

An Examination of the Present Competition Law of Georgia Using Pittman's Criteria

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INTRODUCTION

In the spring 1998 issue of this *Bulletin*, an article by William Kovacic and Ben Slay described and discussed the establishment of the competition law regime of the Republic of Georgia.² In the most recent volume of the *Georgian European Legal Review*, an article by Alexander Tushuri (Deputy Director of GEPLAC for legal issues), and Tato Urjumelashvili (a legal expert of GEPLAC), compared the Georgian competition legislation with EU legislation.³ In this connection, and in response to the need for improvement of the law and harmonization with the European legislation, it would be interesting to evaluate the law of Georgia under the analytical framework used by Russell Pittman (Director of Economic Research in the Economic Analysis Group of the Antitrust Division of the US Department of Justice) to examine the competition laws of the Central and Eastern European (CEE) countries in 1992 and five years later.⁴

The Pittman criteria for evaluation include the following:

- 1) Does the law distinguish between horizontal and vertical agreements?
- 2) Does the law treat horizontal cartel agreements as *per se* illegal?
- 3) Does the law restrict vertical agreements by firms lacking market power?

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² William Kovacic and Ben Slay, "Perilous Beginnings: The Establishment of Antimonopoly and Consumer Protection Programs in the Republic of Georgia," *Antitrust Bulletin* (1998), 15-43.

³ Alexander Tushuri and Tato Urjumelashvili, "Law of Georgia 'On Monopolistic Activity and Competition' -- An Overview," *Georgian European Legal Review* (III, 2000).

⁴ Russell Pittman, "Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe," *The International Lawyer* 26 (1992), 485-503; Pittman, "Merger Law in Central and Eastern Europe," *The American University Journal of International Law and Policy* 7 (1992), 649-666; and Pittman, "Competition Law in Central and Eastern Europe: Five Years Later," *Antitrust Bulletin* 43 (1998), 179-228.

- 4) Do the provisions restricting the behavior of dominant firms make it too easy for a firm to be labeled dominant?
- 5) Does the law protect potential entrants from exclusionary behavior by incumbent firms?
- 6) Is it illegal to harm competitors?
- 7) Does the law seek to control the prices charged by dominant firms?
- 8) What, if any, are the requirements for the prior notification of combinations of enterprises?
- 9) What are the restrictions on agency analysis of proposals for combinations, and what are the consequences of agency inaction?
- 10) What are the criteria by which proposals for combinations are judged?

Russell Pittman addresses these questions to the laws of several CEE countries, including Hungary, Poland, Czechoslovakia (later, after the divorce, the Czech and Slovak Republics), Russia, and Romania.

In our opinion, the questions and answers discussed in Pittman's articles can be used as guides in making enforcement and interpretation decisions, or considering revisions of the law, in other settings as well. The purpose of this article is to apply these standards to the competition law of Georgia.

According to the results of the analysis, based on the basic principles of antitrust economics and the main goals of antimonopoly regulation, taking also into account the specific characteristics of countries in transition, Pittman comes to the following conclusions in his papers:

- "the competitive implications of horizontal and vertical agreements demand different kinds of analysis. A competition law that does not distinguish between the two will require careful development of enforcement policies and court interpretations to avoid confusion among entrepreneurs and other business people;"⁵
- it is necessary to make a clear distinction between *per se* illegal agreements and other kinds of agreements that are subject to "a rule of reason". "This distinction is important in two ways: 1) it provides certainty for economics actors by clearly defining certain behavior as illegal; and 2) it creates economy of enforcement resources by limiting the kinds of agreement that must be examined in detail for ultimate economic effect;"⁶
- "vertical restraints and agreements involving firms without market power cannot harm welfare and so should be permitted;"⁷

⁵ "Some Critical Provisions," at 488.

⁶ *Id.* at 490-91.

⁷ *Id.* at 493.

- “any definition [of dominance] that focus[es] strongly or exclusively on market share rather than on true market power -- which would include consideration both of the likely permanence of a high share, and, in particular, the presence or absence of barriers to entry and expansion by other firms on the market -- risk[s] over-regulating the economy and deterring investors who might fear that their success in achieving high sales would make them subject to close competition office regulation;”⁸
- If the law contains “restrictions on the behavior of dominant firms that are not imposed on other firms, including the possibility of price controls, output controls and antitrust review” and “if the enforcement authorities and courts are too quick to attach the label of ‘dominance’ to a firm, if the simple act of temporary success in entering or competing in a market brings on a regime of government controls and strictures, then firms will not be so eager to succeed in the market, and consumers in particular and society in general will be the poorer.”⁹
- “If these provisions [concerning to the government control of the prices of dominant firms] are strictly enforced the economies may suffer in three ways: first, from ... bureaucratic interference with the market mechanism; second, from increased costs as firms devote resources to dealing with regulators; and third, from structural improvements forgone, as hard-pressed antimonopoly agencies devote resources to regulating prices at the expense of other antimonopoly enforcement.”¹⁰

The law of Georgia “On Monopolistic Activity and Competition” has broad structural similarities to the competition laws of other CEE countries, its principal operational provisions focussing on agreements among firms, dominant firms behavior, and market restructuring. The law has much common also with the competition laws of other CIS (Commonwealth of Independent States) countries, because of both initial economic conditions and longstanding regional cooperation and integration. The law determines in its provisions the organizational and legal foundations for the prevention and elimination of unfair competition as well as the control of restrictive business practices, including anti-competitive behavior of government agencies.

In this paper we examine the Georgian competition law using the criteria suggested in Pittman’s three papers. We find many similarities between the Georgian law and both the CEE and CIS laws in terms of the strengths and weaknesses of the law and in terms of suggestions for both enforcement decisions and amendments that would strengthen the role of competition in the

⁸ “Five Years Later,” at 199.

⁹ “Some Critical Provisions,” at 495.

¹⁰ *Id.* at 501.

Georgian economy. Two aspects of the Georgian law are particularly important for examination and understanding because of the legacy of Soviet planning that continues to influence the economy: provisions regarding the abuse of a dominant position on the market, and provisions concerning anticompetitive actions by government and administrative bodies. First, however, we consider the provisions of the law that deal with agreements among enterprises.

AGREEMENTS

Article 8 of the law states that “economic agents shall be prohibited from the execution of any agreement or making of any decision which leads to the restriction of competition, namely:

- 1) restricts one of the parties in the choice of a market, supplier of resources, or customer;
- 2) obliges one party to the agreement to deliver or to purchase instead of or in addition to the goods stipulated in the agreement, such goods that neither in object nor trading procedures are related to the goods determined in the agreement; or
- 3) significantly restricts competition in the market for particular goods and their substitutes.”

It is clear that Article 8 regulates agreements restricting competition, but it is not quite clear from the context of this article exactly what kinds of these agreements are regulated. The first entry could be read to apply to vertical restraints only, but such provision would make sense only if one of parties of the agreement is in a monopolistic position. However, this kind of relations falls under the scope of article 13, about the abuse of monopolistic position.

The second entry, prohibiting tying agreements, reflects the relevant provisions of article 81 of the EU Treaty.

The third entry clearly concerns horizontal relations, but it is too general. We think that language broadly prohibiting agreements and decisions that restrict competition is not enough and requires further clarification. In addition, because of the generality of the third entry, its provisions might be used also in cases of vertical agreements.

It seems that the generality of article 8 makes it unclear exactly what constitutes an anticompetitive agreement and thus renders difficult both compliance with and enforcement of the law. In particular, it is not clear that the law satisfies any of Pittman’s first three criteria: it does not distinguish between horizontal and vertical agreements; nor does it distinguish between hard-core cartel activity that should be *per se* illegal and joint venture activity that should not; nor, to the extent that it applies to vertical agreements, does it limit its application to enterprises possessing market power.

Kovacic and Slay write that “Article 8 prohibits concerted action among economic agents that directly or indirectly restricts competition. This measure bans agreements that restrict a firm’s choice of market, source of supply, supplier, or customer; impose tying conditions; or significantly limit competition among substitutable products. This article seems to cover both horizontal and vertical agreements. For example, the prohibition on restrictions affecting a firm’s decision about where to operate appears to proscribe both agreements among rivals to allocate geographic territories

and agreements by which manufacturers delineate exclusive geographic areas in which their distributors are sell products.”¹¹

¹¹ “Perilous Beginnings,” at 20.

In addition, according to the opinion of GEPLAC experts Tushuri and Urjumelashvili, “apparently no agreement or decision may be regarded as a violation of the law unless it falls within the list of anti competitive agreements or decisions. Hence, a number of anti-competitive agreements, decisions and concerted practices considered illegal under EU competition rules are not prohibited by Georgian legislation.”¹²

Furthermore, EU competition law stipulates that certain anti-competitive agreements which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress, and allow consumers a fair share of the resulting benefit, may be exempted from prohibition. The law of Georgia does not stipulate any type of exemptions from the prohibited anti-competitive behavior. European experts have advised that an exemptions clause should be introduced into the law simultaneously with amendments to the list of anti-competitive behavior.¹³

It is critically important to develop a clear, predictable and transparent process of competition law enforcement in order for the public to be assured that monopoly behavior will not be the outcome of the transition to the market economy. In this regard, it is necessary in particular to make a clear distinction between horizontal and vertical agreements, to articulate a clear prohibition against hard-core cartel behavior, and to make it clear that firms without market power may organize both their supply and their distribution arrangements without government interference.

Thus, according to this analysis, the law of Georgia needs to be modified in the future, to encompass all types of anti-competitive behavior, and in order to reflect universal competition principles and rules included in the provisions of Article 81 of EU Treaty.

ABUSE OF A DOMINANT POSITION

It is notorious that “firms with market power can impose significant harm on consumers and on society as a whole. They may raise prices to monopoly levels, fail to keep costs low, and fail to engage in technological progress. Most of Western antimonopoly laws are aimed at either preventing the creation of market power or regulating its exercise once it has been created. However, law enforcers in Central and Eastern Europe will face some unique problems with respect to market power. One set of problems will arise from the fact that many firms will have market power derived not from anything remotely related to their success in satisfying consumer needs but

¹² “The Law of Georgia.”

¹³ It should be noted that first antimonopoly legislative act of Georgia -- the Presidential Decree “On Restricting Monopoly Activity and Developing Competition” -- was in force before the present law, and included provisions allowing for exemptions.

only from their history as a state-owned and state-protected monopoly.”¹⁴

¹⁴ *Id.* at 497.

In accordance with international principles, Georgia's antimonopoly legislation does not consider the holding of a monopolistic position by economic agents to be *per se* illegal. Only the abuse of a monopolistic position is prohibited by the law. It should be noted that the law of Georgia, like the laws of other post-communist countries and more than western laws, focuses its provisions on the behavior of dominant firms. The law of Georgia, again in contrast to western antimonopoly laws, pays great attention to the permanent *ex ante* state control of the behavior of monopolistic economic agents, including control prices and contract terms.¹⁵

According to the provisions of the competition laws of most European countries dealing with the definition of a "dominant position", the position of an economic agent, which in view of its market share, financial strength, possibilities for access to the market, economic relations with other economic agents, and other factors, may hinder competition among sellers, shall be considered dominant. In general, an economic agent has a dominant position if it can act on the market independently from its competitors. The antimonopoly laws of CIS countries typically define a dominant position as "an exclusive position of a company enabling it to exert decisive influence on goods circulation on a given market or to limit access to a relevant market for other companies"

The antimonopoly law of Georgia uses the term "monopolistic position" to refer to the same phenomenon that is termed a "dominant position" in other European and CIS laws. The law defines "monopolistic position" as "a special position of an economic agent or public agency that enables the agent or agency to significantly influence the market and to restrict competition." It must be noted that the first antimonopoly legislative acts of Georgia, such as the Decree of State Council of Georgia "On the Restriction of Monopolistic Activities and the Development of Competition" (adopted in 1992 and in force until 1997), used the term "dominant position" like most of the countries having antimonopoly legislation.

As to monopolistic activity, it is defined by the law as "an activity that enables an economic

¹⁵ The law of Georgia defines an economic agent as "a natural or legal person carrying out entrepreneurial activity irrespective of its organizational-legal form, kind of property, or nature of the activity." In accordance with the opinion of TACIS experts, in order to calculate market shares for the determination of a monopolistic position, the notion of economic agent should be broadened.

agent to influence the market price of a good and its close substitutes and to restrict competition.” In our opinion, the language of this definition is not easy to put into practice.

As to specific limitations on dominant firm behavior, according to article 82 of the EC Treaty (formerly Article 86), dominant firms in EC countries are prohibited from engaging in such abuse as:

- a) “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- b) limiting or controlling production, markets, and technical development to the prejudice of consumer;
- 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 trading parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of such contracts”.

According to article 13 of the law of Georgia, “an economic agent holding a monopoly position shall be prohibited from misusing this position for the purpose of discriminating against other agents in the market. Actions shall be deemed as the misuse of a monopoly position if they lead or may lead to the infringement of interests of other economic agents or consumers”. The following acts or behavior are considered as abusive:

- “a) a decline in production or cessation of production, withdrawal of goods from circulation and placing them in inventory in order to create or maintenance a shortage, as well as in order to influence prices;
- b) creation of conditions preventing the entering or leaving the market of another economic subject, or the creation of obstacles for firms already in the market;
- c) creation of such discriminating conditions for participants in the market as to foist on them disproportionately high purchase (or low selling) prices, or that connect the execution of an agreement with the execution of additional terms that neither in the essence of the product nor in trading procedures are connected with the agreement;
- d) any kind of compulsion for entering into an agreement;
- e) monopoly establishment of high or low price which significantly differs from the expenses for production and sale of a product for a certain period;
- 6) the reduction or halting of production of a product that is in demand, if production can profitably be continued;
- 7) the use of dumping prices;
- 8) other actions that cause the restriction of competition or the infringement of the legal interests of economic agents or consumers.”

This list of actions defined by the law as abuse of a monopolistic position is not exhaustive, thus enabling the Antimonopoly Service of Georgia to include other kinds of abuse in the enforcement process.

The following acts or behaviors are usually considered by CIS legislation as abusive:

- 1) Creation of market access barriers for other companies (Azerbaijan, Belarus, Georgia, the Republic of Moldova, Kazakhstan, Kyrgyzstan, the Russian Federation, Ukraine, Uzbekistan);
- 2) Fixing monopolistic high or low prices (Georgia, the Russian Federation, Ukraine);
- 3) Maintaining or raising prices for the purpose of obtaining monopolistically high profits (or additional preferences on the market) (Azerbaijan, Belarus, Uzbekistan);
- 4) Discriminatory pricing of terms of conditions for the supply or purchase of goods (Azerbaijan, Georgia, the Republic of Moldova, Kyrgyzstan, the Russian Federation, Ukraine, Uzbekistan);
- 5) Making the supply of particular goods dependent upon the acceptance of conditions in which the other is not interested or which do not relate to the subject of the contract (Azerbaijan, Belarus, Georgia, the Republic of Moldova, Kazakhstan, Kyrgyzstan, the Russian Federation); and
- 6) Withdrawing goods from circulation to create a scarcity or to increase prices (Azerbaijan, Belarus, Georgia, the Republic of Moldova, Kazakhstan, Kyrgyzstan, Uzbekistan)".¹⁶

We can see that the law of Georgia regulates the issue of abuse of monopolistic position similarly to the common practice elsewhere.

Like the anti-monopoly legislation of the US and European and CIS countries, Georgia's law contains special requirements concerning mergers and acquisitions and vertical agreements by monopolistic economic agents. Namely, article 12 of the law bars dominant firms from entering into agreements with suppliers or customers where the agreements restrict, or may restrict, competition significantly, and article 14 of the law requires the Antimonopoly Service of Georgia to review mergers and acquisitions and bars registration or court approval of the combined enterprise if the Antimonopoly Service issues a negative opinion about the merger. According to article 23, "When acquiring stocks or shares of another economic agent (or its subsidiary), an economic agent with a monopoly position shall obtain the State Antimonopoly Service expert's report."

In addition, monopolist firms that are recidivist violators face special penalties under the law. Article 15 imposes sanctions on economic agents that occupy a dominant position and repeatedly violate the antimonopoly law. Namely, according to the law, in the event of more than one violation of antimonopoly legislation by an economic agent in a monopoly position, the state antimonopoly department is entitled to propose a forced enterprise break-up before the appropriate bodies, so long as there is the possibility of organizational and territorial division of the enterprise, or other measures that the antimonopoly authorities may judge likely to be effective in preventing future violations (the

¹⁶ See Natalya Yachiestova, "Competition Policy in Countries in Transition -- Legal Bases and Practical Experience," United Nations, New York and Geneva (2000), Advance Copy, UNCTAD/ITCD/CPL/Misc.16.

establishment of fixed prices, a limit of profitability, etc.). However, there are no appropriate legislative mechanisms for implementation of the requirements given in these articles of the law.

It is clear that if the prohibitions to monopolistic firms stipulated in articles 13, 12, 14, and 23 of the law are interpreted in pro-competitive ways, market participants will be protected from abuse of monopolistic position by the dominant firms. But it should be noted that the existing condition of corresponding normative and methodological bases makes the law less effective than it should be.

Georgia's antimonopoly law, like the laws examined by Pittman, contains restrictions (e.g. the possibility of price controls, output controls, and contract review, etc.) on the behavior of dominant firms that are not imposed on other firms. In this respect it is very interesting for market participants, as well as firms considering investments in the country, to consider "how easy is for a firm to be labeled 'dominant.'" "Firms considering making investments in these countries will eagerly await any indicators as to how these questions will be resolved."¹⁷ In our opinion this is the key question for improvement of the investment climate, especially in transition countries.

We can see that the definition of monopolistic position given in the law is not at all clear and does not cover all aspects of the European notion of a dominant position. Namely, according to article 11 of the law, "an economic agent shall be deemed as holding a monopoly position if his part in the concrete merchandise market directly or indirectly (through affiliates, subsidiaries or otherwise) exceeds the limited value established by the State Antimonopoly Service". It should be noted that in the many European countries (for example, in Germany, Greece, UK, Hungary, Poland, Bulgaria, Lithuania, and the Russian Federation) the market share above which an economic agent is presumed to be in a monopolistic position on the market is specified in the competition law directly. It should be also noted that the law of Georgia does not define "geographic market", "relevant market", or "product market", the key elements for analysis of competition cases. We would like to note also that in the Decree of the State Council of Georgia, "On the Restriction of Monopolistic Activities and the Development of Competition" (in force from 1992 till 1997), such a kind of a presumptive rate for dominance (35 per cent) was directly indicated. In addition, there were definitions of both a "republican product market" and a "local product market" in this Decree.

Natalya Yachiestova (UNCTAD Consultant and Russian antimonopoly official) writes in her article, "Competition Policy in Countries in Transition - Legal Bases and Practical Experience," "A feature common to all CIS legislation is the use of an additional criterion -- market share -- for the determination of a dominant position. This criterion is stipulated differently in different laws. In some countries (Azerbaijan, Kazakhstan, Kyrgyzstan), dominance is defined as a market share in excess of 35 per cent or at a rate established by the law or by the antimonopoly authorities. In other cases (Belarus, Georgia, Uzbekistan) the right to establish the fact of dominance is granted exclusively to the antimonopoly authorities without indicating a presumptive market share for a company in the law." Under the Russian law a company will be considered as dominant if its market

¹⁷ "Some Critical Provisions," at 496.

share constitutes 65 per cent or more, except in cases when the economic entity proves that despite exceeding the said proportion its position on the market is not dominant. A company with a market share from 35 to 65 per cent may also be considered as dominant if it is so designated by the Antimonopoly Ministry. In Ukraine a company is regarded as dominant if its market share exceeds 35 per cent, but the Antimonopoly Committee of Ukraine has the right to determine the existence of dominance of a company even if its market share is less than 35 per cent. "In certain countries the position of a company with a market share less than 35 per cent may not be defined as a dominant position (the Russian Federation, Republic of Moldova, Kazakhstan)". Actually, the materials of the Intergovernmental Antimonopoly Council of CIS Countries, as well as practical experience demonstrate that market share is used rather as the "main criterion" than an additional criterion.

It is notorious that in general, besides a large market share it is also necessary for the determination of a monopolistic position of an economic agent to examine other relevant circumstances, such as the position of other economic agents (size and economic power) operating in the same market, how market shares have changed over time, the existence of entry barriers, and so on.

Despite this, the law of Georgia, like the laws of other CIS countries, uses market share as the main criterion for the determination of a monopolistic position. Besides, it should be also noted that, despite the existence of a provision on "monopolistic position" in the law, there was until December 2000 no legal or regulatory basis for the determination of a monopolistic position and, proceeding from this, of the "abuse of monopolistic position" during the period 1997-2000. Only in December 2000 was an appropriate normative act put into place (a regulation of the head of the State Antimonopoly Service of Georgia) establishing a 35 per cent market share criterion for a monopolistic position.

Taking into consideration the fact that there is no other criterion in the law of Georgia except for the too general definition of a "monopolistic position", and that this provision relies on market share exclusively, we can conclude that it is not difficult for a successful firm to be labeled a "monopolist" in a particular market under the Georgian Law simply because of its success and regardless of the presence or absence of any true market power.

Taking all this into account, there is no doubt that in respect of the definition of market dominance the Georgian legislation is quite "unique" even among the laws of the CIS countries -- just as the Romanian Competition Law is unique among the Central and Eastern European laws¹⁸ -- and needs serious amendment in order to give confidence to investors that the Antimonopoly Service of Georgia will intervene in the market only in a pro-competitive manner, as well as confidence to the consumers that they will be protected from abusive practice of monopolistic agents.

Like the laws examined by Pittman in his papers, the competition law of Georgia contains provisions called by Pittman "a double-edged sword," provisions that may be used by prospective

¹⁸ "Five Years Later," at 202.

entrants or antimonopoly authorities to attack most harmful of behavior by dominant firms, and each of which has language whose interpretation will be an important determinant of the success of this attacks. “They may indeed be used to protect competition, if they are enforced against existing monopolies that seek to deny inputs or outlets to prospective entrants into their markets, but they may harm competition if they are enforced against normal, pro-competitive behavior by a firm with a large market share. In particular, there is a danger in the language of all these laws that harming a competitor is a violation of the antimonopoly laws. Since competitors are typically harmed when a firm lowers the price of its product or improves its quality, such an interpretation would discourage the outcomes that policymakers are seeking with their conversion to a market economy.”¹⁹

¹⁹ “Some Critical Provisions,” at 499-500.

As examples, Pittman gives several provisions from different laws, namely: “countering the formation of conditions indispensable for emergence or development of competition”, (“if a firm sells a high-quality product at a low price, that is presumably less conducive to the “emergence and development of competition” than if it sells a low-quality product at the high price. Is it an antitrust offence for a dominant firm to sell products that satisfy consumers?”), “hampering access to the market” or “creating an unmotivated disadvantageous market position for the competition”, “encroachment upon the interests of other economic subjects” (“Is producing such a good product that market entry is “hampered” an antitrust offense? Should “detriment” to one’s competitors or “encroachment upon [their] interests” be regarded as antitrust offences? “), and concludes that “if firms are punished simply for entering a market and succeeding too well, other firms will be deterred from entering other markets, and the economy will stagnate.”²⁰

In this content the opinion of other experts is also interesting. For example, similar questions are raised by Natalya Yachiestova in her article. She says, in particular: “Some of the CIS antimonopoly laws contain an additional list of actions which are considered in these countries as an abuse of a dominant position but which are quite defensible from the point of view of the market economy. There are for example such actions as:

- Refusing to conclude a contract with a particular buyer/customer in the absence of alternative sellers /buyers (Azerbaijan, Ukraine) or where production or delivery is generally possible (the Russian Federation)
- Violation of existing business relations with the contractors without preliminary notification and consent of the contractor (Azerbaijan);
- Violating the procedure of price setting established by governmental legal acts (the Republic of Moldova, Kazakhstan, Kyrgyzstan, the Russian Federation, Uzbekistan) (it should be noted that at the present time price setting is usually used by the Government only when establishing tariffs for natural monopolies);
- Reducing or stopping production of goods in demand (provided they can be produced without incurring losses) (Azerbaijan, the Russian Federation).

It may be expected that these provisions will be changed in the process of further modernization of the law.”

We can say the same about some provisions of the competition law of Georgia, for example about provisions “e” and “f” of article 13 and of article 15, concerning price control and other normative acts: in our opinion, they are against market principles.

²⁰ *Id.* at 500.

As to price control: “Central and Eastern European enforcers need no lectures from Westerners concerning the efficiency of markets over governmental price controls. ... Still there are indications that the policymakers have not entirely abandoned the habit of seeking to use government to control the individual economic decisions of firms.”²¹ The law of Georgia on Monopoly Activity and Competition contains such prohibitions concerning price control as the following:

1) The prohibition in article 9.c, addressing unfair competition: gaining advantage in competition by the use of dumping prices or by misleading a consumers.

2) The prohibition in article 13 addressing the abuse of monopolistic position. Recall that the following are considered as abusive:

- a decline in production or cessation of production, the withdrawal of goods from circulation and building up stocks for the creation or maintenance of a shortage as well as for influencing prices;
- the creation of such discriminatory conditions to participants in the market as to foist on them disproportional high purchase (or low selling) prices, or that connect the execution of an agreement with the execution of additional terms which neither in object nor in trading procedures are connected with the agreement;
- the establishment of monopolistically high or low prices that differ significantly from the expenses for the production and sale of a good for a certain period;
- the reduction or halting of production of goods which are in demand, if production may be continued without possible losses;
- the application of dumping prices.

It is well known that standard monopoly regulation practice does not use price regulation, except in the case of natural monopolies, and then only under very strict technical procedures that consider revenue and cost of production. Despite this, as we can see article 13 of the law contains many provisions that are contrary to free pricing principles and to market economy principles as a whole. Furthermore, as was mentioned above, article 15 of the law imposes sanctions on economic agents who occupy a dominant position and repeatedly violate the antimonopoly legislation.

In addition, in contrast to Russia, where the infamous formal list (register) of monopolistic enterprises while still existing and still in use as a general monitoring tool is no longer used for price control, Georgia’s existing legislation allows the use of such methods of control in connection with monopolistic firms. It should be noted that in September of 2000 the “Provision on the State Register of Monopolistic Enterprises” was adopted by Presidential decree.

²¹ *Id.* at 501.

Considering similar provisions in the competition laws of CEE countries, Pittman writes: “One may argue that such provisions, and their enforcement, are part of the political compromises necessary to alleviate popular concerns about the costs of transition to market economy. One may argue too that during the formative period of a market economy, when the lack of infrastructure renders entry difficult into most markets in the economy, completely free prices should not be insisted upon even by the economic purist. One also may be hopeful that the precondition for application of these provisions ... will be less easily satisfied as time passes.”²²

Five years later, Pittman writes: “The Romanian law contains provisions for the direct control of prices, but the limitations placed upon such control are sufficient to make one optimistic that it may not be used ‘to do job of state planing through the back door,’”²³ while “Article 4 specifies that prices in the economy are to be set ‘freely, through competition,’ with the exception of those charged by the natural monopoly enterprises.”²⁴

As we can see, five years later Pittman was still “hoping”, and as the practical evidence demonstrates, chinovniks in Georgia as well as in some other post-socialist countries still are seeking to control prices.

Taking into consideration the price formation principles and price controlling legal mechanisms in Georgia (including relevant provisions of the antimonopoly legislation and the legislation “On Prices and Principles of Price Formation”), we can conclude that they are not always in accordance with the principles of a free market economy. In this regard it is interesting to examine a commentary on the law “On Prices and Principles of Price Formation” written by foreign experts working in Georgia. For example: “The law On Monopolistic Activity and Competition is

²² *Id.* at 502.

²³ “Five Years Later,” at 215, citing Lucas, “Mergers, Market Share and Monopolies: The State of Antitrust Law in Russia,” *European Competition Law Review* 3 (1995), at 199.

²⁴ “Five Years Later,” at 215.

the foundation of Georgia's commitment to free and open markets. Under the provisions of this law, the State Antimonopoly Service is responsible for preventing barriers to competition and reducing or eliminating monopoly problems. The long term success of Georgia's economic reform program will largely depend on the degree to which Antimonopoly law is enforced. Unfortunately competition policy is jeopardized by the law On Prices and Principles of Price Formation (1997)."²⁵

²⁵ See Larry Morgan, "The Law On Prices and Principles of Price Formation: A Barrier to Free Markets," CEPAR Economic Commentary Report #6, November 1997.

According to the law, “except for the cases established by the present law, prices are determined freely by the interested parties, presumably according to market forces.” However, according to the law the Ministry of Economy has the authority to establish state controlled prices “with regard to their economic and social significance and the degree of monopolization and equilibrium of the market.” Besides, “while the law acknowledges the freedom of individual buyers and sellers to agree on transaction prices based on market forces, article 6 of the law cites eight direct and indirect methods for regulating prices.” This study reinforces the view that the law overemphasizes a command, centrally planned economic policy.²⁶

In a free market economy, price is formed by operation of free competition, based on supply and demand factors, the existing tax system, and the interests of purchasing and selling parties. The terms “state controlled price” (tariff), “state fixed price”, and “state regulation” set the tone for strong government intervention in the market, rather than deferring to the forces of supply and demand to determine prices by their interplay.²⁷

In addition, article 15 of the law empowers the State Price Inspectorate (which still exists in Georgia, although there are already established energy and telecommunication regulatory commissions, not to mention the State Antimonopoly Service) to take antimonopoly measures in the field of price formation, including the requesting and collecting of required price control information from economic agents, making proposals for eliminating price control violations, applying economic sanctions for such violations, and imposing administrative penalties on officials or citizens if they do not submit the necessary information for price control.

According to Morgan, to understand the implications of a law, four standard policy analysis questions should be asked: who are the affected parties; what are the market effects; what are the administrative costs; and how will Georgia’s international relations be effected. He proceeds to answer these questions as follows: The price formation law is particularly problematic because of its potential for high administrative costs, economic policy contradictions, and new sources of corruption. The price formation law compromises the spirit of free trade by generally creating trade barriers for domestic producers and consumers.²⁸ We share this opinion and believe that nobody

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

should have the right to dictate to an enterprise: a) to continue production against its will and b) price formation principles, even if the enterprise is in a monopolistic position.

ABUSE OF “STATUTORY DOMINANCE”: ANTICOMPETITIVE ACTIONS BY EXECUTIVE AND ADMINISTRATIVE BODIES

The competition law of Georgia (as well as the State Council decree “On Restricting Monopoly Activity and Developing Competition”, which was in force during 1992-1997) contains legal provisions for the state control of the behavior of executive and local administrative bodies which may influence and lead to a slackening or restriction of competition. The antimonopoly legislation provides legal bases for the prevention of different kinds of anticompetitive behavior by the government structures. Namely, articles 4, 5, 10, 21, 28, and 29 of the law contain provisions concerning objects and subjects for regulation, responsibilities of the State Antimonopoly Service, tools of control, types of punishment for violations, and procedures for appealing against decisions of the antimonopoly agency in this area.

Article 4 of the law defines the set of the legal and physical persons subject to the law and the spheres of application of the law. According to this article, “the present Law applies to the relations influencing competition in the merchandise (production, labor, service) markets and where legal and physical (including foreign) persons, governmental bodies of Georgia -- ministries, other state departments and institutions, executive and local administration bodies of territorial units of any level -- take part. The Law also applies to those cases when the actions carried out by the above mentioned persons or an agreement concluded by them outside of the borders of Georgia restrict (or may restrict) competition or exert negative influence on a product market within the country.” It must be noted that “the law shall not apply to the terms related to copyright and patent law, trademarks and industrial designs.” In addition, according to article 5, the Parliament of Georgia is authorized to exempt “various types of monopolistic activities” from the application of the law if necessary for compliance with state interests. Moreover, according to article 6 of the law, “instances of monopolistic practices and unfair competition in the securities and financial markets fall under the purview of the appropriate legislative acts, except in those cases where these instances affect competition in the product markets of the country.”

Article 10 of the law forbids the state administrative bodies to enact decisions that a) significantly restrict competition and free pricing, b) establish tax exemptions or other privileges for certain economic agents that give them advantages over their competitors (actual or potential), c) ban, suspend, or otherwise prevent economic activity and the independence of economic agents in cases other than those provided by legislation, d) create monopolistic state structures, or grant monopoly power to existing structures, e) join, merge, or create unions, associations, concerns, consortia, management agencies, or intersectoral and regional associations, if this would lead to a slackening or restriction of competition, or f) in general may lead to the granting of a monopoly position to an economic agent. The application of these prohibitions is intended to prevent and eliminate government barriers to market entry at the regional and sectoral levels.

Taking into account the “inheritance” from the Soviet Command Economy -- like the other CIS countries, Georgia was centrally managed for seventy years, not the forty of the CEE countries -- including predominantly monopolistic economic relations, it is not difficult to understand the reasons for the creation of provisions such as these. According to one expert, “Bodies of government at all levels had been the principal, if not the only, economic actors under central planning. Old habits would die hard. It was considered necessary to explicitly forbid interference by these bodies with the new discipline of the marketplace.”²⁹

The competition law of Georgia, unlike those of some other countries (for example, Russia, Kazakhstan, and Lithuania), does not itself contain restrictions direct or indirect participation by officials of state executive bodies in business activity. However, other laws of Georgia prohibit entrepreneurial activity by the officials of state executive bodies.

More seriously, in contrast to the competition laws of other CIS countries (such are Belarus, Russia, Moldavia, Kazakhstan, Uzbekistan, and Tajikistan), the law of Georgia does not contain special provisions prohibiting agreements between executive bodies or between executive bodies and an economic agent, if they result or may result in the restriction of competition and/or infringement of the interests of economic agents or citizens. As noted in the previous section, article 12 of the law prohibits agreements (coordinated actions) between non-competing agents only in those cases where one of the agents holds a monopoly position and the second is his supplier or customer, if such an agreement leads or may lead to a significant restriction of competition.

As to the rights and responsibilities of the Antimonopoly Service of Georgia against administrative bodies and their officials in case of possible violations, article 21 entitles the antimonopoly body to demand any necessary information from the ministries, other state departments and institutions, and governmental bodies of territorial units, and to demand from the violating entity the abolishment of illegal passed decisions. In the event of non-compliance, the Antimonopoly Service is authorized to seek enforcement from the appropriate ministry or from a court, and to seek administrative or even criminal punishment of individual officials.

According to Presidential Decree #137 of March, 1997 “the implementation of decisions made by the antimonopoly body within its competence is compulsory for economic agents as well as for state bodies,” and “the decisions, resolutions, instructions, and regulations, as well as normative acts, adopted by the State Antimonopoly Service within its areas of competence, must be observed by the ministries and departments of the Government of Georgia, by regional and local bodies of government as well as by enterprises and organizations regardless of their forms of ownership and

²⁹ See John Clark, “Restraints by Regional and Local Governments on Competition: Lessons From Transition Countries,” *Brooklyn Journal of International Law* 25 (1999).

organizational and legal status, as well as by individual entrepreneurs.”

These provisions of the competition law of Georgia seem for the most part appropriate for the control of anticompetitive behavior by official bodies, even if it might be preferable to include more specific prohibitions against agreements involving such bodies and private enterprises. Whether the necessary enforcement will and resources are present remains to be seen. Provisions similar to article 10 in the competition laws of Russia, Ukraine, and Romania have had some enforcement success, but this is clearly a very difficult area of the law, especially for a young agency.

COMBINATIONS

As a rule merger control aims to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power in order to limit competition. The majority of merger control systems apply some form of market share test, specify procedures for pre-notification of enforcement authorities in advance of big, important transactions, and provide for special processes for expedited investigations, in order that problems can be identified and resolved before the restructuring is actually undertaken when the merger is consummated.

Merger regulation in the US is based on the core principle that competition is essential to insure that the benefits of a market economy are enjoyed by consumers. Most acquisitions are believed to be either pro-competitive or competitively neutral. The challenge is to distinguish the few mergers that are likely to be anti-competitive from the many that are not.³⁰ Mergers are generally reviewed under the Clayton Act, which prohibits mergers and acquisitions where the effect of such acquisition may be to substantially lessen competition, or tend to create a monopoly.

Authorities and analysts in some countries with smaller markets believe that merger control is unnecessary, because they do not want to impede restructuring firms trying to obtain a critical mass which would enable them to be competitive in world markets. The belief is that a national champion -- even one abusing a monopoly position domestically -- might be able to be competitive in foreign markets. Two objections can be made to these views. First, it is often the case that monopolies enjoy their monopoly rent without becoming more competitive abroad, at the expense of domestic consumers and eventually of the development of the economy as a whole. Second, if the local market is open to competition from imports, the world market might be relevant for the merger control test, and the single domestic supplier might anyway be authorized to merge. Moreover, by not having a merger control system, a host country deprives itself of the power to challenge foreign mergers and acquisitions that might have adverse effects on the national territory activity.³¹

³⁰ See J. Robert Kramer II (Antitrust Division, US Department of Justice), “Merger Enforcement In The United States,” Remarks presented at a conference in Istanbul, 1996.

³¹ See “The Law of Georgia On Monopolistic Activity and Competition: An Overview,”

Pittman believes that “Merger³² pre-notification requirements are one of the great inventions of modern competition law enforcement. When well crafted, as in the US and the EU, they provide several substantial public benefits:

1. They allow the competitive impacts of mergers to be analyzed before rather than after the consummation of the merger, thus substantially reducing the private costs imposed by a negative finding;
2. They provide incentives for the merging enterprises to provide information to the authorities in a timely fashion -- usually by ‘stopping the clock’ on the deadlines for action by the authorities until the information is provided;
3. Subject to that limitation, they force the authorities to act in a timely fashion by (typically) allowing the merger to proceed after a certain period of time has elapsed following pre-notification; and

Georgian Law Review 2000 (I-II).

³² Pittman uses the term “merger” here to refer to “any transaction that combines the heretofore independent interest of two parties, whether by true merger, takeover, purchase of assets, purchase of shares [of stock], and so on.” “Five Years Later,” at 216, note 70.

4. They may even, if accompanied by the requirement of filing fees, provide a nontrivial source of revenues to governments lacking sophisticated systems of public finance.”³³

In many countries having antimonopoly legislation it is obligatory to notify the competition authorities and obtain their permission for merger, if the combined aggregate income of the economic agents concerned exceeds the specified thresholds and they have the capacity to influence negatively the market. The laws examined by Pittman variously require pre-notification if an enterprise meets either a market share, assets size, or volume of sales criterion.

Unlike the practice of many other countries, the law of Georgia regulates mergers, based on the decisions of the State administrative bodies and mergers, only when one of parties holds a monopolistic position. Article 14 of the law requires the Antimonopoly Service of Georgia to review mergers and acquisitions by monopolistic economic agents and bars a merger registration if the Antimonopoly Service issues a negative opinion about the merger. In case of a negative conclusion made by the antimonopoly Service the court shall refuse the registration of the merger. According to article 23, “When acquiring stocks or shares of another economic agent (or its subsidiary), an economic agent with a monopoly position shall obtain the State Antimonopoly Service expert’s report.” In addition, as noted earlier, article 10 of the law prohibits state administrative bodies from joining, merger, or the creation of unions, associations, concerns, consortia, management agencies, inter-sectoral and regional associations, if this leads to slackening or restriction of competition. (Similar prohibitions were contained in the decree “On Restriction of Monopolistic Activities and Development of Competition.”)

According to Pittman, CEE competition laws are generally fairly well designed with respect to merger pre-notification requirements. According to the results of an examination of the law of Georgia using Pittman’s criteria we can conclude that Georgia’s law, unlike most of these laws, does not define the term “merger,” does not establish pre-merger notification requirements, does not impose a time restriction on analysis by the competition agency of merger proposals for companies, nor the consequences of the agency inaction, and does not specify the criteria by which proposals for combinations are to be judged.

TACIS experts argue similarly that Georgia’s law is deficient in not regulating various stages of the process, for instance: when and how the agency assessment should be initiated; what kind of notification should be submitted to the antimonopoly service; timetables for the issuance of a decision permitting or denying the requested merger activity; the consequences if within the specified time period the antimonopoly service does not issue its decision (the economic agents should automatically acquire the right to carry out the planed merger activity); and the grounds for permitting or denying the requested activity.³⁴

³³ *Id.* at 216.

³⁴ “The Law of Georgia On Monopolistic Activity and Competition: An Overview,”

It should be noted that Georgia's original decree "On the Restriction of Monopolistic Activity and Development of Competition" (in force from 1992 until 1997) was better crafted than the existing law in this respect as well. Namely, the decree contained section III, "On Avoiding and Elimination Monopolistic Activity" (articles 9, 10, 11, 12), which included detailed provisions concerning reorganizations, combinations, mergers, and acquisitions.

According to article 9 of the decree it was necessary to carry out preliminary state merger control in order to avoid the creation of dominant position leading to restriction of competition. The same article defined also requirements for the prior notification of combinations of enterprises, and stipulated that the merger, reorganization, or creation of enterprises might be prohibited if they could lead to the creation of the dominant position and restriction of competition. Exemptions were possible if the parties were able to prove that the effect of their combination would be the improvement of production, distribution, quality of products and competitiveness abroad. The article stipulated also that certain enterprises were not required to participate in the notification regime, such as enterprises having charter capital of less than 10 million Russian Rubles.

In addition, according to article 10 of the decree, pre-notification was required of any acquisition, on the same market, by enterprises holding a market share of more than 35 percent, or seeking to acquire more than 50 percent stake of any other enterprise. According to article 12 of the decree, if enterprises did not receive any answer within 30 days or if the antimonopoly body issued a negative conclusion that the firms regard as groundless, the firms were allowed to appeal to court for registration.

Summarizing the above discussion, it is clear that the Georgian Law needs serious further development regarding merger control. In our opinion it would be better if we create new provisions concerning mergers and other combinations based on the appropriate provisions of the original decree.

CONCLUSION

The main purpose of this article has been to suggest improvements in the antimonopoly legislation of Georgia and the mechanisms for its implementation, in order to protect market participants from any kind of unfair competition and monopolistic activity.

Summarizing, we may say that the competition legislation of Georgia needs

significant amendments. In our opinion it would be better to elaborate a new competition law reflecting the universal competition principles and rules included in the relevant provisions of EC Treaty (articles 31 and 81-82).

In order to make enforcement policy effective, especially regarding the education of business and the public, besides the enactment of a new law and appropriate amendments in corresponding laws the Antimonopoly Service of Georgia needs to elaborate special guidelines for different aspects of enforcement: for example, On Investigations of Mergers, On Investigations of Anti-Competitive Practice, On the Analysis of Competition Conditions on Markets, On the Abuse of a Monopoly Position through Monopoly Prices, etc. Besides, it is important to elaborate methodological guidelines and common recommendations (on the rules, procedures and tools of implementation) by the Antimonopoly Service of Georgia for its regional offices in order to harmonize and make more effective their activity.

It is critically important to develop a clear, predictable and transparent process of competition law enforcement in order for investors to be confident that they will be protected from anti-competitive actions of incumbent enterprises and for the public to be assured that monopoly behavior will not be the outcome of the transition to the market economy.

It is vital to develop a broader societal understanding of the legal aspects of competition, including both the obligations and the rights of market participants. In order to accomplish this, it is necessary to increase the degree of transparency of the investigative and enforcement processes. Therefore it is necessary, in addition to issuing and publicizing laws, guidelines, and regulations, to publish other materials concerning the enforcement activity of the Antimonopoly Service, such as annual reports and press releases. Antimonopoly agencies in developed market economies do this as a matter of routine.

In this regard it is important to publish (and encourage others to publish) commentaries on the law, and to organize workshops which will educate economic agents and consumers on the law and regulations and their impacts on market participants.

Finally, the Antimonopoly Service has to improve cooperation with the legislative and executive bodies of Georgia, as well as with international organizations, in order to achieve the best solutions of legal, technical, and financial problems related to antimonopoly regulation and consumers rights protection.