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A COMPARATIVE APPROACH TO COMPETITION LAW IN THE UNITED STATES AND GEORGIA: REGULATING UNILATERAL ACTS AND HORIZONTAL AGREEMENTS THROUGH PREDICTABLE RULES AND CREDIBLE ENFORCEMENT

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INTRODUCTION

Competition law, known as Antitrust Law, in the United States regulates unilateral acts as well as horizontal agreements. Central to understanding and interpreting US Antitrust laws is appreciating its competing goals in light of the legislative language and stated purposes of the key statutes. As Georgia develops its competition laws, it has the benefit of drawing from many resources to shape its law. The Draft Law on the Free Trade and Competition[2] will bring more parallels between United States and Georgia competition law. Significant features of well-crafted commercial law are the protection of rights through clear and predictable rules and the credible efficient enforcement of such legal rules. The amendments to Georgia's competition law should operate to further these features.

II. THE COMPETING GOALS OF US ANTITRUST LAWS

United States antitrust laws are set forth in a number of statutes. The Sherman Act of 1890[3] is the earliest federal antitrust law enacted in the United States. There are two key provisions in the Sherman Act. Section 1[4] of the act

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2 Draft Law on the Free Trade and Competition (Legislative Herald of Georgia (www.matsne.gov.ge), 25.05.2012, registration code: 2401400000.05.001.016710) (English translation) [hereinafter Georgia Draft Competition Law]. As of May 17, 2013, the date of presentation of this article, the law had not yet been adopted.

3 15 U.S.C. § 1, *et seq.*

4 Section 1 of the Sherman Act, Combinations in restraint of trade illegal, provides the following: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . ." 15 U.S.C. § 1.

prohibits agreements among competitors that unreasonably restrain trade, in effect, regulating horizontal and vertical agreements. Section 2[5] of the Act prohibits monopolization, attempted monopolization, or conspiracy to monopolize. Additional laws regulating competition developed later on.[6]

The Sherman Act was enacted in response to the emergence of large corporations, known as "trusts," that were dominating key industries either as monopolists or oligopolists. Consequently some scholars and early court interpretations of the Sherman Act identified the goal of the law to be dispersing economic power and stimulating access to free markets. This approach looked to maximize consumer protection by ensuring a broad measure of competition in the marketplace.[7] Benefits of this approach to the antitrust laws included protecting competition by protecting a marketplace of competitors, making consumers happy by offering many choices to address different consumer needs or desires, and spurring innovation to address competition. Because this approach offers these benefits through expanded competitive choices, it effectively favors small businesses.[8]

Over the last thirty-five years, courts have followed the lead of some scholars in a shift to an economic efficiency model. [9] This approach, fostered by and known as the Chicago School of Economics,[10] purports to enhance consumer welfare by creating efficiency in the marketplace. Economic efficiency is broken out into productive efficiency, that is, maximizing use of resources and avoiding waste through economies of scale, and allocative efficiency, devoting resources to optimal products or users.[11] Economic efficiency also has the goal of protecting competition, but not necessarily competitors. Supporters of the Chicago School maintain that the market, unhampered by governmental interference, will naturally find its peak economic efficiency.[12] The asserted risk in regulating markets through antitrust law is that it will stifle business innovation through rigid rule application. Because economies of scale are usually achieved through expanding organizations, this approach favors larger businesses dominant in industry.

As Georgia develops its competition law and moves to amend and substantially strengthen regulatory oversight of competition, Georgian policymakers—like their counterparts in the United States—appear to be struggling with defining the goals of competition law as a means to strengthen predictability and efficiency in ways consistent with the approaches of both the United States and the European Union.[13] Creating predictable regulatory oversight should advance the effort to encourage foreign business investment while avoiding overly rigid demands on business interests.

The proposed changes in the Georgia Draft Competition Law would make the law much more similar to US antitrust law than the current Georgia Competition Law that is more limited in its scope.[14] Two significant features of law in a flourishing commercial environment are the protection of rights through clear and predictable rules, and credible efficient enforcement of such legal rules. In comparing the Georgia Draft Competition Law to the US Sherman Act three key similarities emerged that I will focus on below. The first is the restriction on unilateral activity that would

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5 Section 2 of the Sherman Act, Monopolizing trade a felony, provides the following: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ." 15 U.S.C. § 2.

6 *See*, *e.g.*, Federal Trade Commission Act §5, 15 U.S.C. §45 (unfair methods of competition are unlawful); Robinson-Patman Act, 15 U.S.C. §13(a) (prohibits anticompetitive price discrimination).

7 Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. Competition L. & Econ. 133, 135-36 (2010).

8 *See, e.g.,* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

9 Patrick A. McNutt, Law, Economics and Antitrust: Towards a New Perspective 119 (2005).

10 Harvey J. Goldschmid, *Comment on Herbert Hovenkamp and the Dominant Firm: The Chicago School Has Made Us Too Cautious About False Positives and the Use of Section 2 of the Sherman Act*, *in* How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust 123, 124 (Robert Pitofsky ed., 2008).

11 Robert Bork, The Antitrust Paradox 63 (1978). *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. Of Regents of Univ. of Okla., 468 U.S. 85, 107 (1984); Arizona v. Maricopa County med. Soc'y, 457 U.S. 332, 367 (1982).

12 See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407-08 (2004).

13 This article compares the changes in Georgia's competition laws to US antitrust laws. The European Union's competition laws appear in the Treaty on the Functioning of the European Union, Part Three, Title VII, Common Rules on Competition, Taxation and Approximation of Laws, Chapter 1, Rules on Competition, Section 1, Rules Appling to Undertakings, Articles 101-103, *available at* http://www.ecb.europa.eu/ecb/legal/1341/1342/html/index.en.html.

14 Georgia Draft Competition Law, Explanatory Memorandum on the Amendments to the Law of Georgia on the Draft Law of Georgia on Free Trade and Competition.

create a dominant position in a relevant market, or tend toward monopolization as that term is understood in US law. The second is the prohibition against horizontal agreements, known as conspiracies in restraint of trade in the United States. The third similarity, an enforcement mechanism, is the proposed Cooperation Program in the Draft Law that is similar to the US Department of Justice Antitrust Division Leniency Program.

III. CLEAR AND PREDICTABLE RULES STRENGTHEN CONFIDENCE IN MARKETS

When it comes to competition law, clear and predicable rules may strengthen confidence and competition in the marketplace, but in avoiding rigidity, flexible rules will often lead to complicated and costly litigation due to needed economic analysis in defining markets and weighing competitive considerations. Two such areas in antitrust law where rule interpretation has lead to significant, and often unpredictable litigation in the United States are in assessing unilateral activity by dominant firms[15] and the definition of market power, and in applying the "rule of reason" to horizontal agreements restricting competition. Both areas require delving into interpretations of US law through legal guidelines and US Supreme Court cases, as well as trudging through the complexity of applying economic concepts to real world cases.

A. Georgia's "Dominant Position" and United States' "Monopolization"

Rules are just the starting point. Agencies charged with protecting the public interest and courts charged with interpreting the law must evaluate potential antitrust claims. Central to that analysis is the concept of "market power." In particular, the question is whether unilateral activity by a firm gives it market power in a relevant market, that is, a market capable of being dominated or monopolized. Both the Georgia Draft Competition Law and US law seek to limit firms from using a dominant position in the marketplace to unfairly harm consumers, typically through higher prices or restricted output.

Georgia's Draft Competition Law defines "dominant position" as an economic agent in the relevant market possessing market power "giving them the opportunity to act independently from competing economic agents, suppliers, customers and end-consumers" that allows them "to have a substantial impact in the market on goods movement" in setting relatively high prices in comparison to competitive prices and maintaining that supra-competitive price "for a long-term," and having the ability to restrict competition.[16] A significant market share is defined as holding at least 40% of the market share in the relevant market, but the definition allows for exceptional circumstances.[17] The 40% threshold allows for flexibility and depends upon fragmentation in the market. An entity that holds a dominant position or is part of a dominant group violates the draft Georgia law if the economic agent abuses that dominant position in one of the following ways: (a) setting unfair prices, trading conditions, or regulations; (b) limiting production, markets, or technical development to the detriment of consumers; (c) imposing certain discriminatory trading conditions; (d) preconditioning contracts that impose obligations unrelated to the subject of the transaction; or (e) engaging in other actions restricting competition.[18]

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15 The Georgia Draft Competition Law uses the term "dominant" position in much the same manner as US Antitrust Law uses the term "monopolization." *Compare* Article 1(i), Georgia Draft Competition Law *to* Robert Pitofsky, *Some Predictions About Future Antitrust Enforcement*, 16 Geo. Mason L. Rev. 895, 897 (2009) (discussing the pursuit of dominant firms such as Microsoft and Intel by the Antitrust Division under the Clinton administration).

16 Georgia Draft Competition Law, Article 1(i). The definition also recognizes the possibility of a dominant group of two or more economic agents that do not experience significant competition from each other. Georgia Draft Competition Law, Article 1(i). The definition applies to groups of no more than 3 economic agents, with a market share of at least 15% each and a total market share of at least 50%, and to groups of no more than 5 economic agents, with a market share of at least 15% and a total market share that exceeds 80%. Georgia Draft Competition Law, Article 1(i) (a), (b).

17 Georgia Draft Competition Law, Article 1(j).

18 Georgia Draft Competition Law, Article 7.

In the United States, the Sherman Act prohibits monopolization and attempted monopolization.[19] The US Supreme Court has defined monopolization as "the possession of monopoly power in the relevant market, and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[20] A monopoly is a market dominated by a monopolist, holding market power sufficient to shift prices for a meaningful period. To have a monopoly in the United States, one need not be the only competitor in the relevant market, nor is holding a monopoly, so defined, illegal.[21] In contrast, the Georgia Draft Competition Law defines "monopoly status" as an "economic agent who has *no competitor* in the relevant market or has the exclusive right to carry out certain kinds of activities."[22] With no statutory guidance on this issue, US courts have generally interpreted a market share of 75% or higher to be sufficient for a *de facto* monopoly, and less than 50% to be insufficient, absent some exceptional circumstance,[23] with the court necessarily having to assess what is sufficient on a case-by-case basis. An attempted monopolization charge allows for a lower market share percentage of the relevant market[24] provided there is proof of a specific intent to monopolize, anticompetitive or predatory conduct in furtherance of that intent, and a dangerous probability of success.[25]

Raising prices due to holding a dominant position or a monopoly position in a market may create an umbrella effect for other competitors in the market, who may also decide to increase prices (albeit not always to the same level as the dominant player) because they are protected from price competition due to the dominant player's increased prices.

B. Dominant Position and Its Defining Criteria: Defining Market Power

Market power is central to both the Georgia Draft Competition Law on unilateral activity and the US antitrust laws.[26] "Market power is the power to raise prices above marginal cost, which is the incremental cost of producing the last unit of output."[27] Requiring proof of market power serves as a screen to sift through and identify cases in which the abuse of market power is most likely to have the greatest anticompetitive effects.[28] Concurrently, the high costs associated with establishing market power may also limit enforcement against anticompetitive conduct.[29] On the other hand, requiring proof of market power may act as a sword to cut off the need for greater proof of abuse because courts are willing to accept the inference that anticompetitive conduct coupled with significant market power is likely to have an anticompetitive effect on the market, or to accept other proof of anticompetitive conduct lacking in procompetitive effects because the costs of proving market share is so high.[30]

Many factors are considered in assessing market power, but market share is often used as a proxy for assessing market power.[31] Calculating market share starts with defining the relevant market or markets, and this often requires

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19 15 U.S.C. §2.

20 United States v. Grinnell Corp, 384 U.S. 563, 570-71 (1966).

21 See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

22 Article 3(y), Georgia Draft Competition Law (emphasis added).

23 Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice 293-94 (4th ed. 2011).

24 Market share percentage in attempted monopolization cases varies widely. *Compare*, White & White, Inc. v. Am. Hosp. Supply Corp., 540 F. Supp. 951 (W.D. Mich. 1982) (market share in mid-twenties sufficient to support "dangerous probability of success") *with* United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976) (47-50% market share is insufficient to prove dangerous probability of success).

25 Swift & Co. v. United States, 196 U.S. 375 (1905) (identifying the three elements of attempted monopolization); Spectrum Sports v. McQuillan, 506 U.S. 447 (1993).

26 *See*, *e.g.*, Georgia Draft Competition Law, Article 3 (g) relevant market, (i) dominant position, and (j) significant market share.

27 Einer Elhauge & Damien Geradin, Global Antitrust Law and Economics 258-59 (2007). Marginal cost may be difficult in itself to assess especially in a market that is not competitive, as may be the case if the market is dominated by one or two firms.

28 Einer Elhauge & Damien Geradin, Global Antitrust Law and Economics 258-59 (2007).

29 Einer Elhauge & Damien Geradin, Global Antitrust Law and Economics 258-59 (2007).

30 Einer Elhauge & Damien Geradin, Global Antitrust Law and Economics 258 (2007).

31 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 7 (Aug. 19, 2010); Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice §6.2b (4th ed. 2011).

significant economic analysis. The stakes for the parties are high in this analysis because such definition is often outcome determinative for the parties. A broadly defined market will tend to result in smaller market shares for all competitors, whereas a narrowly defined market will tend to favor the government agency or private plaintiff challenging the dominance of a competitor in the market. The relevant market is defined by two coordinates: (1) the relevant product market, and (2) the relevant geographic market.[32]

The relevant product market includes not only the product or service provided by the subject competitor, but also substitutes.[33] The elasticity of demand identifies the degree to which other products will act as substitutes for the product at issue. The elasticity of supply identifies the capability of other production facilities to be converted to produce a substitutable product or service. The timing of any switch in production and the excess capacity of competitors or potential competitors may greatly impact the supply curve. Parties are likely to disagree in assessing suitable substitutes, requiring economic expertise to make a case for substitutes.

The relevant geographic market is the geographic area in which a firm can increase its price without a large number of customers immediately turning to alternative supply sources outside the area, or without producers outside the geographic area quickly flooding the area with substitutes. Economists look to pricing over a period of time in the surrounding areas. If pricing rises and falls quickly in response to changes in the surrounding area, then both are likely part of the same geographic market. Barriers to the movement in or out of the market may increase costs, or delay or prohibit entry, and include geographical barriers such as distance or physical boundaries, and political barriers such as tariffs.

Once the relevant market has been defined through the relevant product market and relevant geographic market, market share is calculated for each competitor that produces or services the relevant market. In Georgia, the Draft Competition Law provides that the "economic agent's market share on the relevant market is to be determined by the Agency through using market analysis methodical instructions."[34] In the United States, the 2010 Merger Guidelines recognize "that merger analysis does not consist of uniform application of a single methodology" but it describes relevant considerations in assessing market shares.[35] The US agencies responsible for enforcing the antitrust laws on behalf of the federal government, that is, the US Department of Justice Antitrust Division and the Federal Trade Commission, created the Merger Guidelines. The Merger Guidelines are simply that—guidelines. They are not mandated, and courts are under no obligation to insist on their application in calculating market shares. Instead, the Merger Guidelines reveal the "principal analytical techniques and main types of evidence" used by the Agencies to assess a horizontal merger's likely impact on substantially lessening competition.[36] Once market shares are calculated, they may be used to guide evaluating whether a firm has market power.

The relevant market and resulting market share is a key consideration in assessing market power, but it may not be the only consideration, because it only reflects the current relative status of firms and cannot account for changing market conditions. Both the Georgia Draft Competition Law and the US courts have recognized that in many cases, other factors may play a significant role in assessing market power. In particular, as identified in the Georgia Draft Competition Law and recognized in US case law and regulatory guidelines, some of these factors to consider are as follows: The financial condition of the economic agent and its competitors, market entry or expansion barriers, buyers' market power, accessibility to raw materials sources, vertical integration, network effects, level of market development, significant market share, and ownership length.[37] While historical evidence is useful to calculate present market share,

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32 The Georgia Draft Competition Law defines relevant market as follows: The relevant market – goods/services or interreplaceable flow of goods in a certain area, the boundaries of which are determined in consideration of economic capability for buying goods and expediency. In determining the relevant market, an unobserved economic activity must be taken into account, if any. Georgia Draft Competition Law, Article 3(g).

33 United States v. Grinnell Corp, 384 U.S. 563, 571 (1966).

34 Georgia Draft Competition Law, Article 5(2).

35 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §1, Overview (2010).

36 *Id.* at §§1, 5.2.

37 Georgia Draft Competition Law, Article 5, paragraph 3. *See, e.g.,* United States v. General Dynamics Corp., 415 U.S. 486 (1974) (the Merger Guidelines are not intended to be used to analyze cases other than mergers; however, the description of market participants and the assessment of market shares are illustrative of the approach to assessing the market power of dominant firms). *See also* U.S. Dep't of Justice & Fed. Trade changing market conditions may indicate that historical data overstates or understates future competitive significance.[38] Courts assess whether market power, based upon market share and any other pertinent factors, is sufficient to find monopoly power or a dominant position in the relevant market.

C. Exclusionary Conduct and Abuse of Dominant Position

It is not illegal in Georgia to merely hold sufficient market power to establish a dominant position, nor is it prohibited by US law merely to be a monopoly power in the United States. Central to falling within the restrictions on competition law in Georgia or antitrust law in the United States is a finding that such market power has been abused.

A single economic agent with a "significant market share" of at least forty percent[39] and fitting the definition of dominant position[40] in Georgia is prohibited from engaging in abuse of the dominant position.[41] The Georgia Draft Competition Law identifies specifically several types of prohibited abuses: setting unfair prices or other unfair trading conditions;[42] limiting "production, markets, or technical development to the detriment of consumers;"[43] prohibiting discriminatory transactions with trading partners;[44] and imposing contract preconditions unrelated to the subject of the transaction.[45] The draft law incorporates a catch-all provision for those practices not categorically listed by prohibiting other actions restricting competition or "depriving the legitimate interests of economic agents or consumers."[46]

Similarly, in the United States, a showing of monopoly position triggers a review of whether exclusionary conduct has occurred. Exclusionary conduct involves improper acts by the firm to acquire or maintain power.[47] Some examples of such improper acts include restrictive agreements (such as long-term leases), limiting secondary markets and aftermarkets, and actions taken by the firm lacking economic justification. On the other hand, actions taken that reflect competition on the merits are considered "honestly industrial" and support a conclusion that unilateral conduct was lawful. US courts have recognized that depending upon the circumstance in the marketplace, instances exist where only a limited number of firms may survive or thrive. Examples of actions considered to be honestly industrial are natural monopolies or limited markets, efforts to take advantage of economies of scale, changes in taste or in cost that shift consumer preferences, innovation or invention, objectively necessary actions, and meeting competition through lower pricing or incentives.

Thus, under both legal regimes, market power alone is insufficient to seek redress.

Comm'n, Horizontal Merger Guidelines §5.2 (2010).

38 For example, new technology may cause a shift the purchasing habits that impact a product, see United States v. Von's Grocery, 384 U.S. 270 (1966) (grocery stores in the 1950s US, when suburbs and cars began to dominate; new technology such as refrigeration), or new technology protected by patents in the United States may not be available to all firms in the industry, see Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (patents on shoe-making machinery).

39 Georgia Draft Competition Law, Article 3(j).

40 Georgia Draft Competition Law, Article 3(i).

41 Georgia Draft Competition Law, Article 6.

42 Georgia Draft Competition Law, Article 6(a).

43 Georgia Draft Competition Law, Article 6(b).

44 Georgia Draft Competition Law, Article 6(c).

45 Georgia Draft Competition Law, Article 6(d). This restriction appears comparable to the restrictions on tying an exclusive dealing that are more specifically addressed in the United States by the statutory language in Section 3 of the Clayton Act. The Clayton Act of 194, 1 U.S.C. §3.

46 Georgia Draft Competition Law, Article 6(2).

47 *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).

D. Remedy for Unlawful Abuse of Market Power

The early stage of competition law in Georgia is best acknowledged in the limited remedy available under the Georgia Draft Competition Law. The "Competition Agency," an independent legal entity of public law, is solely authorized to redress violations of the law.[48] Violations of Article 6 (addressing abuse of the dominant position) and Article 7 (prohibiting concerted agreements by competitors) are subject to "a fine, which shall not exceed 10 percent of the economic agent [the] (sic) annual turnover for the previous financial year."[49] In assessing the amount of the fine, the agency must determine the amount of the loss, taking into account both "the duration and severity of the violation."[50]

US law provides remedies for monopolization or attempted monopolization that vary considerably from Georgia law. The differences arise in identifying who can bring such actions, whether such actions are civil or criminal, and finally, the breadth of penalties available to such parties.

In the United States, a civil case may be initiated by private parties injured by the conduct,[51] or by one of two federal government agencies responsible for oversight, the Federal Trade Commission or the U.S. Department of Justice, typically through its Antitrust Division. Additionally, many states also have antitrust or consumer laws providing for civil actions by private parties or by the Attorney General for that state. In addition to civil authority, the Department of Justice has authority to bring criminal actions for monopolization or attempted monopolization.[52] There is no provision for criminal enforcement in the Georgia Draft Competition Law.

Criminal punishment under the Sherman Act provides for substantial penalties. Corporations are subject to fines of up to $100 million, and individuals are subject to a term of imprisonment of up to 10 years, and a fine up to $1 million.[53] An alternative fine provision subjects corporations and individuals to a fine calculated up to twice the gross financial loss or gain resulting from a violation.[54] In civil cases, damages are trebled. The provision of treble damages encourages private civil enforcement of US antitrust laws. The benefits of private enforcement are two-fold: first, injured parties do not need to await action on the part of the government, which may be restricted by limited resources or limited will to pursue certain violators; second, the number of parties available to enforce antitrust law compliance is expanded to the number of parties willing and able to prosecute a civil case. In addition to financial remedies, equitable relief provides a vital avenue to redress harm. Two critical equitable remedies frequently sought in such cases are injunctive relief to enjoin future anticompetitive acts, and divestment to disassemble structures created within the defendant firm that perpetuates abuse of its market power.

The changes to Georgia competition law proposed in the Draft Competition Law are significant in that they improve agency oversight of competition with a view toward strengthening the law for business investment. The changes proposed bring Georgia competition law closer to the legal standards and analysis used to evaluate and regulate competitive practices in the United States. Antitrust law in the United States has developed over 125 years, and Georgia has the benefit of drawing upon US law and EU law as it strives to regulate competition without stifling innovation and good business practices. In practice, establishing the exercise of market power through abuse of a dominant position is complex, costly, and unpredictable. Nevertheless, agency oversight is substantially more predictable in creating a positive competitive environment than the absence of such oversight.

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48 Georgia Draft Competition Law, Article 4 (establishing the Competition Agency).

49 Georgia Draft Competition Law, Article 33.

50 Georgia Draft Competition Law, Article 33.

51 The US Supreme Court has limited private enforcement of antitrust laws to those parties who can demonstrate antitrust injury caused directly by the anticompetitive acts, as distinguished from tort injuries. *See*, *e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); *see also* United States v. Microsoft Corp., 253 F.3d 34 (D.C. 2001) (the government "must demonstrate that the monopolist's conduct harmed competition, not just a competitior").

52 15 U.S.C. §2.

53 15 U.S.C. §2. Prior to June 2004, the maximum fine for a corporation was $10 million, and the maximum punishment for an individual was up to 3 years imprisonment, up to a $350,000 fine, or both. *See* Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4, 104 Stat. 2879, 2880.

54 18 U.S.C. § 3571(d).

IV. CREDIBLE, EFFICIENT ENFORCEMENT: COOPERATION PROGRAM & US DEPARTMENT OF JUSTICE ANTITRUST LENIENCY POLICY

The Georgia Draft Competition Law and US Sherman Act both prohibit concerted agreements to restrict trade among competitors under certain circumstances. The Georgia Competition Agency may impose fines for violating the prohibition, whereas the US Department of Justice may seek civil or criminal sanctions. The difficulty in detecting such violations arises from the secret nature of the agreements. The US Department of Justice has created an Antitrust Leniency Policy[55] designed to promote voluntary cooperation with the government; the policy encourages antitrust violators to step forward to admit misconduct and cooperate with the investigation of its competitors in exchange for the opportunity to avoid sanctions. The Georgia Draft Competition Law offers a limited version of this policy, known as the Cooperation Program.[56] Offering leniency for cooperation aids the government in gathering information and pursuing offenders, thereby requiring fewer resources for more certain outcomes. For offenders, the policies present a means of escaping an unlawful agreement and clearing its risk of liability.

A. Prohibiting Concerted Agreements

Fostering competition among competitors promotes efficiencies in production and distribution, invention and innovation, and promotes consumer savings and consumer choices. While the government may have the consumers' interests at the forefront of regulatory purpose, certain conditions are favorable to fostering agreements or cartels by otherwise would-be competitors.[57] Where competitors are few in number, the level of market concentration is ripe for cartel agreements because agreements are more easily reached among fewer competitors and more easily policed among the cartel members. High barriers to entry into the industry or product homogeneity also serve to promote cartel behavior because barriers restrict the number of competitors, and homogeneity diminishes the likelihood of reliance upon distinguishing factors to set apart products or services. Finally, facilitating devices (such as trade groups) and some sales methods (such as auctions) present opportunities to form cartels.[58] By aggregating market share through cartel agreements, groups of firms who should be competitors may behave as a dominant firm, collectively, resulting in less innovation and lower satisfaction of consumer needs.

Article 7 of the Georgia Draft Competition Law prohibits agreement between economic agents designed to restrict or prohibit competition through setting prices or other trading conditions[59]; restrict production, markets, technical development, or investment[60]; allocate markets, customers, or territories[61]; and prohibit bid rigging in state procurements.[62] Article 8 of the Georgia Draft Competition Law exempts application of Article 7 depending upon the relationship between the economic agents. Thus horizontal agreements are exempt if the "common market share does not exceed 10 percent,"[63] vertical agreements are exempt if the "common market shares does not exceed 15 percent,"[64] and mixed agreements with horizontal and vertical elements are exempt if each party to the agreement has a "relevant

55 US Dep't of Justice, Corporate Leniency Policy, *available at* http://www.justice.gov/atr/public/guidelines/0091.htm.

56 Georgia Draft Competition Law, Article 33.

57 *See*, *e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §7.2, Evidence a Market is Vulnerable to Coordinated Conduct (2010).

58 *See*, *e.g.*, Adam Smith, The Wealth of Nations 128 (Canaan ed. 1937) (1st ed. 1776) ("People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.").

59 Georgia Draft Competition Law, Article 7(a).

60 Georgia Draft Competition Law, Article 7(b).

61 Georgia Draft Competition Law, Article 7(c).

62 Georgia Draft Competition Law, Article 7(f).

63 Georgia Draft Competition Law, Article 8(1)(a).

64 Georgia Draft Competition Law, Article 8(1)(b).

market share that does not exceed 10 percent."[65] Realistically, agreements that implicate only a narrow share of the market are unlikely to have significant anticompetitive effects on the market.

The US antitrust laws restrict cartels and horizontal agreements by applying two distinct analytical frameworks referred to the "*per se* approach" and the "rule of reason."[66] The choice of which framework applies impacts the anticipated cost of litigation and the predictability of such litigation. Indeed, the decision will often have an outcome determinative impact on the litigation.

In circumstances where the type of agreement or practice is almost always economically malign, such horizontal agreements are treated as *per se* illegal, and no proof of a minimum of market power is required.[67] The plaintiff or prosecutor need only prove the agreement to restrain trade. The court will not accept a defense that such an agreement was reasonable. In criminal cases applying the *per se* approach, the prosecutor does not need to prove harm. The *per se* approach is disfavored except in simple cases where there are "naked restraints" on competition. Typically, such restraints arise in three categories of horizontal restraints: (1) agreements to increase prices or restrict production output;[68] (2) market, customer, or territory allocations;[69] and (3) unlawful refusals among competitors to deal with a supplier or buyer aimed at limiting a competitor.[70] Such naked restraints on competition alone are sometimes not sufficient to retain the *per se* approach, and courts will take a quick look at the complaint to assess whether the agreements must be more closely scrutinized to allow the defendants to rebut the presumption that the alleged conduct is illegal and to discern whether it is truly anticompetitive.[71] Limited circumstances such as, for example, agreements involving professional organizations,[72] unfamiliar industries,[73] ancillary agreements,[74] or vertical restraints,[75] likewise may shift the analysis from the *per se* approach to evaluating the agreements under the rule of reason approach.

The US Supreme Court has shifted the primary thrust of antitrust analysis of competitor agreements to the rule of reason approach: "Every agreement restrains trade. The true test is whether it merely regulates and thus perhaps promotes competition, or whether it suppresses or even destroys competition."[76] The rule of reason approach applies a weighing of the agreement's anticompetitive effects against its procompetitive benefits.[77] The plaintiff must first establish market power sufficient to demonstrate that the agreement has or will have an anticompetitive effect on the market. Establishing market power requires the relevant market analysis discussed above, and the accompanying expert economic analysis to establish the relevant market and considerations impacting market power assessment. Once the plaintiff has satisfied this burden, the defendant may demonstrate a procompetitive purpose for the agreement, which the plaintiff may dispute. Often the contested activity may extend beyond simple overt agreements, and includes

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65 Georgia Draft Competition Law, Article 8(1)(c).

66 For cases applying the *per se* approach, *see, e.g.,* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (explaining the *per se* approach); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982) (applying *per se* approach to price-fixing conspiracy); FTC v. Sup. Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990) (applying *per se* approach to conspiracy to a refusal to deal, also known as a "boycott"); Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (applying *per se* approach to territorial allocation conspiracy). For cases applying the rule of reason approach, *see, e.g.,* Broadcast Music v. Columbia Broadcasting System, 441 U.S. 1 (1979) (applying rule of reason approach to price-fixing conspiracy); Northwest Wholesale Stationers v. Pacific Stationery, 472 U.S. 284 (1980) (applying rule of reason approach to boycott conspiracy).

67 *See, e.g.,* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

68 *See, e.g.,* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

69 *See*, *e.g.*, Addyston Pipe & Steel Co. v. United States, 175 U.S. 211(1899); United States v. Topco, 405 U.S. 596 (1972); Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (upholding *per se* approach despite broad criticism of its application to territorial agreements, subsequent to the *Topco* decision).

70 *See*, *e.g.*, Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

71 *See, e.g.*, NCAA v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 84 (1984).

72 *See*, *e.g.*, Nat'l Soc'y of Professional Engineers v. United States,435 U.S. 679 (1978).

73 *See*, *e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

74 *See*, *e.g.*, Cement Mfrs. Protective Assn. v. United States, 268 U.S. 588 (1925).

75 *See*, *e.g.*, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (rejecting application of the *per se* approach in favor of the rule of reason to vertical agreements to fix minimum resale prices).

76 Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

77 *See*, *e.g.*, Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice §5.6, at 253-59 (3d ed. 2005) (describing the rule of reason approach and its distinction from the *per se* approach).

legally and economically ambiguous practices that raise the risk of anticompetitive misconduct, but also could have genuine business benefits. Agreements to exchange some industry information may be lawful and beneficial to enhance competition, but such contact may also risk facilitating illegal exchanges of information. Likewise, tactics such as conscious parallelism in pricing or trade practices may be smart business practices that occur outside of illegal agreements among competitors, or they could be evidence of tacit illegal agreements. The court is tasked with weighing the harm or risk of harm against the benefit or anticipated benefit to arrive at its conclusion regarding whether the challenged agreement violates the antitrust laws. The increased cost of presenting the market power analysis and the unpredictability of the court's assessment in weighing the parties arguments results in a more costly and less predictable outcome than utilizing the *per se* approach. The increased litigation cost and lack of predictive outcomes is justified because the rule of reason approach is less likely to stifle innovative or efficient business practices.[78]

An alternative to the full rule of reason analysis described above is available in certain cases. A court may determine that the case falls within the circumstances that remove it from *per se* analysis, but after a brief examination of the circumstances, still assess that the anticompetitive harm is obvious and a procompetitive explanation is lacking.[79] In these cases, the parties may avoid the cost of protracted litigation, including the need to establish market power. This alternative does not fully evade the lack of predictability accompanying the rule of reason approach because the parties face the difficulty of not knowing whether the court will choose this limited approach in evaluating the case, or will expect the parties to prepare their case with a full rule of reason analysis.[80]

B. Trading Leniency for Cooperation

Twenty years ago, in 1993, the US Department of Justice Antitrust Division implemented a Corporate Leniency Program.[81] The leniency program is instrumental currently in 90% of the government's antitrust criminal cases.[82] The program has increased the number of large fines, with over 100 fines of at least $10 million dollars from criminal antitrust investigations, and more than $1.1 billion dollars in fines in 2012.[83] Average prison sentences for individuals convicted of antitrust crimes in 2010 and 2011 were 2 years.[84] Leniency is only available to a single eligible party to a cartel, and preference is given to the first eligible party to apply.[85] Consequently, the DOJ has had several officers of a corporation contact the government offering cooperation for leniency within two to three hours after a government raid on a corporation.[86] The effectiveness of this program has gained attention not only within the United States, but also by the European Competition Network which adopted a Model Leniency Program in 2006 and revised the MLP in 2012.[87] The Georgia Draft Competition Law includes a Cooperation Program,[88] although it is limited to relief for civil liability given that the draft law does not apply criminal punishment. The discussion below describes the US Leniency Program and then compares that program to the Georgia Draft Cooperation Program.

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78 *See*, *e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 20 (1979).

79 *See, e.g.,* FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986).

80 *See*, *e.g.*, California Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

81 The Antitrust Leniency Program has been modified over time. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 89-670, tit. II § 213(a)., 118 Stat. 666 (2004).

82 Jerry Crimmins, *Cooperation in Antitrust Cases is "Red Hot," DOJ Attorney Says*, Chicago Daily Law Bulletin, Vol. 159, No. 55 (Mar. 20, 2013).

83 *Id.*

84 *Id.*

85 US Dep't of Justice, Corporate Leniency Policy, Parts A.1, and B.1. Additional eligibility conditions are further described in parts A and B of the Corporate Leniency Policy.

86 Jerry Crimmins, *Cooperation in Antitrust Cases is "Red Hot," DOJ Attorney Says*, Chicago Daily Law Bulletin, vol. 159, No. 55 (Mar. 20, 2013).

87 European Commission – MEMO/12/887, 22/11/2012, *Competition: European Competition Network Refines its Model Leniency Programme*, http://europa.eu/rapid/press-release_MEMO-12-887_en.htm (reporting that 26 European Union countries now have a competition leniency program); *see* http://ec.europa.eu/competition/cartels/leniency/leniency.html (describing the Model Leniency Program).

88 Georgia Draft Competition Law, Article 33.

The US Corporate Leniency Policy provides that an award of leniency releases a corporation from criminal antitrust liability for a single corporation that is a member of an illegal cartel in one of two circumstances, and these two circumstances are referred to as Type A and Type B.[89] Type A applies when a corporation comes forward to report illegal activity prior to the Antitrust Division receiving information about the illegal activity; in contrast, Type B applies after the Antitrust Division has knowledge of illegal activity, but prior to acquiring "sustainable proof" of the offense as against the company seeking leniency.[90] To qualify as eligible, the corporation must be the first one to come forward with respect to the illegal activity and to (1) have promptly and effectively terminated criminal activity upon its discovery[91]; (2) report with "candor and completeness and provide[] full, continuing and complete cooperation" that advances the investigation[92]; (3) demonstrate that the "confession of wrongdoing is truly a corporate act"[93]; and (4) provide restitution to its victims, where possible.[94] Moreover, the Antitrust Division must also determine "that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation [came] forward."[95] As an added incentive to corporations, in 2004, Congress eliminated treble damages in private civil actions against successful leniency applicants.[96]

A corporation may only act through its individual agents and employees. Leniency for a corporation requires that those employees cooperate with the government. Consequently, if a corporation qualifies for Type A leniency, then all of its directors, officers and employees who candidly admit their involvement and continue to assist the investigation will also qualify for leniency protection.[97] If the corporation qualifies for Type B leniency, the policy states that leniency for such individuals will be assessed under the Antitrust Division's Leniency Policy for Individuals. Nevertheless, in practice, the Antitrust Division has applied the same protections to Type B corporate leniency employees and agents as it applies to Type A corporate leniency cases.[98]

The Antitrust Leniency Policy includes provisions applicable to individuals separate and apart from those for corporations. Significantly, the corporate leniency policy may not be available either because the individual does not work for a corporation or other organization covered by the policy, or the individual wishes to cooperate while the corporation does not. Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun if (1) "the Division has not received information about the illegal activity from any other source; (2) the individual reports with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and (3) the individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity."[99] As with the corporate leniency policy, in the interest of fairness, the Antitrust Division does not want to reward the most culpable party to the conspiracy with leniency to the exclusion of less culpable cartel participants.

The Georgia Draft Competition Law also includes a Cooperation Program that also excludes leniency to an individual who is the sole organizer and/or initiator of the illegal agreement, or to a person who forcedly made other

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89 US Dep't of Justice, Corporate Leniency Policy, Parts A.1, and B.1.

90 US Dep't of Justice, Corporate Leniency Policy, Parts A.1, and B.1.

91 The Antitrust Division revoked leniency granted to a corporation in one reported case for failing to promptly withdraw from the antitrust conspiracy. Stolt-Nielsen S.A. v. United States, 352 F. Supp. 2d 553 (E.D. Pa. 2005), *rev'd* 442 F.3d 177 (3d Cir. 2005), *cert. denied* 127 S. Ct. 494 (2006). The district court dismissed the indictment of the company after leniency was revoked, finding that the government had received the benefit of its bargain and that it had not proven satisfactorily that the defendant materially breached the agreement by failing to withdraw promptly from the conspiracy. Stolt-Nielsen S.A. v. United States, 524 F. Supp. 609, 616 (E.D. Pa. 2007). The government did not appeal. Press Release, U.S. Dep't of Justice, Justice Department will not Appeal *Stolt-Nielsen* Decision Dec. 21, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/228788.pdf .

92 US Dep't of Justice, Corporate Leniency Policy, Parts A.2, and B.2.

93 US Dep't of Justice, Corporate Leniency Policy, Parts A.3, and B.3.

94 US Dep't of Justice, Corporate Leniency Policy, Parts A.4 and B.4.

95 US Dep't of Justice, Corporate Leniency Policy, Parts A.5 and B.5.

96 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 89-670, tit. II § 213(a)., 118 Stat. 666 (2004).

97 US Dep't of Justice, Corporate Leniency Policy, Part C.

98 US Dep't of Justice Antitrust Division, Antitrust Division Manual III-98 (5th ed. Nov. 2012).

99 US Dep't of Justice, Leniency Policy for Individuals, Part A.

parties participate in the agreement.[100] In language quite similar to the US Leniency Policy, the Cooperation Program promises to release a person from liability under the Competition Law provided the person (1) admits to participating in an agreement to fix prices, allocate markets, customers or territories, or rigs procurement bids in violation of Article 7(a), (c), and (f); provides the agency with all information known and if possible, evidence about the agreement before the agency is aware of the agreement from other sources; and finally (3) cooperates with the Agency in the investigation process without interruption or limitation.[101] The Georgia Cooperation Program appears limited to individuals only and does not include a corporate counterpart.

The benefits of a leniency program extend beyond the ability to collect fines, or in the case of the US Antitrust Leniency Policy, to imprison non-leniency violators. Much more significant is the opportunity for earlier detection of violations that arises from the requirement that cooperators approach the government agency before the agency is aware of the illegal conduct from other sources.[102] Early detection minimizes or stops the harm to consumers from the illegal conduct. Cooperation also spurs efficient enforcement of competition laws. Given that cartels operate as secret agreements, the ability for government agencies to access key information about such cartel agreements is limited without cooperation or is at least substantially more difficult to prove. With the aid and guidance of a cooperating conspirator, the agency is able to locate or develop relevant evidence more quickly, and prove its case more readily with the testimony of the cooperator. Limiting the reward of leniency to the first eligible cooperator disrupts illegal agreements and participants by pitting competitors against each other for the benefit of leniency. Finally, the leniency program promotes lawful conduct by offering firms and individuals the opportunity to admit wrongdoing, resolve legal claims, and move to a lawful business model.

V. CONCLUSION

Georgia's proposed changes to evaluating unilateral practices and horizontal agreements will more closely align its competition policy with US law and EU practices. Drawing upon the experiences of other nations should enhance confidence in Georgia's markets and thereby promote competition. Oversight to detect abuse of market power and exclusionary practices of dominant firms is necessarily subject to variable economic analysis, but nevertheless strengthens the overall competitive environment.

The US Antitrust Leniency Policy has proven to be an outstanding means of efficiently encouraging identification and resolution of antitrust violations. By adopting similar measures, Georgia's Draft Competition Law and its Competition Program is a promising offer to provide credibility to the new legislation through efficient enforcement of laws prohibiting concerted agreements. Georgia's proposed Cooperation Program will encourage a flourishing commercial environment that rewards competition on its merits.

100 Georgia Draft Competition Law, Article 33.

101 Georgia Draft Competition Law, Article 33.

102 Gary R. Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations*, 69 Geo. Wash. L. Rev. 798, 799 (2001).