

**UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT**

**Voluntary peer review of competition policy:  
Armenia**

**Overview**

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## **Note**

UNCTAD's voluntary peer review of competition law and policies falls within the framework of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices (the "United Nations Set of Principles and Rules on Competition"), adopted by the General Assembly in 1980. The set seeks, inter alia, to assist developing countries in adopting and enforcing effective competition law and policy that are suited to their development needs and economic situation.

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## **Preface**

1. This report examines Armenia’s competition policy system (ACPS). It is based upon (a) a review of the legal texts that supply the framework for the ACPS (statutes, implementing regulations, and guidelines); (b) decisions issued by the State Commission for Protection of Economic Competition (SCPEC); (c) study of other reports dealing with the ACPS; and (d) interviews with SCPEC leadership and staff, donor organizations, officials from other Government authorities, academics, and representatives of non-governmental organizations such as business associations and consumer groups.

### **1. FOUNDATIONS AND HISTORY OF COMPETITION POLICY IN ARMENIA**

#### **A. Introduction: Armenia’s competition system in context**

2. Armenia is one of approximately 80 nations that have created their competition systems since 1980. The Law of the Republic of Armenia on Protection of Economic Competition (“the Act”<sup>1</sup>) was passed on 6 November 2000. On 13 January of the following year, SCPEC was established. The ACPS 10th anniversary is approaching, and this review serves as a fair assessment of the state of progress of the ACPS.

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<sup>1</sup> If not indicated otherwise, all Articles referred to in this report are Articles of the Act.

3. Several critical background facts and circumstances affect every aspect of Armenian life. Each significantly influences the character and practice of competition law and policy and the challenges to be confronted. There are two fundamental facts of Armenia's economic and political life. The first is its status for approximately 70 years as a Republic of the former Soviet Union. The second fundamental feature underpinning Armenia's political and economic life is the geopolitical situation in the South Caucasus region, specifically the conflict-ridden relationship between Armenia and its eastern neighbour, Azerbaijan, and between Armenia and its western neighbour, Turkey.

## **B Political and economic context**

4. Until 20 years ago, Armenia's economy was centrally planned. It was done so in relation to the requirements of the constellation of regions and semi-autonomous Republics that made up the Soviet Union. Armenia was an important supplier of manufactured inputs – notably machine tools – to the rest of the Soviet bloc economy and particularly to Russia itself. This market disappeared overnight, both because the absence of competition had left those key parts of what was essentially a highly protected manufacturing economy chronically unable to compete in suddenly liberalized markets, and because the precipitous decline of the Russian economy had significantly reduced the demand side of the market.

5. The former manufacturing capacity has never been successfully revived, certainly on the scale that it existed in Soviet times. Yet the data indicate that the Armenian economy did recover rapidly from this shock, recording, through much of the 1990s, and then especially in the first decade of this century, growth rates that were stratospheric. From 1995 to 2008, an

average annual growth rate of 9 per cent was recorded. Between 2001 and 2007, the economy grew at an average annual rate of 13 per cent, while gross domestic product per capita grew from approximately \$670 in 2001 to \$3,689 in 2008. Growth dipped significantly from 2008 due to the onset of the global economic crisis. Indeed, it appears that these impressive growth rates were largely fuelled by a construction boom financed, in significant part, by remittances from the very large and loyal Armenian Diaspora.<sup>2</sup> Both the remittances and the construction activity that they financed were significantly reduced as a consequence of the economic crisis.

6. Since the Soviet Union's demise, Armenia has opted for a market-based economy. This is not mere rhetoric. If evidence of official support for a liberal, market based economy is required, one need refer no further than the rapid privatization that immediately followed the Soviet Union's demise, the unusually liberal (in formal terms at least) trade regime and, not least, the active official support for competition enforcement.

7. Although privatization has, in other countries, often been identified as a source of market power, whereby publicly licensed monopolies were converted into privately owned monopolies and put in the hands of individuals closely linked to the political rulers, this does not appear to have been the case in Armenia. A former member of the political elite who had been directly involved in the privatization process in the immediate post-Soviet period affirmed that public enterprises were broken up, horizontally where possible, and vertically where appropriate.

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<sup>2</sup> Ministry of Economy of the Republic of Armenia, Armenia Economic Report 2009.



However, his view was that lax post-privatization regulation had permitted re-consolidation of critical utilities in gas, telecommunications, electricity and water.

8. Today, Armenia's economy is characterized by high levels of concentration in important markets, which are significantly influenced by the limited points of entry and exit for the import and export of goods in what is an extremely open economy (that is, an economy where trade represents a significant proportion of gross domestic product). Geopolitical tensions have closed two of landlocked Armenia's most likely routes to the sea, namely, the borders with Turkey and Azerbaijan. Thus, Armenia has effectively one reliable, economically viable route to the sea – through its border with Georgia. These physical limitations on trade routes make it relatively easy to capture and, hence, monopolize trade in important products. If this is accompanied by a weak customs service, the upshot is a significant underreporting of trade, which, given its relative importance in economic life, results in a significant under-reporting of overall economic activity.

9. It is apposite to emphasize and revisit the phenomenon of the so-called “shadow” economy. Armenia's shadow economy is effectively formal sector activity that is not reported to the authorities, principally to enable the trader or the producer to evade the payment of taxes and import duties. By many estimates, this practice understates the size of the Armenian economy by as much as 40–50 per cent, which means that a significant slice of Armenia's economic activity is subject neither to corporate tax, nor import duties nor social taxes.

10. Where economic activity is frequently underreported, the inevitable outcome is that the dominant incumbents pay lower

taxes and customs duties than required. This not only harms the Government's ability to build effective institutions such as competition agencies, regulators and customs and revenue authorities, but it also gives the incumbent companies a strong competitive advantage vis-à-vis actual or potential rivals. This "competitive advantage" – or, rather, source of economic rent – has enabled dominant Armenian business enterprises to capture entire markets.

11. The above-mentioned phenomena have important implications for competition law and policy.

12. Firstly, they underline and reinforce the strength of the opposition that robust competition enforcement will have to confront. This in turn emphasizes the importance of strong, clearly drafted statutes replete with the full panoply of investigative powers.

13. Secondly, it necessitates going beyond competition law enforcement and considering the development of a complementary, comprehensive competition policy. Competition law, which principally concerns private trade restraints, is a subset of a broader competition policy, which is, in turn, additionally concerned with publicly created restraints.

14. Thirdly, the practice of underreporting by large market players points to some potentially positive outcomes for competition policy, were its predominant source to be tackled and eliminated. Were the actual size of the Armenian economy to be known, new entry, including in the form of foreign direct investment – particularly given the privileged access that Armenia has to the markets of the Commonwealth of Independent States – would clearly become a more attractive option, thus potentially

reducing the market power commanded by the incumbent companies.

15. However, there remain grounds for optimism as to the ACPS. Those interviewed, all well informed and from diverse backgrounds and perspectives, emphasized the need for a robust, independent competition authority. Public servants in areas critical to competition, who were actively involved in promoting robust competition, saw the importance of active cooperation with SCPEC in promoting their goals. Those interviewed were confident that the offices of both the President and the Prime Minister supported the reformist path manifest in support for robust competition law and policy.

16. A final, extremely important observation of Armenia's political context concerns international relations. From a competition policy perspective, relations between Armenia and the European Union (EU) are particularly significant. EU relations with Armenia are governed by the EU–Armenia Partnership and Cooperation Agreement, signed in 1996 and entered into force in 1999. Following its enlargement, the EU launched the European Neighbourhood Policy (ENP) and Armenia became part of this policy in 2004. Based on a 2005 Country Report, an ENP Action Plan was adopted by the EU and Armenia on 14 November 2006.

## **II. THE LEGAL FRAMEWORK – THE LAW ON THE PROTECTION OF ECONOMIC COMPETITION**

17. Armenian competition law is rooted in the country's constitution. Article 8 of the Constitution of the Republic of Armenia provides “Freedom of economic activity and free economic competition is guaranteed by the Republic of Armenia”. Most Armenian competition law provisions are provided for by the Act, which was passed on 6 November 2000. There have been

several amendments to the Act since then, the most significant of which took place on 22 February 2007. A few changes related to procedural issues were made in 2008. In addition, Article 12 of the Civil Code of the Republic of Armenia addresses the protection of civil rights in connection with prohibitions on unfair competition and the abuse of dominance. Articles 195 and 196 of Armenia’s Criminal Code criminalize certain forms of anti-competitive conduct. However, it appears that the latter have never been applied in practice.

18. The Act covers what is, for the most part, the standard set of issues contained in most competition statutes. However, and despite several reforms, the legal framework has remained markedly defective in key aspects.

#### **A. Anti-competitive practices**

19. Anti-competitive practices are dealt with in chapters 2 and 3. Chapter 2 – comprising Articles 5.1-5.7 – is principally concerned with anti-competitive agreements, while Article 6 of chapter 3 defines monopolies and dominance and Article 7 of the same chapter prohibits any abuse of a monopolistic/dominant position.

#### **B. Anti-competitive agreements**

##### *Scope of application of the prohibition of anti-competitive agreements*

20. Article 5 is principally concerned with anti-competitive horizontal agreements – that is, agreements between competitors. This is verified by practices listed in Article 5.2. Although this is an uncharacteristically lengthy list, the practices listed in the Armenian Act do indeed cover each of the traditional “hard-core”

cartel offences. However, certain subclauses in this list – for example Articles 5.2(d) and (e) also incorporate what would usually be construed as exclusionary conduct. This is possibly because, as Article 5.3(b) makes clear, Article 5 purports to cover not only horizontal agreements but also vertical agreements.

21. It is conventionally accepted in competition law practice that agreements between competitors belong in a category of their own, not least because the harm arising from them is so universally accepted that there is generally no necessity to prove economic harm but simply to establish the conduct, that is to establish the existence of an agreement between competitors to fix prices, allocate markets or rig bids.

22. On the other hand, vertical agreements, particularly those that do not involve a party that is dominant, are rarely harmful to competition. Undeniably, these agreements do sometimes harm competition – for example, minimum resale price maintenance is widely, although not unanimously, agreed to be anti-competitive. However, for the most part, it would not be common practice to condemn vertical agreements without requiring proof of anti-competitive harm.

23. For this reason, it is recommended that Article 5 be broken up into two separate Articles, the first dealing with horizontal agreements, the second dealing with vertical agreements. It is also recommended that the list of prohibited horizontal agreements be shortened and simplified, identifying those core offences – price fixing, market allocation and bid rigging – that are widely accepted to cause anti-competitive harm. These should be defined as *per se* illegal, whereas other forms of horizontal agreements, as well as vertical agreements, should be subject to the rule of reason.

Standard of proof for anti-competitive agreements

24. Furthermore, it appears that the concept at the heart of each of the prohibited horizontal offences is that of an “unjustified” price movement. This is effectively a movement in prices that cannot be explained by any underlying change in the cost structure. Article 5.2 and 5.4 are understood by SCPEC to provide the legislative basis for this approach. Article 5.2 reads as follows:

*“Anti-competitive agreements shall refer to:*

*(a) [...]*

*(b) Unjustified increase, decrease or maintenance of a product price;*

*Within the context of this sub-clause, unjustified increase of price shall be deemed the increase of a product’s and/or its substitutable products’ price by two or more economic entities during a certain period of time.*

*[...]”*

25. Article 5.4 provides:

*“Anti-competitive agreements shall be deemed proven when:*

*(a) any factual details (including any written document or other written evidence, video or record), or any other evidence not prohibited by the Law, are available;*

*(b) the actions or conduct of economic entities as specified in Part 2 of this Article testify it.”*

26. It appears that the rather unusual approach of the Armenian legislation has two origins, one explained by many years of price regulation, the other by a marked and much remarked-upon absence of investigative powers.

27. The former underlies a rather mechanistic approach to price movements – an approach that holds that price changes are only determined by underlying cost movements rather than by market demand and supply conditions. Note, however, that in conventional approaches to horizontal agreements, the offence of price fixing relates precisely to an agreement to manipulate output or supply in order to increase or maintain prices above the competitive level – that is, above the level which would prevail if competitors took output decisions individually. Accordingly, in prosecuting horizontal agreements to fix prices (or allocate markets or rig bids) there is never any question of a “justified” increase and so never any need to gather and analyse the underlying cost data. In fact, many competition authorities do track unusual price movements. And they would accept that an unusual parallel movement in prices would indicate a *prima facie* problem. The upshot is that SCPEC may be imposing upon itself an unnecessary and costly burden in attempting to prove the absence of a justification.

28. However, this apparently superfluous and burdensome activity is also explained by the second of the factors identified above, namely, the extreme weakness of SCPEC’s investigatory powers. It appears that, because SCPEC’s investigatory powers are unusually weak and constrained, it is obliged to turn to economic evidence, i.e. to the underlying cost data, in order to demonstrate that the price movement is “unjustified” and, from there, to infer a price fixing conspiracy. Increased investigatory powers would offer a solution to this problem...

## C Abuse of dominance

### Definition of Dominance

29. According to Articles 6.1–6.4, dominance is defined by market share and incorporates both single firm dominance (a market share of one third or greater) as well as dominance on the part of the two or three largest firms, depending again on their collective market shares (each of two economic entities will be dominant if between them they command a 50 per cent or greater market share, while each of three firms will be dominant if they capture two-thirds or more of the market in question).

30. In practice, SCPEC faces certain difficulties related to the interpretation of this definition of dominance, since the current interpretation of the market share thresholds does not allow the authority to base its finding of dominance on the economic reality in a given market.

31. The use of market share thresholds to either establish a *prima facie* case and thus shift the burden of proof or to rule out dominance enhances the efficiency of the enforcement of the competition authority and gives entrepreneurs legal certainty. Nonetheless, market share thresholds pose the risk of underemphasizing or overemphasizing market share in certain cases, leading to over enforcement or under enforcement. Therefore, as a rule, competition laws do not stipulate irrefutably that a company is dominant when it reaches certain market share thresholds.

32. This approach would also help to overcome the above-mentioned difficulties that SCPEC faces when applying the market share thresholds for dominance, i.e. that it cannot take into



account the competitive situation in the respective relevant market.

*The register for dominant companies*

33. Once companies are found to hold a dominant position, SCPEC registers them in a centralized register for dominant companies. Article 28 requires that registered firms shall provide to SCPEC “at six-month intervals, information regarding the volumes of product sold (acquired) by them on the given product market, cost structure and price flows (in the case of price changes – with appropriate justification)”.

34. Although the Act does not require SCPEC to register a company as dominant before prosecuting possible abuses of this dominant position, contrary to the views of SCPEC, the Administrative Court has held that inclusion on the register is a jurisdictional prerequisite for prosecution of allegedly abusive conduct.<sup>3</sup> In practice, this view poses significant enforcement challenges to SCPEC, since certain companies transfer their activities to a different legal shell once they are registered as dominant. That is to say, SCPEC needs to register the new legal entity to which activities have been transferred as dominant before starting its investigation – a cumbersome process that renders SCPEC’s work much more difficult.

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<sup>3</sup> See Decision 111-A, “Boundaries of Gasified (Carbonated), Sweetened Drinks involving Coca-Cola Hellenic Bottling Company Armenia” (14 September 2005).

35. The phenomenon of a dominant firm register is not uncommon in transition economies; nevertheless, this is not a warranted use of SCPEC's constrained resources. The experience and skills of the small department that has been employed for many years in gathering this data could be far better deployed in undertaking strategically selected market studies.

36. Indeed, the use of the register and the related emphasis on justifying price increases may be positively counterproductive. For example, it frequently happens that firms registered as dominant in the wake of input price increases approach SCPEC to announce their intention to increase prices. Approving proposed price increases by dominant undertakings clearly falls outside the jurisdiction and functions of a competition authority, which is not a price regulator. The register and the perceived obligation of registered firms to "notify" their price increases in advance could become an obvious platform for collusion. Furthermore, abolishing the register for dominant companies would also render the question whether the inclusion of a dominant firm in the register is a jurisdictional prerequisite for prosecution of allegedly abusive conduct redundant.

## **D Mergers**

37. The Act governing mergers or, as it is termed, "concentration", is particularly vague and terse. For example, only mergers which give rise to a "dominant position" are prohibited, but the Act is silent on mergers that occur when one of the merging parties is already dominant.

38. It appears that the Act requires pre-merger notification, if the asset-based notification thresholds of Article 9.1 are met. However, it is certain that mergers are only rarely notified.

39. The flagrant disregard for the merger notification requirement must inevitably generate damaging questions regarding the credibility of SCPEC – in effect a major provision of the Act is simply not being honoured. To continue allowing this flagrant disregard for the law is clearly highly undesirable. While no satisfactory explanation has been provided for the failure of firms to register, this may result from thresholds that are not appropriately crafted to catch those mergers that possibly produce anti-competitive effects on the Armenian market.

40. Against this background, it should first be assessed why the Armenian merger control provisions have been ineffective and define appropriate amendments. Appropriate thresholds based on turnover rather than on asset value may be a means to address the problem.

41. International experience with merger control underscores the importance of imposing severe sanctions for the failure of firms to comply with notification procedures. Indeed, the fines for failure to notify a merger provided for in Article 36(4) of the Act are higher than those for any other offence. However, while Article 10(4), dealing with “State regulation of concentration” provides that “enacted prohibited concentration” shall be subject to liquidation (annulment, ceasing), it is not clear whether this remedy is also available for failure to notify a transaction. In the absence of more legal clarity, the fine specified in Article 36(4) appears the only sanction available in case of a failure to notify. Hence, the remedies for failure to notify do not appear to include the ability to order divestiture of an illegally consummated merger if the latter substantially lessens competition.

42. A thorough revision of available sanctions for a failure to notify and advocacy measures including merger control guidelines

and public announcements of the agency’s enforcement intentions appear indispensable to promote compliance with Armenia’s merger control regime

### **E. Unfair competition**

43. The prohibition of unfair competition in chapter 5 incorporates an extremely wide-ranging and vaguely defined array of practices. Certain of these offences incorporate what are conventionally understood as “consumer protection” issues. There is an active debate regarding the whether consumer protection and competition rules should be enforced by one body or two. The prior issue in the Armenian Act is undoubtedly the extremely wide ranging and vaguely defined nature of the practices listed.

### **F. State aid**

44. Article 16.1 prohibits State aid “which directly or indirectly leads or may lead to the restriction, prevention of prohibition of competition in any product market”. It extends beyond mere consultation to outright prohibition and potentially eliminates all but the most generally applied industrial policy support mechanisms. It is little wonder that this clause has never been applied and is unlikely to be applied as now cast. Consideration should be given to replacing this clause with a requirement to consult SCPEC before implementing State aid measures.

### **III. INSTITUTIONAL ASPECTS: POSSIBLE ADJUSTMENTS TO COMPETITION POLICY ENFORCEMENT STRUCTURES AND PRACTICES**

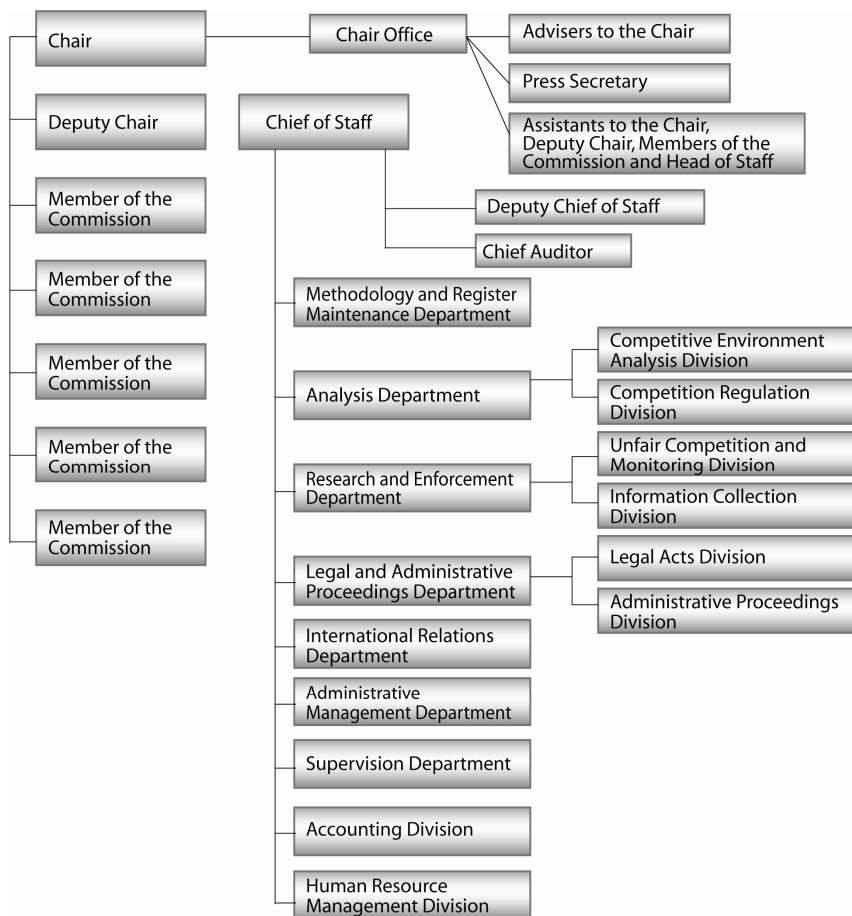
#### **A Institutional framework and operations of SCPEC**

##### **1. Institutional set-up of SCPEC**

45. The Act establishes SCPEC as an independent commission, which is a crucial element for any successful competition law enforcer. SCPEC's board is composed of seven members (the chair who serves, in effect, as the chief executive officer of the authority, the chair's deputy, and five other commissioners) appointed by the President of the Republic of Armenia to renewable five-year terms. Commissioners may be removed from office only for good cause. The political branches of the Government lack authority to overrule the decisions taken by the agency.

46. The work of SCPEC is carried out through several operating units as illustrated below. Altogether, the professional and support staff of SCPEC amounts to 76 employees.

## Structure of the SCPEC<sup>4</sup>



<sup>4</sup> Note that the SCPEC is currently in the process of adjusting its institutional arrangements and procedures.

## 2. Functions of the SCPEC

47. Article 1 assigns SCPEC responsibility “to protect and encourage free economic competition, ensure appropriate environment for fair competition, promote development of entrepreneurship and protection of consumer rights”. To carry out its policy duties, SCPEC is authorized to:<sup>5</sup>

- Exercise control over the compliance of Armenia’s competition statutes;
- Examine possible infringements of the competition statutes and issue decisions concerning such infringements;
- Maintain a centralized register of economic entities holding a dominant position;
- Bring cases in Armenia’s courts concerning infringements of the competition statutes;
- Participate in the drafting of statutes affecting competition policy in Armenia;
- Enter into agreements with other jurisdictions concerning competition policy issues within its remit;
- Cooperate with other Government authorities in Armenia and with international organizations;
- Develop and implement measures to prevent infringements of Armenia’s competition laws;
- Examine and report upon experience with the implementation of the Act and propose improvements to the existing statutes;

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<sup>5</sup> Article 18.

- Publicize the competition authority’s activities, including through the publication of a regular bulletin;
- Perform a public outreach programme to explain the competition statutes and the obligations of affected parties under the law; and
- Carry out other activities that serve to fulfil the objectives of the competition statutes.

48. Taken as a whole, this portfolio of functions and duties provides a sound platform for the implementation of Armenia’s existing competition laws, the building of Government-wide policies that promote competition, coordination with other public bodies, and participation in international networks and other arrangements

### **3. The SCPEC’s investigatory powers**

49. According to Article 19.1 (c), SCPEC is entitled to “conduct research, inspection, study and (or) monitoring according to the procedure defined by the law in order to disclose the reliability of information presented by economic entities, the actual activity of economic entities, or to exercise control over fulfilment of the Commission decisions”.

50. The procedure to be respected when carrying out the above-mentioned inspections is spelled out in the Law on Organizing and Conducting Control in the Republic of Armenia of 17 June 2008. Most importantly, according to Article 3 of this Law, “Prior to commencing the control, the head (his/her alternate) of the relevant public authority shall issue an order or instruction on conducting a control, indicating [...]” Furthermore, the provision stipulates: “Two copies of the order or instruction shall be given



to the head of the economic operator or his/her alternate, three working days prior to the commencement of control”.

51. In practice, this means that the investigation powers of SCPEC are limited to verifying whether already submitted information is accurate after having announced such inspection three working days in advance. Compared to state-of-the-art approaches that prevail in many other competition systems, these investigation powers are decidedly weak. In particular, SCPEC lacks the capacity to compel the production of records by means of dawn raids or other unannounced inspections that deny the affected parties the opportunity to destroy, sequester or selectively present relevant evidence.

52. SCPEC’s investigation powers can be effectively strengthened in two ways. One consists in awarding the agency the power to conduct unannounced “dawn raids” of business enterprises to obtain corporate records in paper or electronic form. Concerns relating to a possible abuse of this form of investigatory methods can be addressed by subjecting them to proper judicial oversight. The second is the implementation of a leniency programme that rewards self-reporting of violations with a substantial or complete dispensation from sanctions.

53. Both tools have proven to be important to the ability of competition agencies to gain access to business records that assist in preparing a well-informed diagnosis of business conduct and, in the case of cartel arrangements, permit the agency to obtain reliable direct evidence (i.e. documents and testimony) of illegal collusion and reduce the need to rely upon more problematic, indirect, circumstantial proof of misconduct. However, it is important to note that the success of a leniency programme depends crucially upon the severity of sanctions for infringements

and the likelihood of detection and successful prosecution. The willingness of a cartel insider to report its misconduct increases as the magnitude and likelihood of the punishment to be imposed on the cartel increases.

#### **4. Procedural aspects**

54. One aspect of SCPEC's administrative practice deserves particular attention. According to Article 6, investigations have to be completed within 90 days. Only in exceptional circumstances, this delay can be extended twice for 10 days. Measured by the practice in other competition systems, this is an extremely short period of time to examine complex matters, which abuse of dominance cases frequently turn out to be

#### **5. Overview of SCPEC activities**

55. Since its establishment, SCPEC has adopted 22 decisions in competition cases. In contrast, in the same period, it has adopted over 100 decisions dealing with unfair competition and approximately 170 decisions imposing fines for the failure to submit information or the submission of false information..

## Overview of Decisions adopted by the SCPEC

| <i>Type of decision</i>   | 2001       | 2002          | 2003               | 2004       | 2005       | 2006            | 2007       | 2008          | 2009            |
|---|------------|---------------|--------------------|------------|------------|-----------------|------------|---------------|-----------------|
| <b>Final decisions in competition cases and procedures relating to unfair competition</b> |            |               |                    |            |            |                 |            |               |                 |
| Abuse of dominance  | -          | 1             | 2 (1) <sup>a</sup> | 1          | 2          | 1               | -          | 2             | -               |
| Anticompetitive agreements  | -          | -             | -                  | -          | 1          | -               | 3          | (2)           | 1               |
| Mergers   | -          | -             | -                  | -          | 1          | -               | -          | 3             | 1               |
| Unfair Competition  | -          | (10)          | (3)                | 40         | 9          | 10              | 13         | 1 (7)         | 5 (3)           |
| Failure to submit information   | (1)        | 3             | 7                  | 19         | 37         | 54 <sup>b</sup> | 15         | 9             | 15 <sup>c</sup> |
| Submission of false information   | -          | -             | 1                  | 2          | -          | -               | 3          | 2             | (1)             |
| <b>Total</b>  | <b>(1)</b> | <b>4 (10)</b> | <b>10 (4)</b>      | <b>62</b>  | <b>50</b>  | <b>65</b>       | <b>34</b>  | <b>17 (9)</b> | <b>22 (4)</b>   |
| <b>Other types of decisions<sup>d</sup></b>   |            |               |                    |            |            |                 |            |               |                 |
|   | 70         | 87            | 96                 | 95         | 93         | 81              | 77         | 101           | 71              |
| <b>Overall TOTAL</b>  | <b>72</b>  | <b>101</b>    | <b>110</b>         | <b>157</b> | <b>143</b> | <b>146</b>      | <b>111</b> | <b>127</b>    | <b>97</b>       |

<sup>a</sup> Decisions in brackets do not impose any fines (e.g. warnings and cease and desist orders).

<sup>b</sup> 4 decisions from 54 were annulled by SCPEC.

<sup>c</sup> 8 decisions from 15 were annulled by SCPEC.

<sup>d</sup> SCPEC adopts a great number of procedural decisions, such as decisions to start an investigation, to hear certain parties, to carry out market studies, etc.; also, decisions related to the expenditure of SCPEC's budget and other administrative issues are contained in this category of decisions.

56. The above-mentioned figures suggest that a significant part of SCPEC's enforcement activity is dedicated to the maintenance and update of the central register of dominant companies. Taken into account, the relatively low figure of decisions where SCPEC actually found an abuse of a dominant position, it appears that

SCPEC could make better use of its resources, which would, however, require some legal reforms, as explained in part 2.3 of this report.

## **6. Sanctions and remedies**

57. Article 36 of chapter 7 specifies the remedies available to SCPEC in the event of a contravention of the Act. Remedies are confined to fines. The article provides for a fine of 2 per cent of proceeds for the year preceding the entry into an anti-competitive agreement to a maximum of 300 million AMD (approximately 820,000 USD)<sup>6</sup>; 2 per cent of proceeds of the previous year in respect of an abuse of a dominant position to a maximum of 300 million AMD; and 4 per cent for failure to notify a merger of the year proceeds up to a maximum of 500 million AMD (approximately \$1.37 million). Failure to submit required information or documentation is subject to a fine of 500,000 AMD, with a repetition of this offence within a one-year period carrying a fine of 2 million AMD.

58. During the interviews for this report, it was mentioned that the rationale for the Act setting fines at fixed percentages of the violator's turnover without any margin of discretion was to limit incentives for corruption. Despite this understandable objective, this rigidity raises certain concerns with respect to the principle of proportionality.

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<sup>6</sup> Converted at the exchange rate of 13 July 2010 (1AMD=\$0.00273).

## **B. The Judiciary and the resolution of SCPEC competition cases**

59. According to Article 30 of the Act, the Administrative Court that was established in 2008 is responsible for hearing appeals against decisions of SCPEC. Prior to this date, so-called economic courts were responsible for the judicial review in competition cases. Judicial review covers procedural and substantial aspects of SCPEC decisions under appeal.

60. Since 2001, approximately 70 decisions of SCPEC have been appealed. In 27 cases, the Administrative Court has upheld the decision of SCPEC (which led to subsequent appeals against the decision of the Administrative Court in 7 cases), in 1 case the appellant against the decision of SCPEC was partially successful and in 7 cases the appellants were fully successful, i.e. SCPEC's decisions were cancelled. In 22 cases, the appeal process was terminated following settlement outside the judicial procedure. To date, 11 cases dating from 2007 to 2009 are still pending.

61. SCPEC is one of a large number of agencies that occasionally have encountered difficulties with the courts, as reflected by the number of decisions of SCPEC that were cancelled upon appeal. However, SCPEC's record before the Administrative Court appears to fall within the mainstream of experience of most competition authorities operating in their first decade.

62. There are a number of steps that SCPEC can take to improve its relationship with the Administrative Court, to increase judicial understanding of competition law, and to improve the evidentiary basis on which SCPEC builds its cases. Among the most important is to provide a fuller explanation of the evidence

and legal reasoning that supports its decisions. This would certainly improve the judiciary's view of SCPEC's work. In addition, strengthened investigation powers would allow SCPEC to provide the required direct evidence for anti-competitive conduct. At the same time, it also is apparent that judges would benefit from projects – e.g. workshops – that would give them more exposure to the essential economic and legal concepts underpinning competition law.

### **C. Budget and resources of SCPEC**

63. The quality of a competition agency – or any other public or private institution – depends crucially on the adequacy of its resources.

64. SCPEC's annual budget is approximately \$500,000. With this amount, SCPEC pays its 76 employees and supports its operations. SCPEC augments its legislative appropriation with occasional grants and other forms of support from donor organizations, which allows e.g. to receive advice from international experts. It is heartening to see what SCPEC has achieved with so few resources. This is a testament to the commitment and effort of its staff. Nonetheless, it is evident that SCPEC cannot fulfil its intended role without a significant increase in the means at its disposal.

65. From interviews with SCPEC personnel and with other observers, it is evident that SCPEC has succeeded in recruiting and retaining a number of talented managers and professional staff. To stay abreast of current developments in competition law and to fulfil the more ambitious role that Armenia appears to contemplate for SCPEC, the agency must continue to enhance the quality of its team. One way is to enhance existing internal

programmes as a way to provide extensive, systematic training to all staff. A high priority of future training efforts should be information gathering and analysis techniques.

66. These measures are worth pursuing, but they may not suffice to achieve major improvements in performance. SCPEC's budget is a major obstacle to realizing truly substantial gains in talent. Interviews with officials at the Central Bank and the Public Services Regulator Commission (PSRC) underscored important disparities in public service talent within Armenia. The Bank and the PSRC receive substantially greater resources per capita and pay their employees far more generously than SCPEC can pay its staff.

#### **D. Relations with the Legislature and the Executive**

67. New competition authorities quickly discover that the actions of various other Government departments affect their ability to implement competition policy. To operate effectively, a competition agency must build relationships with these public instrumentalities to determine the application of concurrent authority and to advocate the adoption of pre-competitive policies. The relationships with the following public institutions warrant continued and, in some instances, expanded attention:

##### Legislature

68. Some steps proposed above will require amendments to Armenia's competition law. SCPEC can play a key role in setting a foundation for these steps by telling legislators why specific reforms and other forms of support serve to increase economic progress in Armenia.

### Ministry of the Economy

69. Ministry officials articulated a vision of competition policy that emphasized the promotion of new entry to increase rivalry and economic performance. There is a useful advocacy role for SCPEC to participate in devising initiatives to promote entry. SCPEC also can help analyse existing barriers to new investment and develop ways to reduce these obstacles. Active, effective enforcement of Armenia's competition law also will assure potential investors that incumbents cannot swiftly stifle new enterprises by improper exclusionary tactics.

### Public Services Regulatory Commission

70. Armenia fits within the mainstream of nations in which difficult jurisdictional issues abound and tensions between the competition authority and sector regulators are significant. Within the past year, SCPEC and PSRC, Armenia's sector regulator for energy, water and telecommunications markets, have signed a memorandum of understanding that provides a general framework of cooperation. Nevertheless, tensions between the two authorities persist.

71. SCPEC has a valuable part to play in ensuring that the competition policy considerations receive careful attention in regulated industry sectors. This applies to the treatment of specific forms of conduct and to the question of how PSRC can use its authority for network management to realize the benefits of rivalry. SCPEC's parallel jurisdiction for some matters and its advocacy activities can counteract perspectives that favour traditional incumbent suppliers and downplay the value of new entry.



### Central Bank

72. The Central Bank and SCPEC have shared interests in the fields of competition law and consumer protection. The two institutions have established a memorandum of understanding to promote regular discussions. This framework appears to have established effective cooperation between the organizations.

### Procurement Office of the Treasury<sup>7</sup>

73. SCPEC has developed a strong cooperative relationship with the Treasury's public procurement office, including the formation of a joint SCPEC/Treasury working group on procurement policy. A valuable addition to this partnership would be to create training programmes to enable procurement officers to spot bid-rigging and corruption.

## **E. Cooperation with non-governmental organizations**

74. Non-government institutions can play a valuable role in educating various constituencies about the requirements of competition law, in creating networks that collect and transmit complaints concerning alleged infringements of the competition law, in training competition policy experts, in performing research relevant to competition policy, and in building public support for the work of the competition agency. Amid budgetary austerity, SCPEC can extend its presence by cooperation with outside groups including business associations, consumer groups,

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<sup>7</sup> Department of Procurement Process Regulation and Budget Execution Methodology within the Ministry of Finance.

professional societies, such as the bar association, and universities.

#### **IV. INTERNATIONAL COOPERATION AND CAPACITY-BUILDING**

75. To realize the benefits of integration into the international community of competition agencies, donors, advisory panels, academic institutions and think tanks, SCPEC requires effective cooperation from international institutions. SCPEC is doing its part. It is the responsibility of the external community to increase the level of assistance and improve the quality of its assistance efforts.

76. Future valuable contributions from the international community could take the form of (a) training SCPEC staff in practical techniques to conduct investigations and develop cases; (b) assisting in drafting legislation and preparing secondary legislation and guidelines; and (c) providing guidance to establish effective procedures for management and operations. Assistance on all these fronts can be applied through programmes conducted in Armenia, study tours, stipends for graduate study abroad, and funding for secondments with foreign competition authorities.

#### **V. FINDINGS AND POLICY RECOMMENDATIONS**

##### **A. Findings**

77. Armenia's "political and economic context" provides more than mere framework; it is central to understanding the current practice and future of competition law and policy. The full benefit of competition policy will not be attained unless fundamental

reforms to the relationship between executive Government and business are undertaken

*Political and economic context*

78. The two fundamental facts of Armenia's economic and political system, which influence every aspect of the country's public life, including its competition law and policy, are (a) its past as a centrally planned economy; and (b) its geopolitical situation, specifically the conflict-ridden relationship between Armenia and its neighbours Azerbaijan and Turkey.

79. High levels of concentration, which are significantly influenced by the limited points of entry and exit for the import and export of goods, strongly characterize Armenia's economy. This appears to be accompanied by a weak customs service, which leads to a significant underreporting of trade. In addition, Armenia struggles with what is called the shadow economy. That is effectively formal sector activity that is not reported to the authorities, principally in order to enable the trader or the producer to evade the payment of taxes and import duties.

80. Where economic activity is frequently underreported, it is inevitable that the dominant incumbents pay lower taxes and customs duties than required. This gives the incumbent companies a strong, competitive advantage vis-à-vis actual or potential rivals, thus further entrenching high levels of concentration and single firm dominance.

81. In order to increase the level of competition in Armenia's economy, it is indispensable to alter the structure of its highly concentrated markets and to stop the large-scale underreporting by certain firms. Mere competition law enforcement will not be

sufficient to remedy these two issues. A common endeavour of key Governmental stakeholders is needed to design and implement a competition policy aimed at facilitating new entry and improving the overall competitive situation in Armenia..

### Legislative framework

82. Despite several reforms, the legal framework of the ACPS has remained markedly defective in key aspects. Substantive provisions dealing with anti-competitive agreements, the abuse of a dominant positions and merger control require significant revision. Most importantly, however, the investigatory powers accorded to SCPEC are insufficient and do not allow SCPEC to effectively fulfil its mandate to fight anti-competitive conduct.

### SCPEC's resources

83. The budget and overall resources of SCPEC do not suffice to carry out satisfactorily the authority's operations and activities. SCPEC does not dispose of the financial means to attract and maintain the highly qualified personnel that it needs to handle complex competition law cases. Neither is SCPEC in a position to invest in staff development, training and equipment.

## **B. Recommendations**

84. Key Government stakeholders, including the Prime Minister and the Minister for Economy, are willing to lend their support to SCPEC. Also, there appears to be a growing conviction that strong competition law and policy are indispensable for the country's economic development.

85. This political support needs to translate into a common endeavour of all key Governmental stakeholders to design and

implement a competition policy aimed at facilitating new entry and improving the overall competitive situation in Armenia. While an adequately resourced, technically competent and publicly supported competition authority will be at the centre of this effort, cooperation with a range of collateral public institutions and civil society, promoted by high-level Governmental support, is equally important.

86. The report's recommendations below are intertwined and will only result in the desired success if implemented as a package.

## 1. Recommendations addressed to the Legislature

### R 1: Abolish the register for dominant companies

- *It is recommended to abolish the register for dominant companies and to carry out targeted market studies in sectors where an abuse of dominance is suspected.*
- *As an interim measure, it is further recommended to clarify that Articles 6 and 7 do not stipulate that the registration of a company as dominant is a prerequisite for the prosecution of an abuse of a dominant position.*

### R 2: Revise the definition of dominant companies

- *It is recommended to check whether the Armenian wording of Article 6 allows interpreting the market share thresholds as triggering a refutable presumption of dominance. If this is not the case, it is recommended to amend Article 6 in this way*

### R 3: Revise the prohibition of anti-competitive agreements

- *It is recommended that Article 5 be broken up into two separate articles, the first dealing with horizontal agreements, and the second dealing with vertical agreements.*
- *It is also recommended that the list of prohibited horizontal agreements be shortened and simplified, identifying those core offences that are widely accepted to cause anti-competitive harm.*
- *These should be defined as per se illegal, whereas other forms of anti-competitive agreements should be subject to the rule of reason.*

R 4: Revise the provisions governing Armenia’s merger control regime

- *It is recommended to firstly assess whether the notification thresholds catch transactions that potentially lessen competition in Armenia. Most probably, the notification thresholds will need to be adjusted, in which case it is recommended to introduce turnover-based thresholds.*
- *Secondly, the substantive test for the assessment of mergers should be amended to also include the strengthening of a dominant position.*
- *Thirdly, it should be clarified that the fines for a failure to notify a concentration also include the possibility that SCPEC order the rescission of a consummated merger that creates or strengthens a dominant position.*
- *Fourthly, the notification and assessment procedure should be spelled out in more detail – either in the Act or in secondary legislation*

R 5: Limit SCPEC’s role with respect to State aid to an advisory function

- *It is recommended to limit SCPEC’s role to an advisory function in the field of State aid. In order to allow SCPEC to exercise this advisory function, appropriate consultation mechanisms need to be established.*

R 6: Introduce margin of discretion for setting fines and increase maximum level of fines for hard-core cartels

- *It is recommended that SCPEC be accorded a certain margin of discretion when setting fines for violations of the Act.*
- *It is also recommended that the Act or secondary legislation specify guiding principles for the use of this discretion.*
- *Furthermore, it is recommended to increase the maximum level of fines for hard-core cartels.*

R 7: Revise provisions on unfair competition

- *It is recommended to revise the provisions on unfair competition to render them more concise.*
- *Furthermore, it is recommended to revise the level of fines for acts of unfair competition.*

R 8: Strengthening the SCPEC's investigatory powers

- *It is recommended to empower SCPEC to carry out so-called down raids.*
- *Accordingly, the current limitation of the objectives for an inspection of SCPEC contained in Article 19 (1) c needs to be abolished and several provisions of Law on Organizing and Conducting Control in the Republic of Armenia of 17 June 2008 need to be amended.*

R 9: Allow for a longer investigation period

- *It is recommended to set an initial investigation period of at least six months, which shall be extendable upon decision by the Board of Commissioners.*



R 10: Create legal basis for leniency programme

- *It is recommended to complement the strengthened investigatory powers of SCPEC by the introduction of a leniency programme to facilitate discovery of cartels.*

**2. Recommendations addressed to the Government**

R 11: Adopt and implement a comprehensive competition policy

- *It is recommended that, under the leadership of the Minister for Economy and with support from the Prime Minister and Cabinet, SCPEC and other key Government bodies, such as the tax and customs authorities and the PRSC embark on a common endeavour to design and implement a comprehensive competition policy for Armenia.*
- *A comprehensive competition policy for Armenia needs to address barriers to entry, high concentration levels in a large number of important markets, performance of key Government institutions and other factors that restrict competition in Armenia today.*

R 12: Increase SCPEC's resources

- *It is recommended to increase SCPEC's resources to a level that allows SCPEC to effectively fulfil its mandate.*

R 13: Facilitate and promote cooperation on the enforcement level between various Governmental stakeholders in the ACPS

- *It is recommended that the Government encourage and support cooperation and exchange of experience on the enforcement level between SCPEC, the Administrative*

*Court and the PSRC, as well as between SCPEC and the tax and customs authorities.*

### **3. Recommendations addressed to SCPEC**

#### R 14: Readjusting priorities and strategies for law enforcement

- *It is recommended that SCPEC continue prosecuting anti-competitive behaviour that relates to products of the basic “market basket” that Armenian consumers purchase in their regular shopping.*
- *In addition, it is recommended that, in building a portfolio of litigation programmes, SCPEC consider giving greater emphasis to the following types of enforcement matters:*
  - *Bid-rigging and other collusion cases involving distortions of the public procurement process; and*
  - *Abuse of dominance or other cases involving infrastructure sectors such as energy and transport, where even small improvements in performance would have broad economic and social benefits.*
- *It is recommended that SCPEC spend fewer resources on analysing data submitted by companies registered as dominant when there are no hints for a potential abuse of their dominant position.*
- *Furthermore, it is recommended that enforcing the Act’s merger control provisions paired with related advocacy measures become one of SCPEC’s enforcement priorities once the legislative basis for merger control has been improved.*

R 15: Enhance staff development and training

- *It is recommended that SCPEC increase staff development and training activities.*

R 16: Undertake competition advocacy aimed at other Government bodies

- *It is recommended that SCPEC engage more expansively in encouraging other Government bodies to adopt pro-competitive policies.*
- *SCPEC’s advocacy efforts should mainly target other Government institutions whose decisions directly affect the competitive process – e.g. public procurement offices and PRSC.*
- *In addition, it is strongly recommended that SCPEC continue engaging in a dialogue on competition law enforcement with the Administrative Court.*

R 17: Strengthen public disclosure and outreach

- *It is recommended that SCPEC build a solid network of partnerships with bodies outside the Government to increase its effectiveness.*
- *It is recommended to use the opportunity presented by the 10th anniversary of the founding of SCPEC to organize a series of events that would engage experts in Armenia and from other countries to suggest paths for future policy development.*
- *Furthermore, it is recommended that SCPEC diversify its advocacy tools by using all types of media for its awareness-raising activities.*

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