Merger Control Worldwide

GENERAL EDITORS
Maher Dabbah AND
Paul Lasok QC

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Davit Harutyunyan[3] and Karine Poladyan[b]*

[a] *Armenian European Policy and Legal Advice Centre and* [b] *State Commission on Protections of Economic Competition Armenia, Yerevan, respectively, Armenia*

Since declaring its independence in 1991, Armenia has been consistently implementing economic reform policy in an effort to establish and develop a sound market-based economy.

One of the major directions of reform policy adopted by the Government of Armenia has been an integration into the world economy and further development of economic relations with foreign countries. The Government of Armenia is confident that these objectives may be achieved through liberalisation of trade and investment policy.

It is apparent that within the framework of the ongoing process of globalisation and international integration, it is impracticable for a country to conduct an isolated economic policy. Consequently, Armenia desires to build mutually beneficial economic co-operation and to participate actively in the process of integration into the world economic system.

Since Armenia declared independence, the processes of economic development can be divided into two stages:

1990-1993:	Early transitional period, characterised by a deep systemic crisis, which was expressed in economic' and energy crises, decline in living standards, a malfunctioning financial system and hyperinflation, involvement in the Karabakh conflict, and the blockade of transportation routes.
1994-present:	Period of continuous economic growth, which was underpinned by three sets of factors: overcoming the energy crisis in 1995; declaration of ceasefire in the Karabach conflict in 1994 and its further observance; and implementation and further maintenance of macroeconomic stability in 1994-1995, elimination of trade barriers (bound rate of tariff- 15%) and creation of open model of economy.

In recent years economic performance has continued to be very impressive. GDP growth rate reached double-digit levels in 2001 and 2003; real GDP growth for 2002 was 12.9% and for 2003 was 13.9%.

1. Relevant legislation and statutory standards

One of the main achievements of economic reform in Armenia has been the adoption of the Law of the Republic of Armenia on Protection of Economic Competition (hereafter "the Law" or the "2000 Law").[2] The Law was adopted by the National Assembly on 6 November

* The views expressed here are personal and do not necessarily reflect those of the Commission.

1 The country's GDP leve! at 1993 - the lowest point of the crisis - comprised 36.2% of GDP level in 1989, which can be considered one of the deepest transient economic crises in world history.

2 The 2000 Law can be viewed alongside other regulatory guidance at the web site of the State Commission for the Protection of Economic Competition, http://www.competitionpoIicy.am and at the web site of the Ministry of Trade and Economic Development, http://www.minted.am/en/index.html (The English version of the Law is not an official translation).

2000 and ratified by the President of the Republic of Armenia on 5 December 2000. The initiative for the current competition legislation came from the Government and the Ministry of Industry and Trade (now the Ministry of Trade and Economic Development). The work on the drafting continued for 2 years and involved close collaboration between the Ministry and the relevant European Union (EU) representative office. It is worth noting that Armenia has no separate law on merger regulation and that all procedures concerning merger control ("concentrations") are regulated by the Law.[3]

The primary legal bases for competition legislation in Armenia are the following:

- The *Partnership and Co-operation Agreement* (PCA) between Armenia and the Member States of the European Community (EC), which entered into force on 1 July 1999.[4] The PCA explicitly provides for legislative co-operation between the parties, among other things, in the field of competition.[5] It envisages approximation of the legislation of Armenia with that of the EC.[6]
- The *Constitution of the Republic of Armenia,* Article 8 stipulates that the "The state guarantees the free development and equal legal protection of all types of property, freedom of economic activity and free economic competition".[7]
- The *Civil Code of the Republic of Armenia,*[8] Article 12, prohibits restriction of competition by the way of exercising civil rights.[9]
- The main objectives of the *Law on the Protection of Economic Competition* are the "protection and promotion of economic competition, provision of appropriate environment for fair competition, for the development of entrepreneurship and protection of consumer rights".[10]

The 2000 Law provides a first fundamental regulatory framework for competition assessment of economic entities in commodity markets. It prohibits concerted practices, abuse of a dominant position, regulates mergers, and deals with unfair competition and consumer protection issues. It is largely aligned with the rules of the EC, in particular with those of EC Treaty.

2. Decision-making bodies and enforcement authority(ies)

2.1. The State Commission for the Protection of Economic Competition of the Republic of Armenia

The State Commission on Protection of Economic Competition of the Republic of Armenia (hereinafter "the Commission") was established on 13 January 2001 with the general objective to protect and promote economic competition, and ensure a competitive environment for businesses in Armenia. The Commission was created under Article 17 of the 2000 Law. The Commission is independent within the scope of its competence. In this regard it is worth

3 The Law on Protection of Economic Competition of the Republic of Armenia Chapter 4 (8, 9, 10).
4 Republic of Armenia Constitution adopted in 1995; Article 6 provides that ratified international treaties comprise an indivisible part of the legal system.
5 PCA, Article 43(2).
6 PCA, Article 43(1).
7 Republic of Armenia Constitution, Article 8.
8 Civil Code of Republic of Armenia came into force in January 1999.
9 Civil Code, article 12 stipulates: "1. Action of citizens and legal persons exercised exclusively with the intention to cause harm to another person are not allowed, nor is abuse of a legal right allowed in other forms. Use of civil law rights for the purpose of restricting competition is not allowed, nor is abuse of a dominant position in the market". Law on the Protection of Economic Competition of the Republic of Armenia, November 2000, article 1.
10 The law on Protection of Economic Competition of Republic of Armenia Chapter 1 (1).

mentioning that the original version of the Law seriously restricted the Commission's independence. It implied that if the annual programme and report submitted to the National Assembly for consideration was not approved, the members of the Commission would submit their resignation to the President of Republic of Armenia within 10 days.[11] As a result of efforts made by the members of the Commission, appropriate amendments in the Law were introduced, which eliminate the above-mentioned provision. These amendments provide an opportunity to the Commission only to publish the annual report and the programme. This was an important step towards strengthening of the Commission's authority.[12]

The Commission is not within the Armenian Government structure; however, the Chairman of the Commission can participate with an advisory vote in Government sessions and make written comments concerning the issues raised which will be entered into minutes of the sessions.

The Commission is composed of seven members: a chairman, deputy and five members. The President of the Republic of Armenia appoints the members of the Commission for a 5-year period, except the members of the first Commission. The Commission is a collegiate body in which all the members have equal competence. The Commission makes a decision (recommendation), stating in it the facts underlying the given decision.

Decisions shall be passed at the sessions of the Commission by majority of votes of the members participating. The quorum of a session is five. If the vote is equal, the chairman or the person presiding will have the deciding vote. Considerations will generally be held at open door sessions, subject to the need for confidentiality.

One shortcoming of the current regime, in the present authors' view, is that the Commission does not have sufficient powers to investigate. The Commission fulfils its obligations only through study, research and monitoring processes. The lack of powers to search premises creates serious obstacles in obtaining correct information while revealing infringements of the Law. Given the importance of its remit, the only way to strengthen the Commission's powers of enforcement is to toughen its procedures for acquiring information from economic entities. This is the basis for the Commission's proposed amendment to the Law, which would *oblige* economic entities to provide necessary information.[13]

2.2. Tasks and functions of the Commission[14]

The Commission is responsible for the following:

- Protection and promotion of economic competition in order to bring about the development of businesses and protection of consumer rights.
- Provision of an appropriate environment for fair competition.
- Prevention and elimination of anti-competitive practices.
- Control of the practices of protection of competition.

In order to meet the above-mentioned objectives the Commission shall do the following:

- Exercise control over adherence to the legislation on the protection of competition.
- Consider cases of infringement of the competition legislation and make decisions on such cases.

11 Given that the representatives of business entities have a power to push the decisions of the National Assembly (lobbying), it is clear that the Commission would be in vulnerable situation.

12 Chapter 6 (27), Amendments in the Law 23 October 2002.

13 The previous version states that economic entities just provide data without the word "oblige". See Chapter 6 (28) Amendment of 25 December 2003.

14 The Law on Protection of Economic Competition of the Republic of Armenia, Chapter 6 (18).

- Maintain a centralised register of economic entities with a dominant position.
- Bring cases of infringement of the competition legislation to court.
- Participate in the drafting of legal acts concerning the development and state policy in the field of economic competition and present such acts in the due order.
- Participate in the conclusion of interstate agreements falling within its competence.
- Co-operation with the public bodies and non-government organisations of foreign states, as well as with the international organisations.
- Develop and implement measures preventing the infringements of the competition legislation.
- Summarise the practice of application of the competition legislation and draw up proposals on improvement of this practice.
- Ensure the publicity of its activity.
- Publish a journal.
- Carry out explanatory works in order to inform the public about the sanctions provided for by present Law.
- Carry out other activities falling within its competence.

3. Notification requirements and procedures

3.1. Notification thresholds

Although there is no special regulation on notification procedure,[15] the Law clearly states that:

> The concentration shall be subject to declaration [notification] if the total gross income of the parties to the concentration has made more than USD 4 million's equivalent in AMD in the year preceding the creation of the concentration or if at least one of the parties to the concentration is entered on the register[16] of economic entities with dominant position on the given commodity market.[17]

On the basis of this provision, it is obvious that concentrations exceeding the specified threshold are subject to compulsory notification. It means that the notification procedure is mandatory. On the other hand, the Law does not prohibit voluntary notification of concentrations where merging parties want to have their concentration cleared prior to its implementation.

There is one vulnerable point concerning merger notification, a matter related to the decision of merging parties whether to notify or not. Where merging parties do not notify a merger notwithstanding that their activity satisfies the defined threshold, it is difficult for the Commission to obtain appropriate information about whether a merger occurred. Potential sources of information include either complaints from other economic entities or reports in the mass media. Where there is no complaint or appropriate information about the merger, the Commission can start an investigation upon its own initiative (but this is sometimes a waste of time).

15 This regulation is still in development. Recently the draft the Act on State Regulation of Concentration in Armenia has been submitted to the Armenian European Policy and Legal Advice Centre/AEPLAC for peer review.

16 The aim of centralised register is to control an activity of economic entities in observed commodity market. Act on "Keeping centralised register of economic entities with dominant position", adopted 25 October 2002.

17 The 2000 Law, Chapter 4 (Article 9(1)).

3.1.1. Gross income

The above-mentioned threshold for notification creates some confusion as whether it refers to profit or to turnover. The precise definition of "gross income" can be found in the Law of Republic of Armenia on "Profit Tax", where it is outlined that "gross income is the sum of all incomes during a given period of time regardless of their sources".[18] Considering the mentioned provision of the Law it can be concluded that the gross income implies the income from all activities whether in local market or in international market. However the notification procedure requires submission of information related to the gross income of economic entities, in particular commodity markets. '[9] In this case the calculation of gross income in particular markets will be subject to serious problems, because the gross income includes operations, which cannot be precisely separated according to different markets (in case if the target company operates in several markets).

3.1.2. "On the given commodity market"

The Law stated that only the concentration which occurred in the same product market is going to be considered.[20] This means that the Law deals only with horizontal mergers, that is the vertical and conglomerate mergers are out of the scope of regulation.[21] Despite the fact that the vast majority of the mergers are horizontal, nevertheless from our point of view an absence of particularly vertical mergers as a subject of regulation is a serious drawback of the Law especially when considering the economic structure and features of business environment in Armenia.

In comparison with merger control in several other jurisdictions, the Law does not contain an "effect doctrine" provision, which is considered as an indispensable measure to protect the domestic market. Although the Law refers to unification of the economic entities, there are nevertheless no provisions concerning joint ventures. This creates significant gap in the Law.

3.1.3. Local and foreign acquisitions

Moreover, the Law has no provision concerning acquisition of a domestic enterprise by foreign companies. This issue has two aspects: the first is the problem of strengthening the market power of the acquired company in the domestic market; the second is connected with competitiveness in the international market, where both companies (domestic and foreign) are competitors.[22]

3.2. Concentration

There are several comments to be made concerning the notification procedure, but it is important first to set out the definition of a "concentration" for the purposes of the Law. Article 8 of the Law deems the following to be a concentration on a commodity market:

(a) Merger of economic entities.
(b) Acquisition by an economic (entity or) entities of at least 35% of the assets of another economic entity.

18 The Law of Republic of Armenia on "Profit Tax", Chapter 3 (Article 7(I)).
19 The Law (Article 9(2)).
20 The Law, Chapter 4 (Article 8).
21 Though vertical mergers generally are pro-competitive, in cases of significant vertical integrations they can reduce competition.
22 Experience shows that there have been cases where the local company has been acquired by a foreign competitor aiming to eliminate competition between them.

(c) Assumption of control by one or several economic entities of another economic entity. Control over an economic entity shall mean:
- Acquisition of ownership or user rights over at least 30% of the asset.
- The right to affect the decisions of the given economic entity.

(d) Acquisition of the shares of another economic entity if the shares, either separately or
together with other shares already held by the economic entity, make:
- 50% of the authorised stock.
- 20% of the voting stock.

The shares held by the economic entity include also shares, which were acquired on account of the given economic entity and other shares belonging to other economic entities and, if the given economic entity is a sole proprietor, also other shares belonging to the given sole proprietor. If several economic entities simultaneously or successively acquire shares in another economic entity in the amounts mentioned above, this should be deemed to also constitute a concentration on the commodity market where the given economic entity operates.

(e) Any other unification of economic entities enabling one economic entity to directly or
indirectly influence the competitiveness of another economic entity.

Any unification of the economic entities shall not be deemed as concentration unless it has resulted in the correlation between the economic entities (hereinafter referred to as "participants") which constitute the parties to the concentration.

"Economic entity" is defined quite widely in Article 4 of the 2000 Law to include sole proprietors, economic organisations and "groups of persons". The latter is given an extensive definition including persons with contractually stipulated voting control over a legal person; persons entitled to control business activities in an executive sense; persons entitled to appoint a majority of the board of directors; and various constellations of persons in control of the executive where they and their family members have rights to dispose of a majority of voting stock.[23]

Two provisions in the definition of concentration overlap one another: Articles 8(b) and 8(c). The subject matter of these two provisions is identical, namely ownership of assets in a company. This creates confusion as to whether to use 35% or 30% ownership stake while determining concentration. As we mentioned the Commission has decided no merger cases so far, but if the case of the mentioned acquisition occurs, there will be a serious problem for the Commission with regard to which criteria to use.

3.3. Notification procedure and formalities

As stated above, there is mandatory pre-merger notification requirement under Armenian Law. Parties should submit their filing to the Commission. The Law provides that the economic entities shall not be allowed to effect a concentration before a decision is made according to the procedure set out under Article 10.[24] Therefore, a notification must be filed before the transaction is completed. There are no filing fees.

23 The interpretation of the notion of "groups of persons" in the Law creates confusion and misunderstanding. Therefore there is a need for further clarification: amendments in the Law or enactment of a separate Act or Guide.

24 The Law, Chapter 4 (Article 10(5)).

3.3.1. Decisions by the Commission

A decision on the legality of a concentration shall be taken within 2 months from the day following the receipt of notification.[25] If the Commission fails to approve or prohibit the concentration within that period, the application is deemed to have been approved. This constitutes a problem with respect to the investigative power of the Commission. As it stands, the Commission must base its decision on the information provided by economic entities, as it has no power to verify the accuracy of the information provided on merger notification (i.e. by search and inspection of economic entities). Thus, the Commission has no choice but to trust the honesty of economic entities.[26]

3.3.2. Information to be submitted

The parties should include enough information to describe the transaction.[27] The concentration notification shall contain information about the legal status of the concentration, including the following data for each party to the concentration:

- the annual gross income;
- the annual gross income in the relevant product market;
- name, business and registration address;
- main type of business;
- the list of the goods produced by the parties;
- information on the representative(s) of any non-resident party registered in Republic of Armenia.[28]

Besides the above, such a declaration may also desirably include other information concerning the commodity market and the activities of market participants (competitor's activities).

3.3.3. Authorisation and translation

Although the Law does not cover authorisation of documents submitted to the Commission, we assume that these can be authorised by the senior official of the merging parties or notarised. As Armenian is the official language, all of the above-mentioned documentation addressed to a state authority must be in Armenian. Hence, translations must be submitted.[29]

3.3.4. Confidentiality

The Commission must protect commercial secrets of economic entities and confidential information in accordance with the Law.[30] Accordingly, data deemed to be a commercial secret and obtained by the Commission in the course of exercising its powers shall remain under the protection of the Law and shall not be subject to publication. The staff of the Commission shall not be entitled to publish or disseminate, or use for personal purposes, any confidential information and commercial secrets obtained during the performance of their official duties. In case of publication of data covered by the above, the damages caused to an economic entity shall be covered from the

25 The Law, Chapter 4 (Article 10).

26 It should be noted that many international experts reviewing the Law have stressed that without adequate investigative power the effectiveness of the Commission's activity will generally be diminished.

27 The Law, Chapter 4 (Article 9).

28 The Law, Chapter 4 (Article 9).

29 As we mentioned the Act on "State Regulation of Concentration" is in the process of development and all these issues are covered by the Act.

30 *Ibid*, Chapter 6 (Article 33).

funds of the state budget in compliance with a procedure established by the Republic of Armenia legislation.[31]

3.3.5. Due process

Concerning the right of the merging parties to make representations, the Commission performs its activity in session meetings, and interested parties have the right to take part in the considerations. The Commission will notify interested parties of the place, date and time of the considerations at least 5 days in advance. However, the absence of the notifying parties will not affect the validity of the Commission's decisions. Interested parties have the right to give evidence, explanations and submit argument, appeal against the approved sanctions and file other petitions.[32] The Commission is currently in the process of developing the special methodological document, which will outline the basic framework for merger review.

4. Substantive assessment and test

From a review of the basic provisions, we can conclude that the Law is based broadly on a dominance test. Chapter 4 of the Law provides that parties are required to notify the Commission of major concentrations, and any concentration leading to a position of dominance shall be prohibited unless it fosters the development of competition on a given commodity market.[33] It should be noted for an accurate understanding of the meaning of the provision that, although the legislation states that having and maintaining a dominant position is *not per se* an anti-competitive practice, a merger that leads to a dominant position is prohibited. Another issue is what criteria are used to define the "efficiencies" for competition, that can be found to follow from a concentration, that is whether the merger will in fact improve competition and how improvements can be assessed and quantified.[34] The Law considers the concentration only in the light of dominancy and positive influence to competitiveness. It means that the merger which leads to dominancy should always bring an improvement of competitive environment in order to be approved. But there might be the case when a created dominant position as a result of a merger will not impede effective competition and it is not necessarily to improve competition. This fact limits the scope of the Commission's activity and removes some mergers from the regulatory framework. Another issue is that it is unclear how the Commission is going to calculate the post-merger dominancy (i.e. market share of merging parties) considering the possible changes in the market (exit, entry or expansion).

The merger control regime in Armenia generally does not employ a "public interest" test or welfare-based examination of a merger. The Commission does not review mergers in light strategic economic policy goals, such as overcoming economic or structural crises, promoting economic growth or reducing unemployment. In other words, mergers are examined with a view to protecting competition.

The Law takes into account the efficiency gains by applying a benchmark under which mergers do not need to be officially approved, that is all mergers are lawful unless they meet the defined criteria. This provision gives an opportunity to the Commission to avoid unnecessary interference in merger operations that are either pro-competitive or neutral.

31 The Law, Chapter 6 (Article 33).
32 The Law, Chapter 6 (Article 30).
33 The Law, Chapter 4 (Article 10).
34 Although this provision can be considered partially as an "efficiency" test, nevertheless, in general, we can conclude that the Law does not have it.

One of the shortcomings of the Law is the absent of the so-called "Failing firm" defence which implies that there might be cases when mergers involve firms that are facing losses. In this case it is often claimed that the merger will not have negative impact to competition since in the absence of the merger the loss-making firms will go out of business in any case. In general a merger with failing firm will have pro-competitive impact on competition if there is no way in which the productive assets of losing firm would remain in the market.

4.1. Dominant position

Important secondary legislation has been published recently concerning the determination of a dominant position of economic entity in commodity market, and provisions on determining the boundaries and volumes of commodity markets.[35] These regulations are important documents for understanding and reviewing concentrations.

According to Article 6 of the 2000 Act, an economic entity is considered to have dominant position if:

(a) it has no competitors or it is not exposed to any substantial competition;
(b) its consumption volume constitutes one-third of the overall consumption on a given market.

A dominant position is assessed with respect to the previous year's results of analysed data, separately based on half-year data. Economic entities are recognised as dominant within certain commodity markets by a decision of the Commission. The registration of economic entities in a dominant position as well as de-registration in case of losing that dominant position is preformed by the decision of the Commission.

4.2. Market definition

It is important also to discuss the regulatory provisions on commodity market boundaries.[36] According to these provisions, the basis for defining the product boundaries of the market is the mutual substitutability of goods comprising a given group of goods,[37] which is defined by any one or more of the following:

- specialised laboratory assessments;
- research done by the Commission;
- the result of a broad survey or alternative group's survey of buyers.

When determining the product boundaries of the commodity market, goods are defined as belonging to a given classification group. The mutual substitutability of goods is defined on the basis of the consumption patterns for the good (i.e. demand-side substitutability).

The geographic aspect of the goods market is defined by characterising a territory, within which it is economically possible and realistic for buyers to acquire the goods. The geographic boundaries of the market are determined in different regions, based on the equal availability of the goods sold. The local market is the territory of the Republic of Armenia, and the local goods

35 Regulation on "Determination of Dominant position of Economic Entity in Commodity Market`` was adopted on 4 March 2002. The Regulation on "Determination of Boundaries and Volumes of Commodity Markets" was adopted on 8 April 2001. These regulations can found on web site of the Commission http://www.competitionpolicy.am.

36 The Regulation on "Determination of Boundaries and Volumes of Commodity Markets".

37 Goods are defined by Article 4 to include works and services.

market is the district of the city, the city, separate dwelling, group of dwellings, region, group of regions, or any other territory.

4.2.1. Rationale for market assessment

Determination of the existence of a dominant position is required for several reasons, including control over agreements and concentrations, discussion of violations of legislation on protection of economic competition, demonopolisation of economic entities, and execution of other obligations stipulated by the Law. The determination of the share of economic entities in the total volume of commodity market is based on the several principles, such as: the products are belonging to the same classifier of the commodity group; calculations should be done for a certain fixed period; the same geographical boundaries of commodity markets for all participating economic entities should be considered; and collecting information on selling volume of entities on the given commodity market and determining total selling volume of commodity market. Based on analysis of the collected information the share of the economic entities is determined within total volume of the commodity market. Over a given period of time it is determined as follows:

$$SEC = SV/TV,$$

where: *SEC* is the share of the economic entity in overall sales; *SV,* the sales volume of economic entity; and 7У is the total sales volume in the given commodity market.

The share of the economic entity in the total volume of the commodity market is determined by physical volume if the commodity market is homogeneous. If the commodity market is differentiated, but it comprises conditional units (e.g. ton of conditional fuel, thousand of conditional boxes), the share of economic entity is also determined by physical volume. In a differentiated commodity market that does not comprise conditional units, the share is determined by volume of cost parameters.

From our point of view one of the key shortcomings of the Law is that while determining the dominant position of a particular firm, the Commission does not consider the development of the market shares in the relevant market over a period of several years.

4.3. Regulatory amendments to determination of a dominant position

It should be noted that the Commission has made amendments in the regulatory act on "Determination of Dominant Position of Economic Entity in Commodity Market". These amendments relate to provisions of the Law concerning the notion of substantial competition, the lack of which was the cause of some problems during the analysis of the competitiveness of commodity markets. The amendments contain basic principles and concepts for the determination of substantial competition, both quantitative and qualitative assessments. However, particularly in relation to the qualitative assessment of the substantial competition definition, it is obvious that these are hardly applicable in practice, considering the fact that the Commission has serious problems while obtaining relevant information. The above-mentioned amendment states:

> The economic entity is not exposed to any substantial competition, if its share *(Q)* for market sales volume are:
>
> 1. 80% and more, but less than 100% ($80\% < Q < 100\%$).
> 2. 33.3% and more, but less than 80% ($33.3\% < Q < 80\%$), as well as the share of next competitor is less than 10% and more times with respect to its share.

3. 33.3% and more, but less than 80%, whilst the share of next competitor is less than 10 times and the ability of other economic entities acting in the same commodity market is not enough to break the existing stability of the market and there are significant barriers to the entry. The stability of the market means the unchanged number of economic entities and their share in the same market up to 1-year period, as well as constant market volume or its possible change up to 5%.

5. Final orders and sanctions by authority(ies)

As mentioned above, the Commission reaches its decisions during meeting sessions. A decision on the validity of a concentration applies from the date of its promulgation and may be appealed in due course in the economic court within 30 days.

The special sanctions are intended for failure to provide information or undue delays. The Law states that "The failure to submit necessary materials to the Commission or the submission of false documents to the Commission shall lead to an imposition of a penalty in the amount of up to 100 times of the baseline duty. If during a year the same infringement will be continued the penalty will raised up to 1000 times of baseline (1000 AMD)[38] duty each time".[39]

Additionally, the Law provides for special penalties for the illegal concentration itself and concentrations of economic entities leading to a dominant position which may be reflected in:

- a merger of economic entities;
- acquisition by an economic entity of at least 35% of the assets of another economic entity;
- assumption of control by one or several economic entities of at least 35% of the assets of another economic entity;
- acquisition of shares in another economic entity if the shares, either separately or together with other shares already held by the economic entity, make 50% of the authorised stock or 20% of the voting stock, shall be subject to an imposition of a penalty in the amount of up to 40,000 times the baseline duty.[40]

The Law also states that "Profits obtained by economic entities as a result of Law infringement shall be transferred to the State Budget."[41]

Finally the prohibited concentration which has been put into effect shall be subject to an order by the Commission to de-merge the entities or to require the entities to restore the market to the position it was before the merger.

According to the Article 36 of the Law 2000 not only the economic entities, the state and local bodies take responsibility for violation of the Law but also theirs officials. Elsewhere, Article 19 states that the Commission, within the scope of its competence, has power to make decisions on imposition of penalties in the event of infringement of the present Law on economic entities and theirs officials, as well as officials of the government and local government administration bodies. However the Law does not provide clear explanation of how the officials will be punished.

During lawsuits the Commission acts as *ex parte* and such hearings are known as a civil action.

38 The Law of the Republic of Armenia on "State Duty" - Chapter 4 (8).
39 The Law, Chapter 7 (36).
40 The Law, Chapter 7 (36).
41 The Law, Chapter 7 (37).

6. Appeal and judicial review

The decision of the Commission shall be implemented by the economic entity, government and local government administration bodies and theirs officials in the time frame indicated by the Commission in its decision. The copy of the decision (recommendation) shall be handed over or sent as a registered letter to the person to whom the given decision concerns within 5 days after it was made. The decisions of the Commission come into force from the date of its promulgation and may be appealed in a due course of law within 30 days of their delivery. The Commission initiates court proceedings if its decision is not implemented. The Commission is relieved by the court from charges payable in the event of filing a claim. At the same time the decisions of the Commission, including a decision on the validity of a concentration in case of appeal by the economic entities as well as government and local government administration bodies and theirs officials are the subject of judicial review by the Economic Court of the Republic of Armenia. The procedure of judicial review is based on the special regulation. The interested person is entitled to apply to court, in accordance with the procedure established in the Law on Civil Procedure Code,[42] for the protection of one's rights, freedoms and legal interests stipulated and envisaged in the Constitution of the Republic of Armenia, laws and other legal acts or agreements. In cases envisaged in this Code and other laws, the persons entitled to defend the rights, freedoms and other legal interests of other persons, can apply to the court for the purpose of defence. The court initiates a civil case only based on a civil action or application.

7. Enforcement by private parties

The Law does not cover the relationship between merging parties, third parties and Commission. However it is not prohibited to start proceedings at the request of third parties. The Commission has the right to make its decisions based on the applications (complaints) and data provided by economic entities, bodies of central and local government administration and consumers, as well as publications in the mass media and other documents at its disposal, if these may serve as a proof of infringement of the Law.[43]

8. Mergers in specific sectors

8.1. Banking

Armenia has a separate merger control regime in the banking system. The relations in banking system are regulated by the Laws on "The Central Bank", "Banks and Banking", "Bank Bankruptcy" and "Bank Secrecy".[44]

The Central Bank of Armenia has the exclusive right to supervise banking activities in Armenia. A bank may be reorganised in the form of a merger with another bank or through re-structuring. Re-structuring of the bank (change in the organisational-legal form) shall be implemented as

42 The Civil Procedure Code of the Republic of Armenia adopted by the National Assembly of the Republic of Armenia on June 17, 1998.

43 The Law, Chapter 6 (34).

44 The Laws on "The Central Bank", "Banks and Banking", "Bank Bankruptcy", "Bank Secrecy" can be viewed alongside other regulatory guidance at the web site of the Central Bank: http://www.cba.am

provided for by the Civil Code of the Republic of Armenia or in the form provided for by other laws. The merger of banks shall be implemented as provided below.[45]

In the case of a merger of one or several banks into another bank, the merging banks shall obtain the prior approval of Central Bank of Armenia before concluding the merger contract. After receiving the relevant documentation the Board of the Central Bank of Armenia shall take a decision within a 1 month period.

At the same time, another article of the Law states that "Banks shall be prohibited from signing contracts that may be directed at or result in limitation of the free economic competition between the banks, or in the result of which the bank, persons related to or co-operating with it achieve dominant position in the banking market of the Republic of Armenia that gives them the opportunity to predetermine the market value and conditions of activities and operations or even only one of operations provided in the Law "Bank and Banking".[46] On the other hand, this restriction does not apply to the bank that has the opportunity of predetermining the market value of the activities or an operation provided by the above-mentioned Law as it is the sole provider of the given activity or the operation. At the same time the Central bank has the power to deny the request and inform the requesting person within a 10-day period if the person and interrelated persons receiving significant participation in the statutory capital of the bank through this transaction, as a result secure dominant position in the banking market of the Republic of Armenia that allows them to predetermine the market value and conditions of services or any one service listed in the same Law.

8.2. Public services

Armenia also has adopted the Law on Regulatory body of public services, which establishes a body for the regulation of public services and sectors to be regulated. The specific provisions for the publicly regulated sectors are the Law on "Energy", "Electronic Communication" and "Code on water". There are significant changes in these specific sectors. The new Law came into force in January 2004. Under the Law, the Regulatory Commission Natural Monopolies of the Republic of Armenia was changed into the Commission for the Regulation of Public Services. The main task of the regulatory body is to set up tariff policy on public services. Concerning concentration in the mentioned spheres there is no provision for merger control under this law. This gives the right to assume that mergers are only controlled *ex post* by the provisions of the Law.

8.3. Company law

It is important to mention that Armenia adopted the Law on Joint Stock Company in 1996 ("Law on JSC"), with amendments made in October 2001, after implementation of the Law on Protection of Economic Competition dated November 2000.

The Law on JSC states that "Company reorganisation by means of Company merger or acquisition in cases stipulated by Law may be implemented only with the permission of the authorised state body". However, this Law does not in fact prohibit or restrict mergers or acquisitions. Quite the contrary, the relevant article of the Law on JSC provides that company reorganisation (merger, acquisition, division, separation and reformation) is carried out by a decision of the Meeting of the Company. And a company is subject to state registration by the body carrying out state registration

45 The Law on the Bank and Banking of the Republic of Armenia, Chapter 8 (67).
46 The Law on the Bank and Banking of the Republic of Armenia, Chapter 4 (42, 34).

of legal entities in the manner stipulated by the Republic of Armenia "Law on State Registration of Legal Entities"[47] and provisions of the Law on JSC.[48]

The Law on JSC was silent on revenue of the merger parties. Meanwhile, we understand that if the turnover of parties to the concentration exceeds the threshold determined by the Law on the Protection of Economic Competition, the parties will be required to notify their operation to the Commission. Otherwise it may be implemented with the permission of the authorised state body.

At the same time there is another problem concerning the terminology and definitions used in various legislation. The Law on Protection of Economic Competition uses the definition of concentration (a wide concept), while the Law on JSC and other legislation use the definition of merger.

The Law on JSC gives the following definition:

> Company merger is the creation of a new company that will obtain the rights and responsibilities of two or more merging companies, while the latter terminate. Merging companies sign an agreement on merger. A decision on reorganization in the form of merger shall be adopted by the Meetings of each of the merging companies, which will also approve the merger agreement, the transfer act, the procedure and terms of merger, as well as the procedure of converting the shares and other securities of each of the merging companies into shares and/or other securities of the newly created company.[49]

At the same time the Law on JSC stipulates that:

> Company acquisition is the termination of one or several companies, the rights and responsibilities of which are transferred to another company. The Companies participating in the acquisition sign an acquisition agreement. A decision on reorganization in the form of acquisition shall be adopted by the Meetings of each of the merging companies, which will also approve the merger agreement, the transfer act, the procedure and terms of acquisition, as well as the procedure of converting the shares and other securities of each of the acquired companies into shares and/or other securities of the acquiring company.

The merger (acquisition) agreement shall be concluded between the companies involved in the merger (acquisition), signed by the head of the Company's executive body, and verified by the Companies' General Meetings of Shareholders. The merger (acquisition) agreement contains the following:

(a) the business names of the parties involved, their places of location, and information on their state registration;
(b) the timeframe, procedure, and terms of merger (acquisition);
(c) the procedure (formula or other standard) used to convert the shares and other securities of the merging (acquired) company;
(d) the terms and conditions of receipt of dividends for shares of the merging (acquired) companies;
(e) the procedure of voting in the Joint General Meeting of Shareholders;

47 This law can be viewed alongside other Laws at the web site of the Armenian Development Agency: http://www.businessarmenia.com
48 The Law on JSC, Chapter 2 (16). This law can be viewed alongside other regulatory guidance at the web site of the Central Bank: http://www.cba.am/emain.html
49 The Law on JSC, Chapter 2 (19).

(f) the dates and procedure of preparation and implementation of the Joint General Meeting of Shareholders of the companies involved in merger (acquisition);
(g) other information, as the parties involved in the merger (acquisition) find necessary.

9. Co-operation with other competition authorities

The State Commission for the Protection of the Economic Competition of the Republic of Armenia is co-operating with some international organisations as well as with other bodies defending competition in the Commonwealth of Independent States (CIS) and other foreign countries.

On 8 December 1991 in Viskuli, the residence of the Belarusian Government in Belovezhskaya forest preserve, the leaders of the Republic of Belarus, Russian Federation and Ukraine signed the Agreement on establishment of the CIS. Later, the heads of 12 sovereign states (except the Baltic states) signed the Protocol to the above Agreement, in which they stressed that the Azerbaijan Republic, Republic of Armenia, Republic of Belarus, Republic of Kazakstan, Kyrgyz Republic, Republic of Moldova, Russian Federation, Republic of Georgia, Republic of Tajikistan, Turkmenistan, Republic of Uzbekistan and Ukraine on equality basis established the CIS. The participants at the meeting unanimously adopted the Declaration, which confirmed the devotion of the former union republics to co-operation in various fields of external and internal policies, and announced the guarantees for implementation of international commitments of the former Soviet Union. Thus, at present the CIS comprises 12 young sovereign states - former soviet republics.

The CIS performs its activities on the basis of the Charter, adopted by the Council of Heads of States on 22 January 1993, which stipulates the goals and principles of the Commonwealth, rights and obligations of the countries, which established it voluntarily.

The Commonwealth is not a state; it does not have supranational powers. In September 1993, the heads of states signed the Treaty on Establishment of the Economic Union, in which they developed the concept of transformation of economic interaction within the Commonwealth, taking into consideration the current realities. The Treaty was based on the necessity of formation of the common economic space on the principles of free movement of goods, services, workers, capitals; elaboration of concerted money and credit, tax, price, customs and foreign economic policies; rapprochement of the methods of management of economic activities, creation of favourable conditions for development of direct production links.

Countries' interaction within the CIS is accomplished through its co-ordinating institutions: Council of Heads of State, Council of Heads of Government, Councils of Foreign Ministers, Defence Ministers, Border Troops Commanders, Inter-parliamentary assembly, Executive Committee, the latter being legal successor of the Executive Secretariat, and the Interstate Economic Committee of the Economic Union, etc.

Within the framework of the CIS, the Commission participates in the work and meetings of the Anti-Monopolistic Policy Interstate Council of the CIS member states, the main goal of which is to develop and implement accorded policy between the CIS member states. Armenia as party to the Council of the CIS has signed an agreement on the Realisation of a Concordant and Harmonious Antimonopoly Policy.[50]

50 The web site of the Executive Committee of the CIS is http://www.cis.minsk.by

The aims of the agreement are as follows:

- co-ordination of joint activities to prevent, restrict and prohibit anti-monopoly activities and/or unfair competition;
- bring together anti-monopoly legislation as much as it necessary for achievement of this agreement;[51]
- fostering the conditions for development of competition, effective functioning of commodity markets and protection of consumer rights;
- consistent procedure for consideration and assessment anti-monopoly activities of economic entities, government bodies and administration, and creation mechanism for co-operation thereupon.

The agreement also stipulates that, unless restricted from doing so by any domestic legislation, the parties will communicate about the following:

- the state of commodity markets, approaches and practical results of demonopolisation in the framework of structural reformation of economic, methodology and experience for preventing and restricting monopoly activities and developing competition;
- providing information, which consist in the domestic registers of monopolist entities, which realising delivery of goods to the commodity markets of country parts;
- Providing information concerning experience to examination of cases on infringement of anti-monopoly legislation.

Countries will co-operate on developing domestic laws and legislative acts on anti-monopoly policy by providing information and methodology.

On May 2004 the Republic of Armenia and the Ukraine signed "The Agreement between Cabinet of Ukraine and Government of the Republic of Armenia on co-operation in the field of competition policy". This is a bilateral treaty aimed at facilitating co-operation and information exchange on competition matters. The Commission is planning to sign such bilateral agreements with other CIS countries.

The Commission joined the International Competition Network (ICN) in 2001. The ICN's activities operate on a voluntary basis and rely on goodwill and co-operation between the jurisdictions involved. The ICN is not intended to replace or co-ordinate the work of the members or other organisations, nor does it exercise any rule-making function. The ICN provides the opportunities for its members to maintain regular contacts, in particular by means of annual conferences and progress meetings.

In co-operation with ICN, the Commission has actively participated in the working meetings and the annual conferences. It is hoped that this structure will contribute to the creation of immediate ties with the competition authorities of the developed countries and the exchange of valuable experience, as well as to the professional development of staff.

The Commission is working closely and actively with various ICN Working Groups, such as Mergers, Antitrust Enforcement in Regulated Sectors, Capacity Building and Competition Policy Implementation Working Groups. The mandate of the Mergers sub-group is to examine the procedural aspects of merger notifications, including issues of jurisdiction, timing, the scope of the merger notification and information requirements, and the timing of merger reviews. This sub-group is also responsible for collecting information on the merger laws of ICN Members

51 This means approximation of all members' legislation, including sub-legislation regulations and guidelines.

and making them available online. Though, where ICN reaches consensus on recommendations arising from the project, it leaves it to the individual competition agencies to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate.

The Commission also co-operates with other international organisations in the sphere of protection of economic competition, namely the Organisation for Economic Co-operation and Development (OECD), the World Bank and the World Trade Organisation (WTO).