

# U4 Expert Answer



## Integrating anti-corruption measures in Georgia's newly established competition agency

### Query

***Please provide information on how best to build in anti-corruption measures within the framework of institution building support to the new Agency for Free Trade and Competition in Georgia.***

### Purpose

Our agency is preparing to support the Agency which has a positive interest in anti-corruption measures

### Content

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### Caveat

This query is a follow up of the U4 answer published in March 2010 on integrating anti-corruption measures in the design of public law enforcement / regulatory agencies

### Summary

There is a broad consensus that promoting competition may have a positive impact on limiting factors fuelling business related corruption and can contribute to foster a corruption free business environment. Establishing strong, independent and accountable competition authorities with adequate investigative, enforcement and regulatory powers is important to achieve this goal.

The literature shows that effective competition authorities share a set of common features including a clear vision of the agency's purpose and strategic priorities, an appropriate structure and transparent processes, sound case and project management systems and human resources practices as well as an effective monitoring and evaluation mechanism. The independence and accountability of the institution also needs to be ensured. Anti-corruption measures can be built up in the institution by promoting transparency and access to information on the agency's operations and decisions, introducing the right set of staff incentives and rules, establishing effective internal and external oversight mechanisms as well as encouraging safe whistleblowing.

In Georgia, the legal and institutional framework for promoting free trade and competition needs to be strengthened as part of the negotiations on Deep and Comprehensive Free Trade Agreement (DCFTA) between Georgia and the EU. A new Agency for Free Trade and Competition has been established in spring 2010, whose independence and competences need to be strengthened through a wide range of possible interventions, including institutional and technical capacity building activities as well as independent monitoring of the implementation of the competition regulations.

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# 1 Anti-corruption and competition agencies

## Competition and corruption

The impact of economic liberalisation and competition on corruption has been discussed in many political and academic fora. American economist Robert Klitgaard's understanding of corruption as a result of monopoly plus discretion minus accountability implies that creating a competitive environment may have an impact on the factors that fuel corruption. The World Bank argues in this direction by stating on its anti-corruption website that promoting competition, especially in sectors with high concentration, through a set of measures such as lowering the barriers to entry, requiring competitive restructuring and clarifying ownership structures can contribute to creating a vibrant and corruption free private sector (World Bank, [Anti-corruption website](#)). The bank recommends enhancing greater competition in particular as part of the reforms aimed at constraining the ability of powerful elites to influence decision and policy making processes (state capture).

There is also empirical evidence that tends to support this approach. For example, using enterprise-level data on bribes paid to utilities in 21 transition economies in Eastern Europe and Central Asia, a 2001 study found that on the side of bribe takers, bribes paid to utilities are higher in countries with greater constraints on utility capacity, lower levels of competition in the utility sector, and where utilities are state-owned (G. and Xu, L. C., 2001).

Even in a competitive environment, there are a number of ways in which firms may get market power through dubious practices and corruption. According to a U4 brief on competition and corruption, corruption can support all the relevant mechanisms by which firms may gain a competitive advantage on the markets (Soreide, T., 2007). In particular, market power can be achieved by various means, including trade barriers, manipulation of prices, collusion, acceptance of welfare mergers or acquisitions or favourable agreement on sole-source supply to government institutions. By distorting the functioning of markets, corruption can result in too much market power for some firms, with implications on prices and supply of goods, and services in the private sector.

While improved competition is important to reduce corruption, better regulation of markets is also an

important aim to achieve in many countries, including Georgia. Competition laws regulate the ways in which firms can gain direct market power and are of crucial importance to address business related corruption, as well as the effectiveness of competition authorities in charge of enforcing and monitoring competition laws.

## Conditions of effectiveness

### *General conditions of effectiveness*

Establishing strong, transparent, and accountable competition authorities is key to ensure effective enforcement of competition regulations. The [International Competition Network](#)<sup>1</sup> (ICN) has identified key areas of focus to strengthen the effectiveness of competition authorities (International Network for Competition, 2009). These include:

**Strategic planning and prioritisation:** Agencies must clearly identify strategic objectives over a period of a few years, using the legal framework as a starting point for the setting of the strategy. They should also develop an implementation plan, containing broad allocation of resources between the main activities of the agency and defining the "deliverables". The agency also needs to prioritise its activities, such as for example selecting cases for in-depth investigation, using clear and transparent criteria.

**Effective project delivery:** Case and project management, agency structure and human resources related issues (particularly recruitment and retention) are key issues to consider in this regard. As already mentioned, clear processes and criteria for case selection are needed to limit discretionary powers. These normally include the degree of congruity with the agency work plan and objectives, the potential of the case (in terms of economic impact and deterrence value) and the prima facie strength of the evidence. Competition agencies also need to have competent, motivated and highly qualified staff which adheres to strict integrity standards.

**Monitoring and evaluation:** Monitoring and evaluating of the effectiveness of the agency is also an important element to track progress against benchmarks and learn from experience. This can be done by looking at

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<sup>1</sup> The ICN provides information about competition authorities in various countries and initiatives to strengthen competition law.

both output and outcome measurements. Agencies typically engage in three major types of evaluation: 1) evaluation of the efficiency of agency procedures (including the investigative process and litigation) based among others on activity indicators and informal internal evaluation; 2) evaluation of impact of cases on the directly affected markets or markets other than the directly affected market (deterrence effect); and; 3) evaluation which goes beyond cases and takes into account the agencies' advocacy and communication campaigns.

**Accountability:** There are different types of accountability, including formal accountability to a political oversight body such as Parliament and general accountability to the stakeholders.

**Independence:** It is generally agreed that competition agencies should be independent to ensure that their actions are legally and not politically motivated. While remaining influential with government, agencies therefore need to stay at arm length from government. Independence can be derived from the law, institutional/governance structure and/or the quality of the board and director. Another way to promote the independence of the agency is to ensure that appointments should exceed election cycles. Funding can also affect the accountability and independence of the agency.

**Communication:** Beyond enforcement, agencies have an important advocacy function. Advocacy and communication are also important dimensions of the agencies' activity to achieve effective enforcement, prevent the introduction of anti-competitive laws and build a competition culture.

The US Federal Trade Commission conducted an in-depth self- assessment in 2008, involving more than 30 international consultations with ICN members and identified in the process seven characteristics of good administrative practice for competition agencies which synthesises the above, including (US Federal Trade Commission, 2008):

- A clear statement of the agency's purpose, with links between the aims and the agency's program and results;
- An internal planning mechanism for establishing a strategy balancing risks and returns, estimating resources;
- A problem solving approach to the agency's activities;

- Mechanism for internal quality control (such as independent assessments by different operating units, scrutiny panels, etc);
- Investments in building and retaining knowledge;
- Communication plans that include education, marketing and networking efforts;
- Processes for routine evaluation of programmes, agency organisation and procedures.

#### How to integrate anti-corruption measures within the framework of institution building<sup>2</sup>

While there is little material dealing specifically with corruption risks at the operational level in the functioning of regulatory agencies – including competition authorities -, the literature suggests that ensuring independence, autonomy, transparency and accountability are the most crucial elements of mitigating corruption risks at the agency level.

#### *Building independent and autonomous regulatory bodies*

The literature suggests a set of accountability and transparency measures that can safeguard the agency against corruption risks (Nawaz, F., 2010). Regulatory authorities should have:

- Vested with a distinct legal mandate;
- Sound human resources practices including professional criteria for appointment, involvement of both legislative and executive branches in appointments, fixed terms for senior staff and protection from removal, staggered terms of appointments;
- Rigorous transparency, including open decision making and publication of decisions and reasons for these decisions;
- Effective, fair and transparent appeal process;
- Scrutiny of the agency's budget, usually by the legislature.

To be autonomous, agencies also need to have their own reliable ring-fenced funding sources, as reliance on budgetary allocations controlled by politicians could potentially undermine the body's independence.

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<sup>2</sup> This section is mainly drawn from the U4 expert answer on [integrating anti-corruption measures in the design of public law enforcement/regulatory agencies](#)

*Transparency and access to information*

It is also important to ensure transparency on processes, operations and performances of the agency by providing public access to information on the agencies' operations, activities and decisions. The Australian Competition and Consumer Commission (ACCC) for example maintains more than twenty public registers which contain submissions from parties, detailing matters such as authorisations and notifications, informal merger clearance, and enforceable undertakings settling court proceedings (Healey, D., 2008). These registers are all publicly accessible on the ACCC website.

*Staff incentives and rules*

As already mentioned, **sound human resource practices** and rules regarding appointments, terms and conditions, competence, etc, can contribute to prevent corruption. Providing the right sets of incentive to staff in terms of salaries, working conditions, or career development opportunities, can play an important role in motivating honest behaviours and retaining competent staff.

In addition, detecting and managing **conflicts of interest** can help reduce incentives for corruption as well as a transparent handling of such conflicts when they occur.

The **revolving door** between the private and public sector is also important to regulate to avoid the formation of corrupt deals between the private and the public sector, with measures aimed at barring staff from the institution from working for the private sector for a certain period of time. Rotating staff who are in regular contact with regulated firms on a regular basis can also be considered, to limit the potential for abuse and collusion between regulators/enforcers and firms managers.

*Oversight mechanisms*

The accountability of the institution can also be strengthened by establishing independent oversight and audit mechanisms. Accountability is facilitated by clear and transparent **internal auditing procedures** as well as by **external control by independent auditors**.

**Third parties monitoring and control** of the agency can also be promoted as a way to strengthen vertical forms of accountability, where stakeholders can participate in the process and prevent capture of the

institution by vested interests. In particular, civil society can play an important role in measuring progress in terms of enforcement and implementation, either through direct participation in monitoring processes or by producing alternative reports. These so-called 'shadow' reporting provides civil society perspective on the state obligations and progress made towards the implementation of competition laws and regulations.

*Complaints mechanisms and whistleblower protection*

As many corrupt arrangements are brought to light by whistleblowers, there need to be effective complaint procedures in place as well as effecting whistleblowing provisions to allow all stakeholders to raise concerns of corruption as well as a broader range of unfair competition.

## 2 The new Agency for Free Trade and Competition in Georgia

*Overview of competition in Georgia**Historical background on competition laws and strategy*

Since 2003, Georgia has gone through an extensive process of reforms and undergone massive deregulation, successfully stimulating economic growth, while raising concerns of unfair competition, poor product safety and lack of consumer protection in the process. In 2005, as part of this process of deregulation and economic liberalisation, a new law on Free Trade and Competition was adopted. According to the Government, this law was adopted as part of the reform of the competition policy aiming, among others, at reducing reportedly widespread corruption accompanying the enforcement of the then existing Law on Monopoly and Competition and thus creating level playing field for market actors (Government of Georgia, 2010).

However, in the view of some observers, the law does not apply sufficiently to agreements restricting competition, concerted practices, abuse of dominant position, and state enterprises (Maliszewska M. et al, 2008). An Agency for Free Trade and Competition was created under the Ministry of Economic Development to oversee the law, with no investigative or enforcement power. From the Government's own account, the

agency lacked both independence and competences (Government of Georgia, 2010).

In the absence of an adequate legal and institutional framework, there is anecdotal evidence that suggests that major monopoly bottle necks exist in the country, particularly in the pharmacy, airlines and import sectors (Transparency International Georgia, 2009).

### *The establishment of the new Agency for Free Trade and Competition (AFTC)*

As part of the negotiations on Deep and Comprehensive Free Trade Agreement (DCFTA) between Georgia and the European Union, the EU has formulated a set of competition related preconditions that promote the establishment of a strong and independent competition authority. A new Agency for Free Trade and Competition (AFTC) as an independent legal entity of public law was established in spring 2010, based on the AFTC's statutes and the respective amendments to the law on Free Trade and Competition. According to the experts consulted within the framework of this query, the agency has not yet been granted appropriate enforcement/investigative and regulatory powers. It is primarily responsible for collecting information on activities of Government bodies which might hinder fair market competition. Although the management and the staff have been appointed, the agency is not active at the moment and there is little indication of a firm political will to make it a strong and effective body, as reflected by Former Minister of Economic Development Kakha Bendukidze's statement: *"The establishment of the anti-monopoly agency is, of course, a step made backwards. But the establishment in the type of format we are planning to do is the least harmful for the economic development"* (Weekly magazine Liberali, 2010).

In December 2010, Georgia adopted a comprehensive national competition strategy that recognises the shortcomings of the current legislation, including:

- The law can not be recognised as a framework law due to shortcomings in terms of absence of key definitions, principles and procedures in the competition area;
- The law is mainly focussed on state aid, while state aid and its granting procedures are not sufficiently defined.

- The AFTC established in the transitional period lacked independence and competences and institutional reform is reportedly underway to address this concerns.

The strategy commits to activities such as elaboration of a new framework law to assure free trade and competition in Georgian markets, international consultations and sharing of best practices in Georgia, preparation of relevant amendments in different laws in Georgia in order to meet the EU requirements for signing the free trade agreement between Georgia and the EU.

### Possible next steps for the AFTC

A few recommendations emerge from the above and experts' input into this query to strengthen Georgia's competition legal and institutional frameworks (Transparency International Georgia, 2009):

1. One of the key priorities would be to overhaul the competition legislation and bring it in line with European practice, based on EU best practice and the Georgian reality.
2. There is now a need to focus on effective implementation of the recently adopted national competition strategy, starting by clarifying some of the provisions and policies outlined in the strategy in areas such as merger control or the definition of dominant position, minimum market share, etc.
3. With regard to the creation of an independent competition authority which is foreseen by the national competition strategy, next steps could include granting the AFTC the necessary independence, equipping it with adequate powers to fulfil its mission, ensuring the full transparency of its operations and activities, and building its technical and institutional capacity.
4. Monitoring and evaluating competition policy activities in terms of the effectiveness of internal agency processes as well as the outcomes of the agency interventions is also an important dimension to consider to ensure effective implementation of the competition strategy. Evaluation activities can be purely internal, but is advisable to involve other stakeholders in the process, including NGOs. Such activities can also be conducted by external experts or organisations. For example, TI Georgia recommended the

establishment of a competition watchdog/monitoring mechanism to assess how the law is implemented, how the agency operates and how effectively it ensures free trade and competition on Georgian markets (Transparency International Georgia, 2009).

### How can donors help in the process?

The presence and quality of competition authorities greatly varies across developing countries. As many donors are involved in private sector development, these types of intervention provide opportunities for strengthening competition regulations and linking this work to anti-corruption. Beyond provision of training, the above mentioned U4 brief makes several recommendations in this regard which could be very relevant to the Georgian situation, with a special emphasis on strengthening:

- The formal frameworks and competition law;
- The institution's financial underpinning;
- The agency staff's competence levels in law and economics;
- The political will/ recognition of the value of independent competition control as well as a strong and non partisan leadership.

Donors support can also include compiling information on lessons learnt from various contexts and countries, carrying assessments of the role and impact of competition authorities and raising awareness on the links between firms' market power and corruption.

In particular, evaluating the competition authorities is an important area of focus for improving the efficiency of competition policy activities, developing a competition culture and providing an impetus for updating and amending laws, guidelines and procedure (UNTCAD, 2007). An important area of intervention for donors could also be to support independent monitoring and evaluation of the competition strategy's implementation. This can also include supporting parallel or "shadow" reporting by civil society organisations that has proved very useful to provide an alternative and independent perspective on the agency's achievements or lack of thereof.

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