitrust Enforcement (2013) Vol. 1, No. 1, 198–219.

[7] ibid.

[8] Andreas Stephan, 'Disqualification Orders for Directors Involved in Cartels' (Forthcoming) 4 <http://competitionpolicy.ac.uk/documents/107435/107587/CCP_working_paper_11-8.pdf> accessed 10 February 2013.

[9] ibid.

[10] Linklaters, 'The OFT's revised director disqualification guidance : deterring directors or competition law breaches?' (2010) <http://www.linklaters.com/pdfs/publications/Corporate/NKDirectorDisqualification.pdf> accessed 10 February 2013.

a breach of competition law.[11] The effectiveness of director disqualification as a deterrent depends to a large extent on corporate culture, and in particular the role that firm directors play and on the competition agency's effective use of the sanction.

**b) Remedies**

13. Competition law remedies can be behavioural or structural. Both can be administered in cases involving mergers and in cases involving anticompetitive arrangements. Each will be explained in more detail in part VI of this chapter.

**c) Damages**

14. In the case of private litigation, a firm also becomes exposed to damages claims arising from harm suffered by individuals or groups of individuals affected by the infringement. Given the far-reaching effects of anticompetitive behaviour, the number of potential claimants for a given antitrust violation is high, which amplifies the amount payable in damages. Nevertheless, deterrence related to damages claims has to be calculated with reference to at least two variables. Deterrence will be positively correlated to: (1) the possibility of overcoming collective actions problems (eg ability to aggregate claims); (2) the amount of the damages awardable by courts (eg single v treble damages).

15. Private enforcement is facilitated by a number of factors. In the US, legislation explicitly grants a right to pursue private claims for damages against infringing firms, and allows claimants to recover treble damages.[12] Combined with a strong "litigation culture", where injured parties are likely to make use of their rights to sue, private litigation can amplify the sanctions faced by infringing firms. It is interesting to note that where infringing firms face the prospect of private damages claims, they may be able to invoke the "passing-on defence", which allows their liability for damages to be reduced where the claimant firm has "passed on" its losses to consumers.

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[11] See, Office of Fair Trading, 'Director disqualification orders in competition cases' (2010) <http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft510.pdf> accessed 10 February 2013; Company Directors Disqualification Act 1986.

[12] This is discussed in part VII of this chapter; see also part VI for the situation in the EU.

## IV ASSESSING THE EFFICIENCY AND EFFECTIVENESS OF SANCTIONS AND REMEDIES

16. In deciding on the severity of sanctions and remedies, it is important to weigh the administrative costs of enforcement against the possible gains. Ineffective sanctions and remedies – that is, those that fail to achieve a sufficient deterrent effect but have a high cost of implementation – can have damaging effects on the economy and on the credibility of the authority. This section outlines some of the economic considerations that must be taken into account in setting appropriate penalties for breaches of competition law.

17. Deterrence is one of the key goals of imposing sanctions and remedies. Specific deterrence (ie deterring the contravening individual) and general deterrence (ie deterring market actors generally) are both directed at limiting infringements of the competition law. The term 'specific deterrence' may be said to correspond to remedies, which are usually directed at preventing future consumer harm. Nonetheless, remedies also have to be taken into account for general deterrence.

18. General deterrence relates to the full range of legal sanctions and remedies that may be employed in competition enforcement. Deterrence can be assessed by reference to the objective of eliminating infringements or economically, from a costs and benefits perspective.[13] In assessing the benefits of punishment, the latter perspective distinguishes between the costs and benefits of deterrence from a public perspective, and the costs and benefits of infringements for offenders and victims.

19. From a public perspective, it is not necessarily efficient to eliminate infringements since enforcement entails costs. If the cost of detecting and punishing violations is higher than its related benefits, sanctions should be avoided altogether. This means that an authority must be careful in deciding which cases to pursue, since not all of them will yield sufficient benefits to warrant the expenditure.

20. On these general law and economics grounds,[14] Landes has individuated a general rule for establishing efficient sanctions and remedies: the optimal penalty should

[13] Gary Becker, 'Crime and Punishment: an Economic Approach' (1968) 76 J Pol Ec 169-217.

[14] See the Coase theorem, known in antitrust literature as the economic internalization approach that is conceptually completely different from the psychological internalization referred to in the paragraph about advocacy. See for instance Wouter Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 World Competition 183-208, at 191.

equal the net harm to persons other than the offender, adjusted upward if the probability of apprehension and conviction is less than one.[15]

21. Within the theoretical validity of such an assumption, it is worth remembering that such an assessment should be conducted applying the so-called 'true consumer welfare standards'. This means that not every kind of Coasian trade is viable for the purpose of competition law, but just those that benefit consumers, ie 'only if there is evidence that enough of the efficiency benefits pass through to consumers so that consumers (i.e., the buyers) would directly benefit on balance from the conduct'.[16]

22. In some contexts, for example in the case of vertical agreements, transaction costs may alter the calculations of economic efficiency.[17] As a result, calculating the efficiency of a given sanction often requires a degree of economic sophistication.

23. It may be worth distinguishing the efficiency of punishment from its effectiveness. Effectiveness is more strictly connected to deterrence. Deterrence exercised over potential infringers is usually described by a simple equation:

$$ES=Q(S) \times P$$

24. This equation demonstrates the relationship between the expected sanction (ES), the measure of the sanction (Q(S)) and the probability of detection (P). It shows that potential infringers will act on the basis of hypothetical legal sanctions. In fact, they will usually refer to the expected sanction that equals the product of the sanction by the probability of detection of the infringement at stake (that is always smaller than zero).[18]

25. On purely economic grounds, if the gains obtained from violating the law are higher than the expected sanctions (combination of likelihood for detection and the level of fine), it will be rational for the economic actor to infringe the law. In fact, this may have formed the justification for several breaches of Commission orders that have led to the imposition of sanctions in EU law. Therefore, the optimal expected sanction (ES) should be higher than the gains (G) from wrongdoing:

$$ES>G$$

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[15] William Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 Chicago L Rev 652.
[16] Steven Salop, 'Question: What is the Real and Proper Antitrust Welfare Standard?: Answer: The True Consumer Welfare Standard' (2010) 22 Loy Consumer L Rev 336, at 337.
[17] Paul Joskow, 'Transaction Cost Economics, Antitrust Rules, and Remedies' (2002) JLEO, 2002, 95 ff.
[18] Calculations over the expected sanctions are even more complicated in reality because of other variables that are connected to behavioural economics. One of those is the so called 'overconfidence bias', that entails that economic actors usually believe that detection of infringements will occur to someone else. See for instance Wils (n 14) 194.

26. One corollary of this equation is that higher sanctions are required where the probability of detection is low. The probability of detection depends not only on how easily identifiable the relevant infringement is, but also on the expenses incurred in creating an efficient apparatus for investigation and prosecution.

27. On the basis of the economic ideas provided below, very harsh sanctions would be advisable where a given government is not likely to expend many financial resources on creating an efficient enforcement apparatus. However, there are particular dangers of applying this calculation in the case of Georgia. In the early stages of the implementation of a new competition regime, creating awareness and trust in the rules is of primary importance. In an economic environment like Georgia's, excessive penalties may decrease the credibility of the system and chill competition. In addition, it is crucial to note the risk of over enforcement; the competition agency should apply high sanctions only in cases where there is a clear indication of wrongdoing. This would be the case in hard core restrictions and cartel violations, for example. When in doubt, a careful approach is needed to avoid chilling competition.

## V THE SIGNALLING FUNCTION: THE PROBLEMS OF UNDER- AND OVER-DETERRENCE

28. Besides specific and general deterrence, competition law sanctions and remedies have a signalling function. Signalling may be considered a component of general deterrence, since signs represented by the decisions of competition authorities affect the incentives of all economic actors. But signalling can be even more powerful, creating a roadmap for economic actors through which a wider set of incentives become relevant.

### a) The role of signalling

29. There are two ways in which the seriousness of a prohibition can be demonstrated. First, availability of particular remedies and sanctions can indicate how legislators view the seriousness of the offence. For example, the fact that imprisonment is generally only available for members of cartels demonstrates that it is the most serious offence.[19] Second, the authorities' choice of penalty, and its severity,

[19] Caron Beaton-Wells and Ariel Ezrachi, Criminalizing Cartels: Why Critical Studies, in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalizing Cartels: Critical Studies of an International Regulatory Movement* (Hart 2011) 3, 22 fn 8.

indicates the seriousness of the offence to which it relates. For example, cartels are generally fined more than breaches of exclusive dealing prohibitions.

**b) Over and under-deterrence**

30. A rational economic operator will decide whether or not to infringe the law on the basis of a cost-benefit analysis. The danger of under-deterrence is that the potential profits that lie in anticompetitive behaviour will incentivise firms to infringe the competition law.[20] Furthermore, the enforcement of competition law is costly. Significant resources are required to monitor agents' behaviour, detect infringements and inflict punishments. If these costly activities fail to reduce the rate at which agents breach competition rules then society does not benefit from them. Therefore, enforcement without any deterrence entails social costs and no economic benefits.[21]

31. There are several factors that are likely to affect an enforcement regime's level of deterrence: (1) the level of loss that firms and individuals expect to suffer if they are held liable or convicted; (2) the perceived probability of wrongdoers being detected and convicted; and (3) the perceived probability of being wrongly convicted. These factors relate to the effectiveness and efficiency of sanctions and remedies. Public sanctions such as fines and imprisonment have a strong impact on the deterrence of anticompetitive behaviour as firms recognise the losses that such sanctions and remedies would entail. Combined with effective public sanctions, private sanctions (eg follow-on damages claims) strengthen the deterrent effect. The probability of wrongdoers being convicted will depend on factors such as the competition authority's financial and human resources, their powers during an investigation and the quality of the law.[22]

32. The optimal level of *ex ante* deterrence should not only ensure the prevention of illegal and socially inefficient actions, but also avoid deterring firms from pursuing courses of action that improve social welfare. Over-deterrence takes place when the risk of sanction is high irrespective of the positive effect of the action. This may be, for example, the result of lack of transparency of law and enforcement. This prevents firms from undertaking actions which are welfare enhancing, and

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[20] Nadia Calviño, 'Public Enforcement in the EU: Deterrent Effect and Proportionality of Fines' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual* 2006:*Enforcement of Prohibition of Cartels* (Hart Publishing, Oxford/Portland, Oregon 2013) 1 (forthcoming).

[21] P Buccirossi, L Ciari, T Duso, G Spagnolo, C Vitale, 'Deterrence in Competition Law' Discussion Paper October 2009, 2 <http://www.sfbtr15.de/uploads/media/285.pdf> accessed 17 February 2013.

[22] ibid 2-3.

thereby harms competition. Even though large *ex ante* penalties can increase *ex ante* deterrence, they can also induce corporations to incur higher precaution and avoidance costs up to a point where they become excessive, relative to the social gain they bring about.[23] This is why a new competition authority, if in doubt about the competitive effects of a given infringement, would be advised to pursue only cases involving hard core restrictions and cartels.

33. In the US, commentators have pointed out that anticompetitive effects can arise when potential plaintiffs have too great an incentive to bring antitrust suits. Over-enforcement can lead to businesses avoiding practices with a legitimate procompetitive purpose. The potential for competitors to use the threat of an antitrust suit to inhibit competition is possible because the high costs of defending an antitrust suit may induce the defendant to settle by abandoning the behaviour regardless of whether the behaviour was procompetitive or not.[24]

34. The problem of over-enforcement, in the context of private litigation, can be addressed by measures such as the adaptation of the doctrine of standing whereby a plaintiff must do more than prove it was harmed by illegal conduct; it must also prove injury to competition.[25]

## VI THE EU EXPERIENCE

35. This section deals with sanctions and remedies in EU competition law.

### a) Remedies – *ex post* assessment under Articles 101 TFEU and 102 TFEU

36. The aim of remedies is to prevent infringements of Articles 101 and 102 of the TFEU. Remedies are related to actual or potential anticompetitive conduct. The remedy should be proportionate to the infringement;[26] the dangers of excessive remedies have been discussed in part V above.[27] It is important that remedies are *simple* and *functionally related* to the conduct.[28]

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[23] B Kobayashi, 'Antitrust, Agency and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations' George Mason Univ Law and Econ, Working Paper No 02-04 (2002).
[24] Deborah Platt Majoras, 'Antitrust Remedies In The United States:Adhering To Sound Principles In A Multi-Faceted Scheme' October 2002 <http://www.justice.gov/atr/public/speeches/200354.htm> accessed 19 February 2013.
[25] See eg *Brunswick Corp v Pueblo Bowl-O-Mat*, 429 US 447 (1977).
[26] E. Thomas Sullivan, 'Antitrust Remedies in the US and EU: Setting a standard of Proportionality', 48 *Antitrust Bull.* 377 (2003).
[27] See also Motta (n 3).
[28] The European Commission Notice on Commitments highlights the penchant of the Commission for simple remedies. The logic can be applied a fortiori to remedies under Articles 101 and 102.

37. Article 7 of Regulation 1/2003 defines two categories of remedies: behavioural and structural.

38. Behavioural remedies can be positive, requiring the undertaking to perform an act, or negative, requiring an undertaking to cease performance.[29] Positive remedies are applied less frequently than negative remedies. Structural remedies usually consist of divestitures orders, and are applied most commonly in *ex ante* analysis, discussed below.[30] Indeed, Regulation 1/2003 indicates that structural remedies should only be imposed 'where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.'[31]

39. It is interesting to note that EU law provides for a voluntary mechanism under which firms can propose remedies to the Commission. Under Article 9 of Regulation 1/2003, legally binding commitments, which may be behavioural or structural, are made by the firms and the Commission does not need to make any finding as to infringement. This saves the cost of prosecution. However, behavioural commitments will only be effective where the probability of detecting infringements is high.

**b) Remedies – *ex ante* assessment under the Merger Regulation**

40. In the case of merger control, remedies are aimed at preventing the creation of a market structure that may be less competitive. Accordingly, remedies are aimed at relieving structural deficiencies in the market post-merger. Under the test of compatibility in Articles 2(2) and 3 of the Merger Regulation, the Commission assesses whether or not a given concentration[32] is likely to significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or of the strengthening of a dominant position.

41. Crucially, the Commission lacks the power to impose remedies. Instead the merging firms propose certain undertakings, which are then considered by the Commission. If the proposed remedies are insufficient and the parties do not reach agreement on remedies which would alleviate the Commission's concerns the

[29] *Commercial Solvents Co. v Commission,* [1974] ECR 223, where the Commission ordered Commercial Solvents to start supplying again when the refusal to supply was found unlawful.
[30] European Commission (no 19) [22]-[57].
[31] Reg 1/2003 Recital 12.
[32] See chapter 2 part III.

merger can be prohibited. However, the Commission has only blocked a very small number of mergers.

42. Remedies acceptable under the Merger Regulation have been the object of intense academic debate, especially by economists. It is recognised that incorrectly applied remedies create a potential for resource misallocation and can diminish the positive effects of a merger.[33]

43. In its revised 'Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004', the Commission stresses the difference between divestitures (the clearest example of a structural remedy) and other types of commitments that can be structural (eg granting access to key infrastructure or inputs on non-discriminatory terms) or behavioural (eg commitments not to raise prices or to remove brands). Structural remedies such as divestitures are preferred as a rule by the Commission as they are durable and they usually do not require medium or long-term monitoring measures.[34]

44. In the absence of a monitoring system, non-structural remedies are treated as mere declarations of intention.[35] As stated above, a monitoring system entails on-going costs. The unavailability of monitoring may entail a rejection of the proposed remedy by the Commission.[36] Nevertheless, the Commission regards non-structural remedies as potentially efficient in certain circumstances.[37]

45. Monitoring is likely to be required for all remedies, but in particular for access remedies and behavioural remedies.[38] However, in the Commission's view there is a substantial difference between the two. The monitoring of access remedies can be delegated to competitors. Contracts between firms providing essential facilities and competitors can contain provisions for the use of alternative dispute resolution ("ADR") methods (eg arbitration) to resolve disputes arising from non-compliance with the remedy. ADR can result in quick decisions and, crucially, enforcement costs are borne by the parties to the contract. The Commission would only intervene where ADR fails to yield results. In this case, the remedy is made possible by the interest of competitors to preserve their access to essential

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[33] See for instance Stephen Davies and Bruce Lyons (eds), *Mergers and Mergers Remedies in the EU* (Edward Elgar 2007).
[34] [15] and [61].
[35] [13]
[36] [14]
[37] [15]
[38] For discussion of the costs involved see A Ezrachi, 'Behavioural Remedies in EC Merger Control – Scope and Limitations' (2006) 29 World Competition 459.

facilities.[39] However, such a mechanism may not work equally well in the case of behavioural remedies, as competitors are unlikely to be involved as contractual counterparties and may also have incentives not to report violations to the Commission. Therefore, the latter type of remedy is only likely to be accepted in exceptional cases.[40]

**c) Sanctions**

46. Since the competence to impose criminal sanctions is fully retained by EU Member States, fines imposed at the EU level are administrative in nature,[41] unlike those imposed for breaches of US antitrust law.

47. The Commission can impose fines for procedural and substantive violations.[42] Fines for procedural infringements are imposed under Article 23(1) of Regulation 1/2003 on undertakings that commit violations of Articles 17, 18 and 20. These include failures to respond to the Commission's requests for information. The Commission has demonstrated its intention to impose high fines for both procedural and substantive violations to create deterrence. High fines have been imposed in cases of procedural violations,[43] and in 2012 alone, the Commission imposed fines amounting to €1,875,694,000 in the area of cartels.[44]

48. The fines imposed by the Commission can reach up to 10% of the worldwide group turnover of the offending undertaking in cases involving substantive infringements (fines for procedural infringements do not exceed 1% of the total turnover).[45] The method for setting the fine has been laid down in the Commission's Fining Guidelines.[46]

49. The Fining Guidelines, recognising the importance of imposing sufficient fines, provide a general two-step method to be followed: determination of the basic amount of the fine and making adjustments to the basic amount.

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[39] 'Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004' [66].
[40] ibid [69].
[41] See Jones and Sufrin (n 1) 1096.
[42] Article 23 of the Reg 1/2003.
[43] *E.ON Energie AG* [2008] OJ C 240/6 where a fine of € 38 million was imposed on the undertaking for removal of the tape fixed by the Commission during a dawn raid on the room where they had kept the information. Similarly in *Bitumen* [2007] OJ L196/40 fine imposed was increased by 10% for obstructing the investigation by the Commission.
[44] <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> accessed 20 February 2013.
[45] Art. 23 (2) and (1) respectively of Reg. 1/2003.
[46] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of the Regulation No. 1/2003.

*i) Determination of basic amount of fine*

50. The determination of the fine in the EU involves a two-stage process. First, the Commission calculates the value of the goods or services to which the infringement directly or indirectly relates. This is observed in the relevant geographic area within the European Economic Area ('EEA') during the last full business year.[47] The Commission takes into account the best figures available. Where complete figures are not provided, it may use partial figures or any other relevant information.[48] In situations where the infringement extends beyond the EEA, the Commission will use the total value of goods and services in the relevant geographic area, determine the market share of the relevant undertaking and apply this share to the aggregate sales within the EEA.[49] This is done so that the relevant sales properly reflect the undertaking's effects within the single market. VAT and other taxes are not taken into account to determine the value of the goods and services.[50]

51. After the value of sales has been determined the basic amount of the fine is set. The fine will be a proportion of the sales value, adjusted according to the gravity of the infringement and multiplied by the number of years in which the infringement took place.[51] The gravity is determined on a case-by-case basis and the Guidelines recognise that horizontal price fixing, market sharing and output limitation agreements are treated as more grave, hence heavily fined. The proportion of value of sales is set at 30%.[52] In the case of horizontal agreements, fines are set at between 15% and 25% irrespective of the duration of the infringement to create sufficient deterrence.[53]

*ii) Adjustments to the basic amount*

52. Once the Commission has determined the basic amount of fine, it has the discretion to make adjustments on account of the following factors:

    - Aggravating factors – Recidivism and the continuation of the infringing conduct lead to an increase of up to 100%. A refusal to cooperate,

[47] ibid [13]. See also Case T-33/02, *Britannia Alloys and Chemicals ltd v. Commission* [2005] ECR II-4973, paragraph 5.
[48] ibid [14].
[49] ibid [18].
[50] ibid [17].
[51] ibid [19].
[52] ibid [21].
[53] ibid [25].

obstruction of the investigation and a high degree of complicity (leaders and instigators are likely to be fined more) leads to increases in fines.[54]

- Mitigating factors – Factors that mitigate the amount fined may include negligent infringement, an immediate termination of the infringement on intervention by the Commission, limited involvement in the infringing conduct and cooperation with the Commission. Additionally, where anticompetitive conduct is mandated or encouraged by legislation or public authorities, the fines will be reduced.[55]
- Other factors – The Commission may increase fines for undertakings with particularly large turnover to create a sufficient deterrent effect.[56] However, the maximum fine that can be imposed equals 10% of the undertaking's global group turnover for the previous year.[57] The leniency notice and the inability to pay as a result of specific social and economic circumstances are also taken into account by the Commission.[58] Additionally, the Commission may depart from the general method provided in the Guidelines due to the specific facts of a given case or the need to amplify or reduce the deterrent effect.[59] However, since the aim of competition policy is to protect competition in the market, a competition authority must be cautious in setting excessive fines. In fact, an inability to pay the fines is a factor taken into account by the Commission in reducing the fines.[60]

53. While private damage actions have been recognised as crucial to ensuring the effectiveness of EU competition law,[61] fines are the only sanction currently available to the Commission. This creates an incentive for the Commission to impose fines that are as high as possible. Combined with effective enforcement and the possibility of detection, the severity of fines that can be imposed makes the violation of competition law unprofitable and unattractive for undertakings.

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[54] ibid [28].
[55] ibid [29].
[56] ibid [30].
[57] ibid [32].
[58] ibid [34], [35].
[59] ibid [37].
[60] Kienapfel and Wils, 'Inability to pay-First Cases and Practical Experiences' (2010) 3 Competition Policy Newsletter 3.
[61] *Creghan v Inntrepreneur Pub Co* [2003] EWHC 1510; *Vicenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR-I 6619.

**d) Damages**

54. The Commission has encouraged private actions as a complementary deterrent at the Member State level.[62] Indeed, the ECJ has stated that the treaty prohibitions of anticompetitive behaviour will not be fully effective without the possibility of private damages claims.[63] Under the current regime, undertakings facing sanctions at the EU level are further exposed to follow-on damages at the Member State level. The possibility of private contractual claims arising from breaches of competition law are seen as an essential supplement to Articles 101 and 102: 'the existence of such a right strengthens the working of the [Union] competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [Union].'[64]

55. However, the EU faces a number of obstacles to effective private enforcement.[65] These include administrative hurdles, limited experience in competition law by national courts, difficulties in gathering evidence and the prohibitive costs of litigation. The Commission's 2008 White Paper stated that damages should be available to all victims, whether direct or indirect, in any economic sector. There should also be an effective way to aggregate claims where large groups of individuals or firms were harmed by a given infringement, and national courts should have powers to request information from parties to minimise the costs of collecting evidence.[66]

**e) Criminal sanctions**

56. Despite not having a basis in EU law, criminal sanctions are used in several EU Member State jurisdictions, including Ireland, Romania, Sweden and the United Kingdom. Two interesting examples of the progressive implementation of criminal policies are provided by the UK Enterprise Act 2003 and by Romanian Law n.

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[62] W. P. J. Wils., 'Should private enforcement be encouraged in Europe?' (2003) World Competition 478; European Commission 'Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003' [2006] OJ C210/2 ('Fine Guidelines'), [4].

[63] Joined Cases C 295/04 to C 298/04 *Vincenzo Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA et al.* [2006] ECR 1-6619 93.

[64] Case C-453/99 Courage Ltd v Bernard Crehan [26]-[27]

[65] European Commission, *Green Paper: Damages Actions for Breach of the EC Antitrust Rules* COM (2005) 0672 final.

[66] European Commission, *White Paper on damages actions for breach of the EC antitrust rules,* COM (2008) 165 final, 4-5 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF> accessed 10 February 2013.

21/1996. In both cases, the law remained unapplied for a substantial amount of time: the first criminal sanctions were imposed in the UK and in Romania respectively in 2008 and 2009.[67] This reflects the importance of creating a competition culture, including rules that are adequately internalised by market participants, before imposing severe sanctions. The criminalisation of cartels in the UK, for example, has removed the obstacles to the extradition of cartel members to other jurisdictions in which they are charged with equivalent crimes. The publicity generated by the early applications of extradition helped to raise the profile of cartels in the UK. In fact, the first discussions about the necessity of such sanctions occurred in the UK precisely with reference to a case of extradition.[68]

**f) Lessons from the EU experience**

57. Generally, sanctions in EU law seek to bring anticompetitive behaviours in line with the law. They also help in creating a competition culture. The application of sanctions and remedies signals the importance of competition to market actors. In the EU, authorities have strived to produce cost-effective remedies that do not lead to any form of market distortion. Their aim is to restore the *status quo ante* wherever possible.[69] In applying sanctions or remedies, the Commission seeks to correlate their severity with the behaviour in question.

58. Structural and behavioural remedies can be applied *ex post* or *ex ante*. In both cases, the application of remedies may entail monitoring costs. These could be overcome where the monitoring function can be delegated to contractual counterparties. Additionally, a cost-benefit analysis guides the court in applying the less expensive of the two remedies when their effectiveness is equal.[70]

59. Additionally, the EU regime demonstrates the importance of complementary sanctions in achieving maximum deterrence. The increasing use of criminal sanctions by EU Member States, as well as the stated functions of follow-on claims for damages at the Member State level, indicate that public sanctions do not exist in a vacuum. Instead, they are part of a wider deterrence mechanism that signals the importance of competitive behaviour to market participants.

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[67] Veronica Pinotti and Martino Sforza, 'Interplay between antitrust and criminal law in Europe' (2011) Bloomberg Law Reports <http://www.mwe.com/info/pubs/pinotti0611.pdf> accessed 10 February 2013.
[68] See Orley Ashenfelter and Kathryn Graddy, 'Anatomy of a Rise and Fall of a Price-Fixing Conspiracy: Auctions at Sotheby's and Christie's' (2005) 1 J Competition L Ec 3.
[69] Jones and Sufrin (n 1) 395.
[70] ibid 398.

## VII THE US EXPERIENCE

60. This section deals with remedies and sanctions in US antitrust law. In order to appreciate the differences between the EU and US regimes, one has to keep in mind that their substantive and procedural laws differ significantly. For instance, US antitrust law has no provision equivalent to Article 102 of the TFEU on the abuse of a dominant position.

61. It should additionally be noted that remedies in the US can be sought at both the federal and state level, though significant differences exist between the two. The state authority may also seek damages or remedies at the federal level for damage caused to itself or its citizens.[71] This section only covers US federal law, since this is of greatest international relevance.

### d) Remedies in the US legal system

62. As in the EU, there is a distinction between structural and behavioural remedies, and a combination of the two may be applied. These remedies are generally applied in cases under section 2 of the Sherman Act, which deals with monopolisation and attempts to monopolise.[72] Historically, the emphasis has been on structural remedies rather than behavioural remedies. After the enactment of the Sherman Act, the government implemented structural changes that were beneficial for the steel, rail and petroleum industries. In the 1940s, it pursued the tobacco, motion picture distribution and aluminium industries. In the 1960s, the powers under the Sherman Act were used for divestiture in the famous cases of IBM and AT&T.[73] Even in the recent case of *United States v Microsoft Corp*[74] the US government sought a combination of behavioural and structural remedies.

63. Behavioural remedies have, at times, been viewed as cumbersome and lacking certainty.[75] However, in the 2011 Antitrust Division Guide to Merger Remedies the DOJ does not indicate that structural remedies are to be preferred over behavioural ones, unlike in the 2004 Guide. The new DOJ approached has been employed in

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[71] Harry First, 'Delivering Remedies: The Role of State in Antirust Enforcement' (2001) 69 Geor Wash L Rev 1004, 1011.
[72] See Chapter 2, III(b).
[73] Doughlas F Broder, *A Guide to US Antitrust Law* (Sweet and Maxwell , 2005) 107.
[74] 87 F. Supp. 2d 30.
[75] *United States v. American Telephone and Telegraph Co.* 552 F. Supp. 131.

three recent merger cases: *Ticketmaster-Live Nation*,[76] *Comcast-NBCU*[77] and *Google-ITA*. In these cases, multiple behavioural remedies were applied, such as access conditions and firewalls.[78] This may be seen as a positive change. In fact, many suggest that the US penchant for structural remedies fails to ensure that the structure of the market is maintained as opposed to the mere prevention of the anticompetitive behaviour.[79]

**e) Sanctions in the US legal system**

64. The US legal system places great focus on sanctions in the forms of fines, imprisonment and damages, as opposed to remedies. The Sherman Act provides that both Section 1 and Section 2 offences – respectively agreements in restraint of trade and monopolising or attempting to monopolise the market – are criminal offences. These offences are punishable with a fine not exceeding $100 million for corporations and $1 million for other persons, by imprisonment not exceeding 10 years, or by a combination of both. This is in contrast to the EU, where the Commission has the power to impose fines, whereas the enforcement of remedies under US law is entrusted to the courts. The Federal Trade Commission Act, however, does provide limited powers to the FTC to impose fines (up to $10,000) and issue cease and desist orders.[80]

65. Fines are imposed not only for violations of substantive law but also for procedural law breaches. They extend, for instance, to the failure to report mergers to the FTC and the DOJ under the Hart-Scott-Rodino Act.

66. Imprisonment is imposed for breaches of both Sections 1 and 2 of the Sherman Act. This applies to firm managers who are directly responsible for the breach. As for any other crime, the prosecution must be able to prove intent. The Court has outlined a two-limb test for determining intent. State of mind should be established by evidence proving that the defendant acted with the purpose of producing anticompetitive effects.[81] Alternatively, evidence must prove that the

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[76] *United States v. Ticketmaster Entm't, Inc.*, 75 Fed. Reg. 6,721, 6,724 (DOJ Feb. 10, 2010) (competitive impact statement).
[77] *United States v. Comcast Corp.*, 76 Fed. Reg. 5,459, 5,461-64 (§§ IV-VI) (DOJ Jan. 31, 2011) (proposed final judgment).
[78] *United States v. Google, Inc.,* 76 Fed. Reg. 21,017, 21,017 (DOJ April 14, 2011); John E. Kwoka and Diana M. Moss, 'Behavioural Merger Remedies: Evaluation and Implications for Antirust Enforcement' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959588> accessed 20 February 2013.
[79] Charles James, 'The real Microsoft case and settlement' (2000) 16 *Antitrust* 58, 60 N.26 at 420
[80] §§ 45(b)-(k).
[81] *United States v United State Gypsum* Co 438 US 422.

conduct had an anticompetitive effect and was undertaken with knowledge that this effect was a probable consequence of the action.[82] Since it is not always easy to establish intent, the DOJ's Antitrust Division has limited itself to criminal prosecutions only in the case of *per se* violations.[83] These are discussed in part I(e) of chapter 5.

67. Imprisonment has the intrinsic value of acting as a deterrent. However the immense success of the US model should not be taken as a symbol of imprisonment being the sole reason for the regime's success; the UK experience suggests otherwise. For imprisonment to be an effective deterrent, certain social, political and economic conditions have to be present, and cartel detection has to be effective.[84]

**f) Damages**

68. In the US, private damages actions have a considerable deterrent effect. Section 4 of the Clayton Act permits individuals harmed by a breach of antitrust law to sue in the federal court regardless of the value of their damages claim. A successful claimant may recover treble damages. The right to sue extends to the US government, which often initiates proceedings against undertakings. Damages can be recovered under both Sections 1 and 2 of the Sherman Act.

69. The courts have held that damages may be measured by any method that provides a reasonable approximation of the plaintiff's economic harm.[85] One of these methods involves calculating the difference in the price paid by the purchaser and the fair market price. However, even though the measure of damages is not speculative,[86] it is not as rigorously assessed as damages in contract or tort. Furthermore, damages may be trebled and can be claimed by anyone who has suffered harm as a result of anticompetitive behaviour. The primary aim of damages in US competition law is to hold the wrongdoer accountable – a considerable deterrent.[87]

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[82] ibid.

[83] These have been recognised by the DOJ as 'hardcore cartel activities such as price fixing, bid rigging and market allocation agreements' *see,* DOJ Antitrust Division 1999 Annual Report, 'The Criminal Enforcement Program', <http://www.justice.gov/atr/public/4523.htm> accessed 4 March 2013.

[84] See, Vasiliki Brisimi, Maria Loannidou, 'Criminalizing Cartels in Greece: A Tale of Hasty Developments and Shaky Grounds' (2001) *World Competition* (2011), 34(1), 157-176; Caron Beaton-Wells and Ariel Ezrachi, *Criminalising cartels: critical studies of an international regulatory movement,* (Oxford, 2011).

[85] *Zenith Radio corp v Hazeltine Research Inc* 395 US 100.

[86] *Bigelow v RKO Radio Pictures Inc* 327 US 557, 566.

[87] *J. Truett Payne Co. v. Chrysler Motors Corp* 451 US 557.

**g) Lessons from the US Experience**

70. The US experience, when seen alongside the EU regime, suggests that no strict divide with reference to the nature of remedies can or should be made. A more balanced approach towards imposing structural and behavioural remedies is preferable and a shift in US opinion in this direction is evident from the 2011 Antitrust Division Guide.

71. The importance of fines and imprisonment in ensuring the effectiveness of antitrust law is also highlighted in the US. As discussed in part III of this chapter, the effectiveness of imprisonment is compromised by the credibility of the penal system and the costs associated with keeping prisoners. These effects may be amplified in emerging competition regimes. However, the imposition of high but proportionate fines seems to be a uniform deterrent strategy followed across jurisdictions, subject to the caveats highlighted in part III.

## VIII IMPLICATIONS FOR GEORGIA

72. Remedies are a challenging aspect of competition law, both from a legislative and enforcement perspective. Applying excessive remedies, or the wrong remedies, can be more costly than allowing the anticompetitive behaviours to continue. Moreover, applying the wrong remedies can have an adverse effect on competition and the structure of the market. A new competition authority imposing excessive sanctions or incorrect remedies might also lose credibility with market participants, undermining its position as competition enforcer.

**a) The role of sanctions**

73. The introduction of a new competition law regime will involve building trust in the rules it establishes. In this early stage, the reputation of the competition authority will be fragile, and its ability to conduct advanced economic analysis of the costs and benefits of a given infringement might be constrained by the factors discussed in chapter 3. As a result, it might be worth confining the imposition of fines and/or imprisonment to the most obvious violations. The focus of a new authority should be on influencing the behaviour of undertakings through a strong signalling function, not on creating a hostile market environment for participants.

74. The same applies to imprisonment. As we have discussed, imposing imprisonments for anticompetitive behaviour can have a powerful deterrent effect on firms' managers. But it can appear arbitrary where the competition authority is seen as lacking in competence. This can be amplified by a distrust of the judiciary. The absence of an established competition regime could make any sanction imposed for the breach of new rules appear excessive to market participants. For this reason, the initial focus must be on education and increasing public awareness of the severe effects of anticompetitive behaviour. This can pave the way for introducing imprisonment in the future.

**b) Structural or behavioural remedies**

75. While both EU and US competition law provide useful benchmarks for the implementation of a new competition policy, adopting these regimes under domestic law creates a risk of over-enforcement. This is because small economies like Georgia face unique challenges, discussed in chapter 2, such as difficulties in achieving economies of scale and scope, and economic specialisation. This means that abuse of dominance cases should be treated more cautiously in Georgia than they might be treated in larger developed economies, and mergers should be assessed principally on the basis of efficiencies, with less weight given to structural factors. A firm seeking to merge might be allowed to do so despite the potential for the creation of dominance, because the merged entity will be better placed to deliver high quality goods and services at a lower price. Shifting the analytical focus away from structural variables would give firms greater room to expand without concern for regulatory intervention.

76. For a number of years, Georgia has been largely dependent on foreign direct investments. On one hand, this can present a strong argument for the elimination of competition law altogether – as indeed Georgia has done – to minimise barriers to foreign entry. Applying excessive structural remedies in the Georgian economic environment can also discourage foreign direct investment. Big multinationals facing structural restraints might react by withdrawing their investment from the market. However, eliminating competition law exposes consumers to harm. This is why a balance must be struck between effective sanctions and remedies and the maintenance of sufficient incentives to attract investment.

**c) Fines**

77. Any fines imposed must be based on a consideration of their impact on the real economy. In particular, the calculation of fines must be based on a measure that is neutral with respect to debt and equity. Fines calculated on the basis of profits, for example, will incentivise firms to use debt finance, since this will reduce or eliminate their liability in cases of non-compliance. This can expose the economy to shocks, since a decline in finance will endanger highly leveraged firms.

# 5 - CARTEL REGULATION

## I THE FIGHT AGAINST CARTELS

### a) Overview

1. Cartels or collusive agreements can be defined as 'horizontal agreements between independent undertakings to fix prices, divide markets, to restrict output and to fix the outcome of supposedly competitive tenders'.[1] Cartels involve a transfer of wealth from consumers to those involved in the agreement. There is no accurate knowledge of how much wealth is transferred but recent studies estimate that the median overcharge achieved by cartels is 20%.[2]

2. Cartels are the main focus of competition policy around the world as they are recognised as the most pernicious anticompetitive activity. The US Supreme Court has referred to cartels as the 'supreme evil of antitrust',[3] and the OECD has stated that 'hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others'.[4] In similar terms, a Deputy Assistant Attorney General for Criminal Enforcement of the US DOJ has said that: 'Cartels have no legitimate purposes and serve only to rob consumers of the tangible blessings of competition'.[5] There is an international consensus that cartels pose the greatest threat for competition.

3. The main problem with the detection and prosecution of cartels is proving their existence. Like any illegal activity, cartels are kept secret by their perpetrators.[6] Most firms are aware of the severe sanctions applied to cartel members. Therefore,

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[1] Richard Whish, *Competition Law* (6th edn, Oxford University Press 2009), 497.

[2] Yuliya V. Bolotova, 'Cartel overcharges: An empirical analysis' 70 Journal of Economic Behavior & Organization 321.

[3] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* 540 US 398, 124 SCt 872 US, 2004 United States Supreme Court.

[4] OECD, 'Recommendation of the Council concerning Effective Action against Hard Core Cartels' (1998) <http://www.oecd.org/competition/cartelsandanti-competitiveagreements/2350130.pdf> accessed 9 February 2013.

[5] Gregory J. Werden, Scott D. Hammond and Belinda A. Barnet, 'Deterrance and Detection of Cartels: Using all the Tools and Sanctions' (2012) <http://www.justice.gov/atr/public/speeches/283738.pdf> accessed 9 February 2013.

[6] In countries with little or no 'competition culture' in an initial period it is likely that proof of cartels will be easier to find. Considering that cartels were part of the business culture it would not been unusual to find collusive agreements even signed as contracts.

a firm choosing to be part of a cartel will take as many precautions as possible. Meetings will be secret and no documents or formal agreements will be written; cartel members will be as careful as they can not to leave any evidence.

4. If they are to succeed in detecting and ultimately prosecuting cartels, competition authorities must be adequately equipped. They must have a budget that allows them to act and 'enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance'.[7]

5. Globalisation has brought on an increase in international cartels that affect multiple markets across two or more jurisdictions.[8] As a consequence of this, cartel prosecution and enforcement has taken on an international dimension with increased cooperation at the bilateral and regional level as well as increased discussion at the multinational level. In many cases, competition authorities will seamlessly coordinate across jurisdictions to uncover and prosecute cartels.

**b) Conditions that facilitate cartels**

6. Cartels are more likely to exist where several economic conditions facilitate collusion among competitors:[9]

   - Structural factors – These features relate to the structure of a given market, and they could be seen as one of the most relevant factors in facilitating collusion. Structural factors can take three forms. First, the level of concentration of the market; the smaller the number of firms operating in a certain market, the more likely it is that collusion will exist. Second, high barriers to entry and expansion into a new market would make it more likely that collusion will occur, as the "threat" of a new competitor will not be present. Third, cross-ownership of firms and links among competitors can lead to collusion; if an economic agent has some level of participation or property in a direct competitor, even if it lacks control over it, collusion is more likely to arise.[10] One example of this is the passive investment, whereby a firm holds shares in a competitor.

[7] OECD, 'Report on Hard Core Cartels' (2000) <http://www.oecd.org/competition/cartels/2752129.pdf> accessed February 9, 2013.

[8] Michal S. Gal, 'Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions' (2009) Volume 33 Fordham International Law Journal.

[9] Massimo Motta, *Competition policy : theory and practice* (Cambridge University Press 2004), 142-159.

[10] ibid. Motta mentions more structural factors but we have highlighted those we thought were more relevant.

This technique allows competitors to hedge against the risk of losing the competitive process.[11]

- Price transparency and exchange of information – Price transparency and exchange of information are necessary preconditions to maintaining a cartel or indeed to any collusive activity. Without knowing what each competing firm is doing in the relevant market, economic agents would not know if, for example, a decreased demand of their product was caused by a demand contraction or by the lower prices set by their competitors. This may lead to "unnecessary" price wars and put pressure on the cartel that would not be necessary if information was transparent. Transparency (ie coordination and information exchange) can involve secrete exchanges of information among competitors. Such exchanges can take place in meetings, through trade associations, in e-mails or any other methods.

**c) Tacit collusion**

7. Oligopolistic concerns arise in concentrated markets. Economic agents in these markets can 'behave in a parallel manner and derive benefits from their collective market power, without necessarily, entering into an agreement or concerted practice'[12] such as those required by Article 101(1) of the TFEU. This oligopolistic practice has usually been labelled as "tacit collusion" in economic theory but is also known as "conscious parallelism", "tacit coordination" and "coordinated effects".[13]

8. The theoretical underpinnings of this practice lie in the theory of oligopolistic interdependence: when market structure is such that few actors are present, they will have very little incentives to compete with each other. Competitors are interdependent, they have a 'heightened awareness of each other's presence and are bound to match one another's marketing strategy'.[14] Price competition between them will be limited or non-existent and the oligopoly will create a non-competitive stability. Furthermore, since all economic actors will want to maximize their profits, an oligopolistic market makes this theoretically possible, in that they will be able to 'achieve and charge a profit-maximizing price which will be set at a supra-competitive level without actually communicating with one another in any

[11] A Ezrachi & D Gilo, 'EC Competition Law and the Regulation of Passive Investments Among Competitors' [2006] OJLS 327.
[12] Whish (n 1) 543.
[13] ibid 543.
[14] ibid 546.

way at all'.[15] In the EU, such parallelism in itself falls outside the scope of Article 101 of the TFEU. A concerted practice, which is caught by Article 101, can be proven where cooperation is the *only* explanation for parallel behaviour. Parallelism would only be used as evidence of a concerted practice 'if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.'.[16]

**d) EU regulation of cartel activity**

9. The rules applicable to cartels in EU law can be found in Article 101 of the TFEU.[17] Here, we highlight two general aspects of the provision that are central to the cartel prohibition in the EU.

10. The first important element is the existence of a cartel agreement. EU law refers to agreements, decisions by associations of undertakings or concerted practices. The application of Article 101(1) is not restricted only to 'legally enforceable agreements: this would make evasion of law simple'.[18] Any kind of agreement, whether enforceable or not, is admissible as evidence of a cartel, including "gentlemen´s agreements" or simple understandings.[19] Agreements within trade associations, which typically emerge as "decisions" of these associations also fall within the scope of Article 101(1). Finally, the term 'concerted practice' is used in EU law to include any other kind of conduct which may not fall within the meaning of "agreement" or "decision". This concept can be used to prosecute cases in which the collusion is tacit. EU case law has laid out the legal test for a "concerted practice" to fall within the meaning of Article 101(1): 'there must a mental consensus whereby practical cooperation is knowingly substituted for competition; however the consensus need not be achieved verbally, and can come about by direct or indirect contact between the parties.' [20]

11. A second aspect is related to the purpose of the anticompetitive agreement, decision or concerted practice. Under the terms of Article 101(1), agreements that

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[15] ibid 547.

[16] Case 48/69 *Imperial Chemical Industries Ltd. V Commission of the European Communities* (1972) ECR 619 [66].

[17] See chapter 2.

[18] Whish (n 1) 97.

[19] ibid 97.

[20] Cases 48/60 [1972] ECR 619, [1972] CMLR 557; Cases 40/73 etc [1975] ECR 1663, [1976] 1 CMLR 295.

have the *object or effect* of preventing, restricting or distorting competition are prohibited.

12. The distinction between agreements that have as their "object" and those that have as their "effect" the restriction of competition is particularly important. If an agreement has the "object" of restricting competition, the authority does not need to prove its anticompetitive effects. This is a policy decision; agreements that have the object of restricting competition are 'so inimical to the objectives of the Community that the can be permitted only where they can be shown to satisfy the requirements of Article 101(3)'.[21] There is a clear parallel with the *per se* rule in the regulation of cartels in the US with the difference that under EU law, an agreement that has the object of restricting competition can still fall under one of the exemptions in Article 101(3).[22]

13. Agreements that have the *effect* of restricting competition will have to be tested according to their anticompetitive effects and this will require a wide-ranging analysis of the market.[23]

14. Under EU law, cartels are not criminal offenses, and offenders risk sanctions in the form of administrative fines. As we have seen in chapter 4, fines under EU law can be (and have been in some cases) very substantial, the highest equalling 1.5 billion euros.[24] However, the Commission has other enforcement powers which create an additional deterrent effect. Dawn raids allow the Commission to conduct impromptu investigations of a firm's offices to obtain documents pertaining to the investigation of a cartel. Additionally, the Commission can obtain a court warrant to search employees' homes and personal vehicles, or seal off parts of the firm's offices.[25] These are considerable disruptions to the business.

**e) US regulation**

15. The regulation of cartels in the United States can be found in Section 1 of the Sherman Act.[26] It is worth noting that the broad formulation of the Sherman Act

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[21] Whish (n 1), 118.

[22] ibid.

[23] ibid.

[24] European Commission, 'Cartel Statistics' (2012) <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> accessed 16 February 2013.

[25] Regulation 1/2003, Articles 20-21.

[26] See chapter 2.

has made case law extremely important in the development of the law. We will focus on two aspects of Section 1.

16. The first element is the "agreement element". Case law has stated that 'whether the agreement is called collusion, a contract, a combination, concerted action, or a conspiracy, a plaintiff or prosecutor must prove with direct or circumstantial evidence that there occurred a meeting of the minds between two or more separate parties'.[27] There must be proof that the defendants 'had a conscious commitment to a common scheme designed to achieve an unlawful objective'.[28]

17. The second relates to the purpose of the agreement or its illegality. Early antitrust case law clarified that Section 1 only outlaws "unreasonable" restraints, not any restraint on trade. Courts have divided unreasonable agreements into two categories: those that would be considered *per se* illegal and those that were found to be illegal after being tested through the *rule of reason.*[29]

18. Agreements that are deemed to be inherently anticompetitive regardless of any justification are classified as *per se* illegal. In these cases the prosecutor will only have to prove the existence of the agreement but not the effects it had on competition. These types of agreements have parallels with agreements that have the "object" of restraining competition in EU law, subject to Article 101(3) as discussed above.

19. Agreements that do not fall into the *per se* category are automatically reviewed under the rule of reason. Similarly to agreements that have the 'effect' of restraining competition under EU law, the prosecutor must prove that the anticompetitive agreement actually harms competition.

20. US antitrust law sanctions cartel activities with fines, as described in chapter 4.

## II LENIENCY

21. With the recognition of cartels as the most 'egregious violations of competition law',[30] competition agencies have been struggling to develop methods to detect and destabilise cartels. One of the most sophisticated tools is the leniency programme,

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[27] Douglas F. Broder, *U.S. antitrust law and enforcement : a practice introduction* (2nd edn, Oxford University Press 2012), 39.

[28] ibid 40.

[29] ibid 38.

[30] OECD (n 4).

which is 'based on the principle that people who break the law might report their crimes or illegal activities if given proper incentive'.[31]

22. Leniency generally involves giving absolute or partial immunity from liabilities to participants in a cartel if they provide information regarding the cartel to the authority. The threshold for the information, the nature of the immunity and the basic model adopted across jurisdictions is discussed below.

23. Leniency programmes have the obvious benefit of piercing the cloak of secrecy surrounding the cartel. Even where the existence of a cartel may be inferred by the authority, the presence of condemning evidence by a participant enables efficient investigation. This eliminates the risk of premature detection, which gives the other participants of a cartel time to destroy evidence. Additionally, leniency programmes provide elements of general deterrence and specific deterrence.[32]

24. One criticism of leniency is that exonerating an offender is morally unjustifiable. However, the opportunity cost of detection undoubtedly weighs over such considerations. This concern is further offset by the fact that most leniency programs do not provide immunity from follow-on private actions and do not extend to other jurisdictions. Furthermore, the infringement decisions are available to the public and have a strong reputational effect. Thus, the members of a cartel are never entirely exonerated. Some have also doubted the efficacy of the programme, as it may lead to better detection but also provide an incentive, in the form of lower fines, to the creation of cartels.[33] However, the impact of the sanctions being reduced is often countered by the fact that only the first informant is eligible for immunity,[34] so the overall disincentive to engage in cartels is still strong. The incentive for a firm to inform on a cartel is often framed in terms of the prisoner's dilemma: where the gains from betrayal are higher than the gains of continued cooperation, the firm will be incentivised to betray.

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[31] Motta (n 9) 193.

[32] G. Spagnolo, 'Leniency and Whistleblowers in Antitrust' in P. Buccirossi (ed.), Handbook *of Antitrust Economics*, (MIT Press 2008).

[33] M. Motta and M. Polo, 'Leniency Programs and Cartel Prosecution' (2013) 21 International Journal of Industrial Organization 347-379 <www.sciencedirect.com/science/article/pii/S0167718702000577#> accessed 15 February 2013.

[34] See J.E. Harrington, 'Optimal Corporate Leniency Programs' (2008) 56 The Journal of Industrial Economics 215-246 <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-6451.2008.00339.x/full> accessed 15 February 2013.

25. Recognising that leniency programmes are essential for the detection of cartels, 23 EU Member States have adopted leniency programmes.[35] As of 2010, 50 jurisdictions worldwide reported having leniency programmes.[36]

**a) Pre-requisites for an effective leniency programme**

26. The 2010 Report of UNCTAD has provided a list of factors recognised as essential for an effective leniency programme:[37]

- Anti-cartel enforcement is sufficiently active for cartel members to believe that there is a significant risk of being detected and punished if they do *not* apply for leniency;
- Penalties imposed on cartelists who do not apply for leniency are significant, and predictable to a degree. The penalty imposed on the first applicant is much less than that imposed on later applicants;
- The leniency programme is sufficiently transparent and predictable to enable potential applicants to predict how they would be treated; and
- To attract international cartelists, the leniency programme protects information sufficiently for the applicant to be no more exposed than non-applicants to proceedings elsewhere.

27. These requirements have been recognized and emphasized by other international organizations, including the OECD[38] and the ICN.[39]

**b) Models of leniency programmes**

28. While the basic objective of enabling detection and the feature of providing immunity remain constant, different jurisdictions adopt different structures creating a variety of models of leniency programmes.

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[35] European Commission website, 'Authorities in the EU Member State which operate a leniency programme', <http://ec.europa.eu/competition/antitrust/legislation/authorities_with_leniency_programme.pdf>, accessed 15 February 2013.

[36] United Nations Conference on Trade and Development, *The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries* , 2010, TD/RBP/CONF.7/4 <unctad.org/en/Docs/tdrbpconf7d4_en.pdf> accessed 15 February 2013.

[37] ibid 3.

[38] OECD, *Fighting Hard Core Cartels: Harm, Efficiency Sanctions and Leniency Programmes* (2002) <http://www.oecd.org/competition/cartels/1841891.pdf> accessed 15 February 2013.

[39] ICN, Anti Cartel Enforcement Manual, *Drafting and Implementing Effective Leniency Policy,* May, 2009 <http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf> accessed 15 February 2013.

*i) Extent of immunity granted*

29. Granting immunity remains an essential feature of the leniency programmes but there may be some distinction as to the extent of immunity. In the case of corporate leniency, a firm may avoid fines by being the first to inform; in some jurisdictions also the second firm may benefit from a reduction in fines. In most cases, the absolute immunity or reduction applies to administrative fines. However, in the US immunity also entails a reduction in private action damages from treble to double. Some jurisdictions where criminal sanctions are present also provide 'amnesty' from criminal prosecution to the first informant.

*ii) The procedure for granting immunity*

30. In some jurisdictions, immunity is granted 'automatically' in the sense that it is granted as soon as the information is provided. This grant, in order to safeguard the interests of the investigation and prevent misuse, is often granted on the condition of continuing, complete disclosure. The US is one of the jurisdictions where immunity is granted in this way.

31. In certain jurisdictions, immunity is granted by the decision-making authority. It is discretionary, in as much as it is not conditional on the provision of information. In the EU, the information is provided to the DG Competition and there is no guarantee of immunity until the Commission makes a decision.

*iii) The nature of information required*

32. Certain jurisdictions place a higher threshold on the nature of the information that may qualify an undertaking for leniency. In the EU, the information should provide "decisive evidence".[40] Other jurisdictions, like the UK and the US, do not place any requisite burden on the nature of the information, however they may base the extent of immunity on who approaches the authority first with information the authority does not possess.

*iv) Who benefits?*

33. Leniency programmes can either be limited to the first informant or extend some benefits to subsequent informants. Since a greater number of informants yield additional benefits for the competition authority in terms of the volume of

[40] See <http://europa.eu/rapid/press-release_IP-02-247_en.htm>.

information provided,[41] most jurisdictions provide for some benefit to subsequent applicants. The most widely adopted model involves granting immunity and leniency for the first informant and reductions in fines for subsequent applicants. Rules governing fines can have four sources: (1) the statute that governs leniency; (2) additional legal instruments; (3) the general framework of the law or (4) the policies of the prosecuting authorities. It is imperative that the immunity granted to subsequent informants is lower than the immunity granted to the first informant.

**c) Essential features of a leniency programme**

34. Irrespective of the differences in the models outlined above, there are certain features of the leniency programme which remain unchanged across jurisdictions:

- A leniency programme needs to be certain and unambiguous so as to enable the applicants to determine their interests in revealing the information.
- Leniency programmes require full, complete and continuing cooperation from the undertaking as well as individual executives. Failure of executives to cooperate could act to the prejudice of the undertaking.
- It is required that the undertaking discontinues all illegal activities after it approaches the authority. However, the competition authority may require further participation, under its supervision, when additional time is needed to prepare an investigation.
- The applicability of the leniency programme is limited to those undertakings that are not the prime instigators of the illegal conduct. However, where a cartel has two leaders, neither is the main conspirator and hence both would qualify for leniency. A restriction based on the level of complicity in the conduct helps counter some ethical arguments against leniency as the main conspirators do not get the benefit of the programme. Furthermore, most leniency programmes do not apply to recidivists.
- Most leniency programmes do not provide any immunity from follow-on civil actions.
- Confidentiality about the identity of the applicant and of the information provided by the applicant has to be maintained by the authority.

[41] See OECD, Working Party No. 3 on Cooperation and Enforcement, *Leniency for Subsequent Applicants,* DAF/COMP/WP3(2012)9, 12 October, 2012, <*search.oecd.org/officialdocuments/displaydocumentpdf/?cote.*> accessed 15 February 2013.

- Most authorities use the 'marker system' to enable the informant to secure his chance of getting immunity by marking his place in the line. This is more relevant for jurisdictions that require a higher threshold of information for the purposes of granting immunity.
- Authorities as a matter of policy should encourage the applicants to inform other jurisdictions of the cartel as well to obtain benefits of leniency applications in those jurisdictions. A uniform structure of leniency across jurisdictions will help increase the efficacy of the programme, especially in view of the rise of global cartels.
- There are opportunities for applicants informing about one cartel to benefit from 'amnesty plus' by giving information about a related cartel.

**d) Leniency programmes and small economies: some special considerations regarding cross-border cartels**

35. The UNCTAD Secretariat highlights[42] that the dynamics of the leniency programme may change for small economies. High market concentration, a close and cohesive community of entrepreneurs and inter-linkages between the bureaucracy and the business class make the use of leniency less effective. Moreover, international cartels are less likely to use the leniency programmes of smaller economies as lower turnover in such economies would imply lower penalties as well.[43] Of course, a leniency programme is still essential to discovering local cartel agreements.

36. For small economies and developing countries, cooperation with competition authorities with successful leniency programmes has the limited advantage of aiding in the prosecution of international cartels. For domestic cartels however, competition authorities need to develop an independent leniency programme. This will be possible if the pre-requisites defined above are met. A strong signal that cartels will be punished severely is the first step in encouraging leniency applications. The authority should assure the informant about the high degree of confidentiality during the investigation to ensure that the applicant does not face the risk of boycott. As the note highlights[44] a robust anti-corruption system will also help in increasing the effectiveness of the leniency programme.

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[42] UNCTAD (n 34) [42].

[43] ibid.

[44] ibid [33].

## III ADVOCACY

37. We have already discussed the importance of advocacy in chapter 2. There are a few additional comments to be made with regard to cartels.

38. In many countries, cartel activity is seen as an acceptable business practice. It is not unusual, for example, for a group of firms to divide territories amongst them. This is seen as an acceptable, even logical practice. If all of them are doing well, why would they take the risk of 'cut-throat' competition? They can be better off by not competing.

39. The enforcement of competition law in relation to cartels faces a difficult cultural challenge when competition law is introduced in a country without an existing competition culture. For this reason the education of the business community becomes central. Business managers must become accustomed to doing business in a very different manner and 'competition advocacy' can play a vital role in this. Advocacy can complement the role of enforcement.

40. In the US, advocacy played a critical role in the fight against cartels. The DOJ used evidence obtained in a lengthy FBI investigation to launch a campaign aimed at stigmatising the behaviour of cartelists and demonstrating the harmful effects of cartel agreements. Evidence included video and audio recordings as well as documents that revealed the motivations of the cartel members. This campaign provoked a strong response in public opinion, which now recognises cartel agreements as criminal.

## IV IMPLICATIONS FOR GEORGIA

41. The best approach for countries like Georgia may be to begin by instituting rules prohibiting naked cartels. Naked cartels are those that commit the most blatant violations of competition law, including price and supply fixing. The authority could consider phasing in prohibitions requiring greater institutional resources once the authority acquires the human resources to deal with challenging cases, and once competition advocacy begins to yield results warranting such a development.[45] As discussed earlier, the enactment of an extensive EU- or US-style catalogue of

[45] Gal, 'When the Going Gets Tight: Institutional Solutions when Antitrust Enforcement Resources are Scarce', *Loyola University Chicago Law Journal*, 41, (2010) 429.

prohibitions may be too ambitious a commitment resulting in diminished credibility of the reform, not to mention probable enforcement errors.