Georgian National Competition Agency

GUIDELINE

Interpretation of the Common Courts on the GNCA's Legally Binding Decisions

2023

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Introduction

Pursuant to the authority vested by the Law of Georgia "On Competition," the decision rendered by the National Competition Agency of Georgia (hereinafter referred to as the "Agency") is considered an individual administrative-legal act according to Georgian legislation. This act may be subject to appeal in the common courts of Georgia at all three judicial levels. Consequently, in the event of a court dispute, the Agency's decisions attain legal validity upon the conclusion of the dispute, and if the decision is not contested, they do so upon the expiration of the appeal period.

In accordance with the first section of Article 33^2 of the Law of Georgia "On Competition", a person has the right to appeal the Agency's decision in the Tbilisi City Court. The court is entitled to fully review the decision of the Agency, including the part of the amount of the fine.

This document reviews only those decisions of the Agency that have been appealed in court and entered into legal force.

The guideline aims to familiarize the various interested parties with the standards and definitions established by the general courts of Georgia on the cases considered by the Competition Agency. Thus, it summarizes the main contents of the Agency's decisions and the important evaluations/interpretations made by various court instances.

1. Revenue Service Case

1.1. Basic Facts of the Case

LLC "Georgian Trans Expedition - Poti" submitted a statement with the Agency concerning the alleged infringement of competition as stipulated in Article 10 of the Georgian Law “On Competition" by the LEPL - Revenue Service. According to the applicant, the Revenue Service is accused of enabling the monopolization of the "Inland Container Terminal" LLC in the market, leading to the disruption of its competitors' operations. In particular, the applicant contends that since 2011, customs authorities have been declining to conduct customs procedures for containers carrying vehicles unless these containers were brought to the competitor's warehouse for customs processing.

The Agency determined that the applicant possessed a customs warehouse activity permit issued by the Revenue Service and offered cargo terminal services. A similar certificate was also held by its competitor, "Inland Container Terminal" LLC, as well as around 20 other undertakings operating within the Poti area.

Following an investigation conducted by the Agency, a decision was reached. The Revenue Service was found to be in violation of Article 10 of the Georgian Law “On Competition." This violation, specifically the creation of an unequal competitive environment for undertakings in the motor-container cargo terminal services market, was assessed by the Agency as an impediment to the entrepreneurial activities of economic agents. Additionally, this conduct was seen as establishing a monopoly position for another undertaking, thereby significantly restricting free pricing and competition.

According to the decision made by the Agency, the LEPL - Revenue Service was instructed to align its actions with competition legislation in order to establish an equal competitive environment for undertakings operating in the motor-container cargo terminal services market, eliminate instances of violations, and ensure its actions comply with legal requirements.

Results of appealing the Agency's decision: The Agency's decision was appealed by the LEPL - Revenue Service in all three courts of instance.

According to the decisions of the Tbilisi City Court, Tbilisi's Court of Appeals and Supreme Court of Georgia, **the dispute ended in favor of the Agency**.

1.2. Significant Interpretations by the Courts

The Supreme Court of Georgia:[1]

- *Both "Georgian Expedition - Poti" LLC and "Inland Container Terminal" LLC fully comply with the legal requirements for obtaining a warehouse activity permit. Both undertakings are equally authorized to offer terminal services for motor-container cargoes. There are no circumstances that would justify the Revenue Service granting preferential treatment to any other company's terminal over "Georgian Trans Expedition - Poti" LLC*

- *The stance taken by the Revenue Service, which asserts that customs clearance of motor cargo is more convenient at the "Inland Container" LLC terminal, either due to its location or faster service, implies that that the Revenue Service gives preference to only one of the companies, while other undertaking also has the necessary state permission for the implementation of economic activities and is in equal legal and economic conditions.*

- *It is essential for the development of a competitive market that the selection of one among the available terminals depends solely on the preference of the service recipient and not on guidance from the Revenue Service*

[1] Ruling #ბს-1145-1139(კ-17) of the Supreme Court of Georgia of 22/02/2018.

2. Batumi City Hall Case

2.1. Basic Facts of the Case

"Libo" LLC submitted a complaint with the Agency, alleging a restriction of competition by the Batumi Municipality's City Hall. The complaint pertained to issues surrounding the extension of outdoor advertising activity permits in the city of Batumi. Specifically, as per "Libo" LLC's complaint, a competing company held the exclusive permit for outdoor advertising placement in Batumi, which had expired in 2016. The Batumi City Hall extended this permit for an additional 5 years without conducting an auction. According to the complainant's standpoint, this manner of extending the outdoor advertising permit by the City Hall contravened subsection "e" of Article 10 of the law. It was viewed as creating a monopoly situation for a specific company operating in the outdoor advertising market.

Following the investigation, the Agency determined that the defendant's actions had led to the perpetuation of an exclusive and practically non-competitive privilege for “Ajadi” LLC. This occurred in a context where a considerably competitive environment for the outdoor advertising market in the city of Batumi could have been established through an auction. The Batumi City Hall argued that their actions fell within the exception outlined in Article 10 of the law, as the legislation of Georgia at the time granted them the authority to extend the permit. However, the Agency contended that the version of the relevant resolution at the time indeed allowed for the extension of permits. Nonetheless, this provision pertains to permits issued after the implementation of the amendment in the resolution and does not encompass the extension of permits issued prior to that period.

According to the Agency's decision, the City Hall of Batumi Municipality was found to have violated Article 10 of the Law of Georgia “On Competition" and was ordered to take appropriate measures to correct the violation

The result of appealing the decision of the Agency: The decision of the Agency was appealed by the City Hall of Batumi in the courts of all three instances.

According to the decisions of the Tbilisi City Court, Tbilisi's Court of Appeals and Supreme Court of Georgia, **the dispute ended in favor of the Agency**.

2.2. Significant Interpretations by the Courts

Tbilisi City Court: [2]

- *The effect of a normative act does not apply to the facts, relationships and circumstances that occurred before the issuance of this act, except in cases where the legislator gives retroactive effect to the normative act.*

- *Resolution #15 of the City Council of Batumi dated September 8, 2016, was not granted retroactive effect. The modification introduced by this particular normative act, which transferred the power to extend the duration of outdoor advertising permits to the administrative body through an amendment to the permit, does not apply to permits issued before the act took effect, namely, prior to November 29, 2011.*

- *In the conditions when the outdoor advertising permit is issued in the form of an auction, and the validity period of the permit issued to "Ajadi" LLC expired on November 21, 2016, and the permit conditions did not include the possibility of extending the validity period of the permit - the entities operating in the market had a legitimate expectation of holding a new auction. St. As a result of the incorrect interpretation of the norm, the Batumi City Hall created a monopoly situation for Ajad LLC by the agreement of October 31, 2016, which is a violation of Article 10, subsection "e" of the "Competition" Law of Georgia.*

The Tbilisi Court of Appeal and the Supreme Court of Georgia **fully shared the assessments of the court of first instance.**[3]

[2] Decision #3/7786-17 of Tbilisi City Court of 2018.

[3] Ruling #3ბ578-19 of Tbilisi Court of Appeal dated March 16, 2020; Ruling of the Supreme Court of Georgia #ბს-913 (2კ-20).

3. Insurance Case №1

3.1. Basic Facts of the Case

The insurance company "Unison" filed a complaint with the Agency, alleging a competition constraint imposed by purchasing organizations. This constraint was evident in state procurement processes, wherein the requirement for bank guarantees from banks for contract performance was deemed in violation of competition laws and considered as restricting the insurance sector.

After the investigation, the LEPL - Municipal Development Fund of Georgia, Department of Roads of Georgia, City Hall of Batumi Municipality, City Hall of Khashuri Municipality, and City Hall of Tbilisi Municipality were found to be in breach of Article 10 of the Law. Specifically, the Agency concluded that, as per Georgia's civil legislation (Article 879 of the Civil Code of Georgia), bank guarantees could be issued by both banking institutions and insurance companies. In light of this legal framework, the Agency deemed the requirement for bank guarantees from banks in specific tenders conducted by the defendants as a violation of competition, as outlined in Article 10 of the Law of Georgia "On Competition." The Agency also asserted that the prohibition on insurance sector companies entering the bank guarantee market for state procurements was unjustified in the context of responsible budget spending. According to the Agency, by mandating bank-issued guarantees, a group of economic agents operating in the relevant market - the insurance companies - were unfairly deprived of the opportunity to continue their involvement in the relevant market.

The result of appealing the decision of the Agency: The Agency's decision was appealed by the State Road Department in all three courts of instance.

According to the decisions of the Tbilisi City Court, Tbilisi's Court of Appeals and Supreme Court of Georgia, **the dispute ended in favor of the Agency.**

3.2. Significant Interpretations by the Courts

Tbilisi City Court:[4]

- *The imperative of ensuring the prudent allocation of state funds, safeguarded under Article 7 of the Law of Georgia "On State Procurement," should be executed in compliance with Article 13. It is particularly important to achieve this through the promotion of healthy competition. This approach encompasses not only the economical use of state funds but also encompasses other vital principles that collectively serve to shield the state from unfavorable economic consequences and market instability.*

- *The set of normative provisions within any given law should be subject to systematic interpretation, aligning with the objectives for which the legislator enacted these regulations to govern specific relationships. In this context, Articles 7 and 13 of the Law of Georgia "On State Procurement" should be systematically construed, ensuring that the scope of action, as delineated by Article 7 in accordance with state interests, does not surpass the boundaries set by Article 13. It should also be in harmony with the foundational principles outlined in the latter article. This balance is critical in realizing the law's ultimate objective: fostering healthy competition and providing equal treatment to potential bidders.*

- *Prudent utilization of state allocations can be achieved through the promotion of healthy competition. Therefore, it is imperative to emphasize that constraining competition cannot be justified by the aim of ensuring "rational spending."*

- *The plaintiff not only argues against the suitability of the bank guarantee issued by a particular insurance company in alignment with the state's interests but also, by considering all justifications and trend assessments, prohibits the entire insurance sector, comprising 16 operating insurance companies and other financial institutions, from entering the market of issuing bank guarantees. This action runs counter to competition law norms and constrains the undertakings' economic activities, thereby infringing upon the provisions of Article 10 of the Law of Georgia "On Competition."*

- *Healthy competition plays a pivotal role in fostering enhancements and refinements in services delivered by undertakings operating in the market. This, in turn, has a direct correlation with the prudent allocation of state resources, allowing the state to obtain high-quality services at reduced costs. According to the law, the insurance sector holds the same rights to issue bank guarantees as other legal entities. Consequently, preserving the insurance sector's exclusion from the bank guarantee market contributes to a stagnation in the insurance sector's development in this aspect. This, in effect, counters the principles of a thriving market economy and hampers the state's economic growth. This situation creates a paradox wherein the plaintiff, on one hand, raises concerns about the competency of insurance companies. However, by barring their entry into the bank guarantee market, they themselves obstruct the*

[4] Decision #3/6149-17 of Tbilisi City Court of March 13, 2019.

advancement of the quality of their services within this segment and the potential for service enhancements. Such an approach is clearly at odds with the objectives of a state that aspires to cultivate a healthy competitive environment and a flourishing market economy.

- *The plaintiff's actions towards insurance companies not only fail to conserve state funds but, conversely, result in increased state expenditure. This is evidenced by the higher costs associated with bank guarantees issued by banks. Such increased costs deter bidders from participating in tenders, reducing their numbers. Consequently, the state's options become limited, compelling it to agree to more expensive services. Furthermore, the elevated expenses incurred by bidders in acquiring bank guarantees are offset by an upsurge in service prices. In light of the above, it is evident that the state incurs more financial losses due to its monopoly in the bank guarantee market than it would have if insurance companies were allowed in the bank guarantee market, fostering healthy competition among banks.*

The Tbilisi Court of Appeal and the Supreme Court of Georgia **fully shared the assessments of the court of first instance.**[5]

[5] Ruling #3ბ/2359-19 of the Tbilisi Court of Appeal dated December 11, 2019; Ruling of the Supreme Court of Georgia dated May 19, 2021 # ბს-443(კ-20).

4. The Case of "Philip Morris Georgia" LLC

4.1. Basic Facts of the Case

On December 29, 2016, Agency order number 252 approved the "filtered and unfiltered cigarette market monitoring report." This monitoring initiative comprehensively assessed the current state of the filtered and unfiltered cigarette market. The analysis included an examination of data pertaining to all importers and manufacturing entities active in this market, sales rates for each brand, concentration levels, key market trends, and the overall competitive landscape.

According to the order of the chairman of the Agency N04/43 of February 15, 2017, the mentioned monitoring report was canceled and re-monitoring was started.

The result of appealing the decision of the Agency: "Philip Morris Georgia" LLC filed a lawsuit with the court, seeking the annulment of the Agency chairman's order number 04/43 dated February 15, 2017.

A key point of contention in this dispute revolved around the legal status of the monitoring process and whether it carried legal implications for the party involved. This question arises because the monitoring is not targeted at a specific entity but rather at **the broader market as a whole**.

The Tbilisi City Court, upon the Agency's motion, **dismissed the lawsuit on the grounds of inadmissibility.**

4.2. Significant Interpretations by the Courts

Tbilisi City Court: [6]

- *In this instance, the plaintiff fails to substantiate the direct and immediate harm incurred or specify which of their legal rights were curtailed by the decision made by the competition Agency under the provisions outlined in subsection "b" of Article 17² of the Law of Georgia "On Competition."*

- *If a suspected violation is identified during the market study, it results in the initiation of a distinct and independent administrative proceeding. The facts uncovered during the monitoring phase do not possess a pre-established, binding authority.*

- *Market monitoring and investigation initiated on a specific violation of the law are different administrative proceedings with different results.*

- *In this scenario, it's evident that the report doesn't hold binding authority over the Agency during the course of administrative proceedings undertaken to assess specific actions. The monitoring report serves the sole purpose of market evaluation, and therefore, the report for "Philip Morris Georgia" LLC does not, and indeed cannot, carry direct legal implications.*

[6] Rulling #3/3871-17 of Tbilisi City Court of December 6, 2017.

5. Case I of Oil Commodity

5.1. Basic Facts of the Case

In November 2014, the Agency initiated an investigation into Georgia's petroleum products market. The results of this investigation led to the decision, as approved by the chairman's order N81 on July 14, 2015. In the motor fuel market, the following entities were found in violation of Article 7, Section 1 of the law “On Competition”, namely subsections “a”,”b” and “c”: “Socar Georgia Petroleum” LLC, “Sun Petroleum Georgia” LLC, “Rompetrol Georgia” LLC, “Wissol Petroleum Georgia” JSC, "Lukoil Georgia" LLC, "Binuli 1" LLC, "L Oil" LLC, and "ITA" LLC. Additionally, 10 sub-licensed companies of "Lukoil Georgia" LLC and 13 partners of "Rompetrol Georgia" LLC were found to be in violation of Article 7, Section 1, subsection "a" of the Law, within the framework of license and franchising agreements.

The violation became evident through the oil companies' involvement in anti-competitive agreements, encompassing price fixing, market allocation, and market restriction. Consequently, the Agency imposed fines amounting to a total of up to 55 million GEL on these companies.

The result of appealing the decision of the Agency: The above-mentioned undertakings (except for 13 partners of "Rompetrol Georgia" LLC) appealed the decision of the Agency to the court.

The courts of Georgia issued a similar decision regarding all entities involved. In each case, **they issued a ruling requesting the annulment of the Agency's decision dated July 14, 2015, and the remanding of the case back to the Agency for further review**.

As for the 8 licensees of "Lukoil Georgia" LLC, the judical proceedings in their part were terminated due to their rejection of the claim, and the order of the chairman of the Agency dated July 14, 2015, in this part, entered into legal force.

5.2. Significant Interpretations by the Courts

Supreme Court of Georgia:[7]

a) Interpretation of Article 7, subsection "a" of the Law of Georgia "On Competition":

- *To establish the existence of an anti-competitive agreement, it is crucial to ascertain the presence of communication between undertakings. According to the Agency, such communication is not in evidence.*

- *If direct evidence is not sought, it is necessary to have such a set of indirect evidence that will reliably confirm the existence of a concerted action.*

- *In a market where competitors' prices are readily observable, an undertaking cannot be deterred from adjusting its growth strategy in response to the actions of competing undertakings.*

- *As long as there are reasonable alternative explanations for the actions of undertakings, the presence of an anticompetitive agreement cannot be deemed established.*

- *The Agency acknowledges that an exceptionally high degree of price parallelism could not have arisen under typical market conditions. However, it does not provide a justification for how the market would have evolved in the absence of an agreement, how the market structure would have taken shape, what level of market concentration would have prevailed, or how the members so-called "Five" would have acted.*

b) Interpretation of Article 7, subsection "b" of the Law of Georgia "On Competition":

b.a) Import level of the market:

- *The cessation of operations by a significant number of importers and the emergence of an oligopoly within the market do not unequivocally demonstrate the presence of coordinated action. This is because the Agency did not adequately investigate the underlying reasons for other importers exiting the market.*

- *Merely providing general instructions on the establishment of barriers is insufficient to validate the Agency's position. This is because there is no clear causal link between the specific actions of LLC "SOCAR Georgia Petroleum" / LLC "Lukoil Georgia" and the imposition of the existing restrictions.*

[7] Ruling #ბს-500-497(კ-17) of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 14, 2017; Ruling of the Administrative Affairs Chamber of the Supreme Court of Georgia dated September 28, 2017 #ბს-595-592(კ-17).

- *The explanations primarily lack a foundation in objective, verifiable factual circumstances and tend to be of a general nature. Furthermore, in some instances, issues such as customs complications, railway challenges, high fuel prices, and others are cited as factors obstructing imports. However, it remains unclear how a private law entity could employ mechanisms on a similar scale to impose such restrictions.*

b.b.) Wholesale level of the market:

- *It is imperative to ascertain whether the refusal to supply was prompted by objective factors, such as disagreements concerning the cost, quantity, and payment method of the fuel to be supplied, or the presence of outstanding debts.*

- *The Agency failed to provide conclusive evidence that the so-called "Five" declined to supply fuel to smaller undertakings under identical contractual terms as the so-called "Related" entities (e.g., prepayment, volume of fuel to be supplied, etc.).*

b.c) Retail level of the Market:

- *An evaluation should be conducted to determine whether the discontinuation of operations by several enterprises engaged in the retail sale of motor fuel is directly linked to the actions of the so-called "Five."*

c) Interpretation of Article 7, subsection "c" of the Law of Georgia "On Competition":

- *The Agency's evaluation of the so-called "Five's" reluctance to compete is inadequately substantiated, and the Agency is unable to establish conclusively that their decision to not expand the network of fuel stations is driven by a desire to refrain from competition.*

6. Case II of "Citroen Georgia" LLC

6.1. Basic Facts of the Case

"Citroen Georgia" LLC filed a complaint with the Agency, alleging a violation of competition laws by the defendant purchasing organizations: LEPL - Emergency Medical Center, "Gardabni Thermal Station" LLC, and the Ministry of Labor, Health and Social Protection of Georgia (purportedly breaching Article 10 of the Law). As per the complaint, these procurement entities favored particular economic agents and impeded the operations of the complainant company by imposing artificial or irrelevant requirements in certain state procurements.

As per the decision approved by the order N04/11 on January 23, 2018 of the chairman of the Agency, the company's complaint was dismissed as inadmissible. Consequently, the Agency refrained from initiating an investigation into the alleged violation of Article 10 of the law by the listed entities, as the standard of reasonable doubt concerning the existence of a violation was not met during the admissibility assessment stage.

The result of appealing the decision of the Agency: The decision approved by the order of the chairman of the Agency N04/11 of January 23, 2018 was appealed by "Citroen Georgia" LLC in all three courts of instance.

According to the decisions of the Tbilisi City Court, Tbilisi's Court of Appeals and Supreme Court of Georgia, **the dispute ended in favor of the Agency.**

6.2. Significant Interpretations by the Courts

Tbilisi City Court: [8]

- *Referring to Article 13 of the Law of Georgia "On State Procurement," the court clarified that it aligned with the Agency's stance. It emphasized that the exclusion of the "crash test" requirement from the tender documentation could not be construed as a violation of Article 10 of the Law of Georgia "On Competition" by the procuring organization. Instead, it was established that the absence of this requirement in the tender documentation was the precise reason why the buyer did not conduct the three tenders announced in 2016. Therefore, by removing the "crash test" requirement, the procuring organization broadened the pool of participants eligible for the tender. This included prospective bidders who were previously unable to participate due to the "crash test" prerequisite. This move by the buyer enhanced market competition and facilitated the involvement of undertakings, including "Citroen Georgia" LLC, in the tender procedures.*

- *The fact that "Citroen Georgia" LLC was blacklisted for misconduct in other tenders on October 18, 2017, at the time when the tender without the "crash test" requirement was announced, did not deter the procuring organization from delaying the tender procedures after five unsuccessful attempts. To circumvent this issue, the organization opted to conduct an electronic tender with simplified conditions and proceeded with the procurement of ambulance vehicles.*

- *Regarding the Ministry of Health's tender, the court underscores that the tender's conditions were familiar to "Citroen Georgia" LLC at the time of the announcement, and the company had undisputedly agreed to those conditions. Therefore, it remains unclear why the plaintiff regards it's disqualification from the tender as a competition constraint when it didn't fulfill the same conditions. It should be noted that "Citroen Georgia" LLC raised concerns about the competitiveness of the tender only after the tender commission rendered a decision to disqualify them.*

The Tbilisi Court of Appeal and the Supreme Court of Georgia **fully shared the assessments of the court of first instance.**[9]

[8] Decision #3/1209-17 of Tbilisi City Court of February 27, 2019.

[9] Rulling of the Tbilisi Court of Appeal #3ბ/1425-19 of December 12, 2019; Ruling of the Supreme Court of Georgia # (ბს)-403 (კ20) of 2021.

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