



Armenian – European Policy and Legal Advice Centre (AEPLAC)

Effective Enforcement of Competition Law in Armenia

Year I

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INTRODUCTION

The present policy paper follows on policy paper **Competition Law Reform in the Republic of Armenia No. 5, July 2001** and should be read in the light of that paper, its description of developments in the Republic of Armenia in relation to competition policy, their impact on ongoing economic and legal reforms and the compliance of the country's competition legislation with international obligations, in particular under the WTO and the PCA.

The focus of this paper is on developments since July, 2001, the work of the Competition Commission and future requirements.

RECENT DEVELOPMENTS

Following the adoption on 6th November, 2000 of “The Law of the Republic of Armenia on the Protection of Economic Competition” (hereinafter “the Law”), the President of the Republic of Armenia appointed, on 13th January, 2001, a Chairman, a deputy Chairman, and five other Members of the State Competition Commission for the Protection of Economic Competition (“the Commission”) as the body charged with the implementation of the protection of competition in Armenia.

The Chairman was appointed for a period of five years, the Deputy Chairman for four years, three Members for three years, one Member for two years and one Member for one year. The last Member has already been replaced. In future, all Members shall serve for a term of five years.

Between January and July, 2001, a Commission Charter was adopted and in accordance with the Charter a structure was created. 40 Members of staff were engaged.

The Commission drew up methodological guidelines for plans of action such as “*On definition of commodity market borders and volume*” and “*On the Centralized Register of Economic Entities with a Dominant Position in the Commodity Market*” as well as internal regulations and internal documentation forms.

The Commission also acquainted itself with international practice with regard to the implementation of competition policy and established relations with other CIS organizations concerned with competition policy. As a result, the Commission took part in a workshop held by the Antimonopoly Interstate Council of the CIS and became a Member of the International Competition Network.

The Commission’s Annual Programme of Activities for 2002 was presented to the National Assembly of the Republic of Armenia in October 2001.

STUDIES CARRIED OUT BY THE COMMISSION

In 2001, the Commission carried out studies of the competition environment in relation to product markets with high concentration levels in order to establish the consumption volumes and concentration levels of each economic entity on the relevant market and the level of (a) concentration; (b) anti-competitive agreements, and (c) unfair competition.

The Commission discovered the existence of at least two or three participants with ‘joint market control’. Such monitoring will continue on a permanent basis.

Irrespective of the existence of particular product or geographic markets, it would seem that two distinct markets have been identified in Armenia.

On the one hand, there is the market involving those large scales enterprises established when Armenia was part of the Soviet Union, which supplied goods to other parts of the Soviet Union and which are now mainly limited to the home market. The

dominance of certain of these enterprises will continue because of the need for large-scale capital inputs on a surplus market, slow capital turnover and the difficulty of access to loans.

On the other hand, there exists a varied market in imported goods without any overwhelming players. This market is based on a fast turnover and fixed profitable trade capital. Market accessibility is high and Armenia has an open foreign trade regime.

THE AMENDMENT OF THE EXISTING COMPETITION LEGISLATION

During the course of 2001, it became apparent to the Commission that there were certain flaws in the Law, some of which had already been pointed out in a Policy Paper published in July 2001 by AEPLAC in its Working Papers series.

The Articles, which the Commission considered should be amended, are those related to (a) the better definition of certain terms used in the Law (b) a closer definition of markets, (c) the need to give the Commission a stronger position in relation to other governmental administration bodies and to economic entities and (d) the need to clarify and strengthen the Commission's power to issue normative acts.

The Commission's legislative policy is to avoid anything in the Law, which might lead to discrepancies; to enhance the Commission's power to obtain information; to achieve transparency in its activities and methods; to determine its competence as regards the adoption of normative legal acts.

The Commission has already submitted to the National Assembly amendments to Articles 6, 19, 27, 28, 33 and 36 of the Law. These amendments have received their first reading.

POLICY PRIORITIES

The policy priorities of the Commission (and, therefore Armenia) must now be based on implementation and on the adoption of any legislative measures which are needed for such implementation.

These should include, *inter alia*, in-depth investigation of 'small players' which may have entered into anti-competitive agreements, the encouragement of prior notification of potentially anti-competitive agreements, taking the identification of high concentration levels one step further to ascertain whether or not such levels are being used to abuse dominant positions, the encouragement and/or the enforcement of notification of mergers and the investigation of mergers.

NEED FOR ACCURATE INFORMATION

In order to fulfill its obligations, the Commission is dependent on reliable information and will need to acquire the full cooperation of bodies, such as the National Statistics

Service, the Ministry of State revenues, the State Customs Committee, the State Register of Legal Persons, the Securities Commission.

It would seem that it is necessary that the Commission be granted extra powers to enable it to obtain such information and that the collection of type of information required by the Commission be included among the duties of such bodies.

A POLICY VIEW OF THE IMMEDIATE TASKS WHICH THE COMMISSION HAS SET ITSELF

The Commission has set itself the immediate task of dealing with five main matters: anti-competitive agreements, dominant position, concentrations, unfair competition, information collection and the creation of a database, publicity, training of staff and cooperation with international organizations.

I. Anti-competitive agreements

The Commission hopes to discover, prevent, restrict and prohibit anti-competitive agreements by the review of prices on product markets, the identification of market sharing trends, the revelation and elimination of obstacles to market entry for economic entities.

In order to achieve some of these aims, it is recommended that the Commission moves beyond the preliminary step of general studies and the establishment of abstract measurements to investigation of the actual day to day conduct of suspected parties and the recognition of individual cases of anti-competitive behaviour.

The Commission should familiarize itself with usual contents of anti-competitive agreements, oral or written, and learn to distinguish them from matters such as obstacles to market entry except for cases where such agreements are specifically designed to create obstacles for third parties.

II. Dominant position

In accordance with the Law, the Commission will establish a centralized register of economic entities with a dominant position. This should not be a substitute for the identification of product and geographic markets in accordance with international jurisprudence, particularly that of the EU and its Member States and the numerous precedents as to what constitutes abuse of a dominant position.

III. Concentrations

The Commission must take care not to confuse questions relating to the abuse of a dominant position and those relating to mergers. The latter is a highly technical matter and close cooperation should exist between the Commission and other state bodies with responsibility for such matters. It is important that the staff of the Commission acquire training in this regard.

IV. Unfair Competition

In addition to cooperation with bodies such as the TV-Radio Council, representatives of the advertising industry, the Municipalities of Yerevan and Marzpetarans, public organizations concerned with consumer interests and other competent institutions, it is recommended that the Commission also establishes a mechanism which will enable aggrieved economic entities or individuals to lodge specific complaints with it.

V. Information collection and the creation of a database

It is intended that the Commission shall establish its own database for the survey and analysis of product markets. This should not be substitutes for other sources of information, such as are used by competition authorities in other countries - notifications, complaints, newspaper reports, company reports.

VI. Publicity, training of staff and cooperation with international organizations

The Commission plans in this area are to be recommended. They include the intention:

- to carry out a publicity and public relations campaign based on discussions, round tables, seminars, press conferences, publications and a web page in order to inform and involve economic entities, consumers, government and local administrative bodies and other interest groups; to provide training programmes for its employees;
- to continue to work with the CIS countries, as well as with other countries and international organizations to improve the scope and quality of its implementation of competition policy.

It is strongly recommended that economic entities and the general public be encouraged to make use of the Law to protect themselves from anti-competitive behaviour. It is not efficient for the Commission to bear the full burden of fighting such behaviour. It would be much more efficient if economic entities and the public could be encouraged to take on themselves part of that burden by, for example, legal proceedings for breach of the Law.

POLICY RECOMMENDATIONS IN RELATION TO COMPETITION PROTECTION

It is recommended that the Commission should concentrate on the following matters in its future work and that, where possible, assistance should be given to it to implement these recommendations.

1. Emphasis should be placed on the training of the Commission and its staff in the field of the implementation of competition policy. This might be achieved by twinning with experts from other competition authorities of the EU or by study placements or internships in such authorities.¹

¹ In March 2001, a study tour by Members of the Commission in Belgium, Germany and Ireland took place.

2. The Commission should have sufficient electronic and other equipment² to enable it to carry out its tasks efficiently.
3. The independence of the Commission must be recognized and maintained (see remarks regarding amendments to the Law);
4. At this early stage, it is perhaps too early to establish priorities. On the one hand, it is important that the Commission be seen to be an effective organization and that successful enforcement of competition policy will strengthen its public image and, ultimately, make it more effective. There is an argument for prosecution of obvious cases of anti-competitive behaviour as a warning to other economic entities. For this reason, the Commission should not hesitate to investigate and deal firmly with anti-competitive agreements involving the lesser players in the market, merely because it runs the risk of being accused of timidity and reluctance to investigate the behaviour of influential entities, which obviously hold dominant positions. Equally, it should not hesitate to pursue the larger players on the grounds that opposition from interested parties within the government, in the National Assembly or in influential business circles with links to the former may frustrate its activities, and leave it open to the charge that it has been failing in its duty. Public action, with attendant publicity, against abuse of dominant position by a large player can only enhance the reputation of the Commission whatever the outcome.
5. Primary and secondary legislation and internal government rules must be changed to allow the Commission to operate without hindrance in a climate which is not receptive to an open, but regulated, competitive environment and has inherited a tradition of secrecy³. The Commission must be given full powers, including powers to enter and search premises, to obtain full cooperation from state bodies and from the general public.
6. The Commission should adopt a “ground-up” rather than a “top-down” approach to the search for information. It should begin with individual cases and not wait for the compilation of general statistics. Anti-competitive behaviour is individual behaviour. Statistics are merely aids, measurements and indications of areas where anti-competitive behaviour might or might not take place. Given the limitations on the Commission’s resources, too much time and money should not be spent in study or the compilation of statistics.
7. The Commission must insist on its independence and its right to plan its own activities and to concentrate on the protection of competition to the exclusion of other matters of government policy.
8. A clear division should be established between the role of the Members of the Commission and that of its staff. It should be the responsibility of the staff to carry out the day-to-day work of the Commission and to prepare dossiers on the basis of which the

² It would appear that lack of funds has prevented the Commission from obtaining all the equipment that it needs in order to carry out its work efficiently.

³ The Commission has already been sued in court on an allegation that it revealed commercial secrets. Fortunately, the court found in its favour on the grounds that the information was not substantial.

Commission may take decisions as to whether or not to proceed with an investigation or to prosecute.

9. The staff should also assist the Members both in the preparation of, and the conduct of, public sessions concerning individual allegations of anti-competitive behaviour. In this context, the Commission should draw up rules of procedure in relation to such sessions to ensure that justice is seen to be done and that the constitutional rights of interested parties are respected.

10. Given that the efficiency of any competition authority depends on the quality of its staff, it is recommended, not only that the staff receive the best training possible, but it be encouraged to stay with the Commission for a long period and to build up its expertise through long term experience.

11. It is understood that a form of Charter (or internal regulations) has been proposed for the Commission which would include the establishment of a Policy and Methodological Department and an Investigation and Enforcement Department. It is recommended that top priority and full resources be given to the Investigation and Enforcement Department. This Department should have the resources and the authority to investigate the behaviour of monopolistic economic entities as revealed, for example, in the newspapers or other sources of information which are already in the public domain, by informants, by aggrieved consumers, suppliers, distributors, sub-contractors, rival economic entities. The same procedure should apply to the actions of government and local government bodies which are suspected of anti-competitive actions. A draft Charter was submitted to the Commission in 2001. It is recommended that in the light of its experience to day, the Commission look again at this draft Charter.

12. As stated above, the Commission staff should be given full power to enter the premises of economic entities which are suspected of anti-competitive behaviour and to examine and remove documentation.

13. The implementation of competition policy is an art and not a science and that those charged with implementation must act more in the fashion of policemen rather than statisticians or sociologists calculating levels of crime. Until a competition conscious climate has been established the concentration must be on cure rather than prevention.

Amendments to the Law

Effective implementation cannot be achieved without a basis in sound legislation. For this reason, it is recommended that the existing legislation be amended in the immediate and continually checked with a view to future changes with developments in the economy and in competition policy.

In the course on a Seminar organized by AEPLAC and held in Yerevan on 23rd and 24th January 2002, concrete proposals were made by AEPLAC in relation to such amendments.

Among other matters, these amendments provided for:

1. the exemption from the effects of the Law of privileges and protections of intellectual property except when they are used improperly to damage competition illegally;
2. the exemption of combinations of workers and employees designed solely to facilitate collective bargaining in respect of conditions of employment;
3. examples of anti-competitive agreements and behaviour;
4. exemptions in relation to agreements, decisions or concerted practices;
5. exemptions for agreements of minor importance;
6. a solid definition of dominant position unrelated to a percentage share of a given market;
7. the conditions that must be fulfilled so that a concentration may be accepted as fostering the development of competition;
8. a development of the actions that the Commission may take to prevent concentrations from harming competition;
9. the encouragement of economic entities and natural persons, who are aggrieved by alleged anti-competitive behaviour on the part of other economic entities, individuals or government or local government bodies, to seek relief in the courts;
10. provisions which would make any orders, rules or methodological guidelines issued by the Commission binding on the economic entities, government administration and local administration bodies and providing for penalties for failure to obey such orders, rules or guidelines;
11. the maintenance of the independence of the Commission by the removal of the power of the National Assembly to dismiss the Members of the Commission if the Assembly disapproves of the Commission's Annual Programme;
12. the removal of the power of economic entities, government administration or local government administration bodies to claim that information required by the Commission amounts to commercial, tax or statistical secret, the reservation to the Commission of the sole right to decide what information should be supplied to it and giving binding legal force to any order issued by the Commission in this context;
13. the granting to the Commission the power to order economic entities to suspend for an initial twenty-one days suspicious business practices if the Commission is satisfied that such an order is urgently required to avoid serious, imminent or irreparable harm to the economic interests of the Republic of Armenia;
14. the granting to the Commission of power to renew such an order if the potential harm still exists;
15. the granting to the Commission of the right to publish certain information or to communicate the information to government bodies which have a right and an interest to receive such information in the order provided by Armenian legislation;

16. penalties for any deliberate act or omission which is intended to hinder, or has the effect of hindering, the implementation by the Commission of its duties or powers;
17. ongoing daily penalties for continued failure to comply with orders of the Commission;
18. a statement of the relief that a court may grant to economic entities or natural persons who take actions in the court in relation to agreements, decisions, concerted practices or abuses of dominant positions prohibited by the Law.

It is vitally important that the independence of the Commission must be protected. The Members of the Commission should not be judged by the National Assembly on the basis of work which it is proposed to do. The power of the National Assembly to dismiss Members of the Commission must be limited to serious failures by the Members to fulfill their obligations within the limits of the powers granted to them by the Law or proven wrong-doing by the Commission. Any motion to remove Members of the Commission must be based on proven facts and particular incidents, on clear failure to fulfill obligations set out in the Law and not on broad allegations, general statements of dissatisfaction or on failure to control breaches of competition which have occurred due to factors outside the control of the Commission. Given the vested interests which a conscientious Competition Commission must inevitably offend, it cannot function unless its absolute independence is assured by the State.

As can be seen above, it is important that definitions of competition concepts be clarified and inadequacies in relation to anti-competitive agreements, concentrations and mergers corrected.. These are the bread and butter of Competition Commissions, even in a transition economy, and must be given their due importance. The Law must be strengthened in relation to these matters and contain more detail about them. Other amendments relate to encouragement of economic entities or natural persons to seek relief in the civil courts on their own initiative, to protect the Commission against the spurious use of the concept of commercial secrecy, to ensure greater cooperation from economic entities and government bodies, to strengthen the Commission's investigative powers, to give protection to employees or sub-contractors who, in good faith, give information to the Commission about anti-competitive behaviour.

The Commission's staff should be given the legal power to enter the premises of economic entities suspected of anti-competitive behaviour and remove documentation, as is the case in many different countries. This power should preferably be given to the Commission by the Law but, it may be possible that an order issued by the Commission itself might be sufficient. There is no shortage of precedents for the use of such powers and of legal text to give the powers.

The new version of the Administrative Code should oblige all those who are subject to it to comply with all relevant requests made to them by the Commission and state that failure to comply with such requests would be an offence under the Administrative Code. It would be helpful if a similar provision were inserted in the Criminal Code.

Finally, Article 2 of the Law states that the Law shall apply to those activities of economic entities, government and local administration bodies which might result in the restriction,

prevention and distortion of competition within the Republic of Armenia. Article 36 makes bodies of central and local government administration liable for infringements of the Law which restrict the entry of economic entities into a market or ousting them from a market. These articles could be applied to cases of discriminatory subsidies or other aids granted to economic entities. It is recommended that the Commission, in conformity with the Republic of Armenia's obligations under the PCA, should, in cooperation with central government administration, establish a policy and lay down clear rules in this respect.

POLICY PAPER ON COMPETITION POLICY REFORM

EXECUTIVE SUMMARY

A Law on the Protection of Economic Policy was adopted in Armenia on 6th November, 2001 and, as a result, a Commission for the Protection of Economic Competition was established. This Commission has been operating and has published an Annual Programme for 2002, outlining its activities in 2001 and its basic tasks for 2002. It has carried out an analysis of the economic environment in Armenia and has adopted Decisions on a centralized register of economic entities with a dominant position, on guidelines for identification of a dominant position and definition of product market borders and volumes.

It is recommended that the Commission concentrate its activities on the investigation of actual allegations of anti-competitive behaviour, the encouragement of the notification of potentially anti-competitive agreements and the prohibition or the alteration of proposed agreements containing anti-competitive provisions. Operating in an anti-competitive environment, the Commission needs the cooperation of private economic entities and public bodies. It needs help to build up its experience. The Law needs to be amended to include more detail about anti-competitive agreements, concentrations and mergers, to give greater powers to the Commission to obtain information, The Commission must be given powers to enter and search premises and remove documentation. The complementary roles of the Members of the Commission and their trained staff should be clarified. The staff should be concerned with initial investigation, the provision of information to the Members and the subsequent implementation of the decisions of the Members. Emphasis should be placed on the training of staff, publicity, investigation and enforcement. The independence of the Commission must be copper-fastened.

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EC Council Regulation 4064/89 *“On prohibiting concentrations creating or strengthening dominant position in the European Community”*

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