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Upgrading Georgia's Competition Legislation – New Obligations and Balancing Benefits for Market Players

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Recently, after almost 15 months of discussions, the Parliament of Georgia adopted a comprehensive set of amendments to the Law on Competition (hereinafter – "LC"). Prepared within the framework of the EU-funded technical assistance project "Support to the Georgian Competition Agency", these amendments are aimed at enhancing the effectiveness of Georgia's competition framework and thereby fulfilling the obligations under the competition chapter of the EU-Georgia Association Agreement.

The above-mentioned amendments and their subsequent specifications in all the major by-laws concerning competition enforcement enter into force in several instalments, between 4 November 2020 and 1 June 2021. These amendments touch almost every aspect of Georgia's competition framework. On an administrative level, they bring more independence and accountability to the principal competition enforcer – National Competition Agency of Georgia (hereinafter – "the enforcer" or "GNCA"). On a substantive level, they clarify legal provisions to align them with the best EU practices. On enforcement level, they equip the GNCA with stronger investigatory and fining powers. Simultaneously, the amendments equip market players with additional tools to effectively exercise their right to defence and achieve favourable outcomes in competition cases.

A brief analysis of the first instalment of these amendments, which entered into force on 4 November 2020 (see the press release), offers a good view of the above-described balance. This article will focus on two sets of provisions within these amendments: those concerning the control of concentrations and market investigations. It will argue that, ***amidst the increased powers of the GNCA which translates into a new set of obligations for undertakings, the latter could also benefit from an enhanced ability to achieve positive outcomes in competition cases.***

Upgrade to the Regime of Merger Control

The amendments to the Articles 11-11 LC enhanced the powers of the GNCA in merger case-handling and imposed respective obligations to the undertakings in multiple respects, including the key areas listed below:

- The law envisages a new mechanism ensuring notification of all mergers which are subject to assessment under Georgian legislation – such transactions cannot be processed by the National

Agency of Public Registry (hereinafter – "NAPR") without prior approval by the GNCA.

- Merger notifications are now subject to an assessment fee – 5000 GEL.
- New regulations also envisage a two-stage assessment procedure: up to 25 working days for all appraisals and additional 90 calendar days involving more complex mergers or the mergers which give rise to reasonable doubt regarding their compatibility with the competitive market environment. In comparison, the old procedure foresaw an initial assessment time of 1 month which could be extended up to 2 weeks only in case of complex mergers – an overall assessment was taking maximum 45 calendar days.
- The SIEC test was explicitly acknowledged as the key assessment standard in merger appraisals. Simultaneously, if a merger results in the acquisition or strengthening of a dominant position, the law envisages a rebuttable presumption of such impediment. The burden of rebutting lays on the party(parties) applying for the merger.
- The law has empowered the GNCA to accept both structural and behavioural remedies proposed by the parties, to evaluate their sufficiency for the purposes of clearing notified transactions, and to make them binding to the parties subject to fines upon their non-fulfilment.
- Carrying out of mergers without prior notification, as well as during the merger appraisal process and after the refusal of clearance from the NGCA is now subject to fines. Under Article 33(4) LC, these could amount up to 5% of the previous year's annual turnover of the party(parties) responsible for merger notification.

Overall, the above-listed powers enable the GNCA to administer a more robust merger control. Meanwhile, the market players also benefit from an upgraded regime in at least three ways.

First, ***the mechanism guaranteeing a proper notification of mergers*** – including both non-processing of transactions by the NAPR without prior approval of the GNCA and fines introduced for implementing unauthorized mergerss – ensures that in the future, competitors will not suffer from the harmful consequences of unnotified mergers which could pose a significant impediment to effective competition. In other words, new provisions support the maintenance of a healthy competitive environment on Georgian markets – this benefits all market players.

Second, the ***introduction of a two-tier appraisal might prove time-consuming in cases involving simple mergers.*** More specifically, new provisions explicitly state that the extension beyond 25 working days requires the adoption of a formal decision which: 1) alleges the existence of reasonable doubt in terms of the compatibility of the merger to the competitive market environment; 2) elaborates on the necessity of a complex assessment. In comparison, old provisions did not require such a decision. As a result, the GNCA was more prone to use the time extension. Amendments eliminated this tendency since they incentivize the enforcer to finish appraisals quickly for non-problematic mergers.

Third, the ***introduction of the institution of remedies equips market players with significant leverage in merger appraisal procedures.*** New rules enable the latter to change the content of their merger even after the notification in a way that it becomes compatible with the competitive environment of the Georgian market. In comparison, the old regime of merger control did not leave a room for such a change – mergers were either cleared or not. Meanwhile, a legal ability to propose remedies facilitates the environment where, in theory, any notified merger can be saved from a negative assessment, subject to acceptance of the remedies by the GNCA.

Enhanced Powers of Market Investigation

Amended Articles 22-25 LC equipped the GNCA with an enhanced set of market investigation powers. The key amendments:

- Extended investigation period for all infringements (in case of market players, these include anti-competitive agreements, abuse of dominance and unfair competition) – the overall time-limit has increased from 10 to 18 months.
- They have enabled the enforcer to conduct effective surprise inspections/down raids during ongoing investigations. The new regime still requires the latter to obtain court permission for this. However, unlike in the past, this permission should be issued without notifying the party to be inspected. Hence, the new regulation preserves a "surprise" element and prevents undertakings from hiding the evidence of infringement before the inspection takes place.
- They have enhanced the choice of investigation outcomes. Previously, the law allowed only two types of such outcomes – finding of an infringement or declaring that it does not exist. In comparison, the amendments introduce the notion of commitments, give the GNCA a power to consider and accept them, and enable it to finish the investigation by giving parties time for their fulfilment.
- They have equipped the enforcer with additional fining capabilities. Namely, in cases concerning unfair competition, the GNCA can impose fines up to 1% of the annual turnover of the infringing party. Fines are also envisaged for not following the binding commitments.

In the face of the above-described increase in the GNCA powers, the market players also get matching capabilities to uphold their right to defence. Two of the major legal advancements are underlined below:

First, based on the LC, Articles 13-18 of the amended order of the GNCA Chairman on Approval of the Investigation Rules and Procedures envisage ***a comprehensive set of regulations governing on-site inspections.*** This includes (but is not limited to) the rights of inspected parties to consult the relevant documents authorizing the dawn raid before the commencement of this procedure, to invite a lawyer/legal representative for inspection monitoring, and to request the acknowledgement of an obtained information as a commercial secret in order to protect the documents containing it, as envisaged by Georgia's legislation.

Second, various procedural rights are also enhanced. Most notably, ***the GNCA now has an obligation to send draft investigation decisions to the parties and allow at least 25 working days for commenting and presenting additional evidence***. ***An ability to propose commitments before receiving such a draft is another strong benefit for market players***. Namely, if the enforcer is convinced that proposed commitments eliminate the risk of infringement, the party (parties) are prepared to accept them as binding, they get an opportunity to end the procedure without being found to infringe competition regulations.

Concluding Remarks

The overview of the new procedures of merger control and market investigations allows for making two conclusions. First, the enforcement capabilities of the GNCA have significantly improved on both fronts and resulted in the respective increase in obligations for market players. Meanwhile, an upgraded framework could better support a healthy competitive process on the

market. Simultaneously, the amendments incorporate a matching increase in defence mechanisms benefiting market players by making them more capable of achieving desired outcomes during competition proceedings.

Maintaining such a balance between new enforcement powers and corresponding rights to the parties is a strong side of the discussed amendments. One could only look forward to a matching realization of these powers and rights in practice.

The views expressed are personal and may not be attributed to the University of Oxford. The author has nothing to disclose.

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