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COMPATIBILITY OF THE LAW OF GEORGIA "ON COMPETITION" WITH EU COMPETITION LAW RELATED TO INFORMATION SHARING AND PARTICIPATION/ATTENDANCE AT MEETINGS

COMPATIBILIDADE DA LEI DA GEÓRGIA "RELATIVA À CONCORRÊNCIA" COM A LEGISLAÇÃO DA UE EM MATÉRIA DE CONCORRÊNCIA RELACIONADA AO COMPARTILHAMENTO DE INFORMAÇÕES E A PARTICIPAÇÃO/PRESENÇA EM REUNIÕES

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Abstract: The article aims to compare the legal competition system between Georgia and the European Union, emphasizing the absence, in Georgian law, of certain protections already provided for in European regulations, especially regarding the sharing of information between competing economic agents.

Keywords: Competition Law. Shared Information between competitors.

Resumo: O artigo objetiva comparar o sistema legal da concorrência entre a Geórgia e a União Europeia, enfatizando a ausência, na lei georgiana, de certas proteções já previstas em normativas europeias, especialmente quanto ao compartilhamento de informações entre os agentes econômicos concorrentes.

Palavras-chave: Lei da concorrência. Informações compartilhadas entre concorrentes.

1 Introduction

Competition laws exist to protect the process of competition in a free market economy. The basis of a free market is competition between firms because such competition brings the greatest benefit to society and delivers efficiency, low price and innovation to the economy. In contrast to other economies, there is a lack or ineffective competition policy in Georgia. This has given rise to the presence of monopoly or oligopoly in most of the sectors of the economy such as energy, gas, telecommunications, transport, pharmaceuticals and financial services, amongst others and with resultant price hikes, excessive control and less choice for consumers. To buttress this fact, in September 2008, the assets of a certain company were seized by the tax authorities leading to the disappearance of products of that company from the market. As a result, its products disappeared from the market for some months. This led to the discovery that although there were substitutable products, they were however of poor quality.

The first legal act, governing competition in Georgia, was the Decree of the State Council of Georgia "On Restriction of Monopolistic Activities and Development of Competition", adopted on 26th of October 1992.[1] The Constitution of Georgia (adopted on 24 August 1995) Article 6, Paragraph 2 states: "The State shall take care of developing a free and open economy, and free enterprise and competition", and according to Article 26, Paragraph 4, "Monopolistic activities shall be prohibited, except in cases permitted by law" (as previously regulated by Article 30, Paragraph 2).[2] Initial attempts at tightening competition law in Georgian began in 1996 with the adoption by the Georgian Parliament of the Law "On Monopoly and Competition."[3] This move was followed by setting up in 1997 through a Presidential Decree the "State Antimonopoly Department". This body has played significant role. For instance, it had the right to determine mergers either by approving or

[1] About the evolution of antimonopoly regulation see Fetelava S., The Evolution of the Competition Theory and Antimonopoly Regulation is Georgia (in Georgian), "Loi" Publishers, Tbilisi, 2007, 149-168, available at http://www.nplg.gov.ge/dlibrary/collect/0001/000464/SLAVA%20Fetelava-Wigni-07-1.pdf. Accessed 28 jun. 2012.

[2] For the commentary of the Article 30, Paragraph 2 See Izoria L., Korkelia K., Kublashvili K., Khubua G., Commentaries on the Constitution of Georgia, Fundamental Rights and Freedoms (in Georgian), "Meridiani" Publishers, Tbilisi 2005, 268-269. See also Izoria L., Contemporary State, Contemporary Administration (in Georgian), "Siesta" Publishers, Tbilisi, 2009, 61. For the interpretation of the "Competition" see Judgments of the Constitutional Court of Georgia: Ltd "RusEnergy Service", ltd "Little Kakhi", JSC "Gorgota", individual enterprise of Givi Abalaki " Farmer" and ltd "Energy" v. Parliament of Georgia and Ministry of Energy of Georgia.; Citizens of Georgia Sh. Natelashvili and A. Mikadze v. Georgian National Electricity Regulatory Commission) GNERC.

[3] See Tushuri A., Urjumelashvili T., The Law of Georgia on Monopolistic Activity and Competition – An Overview, Georgian Law Review, First and Second Quarters 2000, 43-55, available at http://www.geplac.com/publicat/law/archives/glr00q1q2e.pdf. Accessed 28 jun. 2012.

banning them. This role was in fact acted out when the department banned the merger of two beer producing companies (JSC "Kazbegi" and JSC "Casteli") on the grounds that it would create a monopoly within the beer market.

Ever since the Rose Revolution of 2003, integration with the European Union has been one of the top priorities of the Georgian government. Therefore, a new Law "on Free Trade and Competition" was adopted in 2005.[4] This further gave birth to the Free Trade and Competition Agency set up as a state subdivision under the Ministry of Economic Development of Georgia.

However, the competition law and policy were not modeled in the fashion of internationally recognized legislations on competition. For instance, the Law does not regulate issues related to anti-competitive agreements, decisions and agreed practice, monopolies and mergers, to mention but a few. Against this backdrop, it is very important that a study be undertaken through intensive research into the workings of developed legislations in this area. This is justified by the lack of strong mechanisms for tackling the issues stated above or where the mechanisms exist, there are no professionals to monitor, create and implement necessary guidelines for achieving internationally modeled legislations.

Harmonization of Georgian competition legislation with that of the European Union is very important to Georgia for the following reasons:

1. There is an urgent need to promote, create and sustain a regulatory framework for creating the conditions for market entry and promoting competition in Georgia. Especially, sectors such as energy, gas and transport do provide essential inputs to many other economic sectors and are of key importance for Georgian's competitiveness and economic development. It is also important to create and open possibilities for an increased number of undertakings to compete as this will lead to wider choices, better quality and lower prices for consumers;

2. The extraordinary European Council meeting in Brussels on the 1st September 2008 has concluded to set up a relationship with Georgia to foster establishment of a full and comprehensive Free Trade Agreement (FTA). A Deep and Comprehensive Free Trade Agreement with the EU is crucially important for Georgia. The FTA is a priority for Georgia's EU integration. It also enhances Georgia's export to the EU. However, to sign the FTA, first Georgia has to meet certain EU standards by adopting EU regulations and rules;

[4] See Iturriagagoitia J.R., Comments to the Law of Georgia "On Free Trade and Competition", available at http://www.geplac.ge/newfiles/reports/Free%20Trade%20and%20Competition,%20Iturriagagoitia.pdf. Accessed 28 jun. 2012. See also Lapachi K., Policy Paper on Competition, August 2009, 5, Available at http://www.geplac.com/newfiles/EU-Georgia%20important%20Refferences/Policy%20Paper%20on%20Competition%20Lapachi.pdf. Accessed 28 jun. 2012.

3. The need for clear-cut rules and regulations cannot be overemphasized. Coupled with this there is the need for mechanisms for punishing erring defaulters. Because Georgian law is soft or ineffective in some quarters, the rise of price fixing and cartels cannot be properly checked and monitored nor are there any laid down proper means for investigating such;

4. Georgia intends to be internationally focused. This cannot be achieved if its laws are not internationally standardized. Competition law does play very important role in economic development.

The European Union launches talks with Georgia on a Deep and Comprehensive Free Trade Agreement by the end of 2011.[5] Through a legislative initiative of the government of Georgia, a Draft Law "On Free Trade and Competition" was developed. The Law of Georgia "On Competition"[6] was passed by the Parliament of Georgia on May 8 2012. It should be emphasized that this Law is compatible with the standards of the EU Competition Law.

The second chapter of the Law regulates restriction of competition between economic agents. Article 7 of the Law prohibits agreements, decisions and concerted practices which may restrict competition. Generally, this provision reflects the requirements of Article 101 of the Treaty on the Functioning of the European Union (hereinafter, the TFEU), but unfortunately the Law does not follow the modern competition law's pattern fully. It should be stressed, that the Law does not contain any provisions which prohibit exchange of information between competing economic agents, which may distort competition. Information sharing is one of the examples of agreements which might appreciably restrict competition.

The aim of this article is to examine the EU Standards and case law related to information sharing between competitors and to show the importance of the adoption of this rule in the Georgian legislation.

2 Overview of the EU standards on the information sharing between competitors

2.1 Introduction

An important competition law issue is whether undertakings run the risk of infringing Article 101 when they exchange information with one another. This is an issue that the Commission has given consideration to over many years, from as

[5] Knowledge and Attitudes toward the European Union in Georgia, December 5, 2011, 3, available at http://www.epfound.ge/files/eu_report_final_eng_corrected_25jan2012.pdf. Accessed 28 jun. 2012.

[6] Available in Georgian at https://matsne.gov.ge/ka/document/view/1659450. Accessed 01 aug. 2018.

early as 1968 in its Notice on Cooperation Agreements" and in numerous decisions from the 1970s onwards.[7] The 1968 Notice was replaced by the Guidelines on Horizontal Cooperation adopted on 29 November 2000. No separate part of the guidelines is dedicated to the information exchange agreements.[8]

At the end of 2010 the Commission adopted new Guidelines on the applicability of Article 101 Treaty on the Functioning of the European Union to horizontal co-operation agreements[9] (hereinafter, the Guidelines). The Guidelines provide helpful guidance on exchanges of information and draw substantially on the case law of the EU Courts. This document is not legally binding, but it explains in a helpful way the Commissions thinking on how Article 101 should apply to the exchange of information.[10]

The Guidelines begin by describing the arguments in favor of and against exchanges of information;[11] then they explain the different types of exchange of information; thereafter the concept of a concerted practice and exchanges of information that have as their object or effect the restriction of competition are dealt with. This is followed by a short discussion of the criteria in Article 101(3).

2.2 Benefits and dangers of exchanges of information

The exchange of information may be highly beneficial, to competitors, consumers and to the competitive process. The Guidelines acknowledge that

7 Whish R., Bailey D., Competition Law, Seventh Edition, Oxford University Press, 2012, 539.

8 See Švirinas D., The Assessment of Information Exchange Agreements Between Competitors from the Perspective of Competition Law of the EU and of the Republic of Lithuania, Jurisprudence. 2012, 19(1), 90, available at http://www.mruni.eu/lt/mokslo_darbai/jurisprudencija/paskutinis_numeris/dwn.php?id=310338. Accessed 28 jun. 2012.

9 Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF. Accessed 28 jun. 2012.

10 Whish R., Bailey D., cit., 540. See also Boutin A., Emanuelson A., Leupold H., Woods D., The new EU Competition Rules on Horizontal Co-operation Agreements, Competition Policy Newsletter, Number 1, 2011, 10-12, available at http://ec.europa.eu/competition/publications/cpn/2011_1_2_en.pdf. Accessed 28 jun. 2012. About the EU standards see also Roundtable on Information Exchanges between Competitors under Competition Law, OECD Competition Committee, October 2010, 308-321, available at http://www.oecd.org/dataoecd/12/52/48379006.pdf. Accessed 28 jun. 2012. About the U.S. antitrust law approach see Roundtable on Information Exchanges between Competitors under Competition Law, Note by the United States, October 2010, 2-15, available at http://www.ftc.gov/bc/international/docs/1010informationexchanges.pdf. Accessed 28 jun. 2012.

11 See generally The Pros and Cons of Information Sharing, Swedish Competition Authority, 2006, available at http://www.kkv.se/upload/filer/trycksaker/rapporter/pros&cons/rap_pros_and_cons_information_sharing.pdf. Accessed 28 jun. 2012. About anti-competitive and pro-competitive aspects of the information-sharing agreements in American antitrust law see also McChesney F.S., Legal and Economic Concepts of Collusion: American Antitrust versus European Competition Law, THIRD ANNUAL RESEARCH SYMPOSIUM ON ANTITRUST ECONOMICS AND COMPETITION POLICY, September 24-25, 2010, 4-5, available at http://www.law.northwestern.edu/searlecenter/papers/McChesney_TacitCollusionText.pdf. Accessed 28 jun. 2012.

exchanging information is a common feature of many competitive markets[12] and it may highly beneficial to the competitive structure of the market.[13] Competitors cannot compete in a statistical vacuum. Detailed market data may make it easier for undertakings to plan their own business strategies and thus benefit, without harming their customers.[14] Where the exchange of information is harmless or beneficial to competition, it will not infringe Article 101(1).[15]

However, there are, of course, dangers to the competitive process if certain types of information are exchanged in certain market conditions. The ECJ and the Commission have consistently stressed the importance of competitors acting independently.[16] In some cases exchange of information is likely to have significant anti-competitive effects, although some types of information agreement may have the object of restricting competition. Exchange of information between competitors would be incompatible with the competition rules if it reduced or removed competition on the market.

Where information exchanges do not have as their object the restriction of competition, an appraisal of the effect of the agreement will be required, taking into consideration of course the actual context to which they belong. The compatibility of the information exchange with Article 101(1) cannot be determined abstractly but must be determined taking into account the economic conditions on the relevant market. Accordingly, the compatibility of an information exchange system with the competition rules cannot be assessed in the abstract. It depends on the economic conditions on the relevant markets and on the specific characteristics of the system concerned, such as, in particular, its purpose and the conditions of access to it and participation in it, as well as the type of information exchanged.[17]

[12] Guidelines on Horizontal Cooperation Agreements, para 57.

[13] Jones A.., Sufrin B., EU Competition Law, Text, Cases, and Materials, Fourth Edition, Oxford University Press, 2011, 821.

[14] Whish R., Bailey D., Op. cit., 540. See also Jones A.., Sufrin B., Op. cit., 821. As notes Schenk in his dissertation information sharing agreements between competitors are a means to reach complete information. See Schenk C., Cooperation between Competitors Subcontracting and the influence of information, production and capacity on market structure and competition, November 1999, 21, available at http://edoc.hu-berlin.de/dissertationen/schenk-christoph-1999-11-16/PDF/Schenk.pdf. Accessed 28 jun. 2012.

[15] Švirinas D., Op. cit., 88. For example, several trains using the same track, or several power generators using the same electricity grid, or several firms utilizing the same computer network – all of these cannot function without exchanging information about the use one firm makes of the common facility or of the interfacing between the facility and another firm. See Aviram A., Tor A., Overcoming Impediments to Information Sharing, The Harvard John M. Olin Discussion Paper Series, Discussion Paper No. 427, July 2003, 7, available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/427.pdf. Accessed 28 jun. 2012.

[16] Jones A.., Sufrin B., Op. cit., 822. Exchange of Information can reduce their ability or incentive to compete independently and it is the potential for collusion and conspiracy for price fixing, and engaging in other anticompetitive behaviour. See Smitherman III, C.W., The Future of Global Competition Governance: Lessons From the Transatlantic, American University International Law Review 19, no. 4, 2003, 780, available at http://digitalcommons.wcl.american.edu/auilr/vol19/iss4/2/. Accessed 28 jun.2012.

[17] Jones A.., Sufrin B., cit., 822.

The Guidelines identify two main competition concerns arising from an exchange of information: first, it may enable undertakings to predict each other's future behavior and to coordinate their behavior on the market; and secondly, it may result in anti-competitive foreclosure of access to the market in which the exchange of information takes place or to a related market.[18]

2.3 Types of exchange of information

Information may be exchanged in various contexts. It is therefore necessary to characterize the exchange of information in order to ascertain whether competition is likely to be harmed. Statistical information which enables undertakings to assess the level of demand and output in the market or the costs of its competitors may be beneficial and is not of itself objectionable. Also, exchange of technical or other information that does not restrict the partie's freedom to determine their market behaviors independently should not be objectionable.[19] However, exchanges of information, for example, on individual's pricing intentions, or information about capacity increases; investment plans; research projects; individual output and sales figures; or other business secrets are likely infringe Article 101(1).[20]

Information exchange may support a horizontal cooperation agreement. For example, where an exchange of information forms part of another type of horizontal cooperation agreement its assessment should be carried out in combination with the assessment of that agreement; an obvious example would be the parties to a production agreement sharing information about costs.[21]

Information exchange also may support a cartel. Exchange of information will be unlawful where it is part of a mechanism for monitoring and/or enforcing compliance with some other agreement that is itself unlawful. For example, where undertakings establish a cartel, they will invariably put in place mechanisms that enable them to be sure that each participant is complying with the agreed rules, and the exchange of information is an important part of this policing function. The collection, processing and dissemination of the information may be achieved through a trade association or cartel consultancy.[22]

[18] Guidelines on Horizontal Cooperation Agreements, section 2.2.1, fn 1.
[19] Jones A.., Sufrin B., cit., 822.
[20] Ibid., 822-823.
[21] Whish R., Bailey D., cit., 540.
[22] Ibid., 541. See also Kaczor A., Warning: exchange of commercially sensitive information between competitors may result in an infringement of Article 101 TFEU by object, Amicus Curiae, Issue 85, Spring 2011, 6, available at http://sas-space.sas.ac.uk/3129/1/Amicus85_Kaczor.pdf. Accessed 28 jun. 2012.

2.4 Structure of the market

In assessing information agreements, the Commission also pays close attention to the structure of the relevant market. Information exchanges in markets which are prone to cartelization or are oligopolistic are likely to be scrutinized by the Commission. The tendency for firms to fall in line with the behaviors of their competitors is particularly strong in oligopolistic markets. The improved knowledge of market conditions aimed at by information agreements strengthens the connection between the undertakings, in that they are enabled to react very efficiently to one another's actions, and thus lessens the intensity of competition. The effect of such exchanges is likely to be less serious if consumers also have access to the information, and if the agreement provides for post-notification of historic information rather than pre-notification of information.[23]

2.5 Forms of exchange of information

Information exchange can take various forms: data can be directly shared between competitors or indirectly exchanged through a trade association or a third party, such as a common supplier.[24] To infringe Article 101(1) there must be an agreement and/or concerted practice between undertakings to exchange information or a decision by an association of undertakings to the same effect.[25]

Even if it cannot be established that an agreement which is restrictive of competition has been concluded, Article 101(1) prohibits behaviour which eliminates the risks of competition and the hazards of competitors' spontaneous reactions by cooperation. Where no agreement or concerted practice exist no infringement of Article 101(1) is of course committed.[26]

Paragraphs 60 to 63 of the Guidelines provide useful guidance on the concept of concerted practice in the context of exchange of information. By the Guidelines Article 101(1) applies to sharing of 'strategic data', that is to say data that reduces strategic uncertainty in the market[27]26, between competitors. The Guidelines also explain that a unilateral disclosure of strategic information can

[23] Jones A.., Sufrin B., cit., 823.

[24] About the information sharing between retailers and suppliers see Whelan P., Trading Negotiations between Retailers and Suppliers: A Fertile Ground for Anti-Competitive Horizontal Information Exchange?, ECJ VOL. 5 NO. 3, December 2009, available at http://www.biicl.org/files/5147_biiclhubpaper.pdf. Accessed 28 jun. 2012.

[25] Whish R., Bailey D., cit., 541. See also Odudu O., Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion, Euro Comp J, 7(2) (2011), 205-206.

[26] Jones A.., Sufrin B., cit., 824.

[26] Guidelines on Horizontal Cooperation Agreements, para 86.

give rise to a concerted practice;[28] there is a presumption that, by receiving such information from a competitor, a firm accepts it and adapts its future conduct on the market.[29] Where a firm makes a unilateral announcement that is genuinely public, for example in the press, a concerted practice is unlikely.[30]

2.6 Assessment under Article 101(1)

The assessment under Article 101 consists of two steps. The first step, under Article 101(1), is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object or actual or potential restrictive effects on competition. The second step, under Article 101(3), which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1), is to determine the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition. The balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3). If the pro-competitive effects do not outweigh a restriction of competition, Article 101(2) stipulates that the agreement shall be automatically void.[31]

The Guidelines recognize that the exchange of information can have positive effects, in particular when they enable firms to become more efficient. However, there are also situations where the exchange of information can be harmful to competition. The problem for competition law is to distinguish those exchanges of information which have a neutral or beneficial effect upon efficiency from those which seriously threaten the competitive process by facilitating collusive behavior.[32]

Exchanges of information, the object or effect of which is to influence the conduct on the market of an actual or potential competitor, to disclose to a competitor the course of conduct which the sender has decided to adopt on a market, or to render the market artificially transparent, will therefore be unacceptable.[33]

[28] Ibid., para 62.
[29] Ibid.
[30] Ibid., para 63.
[31] Guidelines on Horizontal Cooperation Agreements, para 20. About assessment under Article 101(1) and 101(3) see generally Costin I.F., Information Exchange among Undertakings in EU Competition Law, MBL Thesis, July 2011, 39-55, available at http://www.unige.ch/droit/mbl/upload/pdf/Ioana_Costin_M_moire_MBL_Final.pdf. Accessed 28 jun. 2012.
[32] Whish R., Bailey D., cit., 542.
[33] Jones A.., Sufrin B., cit., 824.

2.6.1 Restrictions of competition by object or effect

Paragraph 74 of the Guidelines suggests that the exchange of information between competitors which identify the future intended prices or quantities of individual firms has as its object the restriction of competition and is unlikely to satisfy the criteria of Article 101(3).

Nor is it necessary for A and B to have explicitly agreed that they will increase their prices: the mere fact of providing information to one another about future pricing behavior - or even for one to provide such information to the other - is likely to be sufficient for a finding of an agreement on prices.[34]

It is not a defense for an undertaking to argue that it attended a meeting at which prices were discussed, but that it maintained silence throughout the meeting, and gave no indication of its own intentions. Attendance is sufficient to implicate the undertaking in the price fixing unless it left the meeting and took positive action to "publicly distance" itself from any unlawful behavior. The message could hardly be clearer: do not remain at a meeting at which competitors discuss prices or quantities.[35]

2.6.2 Characteristics of the market

Paragraph 76 of the Guidelines explains that exchanges of information are more likely to have anti-competitive effects in markets where conditions for coordination are propitious. The Guidelines say that coordination is more likely on markets which are sufficiently transparent, concentrated, non-complex, stable and symmetric. The Guidelines point out that exchanges of information are not likely to be anti-competitive in very fragmented markets, unless the information exchanged increases transparency or changes the market situation in another way that is conducive for coordination. Whether an exchange of information facilitates collusive behavior depends on not only the initial market conditions but also how the exchange of information may change those conditions. In deciding whether coordination will be sustainable the Commission will consider whether there is a credible threat of retaliation to prevent other firms from cheating.[36]

[34] Whish R., Bailey D., cit., 542.
[35] Ibid., 543.
[36] Guidelines on Horizontal Cooperation Agreements, para 85.

2.6.3 Characteristics of the information exchanged

The Guidelines explain that the exchange between competitors of strategic data is more likely to fall within the mischief of Article 101.[37]

The Guidelines point out that information on prices and quantities is the most strategic in nature, followed by information about costs and demand.[38] The Guidelines explain that the strategic usefulness of data also depends on its market coverage, aggregation, age and frequency of exchange. The exchange must affect a sufficiently large part of the relevant market in order for it to be capable of having a restrictive effect on competition.[39] The exchange of individual data about particular undertakings is more problematic than aggregated data.[40] Also it is relevant the age of the data. The question is whether the information facilitates collusive behavior, so that historic data are less significant than future ones.[41] The frequency of any information exchange is also a relevant factor.[42]

The Guidelines point out that the exchange of 'genuinely public information' is unlikely to infringe Article 101(1).[43] Information is genuinely public in nature if the costs of obtaining it are the same for all competitors and customers. If the information exchanged is in the public domain, but is not equally accessible to competitors and customers, the Commission considers that Article 101(1) may apply as it would do to any other agreement. A further consideration is whether the information exchanged is shared with customers or not:[44] the Commission states in the Guidelines that the more the information is shared with customers, the less likely it is to be problematic.[45]

2.7 Assessment under Article 101(3)

The Commission explains in paragraph 95 that benchmarking, whereby undertakings measure their performance against 'best practice' in their industry, may enable them to improve their efficiency. In certain situations, information may be exchanged to ensure an optimal allocation of resources, thereby reducing any mismatch between supply and demand. By spreading technological know-how,

[37] Ibid., para 58.
[38] Ibid., para 86.
[39] Ibid., para 87-88.
[40] Ibid., para 89.
[41] Ibid., para 90.
[42] Ibid., para 91.
[43] Ibid., para 92.
[44] Whish R., Bailey D., cit., 545.
[45] Guidelines on Horizontal Cooperation Agreements, para 94.

information agreements can help to increase the number of firms capable of operating on the market. The exchange of consumer data in markets characterized by asymmetric information about consumers may bring about efficiencies.[46]

Consumers too can benefit from an increase in public information: the more they know about the products available and their prices, the easier it will be for them to make satisfactory choices. Indeed, perfect competition is dependent on consumers having perfect information about the market. Quite often the reason why a market does not work well for consumers is that the information available to them is too sparse or confusing; in some markets there may actually be too much information for consumers to be able to digest.[47] By the Guidelines consumers are less likely to benefit from exchanges of future pricing intentions than exchanges of present and past data.[48] Further, the parties must show that the subject-matter, aggregation, age, confidentiality, frequency and coverage of their exchange of information carries the lowest risks of facilitating collusion indispensable for creating the claimed efficiencies.[49]

3 The exchange of information between competitors in the European Commission's and European courts' practice

As we mentioned above, the Guidelines provide helpful guidance on exchanges of information and draw substantially on the case law of the EU Courts. The introduction of a section on information exchange in the Guidelines is an improvement since it provides for the first time the Commission's interpretation of the respective case law.[50] The current law of information exchange originates exclusively from the Commission's enforcement and interpretation of the Article 101 and from the review of the Commission's practice by the European courts. Reference will be made only on a several leading cases, which are giving guidance as to what is the dividing line between lawful and unlawful exchanges of information.

[46] Whish R., Bailey D., cit., 546.
[47] Ibid.
[48] Guidelines on Horizontal Cooperation Agreements, para 99-100.
[49] Ibid., para 101.
[50] See New Guidelines on Horizontal Co-operation Agreements, Brussels and London February 8, 2011, 10, available at http://www.cgsh.com/new_guidelines_on_horizontal_co-operation_agreements/. Accessed 28 jun.2012.

3.1 Examples of information exchanges viewed as illegal

3.1.1 The UK Agricultural Tractor Registration Exchange case[51]

This case was one of the first cases evaluated by the European Court of Justice that brought information exchange exclusively (and not only as a support to/facilitation of a collusion case) as an infringement of Article 101(1).[52]

On 4 January 1988, the Agricultural Engineers Association Ltd (AEA), the United Kingdom trade association of manufacturers and importers of agricultural machinery, notified an information exchange agreement called the UK Agricultural Tractor Registration Exchange ('the Exchange'). That agreement concerns an exchange of information identifying the volume of retail sales and market shares of eight manufacturers and importers of agricultural tractors on the United Kingdom market. The Exchange is managed by the AEA with the service of the computer bureau Systematics International Group of Companies Ltd ('SIL'). This information exchange has existed at least since November 1975.

The Commission started its investigation of the Exchange in 1984. During investigations about complaints of interference with parallel trade by individual manufacturers, the Commission discovered the existence of the Exchange in the course of inspections at the offices of some of the members of the Exchange and at the offices of the AEA and SIL.

Commission condemned the exchange of information relating to past transactions.[53] In condemning the agreement under Article 101(1) and refusing to exempt it under Article 101(3) the Commission took account of the fact that: 1) the market was highly concentrated, (the eight manufacturers/importers bad approximately 87-88 per cent of the relevant market); 2) there were high barriers to entry into the market; 3) there were insignificant extra-Union imports; 4) the information exchanged was detailed and identified the exact retail sales and shares of the undertakings which were generally trade secrets between competitors; and 5) the members met regularly.[54]

The Commission held that the exchange of information prevented hidden competition by creating transparency on a market which was already highly

[51] See 92/157/EEC Commission Decision of 17 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty IV/31.370 and 31.446 - (UK Agricultural Tractor Registration Exchange), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1992:068:0019:0033:EN:PDF>. Accessed 28 jun.2012.

[52] See Nair R.D., Mncube L., The role of information exchange in facilitating collusion- insights from selected cases, 8, available at http://www.compcom.co.za/assets/Uploads/events/10-year-review/parallel-3a/The-role-of-information-exchange-dasNairMncube140809-2.pdf>. Accessed 28 jun.2012.

[53] See Jones A.., Sufrin B., cit., 823.

[54] See OJ [1992] L 68/26. See also Whish R., Bailey D., cit., 544.

concentrated and largely shielded from outside competition. Although it recognized that there were benefits of transparency in a competitive market, in this case the concentration of the market was not low and the market transparency was not in any way directed towards the benefit of consumers. The information in this case enabled each participant accurately to establish its rivals' market position and to see immediately if a rival increased its market share (for example, by price reductions or other marketing incentives). Its limited price competition since competitors would be able to react quickly to changes in market positions (this would, of course, mean that there was little incentive for a potential initiator to take steps to improve its position). Information would thus limit the possibility of surprise or secrecy if a rival received information disclosing sensitive information about his competitors. It would then be able to react quickly and eliminate any possible advantage to be gained by the initiator. According to the Commission, the information would also be likely to increase barriers to entry since participants would know immediately of new market entrants and would be able to react accordingly.[55]

The Commission rejected arguments that the exchange of information would generate efficiencies in terse terms[56] and concluded that a detailed exchange of sensitive information in a market which is highly concentrated and not exposed to external competitive pressure increases the likelihood of collusive outcomes on the market. Thus, it condemned the exchange of information as an infringement of Article 101.

The UK Agricultural Tractor Registration Exchange case is still today the landmark case shaping the law in this area. The Commission's decision was reviewed on appeal by both the Court of First Instance and the European Court of Justice, but both rejected the appeal and fully endorsed the Commission's approach.[57]

3.1.2 John Deere Ltd v. Commission[58]

The Commission's analysis on the UK Agricultural Tractor Registration Exchange case was upheld by the General Court in John Deere Ltd v. Commission.[59]

[55] See Jones A.., Sufrin B., Op. cit., 825. See also Capobianco A., Information Exchange Under EC Competition Law, CML Rev. 2004, 1252, available at http://www.wilmerhale.com/files/Publication/893cae33-f11f-496e-8f3e-9afa58a74a93/Presentation/PublicationAttachment/5e46516a-970c-4cc5-8b7a-0320343e8bfc/InformationExchng_ECCompetitionLaw.pdf. Accessed 28 jun.2012. See also Leupold B., Information Exchange between Undertakings, Master thesis, Spring 2006, 21, available at http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1555046&fileOId=1563529. Accessed 28 jun.2012.

[56] Whish R., Bailey D., cit., 547.

[57] Capobianco A., cit., 1249.

[58] See Case T-35/92 John Deere Ltd v Commission of the European Communities, Judgment of the Court of First Instance (Second Chamber) of 27 October 1994, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992TJ0035:EN:PDF. Accessed 28 jun.2012.

[59] See Jones A.., Sufrin B., cit., 825.

The Agricultural Engineers Association Limited (hereinafter, "the AEA") is a trade association open to all manufacturers or importers of agricultural tractors operating in the United Kingdom. At the material date, it had approximately 200 members.

On 4 January 1988 the AEA notified to the Commission, primarily with a view to obtaining negative clearance, or alternatively an individual exemption, an agreement relating to an information system based on data held by the United Kingdom Department of Transport relating to registrations of agricultural tractors, called the 'UK Agricultural Tractor Registration Exchange' (hereinafter 'the first notification'). That information exchange agreement replaced a previous agreement dating back to 1975 which had not been notified to the Commission. That latter agreement had been brought to the attention of the Commission in 1984 during investigations carried out following a complaint made to it concerning obstacles to parallel imports.

The General Court accepted that a truly competitive market would benefit from transparency but that exchanges of precise information at short intervals on a highly concentrated market would be likely to impair the competition which existed between the traders.[60]

The Court observes that, as the applicant points out, the Decision is the first in which the Commission has prohibited an information exchange system concerning sufficiently homogeneous products which does not directly concern the prices of those products, but which does not underpin any other anti-competitive arrangement either. As the applicants correctly argues, on a truly competitive market transparency between traders is in principle likely to lead to the intensification of competition between suppliers, since in such a situation, the fact that a trader takes into account information made available to him in order to adjust his conduct on the market is not likely, having regard to the atomized nature of the supply, to reduce or remove for the other traders any uncertainty about the foreseeable nature of its competitors' conduct. On the other hand, the Court considers that, as the Commission argues this time, general use, as between main suppliers and, contrary to the applicant' s contention, to their sole benefit and consequently to the exclusion of the other suppliers and of consumers, of exchanges of precise information at short intervals, identifying registered vehicles and the place of their registration is, on a highly concentrated oligopolistic market such as the market in question and on which competition is as a result already greatly reduced and exchange of information facilitated, likely to impair substantially the competition which exists between traders. In such circumstances, the sharing, on a regular

[60] Ibid.

and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all the competitors the market positions and strategies of the various individual competitors.[61]

Furthermore, provision of the information in question to all suppliers presupposes an agreement, or at any rate a tacit agreement, between the traders to define the boundaries of dealer sales territories by reference to the United Kingdom postcode system, as well as en institutional framework enabling information to be exchanged between the traders through the trade association to which they belong and, secondly, having regard to the frequency of such information end its systematic nature, it also enables a given trader to forecast more precisely the conduct of its competitors, so reducing or removing the degree of uncertainty about the operation of the market which would have existed in the absence of such an exchange of information. Furthermore, the Commission correctly contends, at points 44 to 48 of the Decision, that whatever decision is adopted by a trader wishing to penetrate the United Kingdom agricultural tractor market, and whether or not it becomes a member of the agreement, that agreement is necessarily disadvantageous for it. Either the trader concerned does not become a member of the information exchange agreement and, unlike its competitors, then forgoes the information exchanged and the market knowledge which it provides; or it becomes a member of the agreement and its business strategy is then immediately revealed to all its competitors by means of the information which they receive. It follows that the pleas that the information exchange agreement at issue is not of such a nature as to infringe the EU competition rules must be dismissed.[62]

Secondly, with regard to the type of information exchanged, the Court considers that, contrary to the applicant's contention, the information concerned, which relates in particular to sales made in the territory of each of the dealerships in the distribution network, is in the nature of business secrets. Indeed, this is admitted by the members of the agreement themselves, who strictly defined the conditions under which the information received could be disseminated to third parties, especially to members of their distribution network. The Court also observes that, having regard to its frequency and systematic nature the exchange of information in question makes the conduct of a given trader' s competitors all the more foreseeable for it in view of the characteristics of the relevant market as analyzed above, since it reduces, or even removes, the degree of uncertainty regarding the operation of the market, which would have existed in the absence of such an exchange of information, and in this regard the applicant cannot profitably

[61] See Case T-35/92, para. 51.
[62] Ibid, paras. 52-53.

rely on the fact that the information exchanged does not concern prices or relate to past sales. Accordingly, the first part of the plea, to the effect that there is no restriction of competition as a result of alleged "prevention of hidden competition", must be dismissed.[63]

An appeal before the ECJ against the judgment of the General Court was unsuccessful.

3.2 Examples of information exchanges viewed as permissible

3.2.1 Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v Asociación de Usuarios de Servicios Bancarios (Ausbanc)[64]

This case concerns a reference for a preliminary ruling in which the Supreme Court of Spain, in the course of examining whether a credit information register that is accessible by financial and credit institutions in Spain in return for payment is compatible with Article 101.

The Court's judgment in this case is a most interesting one, in which it took an economic approach to the question of whether competition was likely to be restricted. It seems fairly clear that its view was that the exchange in question did not infringe Article 101(1).[65]

The compatibility of information exchange with Article 101(1) cannot be determined abstractly but must be determined taking into account the economic conditions on the relevant markets. This point is spelt out clearly by this case.[66]

In this case Ausbanc had challenged the exchange of information between financial institutions on the solvency of customers and borrower default. With regard to the question of whether the agreement had as its effect the restriction of competition the ECJ stressed the importance of considering whether supply on the market was highly concentrated, whether information identified competitors

[63] See Case T-35/92, para. 81.

[64] Case C-238/05: Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v Asociación de Usuarios de Servicios Bancarios (Ausbanc) [2006], available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005CC0238:EN:HTML. Accessed 28 jun.2012. This case illustrates the importance in applying a rule of reason approach to an information exchange case. See Nair R.D., Mncube L., cit., 9.

[65] See Whish R., Bailey D., cit., 545.

[66] See Case C-238/05, para. 54. See also Jones A.., Sufrin B., cit., 822.

individually and whether access to the information was available in a non-discriminatory manner to all operators.[67]

The Court of Justice held that, where credit institutions participated in the creation of a register of information about the solvency of customers, it was not important to decide whether this happened as a result of an agreement, a concerted practice or a decision of an association of undertakings.[68]

The Court specifically noted that the market in question was a fragmented one: that is to say that it was not concentrated, which would have been a factor conducive to coordinated behaviour.[69]

As indicated at paragraph 47 of this judgment, registers such as the one at issue in the main proceedings, by reducing the rate of borrower default, are in principle capable of improving the functioning of the supply of credit. Furthermore, by reducing the significance of the information held by financial institutions regarding their own customers, such registers appear, in principle, to be capable of increasing the mobility of consumers of credit. In addition, those registers are apt to make it easier for new competitors to enter the market.[70]

The ECJ recognized need to carry out an Article 101(3) assessment in order to resolve the dispute at issue. For example, the court might be required to determine whether objective economic advantages, such as helping to prevent over indebtedness for consumers of credit and leading to a greater overall availability of credit, might be such as to offset the disadvantages of any restriction of competition identified. The ECJ stressed that in making the Article 101(3) determination, it was not necessary that all consumers should benefit from the system. Rather, it was not inconceivable that some applicants for credit would be faced with increased interest rates or refused credit. This circumstance was not in itself sufficient to prevent the condition that consumers are allowed a fair share of the benefit from being satisfied since "it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers".[71] Indeed, the exchange in this situation might be capable of leading to a greater overall availability of credit, including for applicants for whom interest rates might be excessive if lenders did not have appropriate knowledge of their personal system.[72]

[67] Jones A.., Sufrin B., Op. cit., 827. See also Whish R., Bailey D., cit., 544.
[68] Case C-238/05, paras. 30-32. See also Whish R., Bailey D., cit., 541.
[69] See Case C-238/05, para. 43. See also Whish R., Bailey D., cit., 544-545.
[70] See Case C-238/05, para. 56.
[71] See Case C-238/05, para. 70.
[72] See Jones A.., Sufrin B., cit., 828.

3.2.2 Wood Pulp II case[73]

The Wood Pulp case patently illustrates the complexities surrounding the notion of concerted practice. In that case, a group of wood pulp producers operated a system of quarterly announcements of prices. Under that system, a few weeks or days before the beginning of each quarter all wood pulp producers communicated to their customers the prices they wished to obtain for each type of pulp. The Commission regarded that parallel action as proof that concentration had taken place.[74]

The decision by the European Commission to fine the companies involved in the alleged conspiracy was appealed and overturned before the European Court of Justice. ECJ ruled that the fact that pulp producers publicly announced price raises to users before those rises came into effect was not, in itself, sufficient to constitute an infringement of Article 101(I).[75] The ECJ stated that parallel conduct cannot be regarded as proof of concentration unless concentration constitutes the only plausible explanation for such conduct.[76] It is necessary in this case to ascertain whether the parallel conduct alleged by the Commission cannot, taking account of the nature of the products, the size and the number of the undertakings and the volume of the market in question, be explained otherwise than by concentration.[77]

According to facts and experts' opinion there were a high degree of transparency in the pulp market resulting from the links between traders or groups of traders was further reinforced by the existence of agents established in the Community who worked for several producers and by the existence of a very dynamic trade press. By the ECJ announcements served purchasers wished to ascertain as soon as possible the prices which they might be charged in order to estimate their costs and to fix the prices of their own products.[78]

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[73] Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 A. Ahlström Osakeyhtiö and others v Commission of the European Communities [1993], available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985J0089(01):EN:HTML. Accessed 28 jun.2012.

[74] Albors-Llorens A., EC Competition Law and Policy, Willan Publishing, 2002, 26.

[75] See Joined cases C-89/85 etc, paras. 59-65. See also Whish R., Bailey D., cit., 542.

[76] Allendesalazar R., Oligopolies, Conscious Parallelism and Concertation, EUI-RSCAS/EU Competition 2006 – Proceedings, 5, available at http://www.eui.eu/RSCAS/Research/Competition/2006(pdf)/200610-COMPed-Allendesalazar.pdf. Accessed 28 jun.2012.

[77] See Joined cases C-89/85 etc, para. 72.

[78] Joined cases C-89/85 etc, para. 77. See Ebinger K., Critical Characteristics of Information Exchange Practices and their Effects on Competition, Master Thesis, March 2009, 46, available at http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/pdfs/publications/master-theses/ebinger.pdf. Accessed 28 jun.2012.

The ECJ found that there was no infringement of Article 101 where undertakings had announced their price increases in advance. The increases had been rapidly transferred between both buyers and sellers by means of publication in the trade press and by agents which dealt with a number of buyers and sellers and no agreement or concerted practice between the producers to exchange the information had been established.[79] The ECJ stated: "While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market".[80]

John Deere v. Commission can usefully be compared with the decision in Wood pulp. As we noted above, in Deere, the members of a trade association agreed upon a system of exchange of information between them that would enable their sales to be identified. The Commission took the view – upheld by the Court of First Instance – that such exchanges of information had the effect of restricting competition by removing uncertainty about the nature of the competitors' conduct and by raising barriers to entry for non-members. The European Court, on appeal, helpfully distinguished the ruling in Wood pulp from the one in the present case. It explained that in the former case the system of quarterly announcements involved communication of information to purchasers, whereas in the latter the information was to be shared only by certain undertakings that were parties to the system.[81]

3.3 Example about the exchanging information over the telephone

The Guidelines gives several examples of exchanging information between the competitors and provides their analysis. Among them is one interesting situation, which also may take place in Georgia.

[79] See Jones A.., Sufrin B., cit., 824.
[80] See Joined Cases C-89/85 etc, para. 33.
[81] See Albors-Llorens A., cit., 27.

The four companies owning all the petrol stations in a country exchanged current gasoline prices over the telephone. They claimed that this information exchange cannot have restrictive effects on competition because the information is public as it is displayed on large display panels at every petrol station.

By the Guidelines the pricing data exchanged over the telephone is not genuinely public, as in order to obtain the same information in a different way it would be necessary to incur substantial time and transport costs. One would have to travel frequently large distances to collect the prices displayed on the boards of petrol stations spread all over the country. The costs for this are potentially high, so that the information could in practice not be obtained but for the information exchange. Moreover, the exchange is systematic and covers the entire relevant market, which is a tight, non-complex, stable oligopoly. Therefore, it is likely to create a climate of mutual certainty as to the competitors' pricing policy and thereby it is likely to facilitate a collusive outcome. Consequently, this information exchange is likely to give rise to restrictive effects on competition within the meaning of Article 101(1).[82]

4 Conclusion

Summarising the above, we can conclude that the competition legislation in Georgia still needs further development. The Law "On Competition" can be considered as an important step towards the establishment of competitive environment. However, as we see this Law has some deficiencies regarding anti-competitive agreements, decisions and concerted practices, because it does not regulate such important issue as prohibition of information sharing between competitors which may cause restriction of competition.

In this context, it would be advisable to rely on the experience of other countries, and particularly that of the EC, because the adoption of effective competition rules and their implementation has an essential importance for the emerging Georgian economy, since fair competition is a great spur to business effectiveness and efficiency.

[82] See Guidelines on Horizontal Cooperation Agreements, para 109.

Finally, we can say that nowadays level of the approximation of the current legislation with the EU competition law at the stage is satisfactory, but further works should be done in order to fully harmonize it with EU standards.

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