Will Azerbaijan's Competition Code be a Tool for a Highly Monopolized Economy?

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A new version of Azerbaijan's Competition Code has now been resubmitted to parliament for debates after a long, almost seventeen-year hiatus. Observing the ongoing discussions across platforms, from the outside it seems that this legal document is viewed by the public almost as a panacea.

The unfavorable competitive environment in Azerbaijan's economy, the high level of monopolization of various sectors, particularly financial services, construction, wholesale trade and industry with oligarchic capital, from which a substantial part of the national income is generated, is a reality that everyone can easily observe in everyday life. Undoubtedly, under these circumstances, it is understandable that many have high expectations for the Competition Code. But if we take into account the experience of various countries that have managed to form mechanisms of healthy competition in the economy over the past decades, will the draft law submitted to parliament for debates combat monopolies associated with political power in Azerbaijan and ensure equal conditions of competition for all economic entities?

Even the best quality legislation may fail to achieve the objectives set out in the sectors chosen as regulatory targets. This happens when no political conditions to implement any law exist. The term *political conditions* mean, first of all, the existence of independent and professional media formed on legal grounds, as well as independently and mutually checking branches of government that are publicly controlled. If there are no independent judicial and parliamentary powers in the country and if these branches of

government only enact the will of the supreme executive power, laws lose their significance.

The enforcement of competition law is not effective only because of a legal framework that meets quality and necessary standards. Even compliance with the best laws may not be enough to ensure a favorable competitive environment in the country. It is impossible to achieve the goals set by competition policy without necessary institutional prerequisites. On the other hand, the institutional environment's strength or weakness depends on the status and structure of the competition authority.

OECD research shows that there is no single recipe for organizing competition agencies worldwide and different models are found in different countries. Although some jurisdictions have opted to place their competition authorities under the responsibility of a central government structure (e.g. Ministry of Economic Affairs), the compotetion authorities exercise autonomous powers while maintaining their functional independence. Another practice is to establish a competition authority with the status of an independent agency. OECD experts prefer the latter. This position of the OECD can also be seen in the Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement. According to this document, adherents should ensure that competition law enforcement is independent, impartial and professional and guarantee that competition law enforcement is conducted by accountable public bodies that enjoy independence, i.e., are free from political interference or pressure. The OECD approach is to ensure that decisions made by an independent agency, free from political interference or pressure, are based both on the principles of healthy competition policy and on the sustainability and predictability of such decisions. Compared to other organizational models, confidence in independent agencies, from both the public and market players, is generally higher.

According to experts, autonomy is manifested not only in the organization of management and decision-making, but also in the formation of financial resources for the management of the agency. The organization of management is its structure and the selection of its staff. In practice, an ideal competition agency is based on collegial decision-making and has a decisive structure in the format of a council consisting of several members. That is, the person in charge, acting as the executive director or chairman of the agency, does not make decisions independently, but on the basis of a majority vote of the board members. In many participatory democracies, both the executive director and members of the collegial decision-making body are appointed by a parliamentary vote, and the body itself is accountable to the legislature. At the same time, it is considered important that these bodies have the necessary level of funding and autonomous rights in the use of these finances to act independently. In many countries (e.g., Portugal), more than 80 percent of financial resources administered by competition agencies come from financial penalties and fines they impose.

As much as independence would not matter for the effective operation of competition authorities, public scrutiny and a high level of accountability are equally important. OECD experts believe that performance indicators should be defined and reported on the basis of these indicators to assess the performance of these institutions. The use of such indicators not only ensures quality reporting, but also improves the effectiveness of competition authorities by identifying their strengths and weaknesses.

The experience of Lithuania as a country with an independent competition authority is interesting. Under the country's Competition Law, the Competition Council is an independent state institution accountable to the legislature (Seimas), implementing state competition policy. When performing its statutory functions, the Competition Council is free and independent in its decision making. The Competition Council is

a budgetary institution financed from the state budget. The Competition Council consists of the chair and four members. The chair and members of the Competition Council are appointed by the President of the Republic on the recommendation of the Prime Minister of the Republic of Lithuania. The chair and members of the Competition Council are appointed for a term of six years. The same person may be appointed a chair or a member of the Competition Council for not more than two consecutive terms of office. The chair and members of the Competition Council must be Lithuanian citizens of good repute with a university degree in law or economics (at least a Master's degree or equivalent).

The model proposed in Azerbaijan does not envisage the establishment of an independent competition agency. It is true that there is no separate provision defining the status of the agency in the draft Competition Code, over which parliamentary discussion has already started. However, Article 1.1.37 proposed in the draft clarifies the concept of "competition agency" as follows: "a body determined by the relevant executive authority, which exercises state control over compliance with competition legislation, takes part in the formation of the state competition policy and ensures the implementation of this policy as well as competition regulation. As can be seen, this article does not refer to the creation of any independent agency. Taking into account that in Azerbaijan, the Ministry of Economy is currently the competition policy maker, as stated in the draft, it is that ministry that will create a competition authority under its subordination.

It is also true that in countries with an authoritarian and highlycentralized system of government like Azerbaijan, formally independent entities don't seem to make a difference. In conditions where even the parliament and the judiciary are independent branches of state power on paper, the granting of independence to a competition body in legislation would entail no serious consequences.