



USAID | **GEORGIA**
FROM THE AMERICAN PEOPLE



Governing for
Growth
in Georgia

INSPECTION POWERS OF COMPETITION AGENCY UNDER DCFTA

POLICY PAPER

USAID GOVERNING FOR GROWTH (G4G) IN GEORGIA

22 MARCH 2016

This publication was produced for review by the United States Agency for International Development. It was prepared by Deloitte Consulting LLP. The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

INSPECTION POWERS OF COMPETITION AGENCY UNDER DCFTA

POLICY PAPER

USAID GOVERNING FOR GROWTH (G4G) IN
GEORGIA

CONTRACT NUMBER: AID-114-C-14-00007

DELOITTE CONSULTING LLP

USAID | GEORGIA

USAID CONTRACTING OFFICER'S

REPRESENTATIVE: REVAZ ORMOTSADZE

AUTHOR(S): TBSC CONSULTING

TRADE FACILITATION: 5720

LANGUAGE: ENGLISH

22 MARCH 2016

DISCLAIMER:

This publication was produced for review by the United States Agency for International Development. It was prepared by Deloitte Consulting LLP. The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government

DATA

Reviewed by: : Nino Chokheli, GoG Capacity Strengthening Component Lead, Bondo Bolkvadze, Customs Adviser

Project Component: GoG Capacity Strengthening

Practice Area: DCFTA

Key Words: Competition, DCFTA, EU, Regulation

ACRONYMS

AA	Association Agreement
CSPA	Competition and State Purchasing Agency
DCFTA	Deep and Comprehensive Free Trade Agreement
EU Member Codes	AT (Austria); BE (Belgium); BG (Bulgaria); CY (Cyprus); CZ (Czech Republic); DE (Germany); DK (Denmark); EE (Estonia); EL (Greece); ES (Spain); FI (Finland); FR (France); HR (Croatia); HU (Hungary); IE (Ireland); IT (Italy); LT (Lithuania); LU (Luxembourg); LV (Latvia); MT (Malta); NL (Netherlands); PL (Poland); PT (Portugal); RO (Romania); SE (Sweden); SI (Slovenia); SK (Slovakia); UK (United Kingdom)
EUR	Euro
EU	European Union
FIT	Forensic IT
GDP	Gross Domestic Product
G4G	Governing for Growth in Georgia
OECD	Organization for Economic Cooperation and Development
PPD	Public Private Dialogue
USAID	United States Agency for International Development

CONTENTS

DATA	III
ACRONYMS	IV
1. EXECUTIVE SUMMARY	1
2. METHODOLOGY	3
3. INTRODUCTION.....	4
4. SHORT CONTEXT	5
5. PROBLEM STATEMENT	7
6. ALTERNATIVE POINTS OF VIEW AND EU PRACTICE.....	9
7. THE POINT OF VIEW OF THE COMPETITION AGENCY.....	10
8. OVERVIEW OF EU LEGISLATION AND PRACTICES.....	12
9. ARGUMENTS AGAINST THE CHANGES	16
10. RECOMMENDATIONS.....	19
11. PLAN OF ACTION.....	23
12. APPENDIX ONE – SUMMARY OF DCFTA REQUIREMENTS.....	24
13. APPENDIX TWO – POWER OF INSPECTIONS IN EU JURISDICTIONS	25
14. BIBLIOGRAPHY.....	28

1. EXECUTIVE SUMMARY

The Association Agreement (AA) and Deep and Comprehensive Free Trade Agreement (DCFTA) with the European Union (EU) offer Georgia a framework for modernization. At the same time, it requires approximation of norms and regulations in various sectors, including competition policy and enforcement.

Very importantly, the AA and DCFTA do not obligate Georgia to copy laws from the EU. Rather, approximated laws should not be more restrictive than necessary to fulfill a legitimate objective.

This policy paper concerns approximation requirements from the AA and DCFTA in the area of competition policy with a particular emphasis on the inspection powers of the competition authority in Georgia (*i.e.*, the Competition Agency).

The authors of this policy paper met with key experts in the field, representatives of government and business and organized a public-private dialogue (PPD) to understand concerns *vis-à-vis* competition policy. Their comments and insights were synthesized into policy issues and recommendations for solving the root causes of the policy issues as shown in this paper.

Reforming competition policy is a key requirement of DCFTA. According to the AA, Georgia should have effective anti-monopoly legislation and a competent competition regulatory authority. Georgia's commitments in this field are envisaged by Title IV on Trade and Trade-Related Matters, Chapter 10, of the Association Agenda between the EU and Georgia 2014 – 2017.

Under the framework of legislative approximation, Georgia already has substantial progress in this regard. This included introduction of the Competition Agency, adoption of a Competition Framework Law and a number of sub-normative acts to specify them. However, much remains to be done before Georgia is in full compliance with EU requirements in terms of effective enforcement.

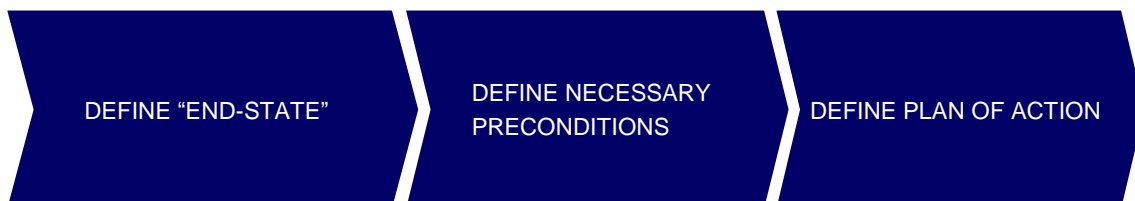
There are six interrelated issues concerning the inspection powers of the Competition Agency. Each is elaborated in the body of this Policy Paper.

- Anti-trust regulation is one of the most important functions of the Competition Agency
- The inspection powers of the Competition Agency are disputable
- To deal this problem, the competition agency is considering to request increased inspection powers
- However, increased inspection powers runs a risk of negative perceptions
- The need to (eventually) give the Competition Agency increased inspection powers (better access to direct evidence) is unquestionable
- As a result, the issue is not whether to give the Competition Agency increased inspection powers (better access to direct evidence), but rather when such a change would be timely and reasonable

Not surprisingly, there are significant differences of opinion on how to proceed in this area. The views of the Competition Agency, practices common in the EU and opinions of opponents of increased inspection powers are discussed later in this Policy Paper.

Georgia has time to improve matters before it becomes a full member of the EU. Therefore, for policy making purposes, the following steps should be followed as shown in the following chart:

Chart 1: Three-Step Process to Increase Inspection Powers of Competition Agency

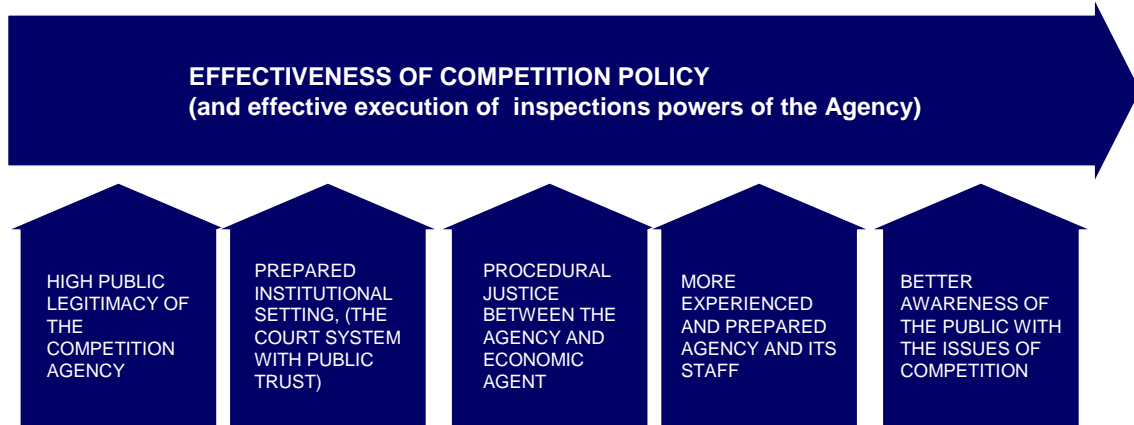


There are several interrelated recommendations on how to proceed from here. They are elaborated in the body of this policy paper.

- End-state inspection powers for the Competition Agency, and their application, should be on par with the best EU practices
- A concrete deadline for meeting all preconditions for the end-state of inspection powers should be set;

- However, inspection powers of the Competition Agency should not be increased until several key preconditions (supporting pillars) are in place

Chart 2: Pillars Underlying Effective Implementation of Competition Policy



- Pillar One: The public legitimacy of the Competition Agency should be increased by changing its governance (e.g., how the Chairman is appointed)
- Pillar Two: The court system should be strengthened to improve oversight and control of the Competition Agency and its decisions

- Pillar Three: A proper procedural balance between the Competition Agency and economic agents (e.g., businesses) should be set
- Pillar Four: The Competition Agency capacity and its staff should become more experienced in anti-trust areas
- Pillar Five: Public awareness of competition issues should be increased.

2. METHODOLOGY

This section briefly describes the process used to prepare this policy paper. There were three phases as described in the following three sub-sections.

Phase I

The initial draft of this Policy Paper was based on secondary and primary research. Secondary research included overview and analysis of existing materials about the topic such as:

- DCFTA and AA and other official documents related to EU – Georgia negotiations;
- Official online portals related to the topic;
- Overview of academic research documents related to EU competition practices;
- Training materials on competition.

Primary research included Key Informant and expert interviews with:

- Representatives of the Competition Agency;
- Foreign experts involved in capacity building of the Competition Agency;
- Experts involved in drafting of the Competition Framework Law;
- Representatives of the business community, including associations and affected businesses;
- Representatives of the non-governmental sector;

The initial draft was written considering input from all these sources.

Phase II

Once preliminary conclusions were reached, it was validated in with the USAID's Governing For Growth (G4G) project as well as representatives of business community (*e.g.*, associations). The conclusions and recommendations were then discussed in a PPD session.

Phase III

The initial draft of this Policy Paper was revised based on PPD results and findings in Phase II (*i.e.*, this document).

3. INTRODUCTION

The AA between the EU and Georgia and one of its most important parts – DCFTA – is a historic chance for Georgia to progress reforms on the way to European integration in terms of liberalization of trade of products, services and capital movement. It is estimated that as a result of this, in the long run that:

- Georgia's Gross Domestic Product (GDP) will increase by 4,3 percent;
- Georgian exports will increase by 12 percent;
- Georgian imports will rise by 7,5 percent.¹

Reforming competition policy was a key requirement of DCFTA. According to the AA, Georgia should have effective anti-monopoly legislation and a competent competition regulatory authority. Georgia's commitments in this field are envisaged by Title IV on Trade and Trade-Related Matters, Chapter 10, of the Association Agenda between the EU and Georgia 2014 – 2017.

Under the framework of legislative approximation, Georgia has already made substantial progress. This included introduction of the Competition Agency, adoption of a Competition Framework Law and a number of sub-normative acts to specify them. However, much remains to be done before Georgia is in full compliance with EU requirements in terms of effective enforcement.

¹ Trade Sustainability Impact Assessment in support of negotiations of a DCFTA between the EU and Georgia. ECORYS and CASE; October, 2012.

4. SHORT CONTEXT

Georgian competition policy was subject to significant changes in recent years. This section summarizes competition policy and enforcement in recent years.

Competition Policy – A victim of liberal ideology

The Georgian Anti-Monopoly Body (Competition Authority) was abolished in 2005. Thereafter there was limited Governmental supervision of competition protection rules and principles. The liberal ideology introduced by former Minister of Economic and Sustainable Development, Kakha Bendukidze, heavily influenced public policy with regards to many aspects of the role of Government and its regulatory functions. This led to significant reduction of the regulatory role of Government and in some cases to complete abolition of regulatory legislation and corresponding regulatory bodies. Competition regulation and the Anti-Monopoly Body were among those things abolished. The ultra-liberal policy of the previous Government is a subject of controversy and public discussion.

Pseudo reversal towards more regulation was driven by DCFTA requirements

Moving toward the EU and its preconditions – DCFTA and AA – necessitated some reversal from the ultra-liberal approach. Therefore actions were taken to meet the basic requirements of DCFTA.

In December 2010, the Government issued a decree to approve a Comprehensive Strategy of Competition Policy. The Strategy outlined key directions towards reforming the competition regulatory environment, including acknowledging the need for a comprehensive framework law and a central regulatory authority.

In May 2012, the Georgian Parliament adopted the Free Trade and Competition Law. In the same year the Competition and State Purchasing Agency (CSPA, a new Competition Authority) was established by a decree of the President. Although augmented in its authority, Government considered that these two elements (Free Trade And Competition Law and the CSPA) met the minimum requirements (EU standards) and no further details were needed. For several years, because of the limited authority of the CSPA, it did not investigate a single case related to unreasonable and illegal limitation of competition or other violation of the Free Trade And Competition Law.

More competition as a pre-election promise and DCFTA requirement

Enhancing competition and limiting the influence of oligopolies in various market segments has been a hot topic for the last few years in Georgia. Therefore, establishment of a dedicated and fully authorized Competition Authority was one of the pre-election promises of the current Government. This was the reason why on the eve of signing DCFTA Government introduced changes in the law, made amendments to the Competition Law and introduced a new Competition Agency. Government justified these moves as necessary moves toward DCFTA.

Consequently, in 2014 the Competition Agency was reformed again. In May 2014, the Free Trade And Competition Law was amended and renamed as the Competition Law. This time, the functions and authorities of the Competition Agency were significantly enhanced. The Competition Law defines the functions of the Competition Agency and its mandate.²

A better competition law and Competition Agency result

The primary objective of the Competition Agency is enforcement of the competition policy in Georgia, create and protect the conditions for developing competition and reveal and prevent any type of anti-competitive actions within the country. The Competition Agency has discretion to decide to analyze and monitor the markets of services and goods. The Competition Agency is accountable directly to the Prime Minister; the Prime Minister appoints and dismisses the Chairman of the Competition Agency.

For the purpose of effective implementation of DCFTA requirements, in July 2014, Georgia's EU Integration Commission adopted the DCFTA 2014 – 2017 Action Plan, which includes activities to be carried out in this direction. A detailed annual Action Plan for 2015 was also prepared. In addition, a needs assessment document was developed, and publicly presented in November 2014. One portion of the Action Plan included planned activities related to competition.

² From this point, the terms the Competition Law and the Competition Agency refer to current arrangements in Georgia.

With this, DCFTA requirements are met

According to our analysis, which is based on interviews with key experts, at this moment the main requirements of DCFTA are met. Chapter 10 of DCFTA is in essence a three-page general requirement sections (only seven articles) and does not provide detailed guidelines related to competition.³ Chapter 10 only specifies the two general and most important aspects of the obligations: Framework Law and Competition Authority (plus transparent Government Subsidies). At this moment, both components are in place and the negotiation process ended satisfactorily in this respect. Georgia's Competition Law and the Competition Agency meet the minimum criteria set by the EU.

But there is significant room for improvement

DCFTA mentions the Competition Law and the Competition Agency in the context of effectiveness. Effectiveness is an arbitrary evaluation and it could be argued that under this, the best EU practices are meant as the comparison target. In this regard, we should admit some of the existing weaknesses both of the current Competition Law and the Competition Agency in several directions. These weaknesses are listed in the following section on the problem statement.

Consequently, as we move towards complete integration into EU, we need to seek ways to continuously improve the effectiveness of the Competition Law and the Competition Agency until we reach a state comparable to the best EU practices. This transition may well take several years, since much supporting technical capacity development is needed.

³ Summary of the requirements of Chapter 10 is provided in an Appendix.

5. PROBLEM STATEMENT

This Section describes the current competition problem in six parts.

Anti-trust regulation is one of the most important functions of the Competition Agency

Out of all matters, anti-trust regulation and effective enforcement is one of the most important functions of competition policy. The requirements of DCFTA state that “Each Party shall maintain an authority responsible and appropriately equipped for the effective enforcement of the competition laws”⁴. The use of the word “effective” is key; simply having a Competition Law and Competition Agency is not sufficient; they must both be effective.

The inspection powers of the Competition Agency are disputable

The inspection powers of the Competition Agency is one area where Georgia lags EU practice. At present, the Competition Agency’s power to carry out effective inspections is limited, such as:

- The lack of power to carry out unannounced inspections;
- Limited access to direct evidence;⁵
- No sanctions on businesses for non-compliance;
- No on-site inspections are permitted in case of self-initiative by the Competition Agency.

More complete descriptions of these problems are provided below.

Out of the four problems listed, the lack of power to carry out unannounced inspections is the most painful. It is argued that the Competition Agency cannot obtain direct evidence in case of cartel agreements and as a result the Competition Agency cannot reveal cartel agreements. Although not yet public, we were told that the Competition Agency used its limited access to direct evidence as an argument supporting the use of a lower standard of proof (*i.e.*, indirect evidence) in the recent anti-trust case with oil companies.⁶

To deal this problem, the Competition Agency is considering to request an increased inspection powers

To increase the effectiveness of its work, the Competition Agency recently advanced the idea to increase the inspection power of the Competition Agency in all four directions noted previously:

- Conduct unannounced inspections, but with court decision;
- Access more information during inspections;
- Propose sanctions for non-compliance;
- Permit site inspections in case of self-initiative by the Competition Agency.

At the moment of writing this policy paper, none of these ideas have a form of amendments to the Competition Law. However, the ideas are well-presented in writing and the likelihood of their advancement as a proposed amendment in the coming months is high.

However, increased inspection powers run a risk of negative perceptions

If the above considerations take the form of the amendments to the Competition Law, it may frighten the business community. Recent rumors of such changes have already caused controversy. Some commentators claim that by doing so, Government will create another regulatory monster, which runs counter to the objective of having a welcoming business environment. To the end, it is argued that increasing the powers of the Competition Agency could actually hurt their own reputation. The recent

⁴ DCFTA, Chapter 10, Article 204.

⁵ Direct evidence is evidence that does not require any reasoning or inference to reach a conclusion. For example, if a person looked outside a window and saw rain falling, that is direct evidence that it rained.

⁶ Indirect evidence is evidence that requires reasoning or inference to reach a conclusion. For example, if a person heard distant pitter patter, and later walked outside and saw that the ground was wet, smelled freshness in the air and felt that the air was moist, those sensations would be indirect evidence that it rained.

case of investigation of the oil importers sector demonstrated a tendency towards negative public perceptions.⁷

Therefore, the decision to expand the powers of the young and inexperienced Competition Agency when there are signs of political influence may lead to unintended consequences. All changes need to be carefully considered.

The need to (eventually) give the Competition Agency increased inspection powers (better access to direct evidence) is unquestionable

To carry out the policy and reveal cartels, all Competition Authorities need very quick and effective access to both direct and indirect evidence. Without such competencies, Competition Authorities simply cannot defend a competitive business environment.

In the modern business, the way cartels are formed become more and more sophisticated and advanced. The difficulty of obtaining direct evidence rises proportionately. No one questions the need of access to direct evidence in this regard.

As a result, the issue is not whether to give the Competition Agency increased inspection powers (better access to direct evidence), but rather when such a change would be timely and reasonable

On the one hand, full inspection powers are a central and required part of anti-trust regulation in all EU jurisdictions. Eventually, the Georgian Competition Agency will need such powers if it is to perform its mandate.

On the other hand, due to the fact that the Competition Agency is very young; it did not create strong enough reputation; and requires significant human capital development it is not yet prudent to give full inspection powers to the Agency. This is neither required under DCFTA. Consequently, the question is when such a decision is reasonable and timely and what set of powers should the Competition Agency have at this point in time and under these circumstances.

⁷ In 2015, the Competition Agency announced results from its first important anti-trust investigation in the oil importer sector. The way the study was initiated (following a public announcements by the Prime Minister) gave many the impression of political influence; this greatly hurt the reputation for independence of the Competition Agency. The standard to which the investigation was done is a separate issue; we were told that the case is based entirely on indirect evidence that will be easily refuted in court. The court case will attest or disapprove the effectiveness of the Competition Agency's work.

6. ALTERNATIVE POINTS OF VIEW AND EU PRACTICE

In the following Sections, three perspectives are provided as depicted in the following chart. First, we provide a more detailed legal review of the problem from the perspective of the Competition Agency; this is the basis for seeking changes. Then, we review best practices in terms of inspection powers, both at the level of EU (*i.e.*, Commission of European Communities) and the level of individual EU Member State jurisdictions. Finally, we provide opposing views and arguments against proposed changes.

Chart 3: Alternative Points Of View Concerning Inspection Powers Of Competition Agency



The following observations about inspection powers from different points of view are presented in a neutral format; the observations are not the views of the authors of this policy paper. Our conclusions, based on an analysis of the alternative viewpoints augmented with the best EU practices, follow later.

7. THE POINT OF VIEW OF THE COMPETITION AGENCY

This section summarizes an internal legal review document provided by the Competition Agency concerning increasing its inspection powers (to better obtain direct evidence). The next-following section discusses practices in the EU concerning inspection powers of Competition Authorities (to obtain direct evidence), compared to the situation in Georgia. The second-following section discusses a number of arguments against increasing the inspection powers of the Competition Agency (to better obtain direct evidence).

These observations about inspection powers from the point of view of the Competition Agency are presented in a neutral format; the observations are not the views of the authors of this policy paper. Our conclusions, based on an analysis of the alternative viewpoints augmented with the best EU practices, follow later.

The Competition Agency's power to conduct unannounced on-site inspections is limited

The Competition Law defines the authority of the Competition Agency in the process of investigation. Article 18, Article 23 and Article 25 are related to this point. Namely, according to sub-point “e” of Article 18, the Competition Agency has the right to do on-site inspections of the economic agent (*e.g.*, business). Point 8 of Article 25 defines special conditions to execute on-site inspections. Namely, the Competition Agency is authorized to apply to the court with motivated request to carry out an on-site inspection in certain cases.

However, neither the Competition Law, nor the Law On Controlling Entrepreneurship Activity or the Administrative Procedural Code envisions special rules for procedural activities carried out by the Competition Agency during an on-site inspection. Consequently, by default this process falls under Chapter VII of the Administrative Procedural Code, which is related to general inspection of entrepreneurship activity. Article 21 (part 2) of the Administrative Procedural Code defines the obligations of the court; it stipulates that after receiving a request from the Competition Agency, the court is empowered to decide without oral hearing and to notify the economic agent or its representative about potential inspection within 24 hours and send relevant materials.⁸

It is argued that the 24 hour advance warning gives the economic agent the opportunity to conceal or destroy evidence. Consequently, it is concluded that for the effective functioning of the Competition Agency, specifically in relation to anti-trust policy, the Competition Agency should have much broader power to carry out unannounced inspections.⁹ This could be done based on a court decision without notifying economic agents about the pending inspection. Also, it is argued that it should be possible in urgent and extreme cases to carry out inspections without the court decision (within reasonable time after which to apply to court with the request to issue permission and approval).

During an inspection of an economic agent (*e.g.*, business), the Competition Agency has access to much, but not all, direct evidence

Article 18, sub-point “e” of the Competition Law, authorizes the Competition Agency to carry out on-site inspections, which include (Point 10):

⁸ That is, the subject of the investigation (*i.e.*, a company) is notified 24 hours in advance of any inspection by the Competition Agency.

⁹ Emphasis added.

- Examine documents related to the activity of the economic agent, including financial and economic documents, regardless their confidentiality
- Make copies of the documents listed in previous point
- Receive clarifications from the economic agent on the site
- Have access to legal or actual place of the economic agent.

The Competition Agency does not have power to obtain all direct evidence. Namely, the Competition Agency lacks authority to check private or business electronic correspondence of the economic agent or check phone conversations or conduct inspections in private places related to the economic agent (e.g., cars, homes), where direct evidence could be located.

It is argued that the lack of access to all direct evidence is a huge gap that works against the effectiveness of Competition Agency in terms of carrying out anti-trust policy.

There are no sanctions on non-compliance to requests for clarification

According to Article 18 (Point 1, Sub-point D) and Article 25 (point 6) of the Competition Law, during the course of investigation, the Competition Agency invites interested parties for clarifications. However, the Competition Law does not set out sanctions against economic agents for not complying with this rule. The Competition Agency lacks the ability to compel the economic agent to come and provide clarifications, which represents an obstacle in the investigative process.

Without a specific sanction established for non-compliance, the ability to request clarifications is ineffective.

Agency lacks power to initiate on-site inspections in case of self-initiative

According to the Article 25 (Point 7) of the Competition Law, the Competition Agency has the authority to conduct on-site inspection of the economic agent (e.g., business), against which the Competition Agency receives a complaint or an application from a third party. However, the competition Agency does not have the power to conduct on-site inspections in cases where the investigation is initiated by the competition Agency itself, rather than based on the application or a complaint of a third party.

8. OVERVIEW OF EU LEGISLATION AND PRACTICES

This section discusses practices in the EU concerning inspection powers of Competition Authorities (to obtain direct evidence), compared to the situation in Georgia. The previous section summarized an internal legal review document provided by the Competition Agency concerning increasing its inspection powers (to better obtain direct evidence). The following section discusses a number of arguments against increasing the inspection powers of the Competition Agency (to better obtain direct evidence).

There are two levels of applicable competition legislation for EU members: The Commission of The European Community (Commission) and individual jurisdictions of EU Member States (Member Competition Authorities). The following sub-sections first explore Commission-level regulation followed by Sub-Sections at the level of Member Competition Authorities.

Unannounced inspections of economic agent (*e.g.*, business) premises at commission level

Unannounced inspections of business premises have always been the Commission's most important tool in its fight against cartels and other anticompetitive behavior.¹⁰

Articles 20 and 21 of Regulation No 1/2003 of the Council of European Union define the rules of inspection by the Commission together with the Member Competition Authority if there is an infringement of Articles 81 and 82 of the Treaty.¹¹ Namely, Article 20 stipulates that during an inspection of an economic agent (*e.g.*, business), authorized representatives of the Commission are empowered to:

- Unlimited access to any premises, land and means of transport of the economic agent;
- Examine books and take copies and extracts;
- Seal the economic agent premises and books;
- Ask any representative of the economic agent questions related to the subject-matter.

This power can be delegated to the Member Competition Authority in whose territory the inspection is to be conducted, if the Commission or Member Competition Authority asks about active assistance. Moreover, the Member Competition Authority can conduct an inspection on behalf of the Commission.¹²

Unannounced inspections of private premises (*e.g.*, not business) at commission level

Article 21 of the same regulation states that if there is a severe infringement of Articles 81 and 82 of the Treaty and if there is a reasonable belief that relevant books or other records related to the economic agent (*e.g.*, business) and to the subject-matter of the inspection are kept in any other premises, land and means of transport (including the homes of directors, managers and other members of staff of the economic agent and associates of the economic agent), then the Commission can order an inspection to be conducted in such other premises, land and means of transport.

This decision should be consulted with the Member Competition Authority and should be authorized by of the judicial body of the member state. The responsibility and function of the judicial body of the member state is to review the authenticity and reasonableness of the decision of the Commission and evaluate whether the proposed measures are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement and to the importance of the evidence sought.

¹⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009SC0574&from=EN>

¹¹ COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

¹² Article 22 of the same regulation.

The first inspection of private premises took place in the context of the marine hose cartel investigation.¹³ The inspection was carried out in May 2007 by Commission’s inspectors in the premises of several marine hose producers in France, Italy and the United Kingdom. In parallel, the Commission inspected the private premises of a director of one of the involved producers in the United Kingdom. The Commission found sufficient evidence in the private premises to enable the Commission to fine the cartel 131 million EUR in January 2009.

Since this first successful experience, the new investigation tool (introduced by Article 21) became an instrument for the Commission in its fight against ever-developing cartels.

Inspections of economic agent (e.g., business) and private (e.g., non-business) premises at the level of EU member states

In all EU member state jurisdictions, Member Competition Authorities have the power to carry out unannounced inspections of economic agent premises to ensure that evidence is not destroyed. However, there are several legal bases upon which these inspections are carried out.

In many jurisdictions, the Member Competition Authority has the power to conduct announced inspections with or without warrant of the court. In some cases, if the Member Competition Authority carries out an inspection without a court warrant, it is limited to only business premises such as in the United Kingdom. In some instances, special conditions apply to special types of business premises such as doctor or lawyer offices, where the presence of judge or a representative of a relevant professional association is needed such as in Portugal.

There is a variation of the scope of checks envisioned by the competition laws in different jurisdictions. For instance, in Latvia there are two types of checks: Plain Visits and Inspections. In Poland, there are two types of inspections: Plain Inspection and Inspection with Search, the later requiring a court warrant. The Competition Authority in Poland has the right not to announce the inspection before it is initiated.

Comparison of Competition Authority inspection powers in EU jurisdictions and Georgia

The following charts compare Georgia to EU member states in terms of powers of Competition Authorities to carry out unannounced inspections. A more detailed overview of differences in practices among EU Member States is shown in an Appendix.

Chart 4: Comparison Inspection Powers for Economic Agent (e.g., business) Premises in EU Member States and Georgia

INSPECTION POWER	SITUATION IN EU JURISDICTIONS ^{14, 15}	SITUATION IN GEORGIA
<ul style="list-style-type: none"> The Common Ground for Launching Inspections 	<ul style="list-style-type: none"> Reasonable Suspicion 	<ul style="list-style-type: none"> Reasonable Suspicion
<ul style="list-style-type: none"> Authority to Initiate Unannounced Inspection 	<ul style="list-style-type: none"> A court warrant is required [AT, BG, DE, DK, EE, FR, HU, IE, LT, LV, PL, PT, SV, UK] Decision of the Member Competition Authority is sufficient [BE, COM, CY, CZ, EL, ES, FI, IT, LU, MT, NL, PL, RO, SI, SK, UK] 	<ul style="list-style-type: none"> Not Possible

¹³ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009SC0574&from=EN>

¹⁴ AT (Austria); BE (Belgium); BG (Bulgaria); CY (Cyprus); CZ (Czech Republic); DE (Germany); DK (Denmark); EE (Estonia); EL (Greece); ES (Spain); FI (Finland); FR (France); HR (Croatia); HU (Hungary); IE (Ireland); IT (Italy); LT (Lithuania); LU (Luxembourg); LV (Latvia); MT (Malta); NL (Netherlands); PL (Poland); PT (Portugal); RO (Romania); SE (Sweden); SI (Slovenia); SK (Slovakia); UK (United Kingdom).

¹⁵ Numbers in parentheses after an EU Member name means that several regimes apply in the corresponding country and this particular power is applicable only within some regimes.

INSPECTION POWER	SITUATION IN EU JURISDICTIONS ^{14, 15}	SITUATION IN GEORGIA
• Possibility to Make Copies Of Original Documents	• All jurisdictions	• Possible
• Possibility to Seize Original Documents	• Not all of Member Competition Authorities can seize original documents during inspections	• Not possible
• Possibility to Collect Digital/Forensic Evidence	• All jurisdictions	• Not possible
• Possibility to Seal Premises	• All jurisdictions except for AT, IE and LU	• Not possible (court warrant is required to temporarily stop certain activity of the economic agent)
• Power to Ask Questions During Inspections	• All jurisdictions	• Possible
• Police Assistance	• Available in most jurisdictions • In some cases compulsory [BG, FR (2), LU, LV]	• NA
• Enforcement Measures And Sanctions for Non-Compliance	• Sanctioned in almost all jurisdictions	• Sanctioned partially • Sanctions for not providing information • No sanctions for not visiting the Competition Agency during the inspection process

Chart 5: Comparison Inspection Powers for Non-Economic Agent (e.g., non-business) Premises in EU Member States and Georgia

INSPECTION POWER	SITUATION IN EU JURISDICTIONS ^{19, 20}	SITUATION IN GEORGIA
• Possibility to Inspect Non-Business Premises	• Envisaged in the vast majority of jurisdictions (AT, BE, CY, CZ, DE, EE, EL, ES, EU, FI, FR, HU, IE, LT, LU, LV, MT, NL, PL, PT, RO, SV, SI, SK, UK)	• Not possible
• The Common Ground for Launching Inspections	• Reasonable Suspicion	• NA
• Authority to Initiate Unannounced Inspection	• A court warrant is required [AT, BG, DE, DK, EE, FR, HU, IE, LT, LV, PL, PT, SV, UK] • The Member Competition Authority can decide, but the presence of a judge or prosecutor is compulsory. [EL]	• NA
• Possibility to Make Copies of Original Documents	• Same as economic agent premises	• NA

INSPECTION POWER	SITUATION IN EU JURISDICTIONS ^{19, 20}	SITUATION IN GEORGIA
<ul style="list-style-type: none"> • Possibility to Seize Original Documents 	<ul style="list-style-type: none"> • Same as economic agent premises 	<ul style="list-style-type: none"> • NA
<ul style="list-style-type: none"> • Possibility to Seal Premises 	<ul style="list-style-type: none"> • Possible [BE, DE, EE, EL, HU, LU, LV (in part), RO, SI, SV, UK] • Not possible [AT, CZ, DK, EU, FI, FR, IE, LT, MT, NL, SK] 	<ul style="list-style-type: none"> • NA
<ul style="list-style-type: none"> • Power to ask Questions During Inspections 	<ul style="list-style-type: none"> • Possible with some exceptions 	<ul style="list-style-type: none"> • NA
<ul style="list-style-type: none"> • Police Assistance 	<ul style="list-style-type: none"> • Some difference with economic agent premises 	<ul style="list-style-type: none"> • NA
<ul style="list-style-type: none"> • Enforcement Measures and Sanctions for Non-Compliance 	<ul style="list-style-type: none"> • Sanctioned in some jurisdictions 	<ul style="list-style-type: none"> • NA

9. ARGUMENTS AGAINST THE CHANGES

This section discusses a number of arguments against increasing the inspection powers of the Competition Agency (to better obtain direct evidence). These arguments were raised by key informants, experts and representatives of the business community during our work. The second-preceding section summarized an internal legal review document (provided by the Competition Agency) concerning increasing its inspection powers (to better obtain direct evidence). The preceding Section discussed practices in the EU concerning inspection powers of Competition Authorities (to obtain direct evidence), compared to the situation in Georgia.

These observations about inspection powers from the point of view of opponents to changes in inspection powers are presented in a neutral format; the observations are not the views of the authors of this policy paper. Our conclusions, based on an analysis of the alternative viewpoints augmented with the best EU practices, follow later.

Intense resistance to additional regulation by business is grounded in the past

It comes with no surprise that any additional regulation causes a legitimate objection and counter arguments from the side of business community. We were told by an international competition expert that almost all new EU member states went through this stage, all showed resistance against competition regulation. It seems natural and anticipated. This is true in particular to Georgia, in which a negative memory of the abuse by state regulators (e.g., Financial Police; Revenue Service) from the past, although gone, still influences the business community.

Business community representatives admit that today the business environment is mostly free from such interventions; the cause of the fear is largely gone. However, complete eradication of these negative memories will require a considerable period of consistent exercise of the present non-disturbance policy by Government.

Not surprisingly, any new business regulation triggers negative memories of the past, which might lead to dire consequences for the business and the fragile investment climate in Georgia.

Giving additional inspection powers to the Competition Agency will have no practical sense in terms of revealing cartels

It is argued that in a practical sense revealing a cartel is an enormous and very complex task, not only in Georgia, but in any place. Even in countries where expansive inspection powers are given to the Competition Authority, there are not many cases where cartel behavior was proved. The relative paucity of successful cases reflects the difficulty of proving cartel behavior.

Some therefore believe that giving increased inspection powers to the Competition Agency will not appreciably improve the effectiveness of anti-trust policy.

Giving additional inspection powers to the Competition Agency may damage the reputation of the Competition Agency

Given the limited public legitimacy (perceived lack of independence) and not strong reputation of the Competition Agency (all explained later), giving increased inspection powers to the Competition Agency would be perceived negatively by the business community.

In addition to this, since the usual suspects in cartel cases are large companies who mostly provide basic commodities to the population, there is a perceived risk that the Competition Agency would be used as a political instrument to manipulate social issues.

There are several main obstacles foreseen by business on the way to these changes

There are several major aspects, which might prevent the Competition Agency to exercise increased inspection powers effectively.

- Relatively low legitimacy (perceived lack of independence) of the Competition Agency due to the way its Chairman is appointed;
- Limited experience and qualification among Competition Agency staff;
- The qualification and competence of the courts in competition issues is low.

Each of these issues is elaborated in the following sub-sections.

The Competition Agency does not enjoy high legitimacy; there is perceived lack of independence

It comes as no surprise that the perceived formal and informal independence of any Competition Authority from external influences (or the lack thereof) is a key influencer of opinion on the legitimacy of the Competition Authority. This is true in all jurisdictions, as well as Georgia. Independence allows the Competition Authority to resist demands that serve special interests at the expense of the larger public welfare and provides greater confidence and trust that its decisions are impartial.¹⁶ In an Organization for Economic Cooperation and Development (OECD) survey on competition policy, greater independence was the factor most frequently identified as likely to lead to better promotion of Competition Law objectives.¹⁷

Factors that strongly affect formal independence are:

- Legal and structural separation of the Competition Authority from Government;
- The body that appoints members of the Competition Authority;
- Criteria used when appointing members of the Competition Authority;
- The appointment tenure of members of the Competition Authority;
- Rules on conflicts of interest and rules determining compatibility and political affiliations;
- The grounds and procedure for dismissal of a member of the Competition Authority before the end of their mandate;
- Existence of adequate human and financial resources and autonomy in using them.

The informal independence of a Competition Authority depends on the perceived strength of its leadership, which very much depends on the people appointed as Chairman or member of the Competition Authority.¹⁸

Study of EU practices shows that while there is not a single accepted model of institutional design that is considered optimal, the Commission clearly stresses the necessity of guaranteeing the independence of Member Competition Authorities.¹⁹ For that purpose, having minimum guarantees or safeguards of independence in place gives Competition Authorities the necessary authority to act and increases real and perceived impartiality and credibility of the actions of the Competition Authorities.

The way the Chairman of the Georgian Competition Agency is appointed is a subject of critique and negatively affects the reputation of the Competition Agency as being independent from political influences. The Chairman of the Competition Agency is appointed by only one branch of power, the Prime Minister in this case, and the Prime Minister has the power to dismiss the Chairman at any time. Because of this, businesses do not have assurance that the Competition Agency will be free from political influence in their decisions. The image of the Competition Agency as objective suffers as a result.

The background of the recent anti-trust investigation in the oil sector was a clear example, which left the perception of such political influence.

There is limited experience and qualification among competition agency staff

The inspection function of the Competition Agency is very complex and difficult; it requires highly developed human and institutional capacity and experience.

¹⁶ Principles for the Independence of Competition Authorities; Sofia Alves, Jeroen Capiou and Ailsa Sinclair; European Commission, Brussels. Competition Law International Vol 11 No 1 April 2015.

¹⁷ OECD, Global Forum on Competition; 'The Objectives of Competition Law and Policy: Note by the Secretariat' (2003) Session 1, Doc No CCNM/GF/COMP(2003) 3, 8 www.oecd.org/daf/competition/prosecutionandlawenforcement/34375749.pdf accessed 15 January 2015.

¹⁸ Principles for the Independence of Competition Authorities; *op cit*²⁰

¹⁹ Communication from the Commission to the European Parliament and the Council; 'Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives' COM (2014) 453, the accompanying 'Staff Working Documents: Ten Years of Antitrust Enforcement under Regulation 1/2003' SWD (2014) 230 and 'Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues' SWD (2014) 231.

The Competition Agency is young and its experience is very limited. This could become a hurdle in the way to effectively enforce additional inspection powers by the Competition Agency. It is perceived, that even within the limited inspection powers at present, the Competition Agency could not do its best during the recent oil sector case.

The qualification and competence of the courts in competition issues is low, making effective control of the Competition Agency by the courts problematic

Currently, the court system is the only external body who could control decisions made by the Competition Agency, reverse wrong decisions and generally guarantee that the Competition Agency's power is balanced. Included in this is checking whether the grounds for starting an inspection are sound and legitimate and that penalties are legitimate and fair.

Given the present limitations of the Competition Agency in terms of human and institutional resources as well as suspicious political influence from Government, the need for such a highly competent external balance and control is vital. It is argued that the court system in Georgia does not yet have these competencies.

On the procedural side, there is a complaint that companies are not given sufficient time to object before final decisions about penalties are made and published.²⁰

²⁰ During the recent case of oil industry, the oil companies were not given sufficient time to prove their innocence before the final decision was made.

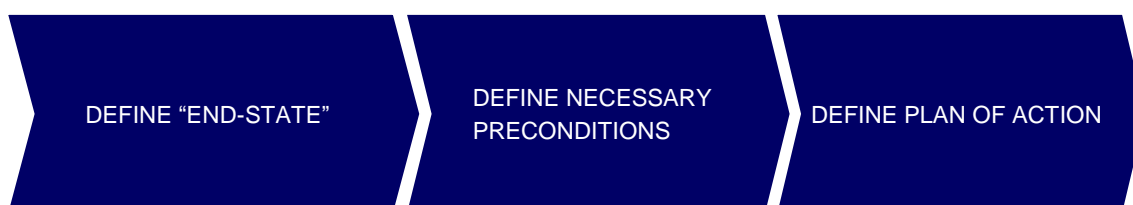
10. RECOMMENDATIONS

Despite the fact that DCFTA immediate requirements vis-à-vis competition policy are met and the Competition Law and Competition Agency are in place, many questions related to effectiveness remain. It is certain that eventually inspection powers of the Competition Agency should be very much in line with the practices of EU Members.

Therefore, for policy making purposes the following steps should be taken as shown in the chart:

- Define end-state inspection powers and when they should be in place and in use;
- Define necessary preconditions for actually applying the end-state inspection powers (conditions that must be satisfied before the inspection powers can be applied);
- Define and implement a plan of action (organizational development so that the necessary preconditions are satisfied at the time the end-state inspection powers are actually applied).

Chart 6: Three-Step Process To Increase Inspection Powers Of Competition Agency



10.1. DEFINE END-STATE INSPECTION POWERS

The end-state inspections powers for the Competition Agency includes a recommended list of powers as well as recommend timeline to achieve the end-state. This section describes these powers and timelines.

End-state inspection powers for the Competition Agency, and their application, should be on par with the best EU practices

EU experience shows that effective inspection is an inseparable part of anti-trust investigation. Effective inspections mean full and uninterrupted access to all direct and indirect evidence, which might contain the indications to the violation of the Competition Law.

Therefore, the Competition Agency should be equipped with all necessary instruments to conduct effective inspections including:

- Ability to conduct unannounced inspections of economic agents (e.g., businesses) based on court warrant;
- Access to digital/forensic evidence;
- Access to non-economic agent (e.g., non-business) premises with necessary preconditions such as reasonable suspicion and court warrant and with collaboration of other state authorities;
- Sanctions for non-compliance to requests for clarification;
- Power to initiate inspections at discretion of the Competition Agency itself.

A concrete deadline for meeting all preconditions for the end-state of inspection powers should be set

Achieving the end-state shown in the previous recommendation will require several years of hard work on legal matters and capacity development of the Competition Agency and the court system. It took years for EU Members to take the same path. Nevertheless, doing the hard work was worthwhile to permit EU Members to have effective enforcement of their competition laws. The transition time was used to work out all required preconditions to successful realization of competition policy objectives.

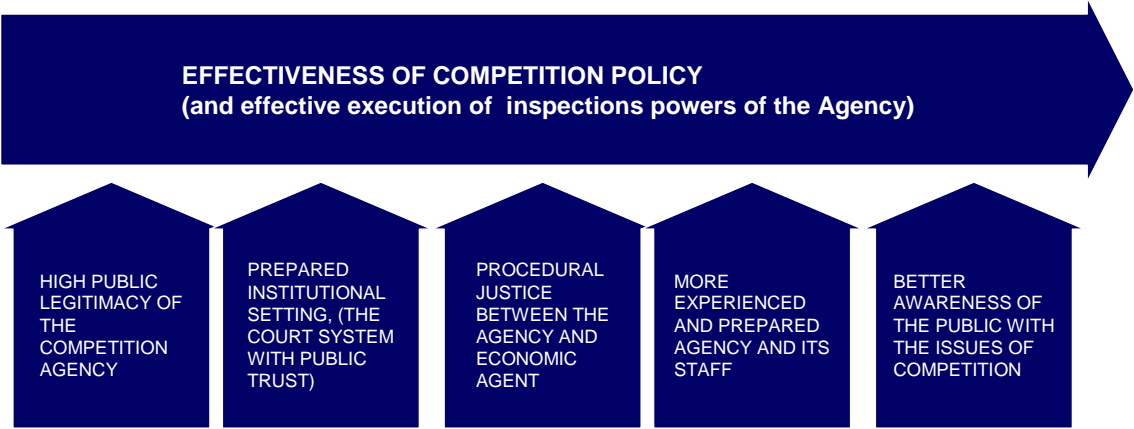
Therefore, for practical purposes, the end-state cannot be accomplished any time soon and there is no need to do so. Our analysis shows, that Georgia is up-to-date in terms of major requirements of DCFTA and we recommend that there is no need to make unnecessarily hasty changes in this regard.

Instead, a concrete deadline and intermediate milestones should be set against which a development plan should be adopted. Success in the development plan will satisfy the necessary preconditions (discussed in the next Section). The Government should set the concrete deadline, intermediate milestones and development plan.

10.2. PRECONDITIONS (PILLARS OF EFFECTIVE COMPETITION POLICY)

The effectiveness of competition policy in general and the effective execution of inspection powers by the Competition Agency in particular, must be considered within the broader context of political, human and institutional settings, which represent its key supporting pillars as shown in the following chart. If one pillar is flawed, policy effectiveness will not be achieved.

Chart 7: Pillars Underlying Effective Implementation Of Competition Policy



Inspection powers of the Competition Agency should not be increased until several key preconditions (supporting pillars) are in place

Georgia faces a chicken-and-egg situation for competition policy: there can be no effective enforcement without suitable inspection powers, but no inspection powers can be granted without experience in effective enforcement.

This quandary should be resolved by meeting the preconditions over time, and only then implementing new inspection powers. Without this, the proposed changes will be perceived negatively and will have adverse effects on business and Georgia’s investment climate.²¹ Hence it will not be considered effective.

The following Sub-Sections show recommendations on each pillar.

Pillar one: The public legitimacy of the Competition Agency should be increased by changing its governance (e.g., how the chairman is appointed)

As noted previously, at present the Chairman and overall work of the Competition Agency is perceived to be politically influenced. In such a situation, public legitimacy and corresponding public trust of the Competition Agency cannot be high.

Some of the aspects of institutional set up and governance of the Competition Agency should be revised, namely:

- Ensure legal and structural separation of the Competition Agency from Government;

²¹ The public perception of the very first cases investigated by Competition Agency proves this opinion.

- Allocate adequate human and financial resources to the Competition Agency and provide autonomy in using them;
- Redistribute the power to appoint the Chairmen among two or more branches of Government;
- Assure fixed length of the tenure of appointment the Chairman (*e.g.*, term appointment that does not match the tenure of Parliamentary elections, ensuring occasional co-habitation);
- Define clear grounds and procedure for dismissal of the Chairman before the end of its mandate;
- Revisit and redefine criteria for appointment of the Chairman;
- Reaffirm rules on conflicts of interest and rules determining compatibility and political affiliations.

Having such minimum guarantees or safeguards of independence in place, coupled with strong leadership, will provide the Competition Agency the necessary authority to act independently, which will increase real and perceived impartiality and credibility of the Agency. This in turn will increase the legitimacy of the work of the Competition Agency and consequently will strongly contribute to effective execution of competition policy.

Pillar two: The court system should be strengthened to improve oversight and control of the Competition Agency and its decisions

Just and competent courts will ensure that the inspection power of the Competition Agency is not abused. The court will play a pre-supposed role of filtering and neutralizing inspections with wrong motivation by the Competition Agency and play a role of a just and trusted arbiter.

Currently, Georgian courts cannot fulfill this role. Perceptions of their political independence as well as their level of knowledge and competence in competition cases should be considerably enhanced. This will require the following activities:

- Reinforce the specialization of the competent court by introducing a competition sub-division or specialized judges;
- Provide lawyers necessary theoretical basics in economics and competition policy and EU case law;
- Provide lawyers easy access to competition cases from European Commission and individual EU jurisdictions;
- Exercise simulated cases;
- Devise a twinning program of lawyers with other EU jurisdictions, which will include knowledge sharing and capacity building;

Pillar three: A proper procedural balance between the Competition Agency and economic agents (*e.g.*, businesses) should be set

At present, economic agents do not enjoy procedural justice. Procedural balance should be increased through two legislation changes:

- Introduce procedure of issuing Statement Of Objections;
- Introduce the Commitment Procedure.

The Statement Of Objections procedure should provide the economic agent time and opportunity to provide documented responses to preliminary conclusions (*i.e.*, a Statement of Objections) reached by the Competition Agency before decisions are officially published and economic agents are penalized. The Commitment Procedure should provide the opportunity to economic agents in some instances to end an investigation by voluntarily offering commitments to meet the competition concerns identified.

Both procedures are the best EU practices, which are not envisioned by the current Georgian competition legislation.

This change will help companies avoid additional expenses related to court appeals and give them the chance to prove their innocence. Through this, a preventive role of the competition regulation will be emphasized.

We understand that to accommodate more time to the economic agent for responding to Statement Of Objections, the investigatory time for the Competition Agency should not be limited. Therefore, this change will require commensurate prolongation of the time allocated to the Competition Agency to finish the investigation of the case.

These changes in the competition legislation should be enacted as soon as possible.

Pillar four: The Competition Agency capacity and its staff should become more experienced in anti-trust areas

The Competition Agency and its staff should become more prepared by:

- Perform constant and periodic development of sectoral studies;
- Strengthen human capacity of the Competition Agency by targeted on-job trainings and workshops with cooperation of EU Competition Authority members;
- Mobilize a semi-permanent foreign practitioner within the Competition Agency to actually do sector studies and teach staff by doing.

First of all, this is important for the reputation and effective work of the Competition Agency. Qualification will entail more trust from the public and more attention from the side of businesses, who are potential offenders. Again, through this, the preventive function of the Competition Agency will be reinforced.

In addition to this, effective collaboration of the Competition Agency with other competent bodies of Government such as Revenue Service, Audit Department, Tax Police (particularly when the Competition Agency's human capacity is limited), should be emphasized.

Pillar five: Public awareness of competition issues should be increased by means of careful awareness and reputation management

Awareness of the public about the importance of fair competition is critical for overall effectiveness of competition policy. Unless society is strongly convinced of the virtue of fair competition, any action of the Competition Agency will be perceived negatively with a loss of public acceptance.

The following should be done:

- Plan and execute a comprehensive reputation study of businesses and general public;
- Based on the study, plan and execute large information/image campaign to inform public about the virtues of free competition and update businesses about the new rules;
- Introduce within the Competition Agency a PR/Marketing department to manage the reputation of the Agency;
- Continue and strengthen active engagement with business and the NGO community through the means of public discussion and seminars.

Better informing the public about the virtues of competition will increase public involvement in competition issues. Better informing the business community about the consequences of the Competition Law will also reinforce the preventive function of the regulation.

11.PLAN OF ACTION

Achieving the preconditions noted previously should be scheduled as shown in the following chart.

Chart 8: Plan of Action

PROPOSED ACTION	DESCRIPTION	PROPOSED PERIOD TO IMPLEMENT ACTION
<ul style="list-style-type: none"> Set and agree the specific future date when the agency will be given all requested powers 	<ul style="list-style-type: none"> We recommend to set 2020 as the date. This is reasonable period to satisfy all necessary preconditions and prepare the ground for increasing the powers. This is an arbitrary issue and is the subject of public discussion and consensus. 	<ul style="list-style-type: none"> 2016
<ul style="list-style-type: none"> Reform the law to give more public legitimacy to the agency 	<ul style="list-style-type: none"> e.g., redistribution of the power of the appointment of the Chairmen of Agency among two or more branches of state or providing more independence to the Chairman of Agency by term appointment, which does not match the tenure of the ruling party, which appointed. 	<ul style="list-style-type: none"> 2016
<ul style="list-style-type: none"> Reform the law to provide more procedural justice to undertakings under the inspection 	<ul style="list-style-type: none"> Use the examples of EU commission to use power of objections to undertakings to give them more opportunity to claim their innocence in front of court before they are penalized 	<ul style="list-style-type: none"> 2016
<ul style="list-style-type: none"> Reform the court system and train the judges in competition law 	<ul style="list-style-type: none"> This could include creating specialized competition division within the court system and/or the system to randomly distribute court cases among specialized judges. 	<ul style="list-style-type: none"> 2016 - 2017
<ul style="list-style-type: none"> Plan and conduct public information campaign about virtues of competition 	<ul style="list-style-type: none"> This will guarantee that public more is informed about the issues and businesses prepare to follow rules and stop to follow wrong practices (preventive function). 	<ul style="list-style-type: none"> 2016 - 2017
<ul style="list-style-type: none"> Train the Agency's staff 	<ul style="list-style-type: none"> This could include inviting foreign practitioner, who will work on permanent basis. Permanent involvement will make sure that on the one hand he/she is more aware of Georgian reality and on the other hand trains staff by actually doing. 	<ul style="list-style-type: none"> 2016 - 2017
<ul style="list-style-type: none"> Continue to conduct pilot industry economic studies 	<ul style="list-style-type: none"> This will provide useful experience to the Agency staff 	<ul style="list-style-type: none"> 2016 - 2017

12.APPENDIX ONE – SUMMARY OF DCFTA REQUIREMENTS

Requirements related to competition is provided in Chapter 10 of DCFTA. This Chapter is only three pages and contains seven Articles. In a nutshell, the most important requirements of this Chapter to parties are:

- To maintain sound competition legislation;
- To maintain an effective enforcement authority;
- To maintain transparency in state subsidies.

More specifically, Chapter 10 consists of seven Articles as noted in the following:

Article 203 – Principles. This Article states acknowledgement of the parties of 1) the importance of the undistorted competition in their respective markets and 2) the threat that competition distortions may undermine the benefits of trade liberalization between the parties.

Article 204 - Antitrust And Mergers Legislation And Its Implementation. The Article necessitates parties to have comprehensive competition legislation, which effectively deals with anti-competitive practices, including: concerted practices, anti-competitive unilateral conduct of enterprises with dominant market power and concentrations. The competition legislation should provide an effective control of these areas to avoid significant competition distortions and it should be guided with fairness, transparency and non-discriminatory principles. The Article also requires that a country have a dedicated Competition Authority responsible for effective enforcement of this legislation.

Article 205 - State Monopolies, State Enterprises And Enterprises Entrusted With Special Or Exclusive Rights. The Article in effect allows having state enterprises as far as their functioning and performance is subject to competition requirements referred to in Article 203 unless application of these laws obstruct the performance of the particular tasks of public interest assigned to the state enterprises.

Article 206 – Subsidies. This Article obliges the parties to exchange information (e.g., legal basis, form, recipient, amount) about state subsidies that are granted for the production of goods. Placing information on a public web-site can be considered as provided. In relation to subsidies of services, the information can be provided at the request of the other party.

Article 207 – Disputes. This Article provides guidelines for dispute settlement. It refers to Chapter 14 of DCFTA as well as provides exclusions for Articles 203, 204, 205.

Article 208 – Relationship with the WTO. The Article provides considerations about relations of provision of Chapter 10 vis-à-vis WTO obligations of each party.

Article 209 – Confidentiality. The Article accounts for limitations imposed by respective jurisdiction in terms of business and professional secrecy.

In summary, the relevant chapter of DCFTA sets some broad guidelines vis-à-vis regulation competition. The actual practice within the jurisdiction of each state (in our case in Georgia), is a subject of variation within the set limits and should be pursuant to best practices by other EU states.

13. APPENDIX TWO – POWER OF INSPECTIONS IN EU JURISDICTIONS²²

Inspections of economic agent (*e.g.*, business) premises

The Common Ground for Launching Inspections. The most common ground for launching inspections is generally the existence of elements pointing towards reasonable grounds for suspecting an infringement [AT, BE, BG, CZ, DE, DK, EE, EL, ES, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SV, and UK].²³

Authority to Initiate Inspection. In all EU jurisdictions, in order to start an inspection of a business premise a relevant decision is required. In some jurisdiction, the decision of the Competition Authority is sufficient, whereas in others the court warrant is required. The court warrant is required in 14 countries [AT, BG, DE, DK, EE, FR, HU, IE, LT, LV, PL, PT, SV, UK].²⁴ A decision of the Competition Authority is sufficient in 16 countries [BE, COM, CY, CZ, EL, ES, FI, IT, LU, MT, NL, PL, RO, SI, SK, UK].

In addition, in some jurisdictions Competition Authorities need a court warrant in case they face opposition, they want to use coercive measures, or they want to rely on the cooperation of the police or a similar body [ES, IT, LU, MT].

Competent Courts. Court warrants, when and where necessary, may be requested before different types of courts. In some cases, a central court is competent to issue the warrant [AT, BG, DE, HU, LT, LV, MT, PL, PT, SV, UK]. In other jurisdictions local administrative or criminal courts near the seat of the economic agent (*e.g.*, business) to be inspected are competent [AT, BG, DE, HU, LT, LV, MT, PL, PT, SV, UK].

Contents of The Inspection Decision or Court Warrant. The contents of the inspection decision varies considerably across EU states in terms of specifying the inspecting authority, applied legal basis, object / suspected infringement / conduct / affected market, rights and obligations (sanctions if applicable) and temporary scope of the inspection.

Possibility to Make Copies And Seize Original Documents. All Competition Authorities have the possibility to make copies of documents during inspections. However, not all of them can seize original documents during inspections.

Possibility to Collect Digital/Forensic Evidence. All of the Competition Authorities have the power to collect digital/forensic evidence. Their powers in this regard may differ, according to the respective legal requirements.

Several Competition Authorities have the power to take digital copies/forensic images of the evidence found at the premises investigated, whereas others have the possibility to take a digital copy/forensic image of the evidence for sifting at their offices. Finally, some Competition Authorities copy all the digital data to which they have access from the location of the investigation (regardless of where the data is physically stored).

Competition Authorities may use different Forensic IT (FIT) tools, which means that the possibility to index, search, sort and extract material may differ between jurisdictions.

Possibility to Seal Premises. All jurisdictions foresee the power to seal premises, except for AT, IE and LU. In most cases, seals are normally only used over night when the inspection continues for more than one day. Time limits for the sealing varies but stays within the reasonable range. It is a criminal offence to breach seals in some jurisdictions [DE, FI, HU, RO, SV].

²² ECN (European Competition Network) working group cooperation issues and due process – “Investigative Powers Report”. October 31, 2012.

²³ AT (Austria); BE (Belgium); BG (Bulgaria); CY (Cyprus); CZ (Czech Republic); DE (Germany); DK (Denmark); EE (Estonia); EL (Greece); ES (Spain); FI (Finland); FR (France); HR (Croatia); HU (Hungary); IE (Ireland); IT (Italy); LT (Lithuania); LU (Luxembourg); LV (Latvia); MT (Malta); NL (Netherlands); PL (Poland); PT (Portugal); RO (Romania); SE (Sweden); SI (Slovenia); SK (Slovakia); UK (United Kingdom).

²⁴ Numbers in parentheses after an EU Member name means that several regimes apply in the corresponding country and this particular power is applicable only within some regimes.

Power to Ask Questions During Inspections. All Competition Authorities have the possibility to ask questions related to the inspection and to the investigation during inspections. There is some distinction between various types of questions and their scope across jurisdictions.

Police Assistance. Most Competition Authorities have the possibility to ask for police assistance during inspections. In most of these jurisdictions, police assistance is requested at the discretion of the Competition Authority only at the moment of entering the premises, or when suspicion exists that opposition is envisaged or danger will be faced [AT, BE, DK, PT, RO, SI, SK]. Police assistance is compulsory in some jurisdictions [BG, FR, LU, LV].

In FR, police officers are only entitled to enter the premises by force if the economic agent (*e.g.*, business) refuses to give access to the premises and does not comply with the court warrant; they cannot use their powers once they are within the premises. In other jurisdictions, police assistance can be provided mostly during the early stage of the inspection or if there is a risk of resistance from the economic agent to the inspection. In some jurisdictions, this assistive function is undertaken by other authorized bodies (*e.g.*, Swedish Enforcement Agency in SE).

Limitations. In nearly all jurisdictions the Competition Authorities respect well-founded claims for the protection of Legal Professional Privilege (LPP), subject to certain conditions. Some authorities have time limits that restrain their power to inspect with regard to the validity of the decision or court warrant ordering or allowing the inspection (usually between one and six months). Other limitations may also play a role in certain very limited circumstances, such as privacy, data protection, the protection of commercial correspondence and banking secrecy.

Judicial Review. In many jurisdictions [AT, BG, CZ, DE, DK, ES, EU, FR, IE, LU, LV, NL, PT, RO, SV] parties can appeal the Competition Authority's decision/court warrant authorizing the inspection separately, although the appeal has no suspensive effect except for the United Kingdom, where it is possible to appeal and suspend an inspection decision/warrant. In other jurisdictions [BE, CY, EE, FI, FR, HU, PL and SI], the legality of the inspection may be assessed in an appeal brought against the final prohibition decision.

Treatment of Incidental Evidence. In several jurisdictions incidental evidence can be secured or seized if it relates to an infringement of the competition rules. In others, the authorities need to obtain a new authorization to inspect according to the applicable law and procedures.

Power to Search Economic Agents (*e.g.*, businesses) Which are not Subject to Investigation. In a clear majority of jurisdictions the inspection powers and sanctions for non-compliance apply equally to economic agents which are subject to an investigation procedure and to other economic agents. In some jurisdictions [DE, IT, LT, LV, SI], premises of economic agents which are not subject to an investigation can be searched in the same way as economic agents subject to an investigation if there are concrete facts from which it can be deduced that specific evidence will be found in these premises and a court order/warrant is required. Italy is the exception, where the Competition Authority's decision is sufficient, and a court order/search warrant is not necessary. In other jurisdictions there are some limitations with regards to the economic agents which are not the subject to an investigation.

Enforcement Measures and Sanctions for Non-Compliance. Non-compliance in the course of an investigation is sanctioned in almost all jurisdictions. In a large number of jurisdictions [BE, BG, CZ, EL, ES, EU, FR, HU, LT, NL, PT, RO, SI, SK], the fine prescribed in their competition laws for this type of conduct can be up to 1 percent of the economic agent's (*e.g.*, business') annual turnover in the preceding year, which is the same as the maximum level foreseen in Article 23(1) of Regulation 1/2003. In Luxembourg, it may be up to 5 percent of the economic agent's annual turnover in the preceding year. In other jurisdictions, there are specific monetary ceilings [CY – up to 85 000 EUR, IT – up to 52 000 EUR, PL – up to 50 000 000 EUR]. There are fines envisioned for natural persons as well.

In some jurisdictions [DE, SV], there is no fine for non-compliance, but the authority can gain access to the premises with the help of the police (or the Swedish Enforcement Agency (SEA) in SV) in a case of non-compliance. Resisting the police or the SEA can constitute a criminal offence.

Inspections in non-economic agent (*e.g.*, non-business) premises at the level of member states

Legal Basis. The possibility of inspecting non-economic agent premises is envisaged in the vast majority of jurisdictions [AT, BE, CY, CZ, DE, EE, EL, ES, EU, FI, FR, HU, IE, LT, LU, LV, MT, NL, PL, PT, RO, SV, SI, SK, UK]. The decision to launch an inspection in non-economic agent premises is

commonly subject to the existence of a degree of suspicion that records related to the economic agent and to the subject-matter of the inspections are being kept in other premises than those of the economic agent.

The jurisdictions empowered to inspect non-economic agent have pointed to (i) either applying the same standard as for economic agent premises [DE, UK], or (ii) referred explicitly to elements pointing towards "reasonable grounds", "reasonable suspicion" or "founded suspicion" that evidence will be found on the premises [CZ, EE, EL, EU, FR, HU, IE, LT, LU, LV, MT, PL, PT, RO, SI, SK, UK].

Procedural Requirements. In most jurisdictions where inspections in non-economic (e.g., non-business) premises can be undertaken, a court warrant is required. In several jurisdictions where a decision by the Competition Authority is sufficient to conduct inspections in economic agent premises, a court warrant for the inspections in non-economic agent premises is required [BE, CY, CZ, EU, FI, LU, MT, PL, RO, SI, SK, UK]. In other jurisdictions [EL], non-economic agent premises can be searched under an inspection decision by the Competition Authority, but the presence of a judge or prosecutor is compulsory.

Possibility to Make Copies Of And Seize Original Copies. No specific differences with regard to the possibility to make copies and seize original documents in inspections of non-economic (e.g., non-business) premises in comparison to inspections of economic agent premises have been raised regarding this power.

Sealing of Premises. In several jurisdictions it is possible to seal non-economic agent (e.g., business) premises during inspections [BE, DE, EE, EL, HU, LU, LV (in part), RO, SI, SV, UK], while in others it is not possible to use this power [AT, CZ, DK, EU, FI, FR, IE, LT, MT, NL, SK].

Power to Ask Questions During Inspections. While almost all authorities have the possibility to ask questions related to the subject matter of the inspection during inspections in economic agent (e.g., business) premises, some do not have this power in the framework of inspections in non-economic agent premises [AT, COM, FI].

Police Assistance. There are some differences between the situation of economic agent (e.g., business) premise and non-economic agent premises in terms of using police assistance [RO – need to accompany the inspection by judge, SI – two adult witnesses).

Limitations. There are not any differences in general regarding limitations in the case of inspections in non-economic (e.g., non-business) premises as compared with inspections of economic agent premises.

Enforcement Measures and Sanctions for Non-Compliance. Some jurisdictions [CY, LU] have no sanctions in the case of non-compliance in the course of an inspection in non-economic agent (e.g., non-business) premises, while their laws envisage sanctions in the case of non-compliance with inspections in economic agent premises. In other jurisdictions [PL], the owner of a dwelling (living quarters), room, real estate, or means of transportation being searched may refuse to provide information or co-operate in the course of an inspection only in several sensitive occasions.

14. BIBLIOGRAPHY

1. Association Agreement between the European Union and Georgia: http://eeas.europa.eu/georgia/pdf/eu-ge_aa-dcfta_en.pdf
2. ქვეყნის ძირითადი მონაცემები და მიმართულებები, 2014-2017 წლებისთვის, გადამუშავებული ვარიანტი, საქართველოს მთავრობა, 2013 წელი
3. საქართველოს სამოქმედო გეგმა ღრმა და ყოვლისმომცველი სავაჭრო სივრცის შესახებ შეთანხმების (DCFTA) განხორციელებისათვის 2014 – 2017 წწ
4. ღრმა და ყოვლისმომცველი თავისუფალი სავაჭრო სივრცის შესახებ შეთანხმების (DCFTA) განხორციელების 2014-2017 წლების სამოქმედო გეგმის შესრულების 2014 წლის ანგარიში, ეკონომიკის სამინისტრო, 2014
5. Competition Policy and Competition Regulatory Authority in Georgia, Transparency international Georgia, Tbilisi, 2013.
6. საქართველოს კანონი კონკურენციის შესახებ, საქართველოს 2014 წლის 21 მარტის კანონი №2159 - ვებგვერდი, 27.03.2014წ
7. საქართველოს კანონი თავისუფალი ვაჭრობისა და კონკურენციის შესახებ, პროექტი, 2013
8. „თავისუფალი ვაჭრობისა და კონკურენციის შესახებ“ საქართველოს კანონში ცვლილების შეტანის თაობაზე 2012 წ
9. საქართველოს მთავრობის განკარგულება N1551 კონკურენციის ყოვლისმომცველი სტრატეგიის დამტკიცების შესახებ, 2010 წლის 3 დეკემბერი, თბილისი
10. კონკურენციის სააგენტოს წერილი მსოფლიო ბანკს N02/338, კომუნიკაცია მსოფლიო ბანკის რეკომენდაციებთან დაკავშირებით, რომელიც ეხებოდა სააგენტოს წესდებს და მეთოდოლოგიურ სახელმძღვანელო დოკუმენტებს, 22 დეკემბერი 2014წ.
11. საქართველოს მთავრობის დადგენილება N288, საჯარო სამართლის იურიდიული პირის – კონკურენციის სააგენტოს დებულების დამტკიცების შესახებ, 2014 წლის 14 აპრილი, ქ. თბილისი
12. კონკურენციის სააგენტოს თავმჯდმარის ბრძანება N30/09–5 საქმის მოკვლევის წესის და პროცედურის დამტკიცების თაობაზე, 2014 წლის 30 სექტემბერი
13. Competition Policy In Georgia, Transparency International Georgia, Tbilisi, 2012
14. EU-Georgia Deep and Comprehensive Free-Trade Area, European Commission, Date: 11/02/2014
15. An EU Competition Policy for growth, ERT, 2014
16. Challenges in EU Competition Policy, ERT, 2010
17. კონკურენციის რეგულირების პოლიტიკა საქართველოს ციფრულ საეთერო მაუწყებლობაზე გადასვლის პროცესში და მის შემდგომ პერიოდში, „ინფორმაციის თავისუფლების განვითარების ინსტიტუტი“, (მარტი, 2013 წელი),
18. The Global Competitiveness Report 2015–2016, World Economic Forum
19. კონკურენციის სააგენტოს შიდა სამუშაო დოკუმენტი, მოკვლევის პროცესში საკანონმდებლო ხარვეზებთან დაკავშირებით.
20. ECN Working Group Cooperation Issues And Due Process Investigative Powers Report, 31 October 2012
21. ECN Recommendation On Investigative Powers, Enforcement Measures And Sanctions In The Context Of Inspections And Requests For Information
22. Communication From The Commission To The European Parliament And Council, Report on the functioning of Regulation 1/2003, Brussels, 29.4.2009, SEC(2009) 574 final

23. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), The Council Of The European Union
24. Trade Sustainability Impact Assessment in support of negotiations of a DCFTA between the EU and Georgia, prepared by ECORYS and CASE; October, 2012
25. Principles for the Independence of Competition Authorities; Sofia Alves, Jeroen Capiiau and Ailsa Sinclair; European Commission, Brussels. Competition Law International Vol 11 No 1 April 2015
26. OECD, Global Forum on Competition; 'The Objectives of Competition Law and Policy: Note by the Secretariat' (2003) Session 1, Doc No CCNM/GF/COMP(2003) 3, 8 www.oecd.org/daf/competition/prosecutionandlawenforcement/34375749.pdf accessed 15 January 2015
27. Communication from the Commission to the European Parliament and the Council; 'Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives' COM (2014) 453, the accompanying 'Staff Working Documents: Ten Years of Antitrust Enforcement under Regulation 1/2003' SWD (2014) 230 and 'Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues' SWD (2014) 231

USAID GOVERNING FOR GROWTH (G4G) IN GEORGIA

DELOITTE CONSULTING OVERSEAS PROJECTS LLP

ADDRESS: 85 Z. PALIASHVILI STREET, TBILISI

Phone: +995 322 240115 / 16

E-mail: info@g4g.ge