AN INTRODUCTION TO COMPETITION LAW AND POLICY IN UZBEKISTAN

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Foreword

For many years, OECD competition law and policy reviews have provided a valuable tool for countries looking to reform and strengthen their competition frameworks.

This review provides insights into the current strengths and weaknesses of Uzbekistan's competition regime and sets out recommendations to help the country strengthen its competition framework. The successive implementation of these recommendations can support Uzbekistan's efforts to improve its legal and enforcement framework and align more closely with international best practices.

The work was conducted within the framework of the project "Fair Market Conditions for Competitiveness in six OECD partner countries", which is supported and financed by the Siemens Integrity Initiative. Uzbekistan is one of the partner countries and has set out on an ambitious path to reform its economy and to increase market competition. Competition law and policy is an essential pillar in market economies, to ensure the functioning of competitive markets and to safeguard the competitive process.

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The report is based on a variety of sources, including questionnaires and interviews during virtual fact finding meetings, information and presentations shared by local stakeholders and experts, previous OECD reviews, and other research on Uzbekistan.

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Abbreviations and Acronyms

ACRU	Anti-monopoly Committee of the Republic of Uzbekistan
CDCE	Committee for De-monopolisation and Competition Enhancement under the Ministry of Finance (1996-2000)
EU	European Union
ICN	International Competition Network
LCLMA 1996	Law on Competition and Limitation of Monopoly Activities of the Republic of Uzbekistan
LLMA 1992	Law on Limitation of Monopolistic Activities of the Republic of Uzbekistan
LNM 1999	Law of Natural Monopolies of the Republic of Uzbekistan
MFCompDept	A competition department under the Ministry of Finance (between 1992-1996) responsible for antimonopoly and price regulation policies
MIFT	Ministry of Investments and Foreign Trade of the Republic of Uzbekistan
MoEDPR	Ministry of Economic Development and Poverty Reduction of the Republic of Uzbekistan
MoJ	Ministry of Justice of the Republic of Uzbekistan
NFCP	Non-budgetary Fund for Competition Promotion
NSD 2017	National Development Strategy of the Republic of Uzbekistan for the years 2017-2021
OECD	Organisation for Economic Co-operation and Development
SCDCEE	State Committee for De-monopolisation, Competition Enhancement and Entrepreneurship
TFEU	Treaty on the Functioning of the European Union
UNCTAD	United Nations Conference on Trade and Development
UzAPCR	Agency of the Protection of Consumer Rights of the Republic of Uzbekistan
UzLC 2012	Law on Competition of the Republic of Uzbekistan
UzNPMA	National Project Management Agency under the President of the Republic of Uzbekistan
UzSAMA	State Asset Management Agency of the Republic of Uzbekistan

Executive Summary

Uzbekistan is well on its way to implementing an effective competition law and policy. The elementary conditions for the Anti-monopoly Committee (ACRU) are largely in place to thrive and to make a significant contribution to achieving competitive markets in Uzbekistan to the benefit of the country's consumers and businesses, and leading to increased productivity, innovation, growth and employment. Moreover, ACRU management is competent, demonstrating strong knowledge of, and experience with competition law and policy in Uzbekistan and beyond.

Since the adoption of its first competition legislation in 1992, Uzbekistan has aimed at developing its market-based economy, investing in creating competitive markets. Multiple reforms of the competition regime have taken place over the past 30 years, intended to improve both the institutional framework and the substantive law and enforcement procedures. Uzbekistan's National Development Strategy 2017 (NSD 2017) is the last in this series of reforms, and major changes include: (1) the establishment of an independent national competition regulator – the State Anti-monopoly Committee of the Republic of Uzbekistan (ACRU) – in 2019; and (2) the development of a new (draft) law on competition to improve the existing legislation. Both changes mark an important step in the right direction of improving the effectiveness and functioning of the competition regime in Uzbekistan

By submitting to this OECD review of its competition law and policy, Uzbekistan takes another step and demonstrates its dedication to implementing a modern and effective competition law and policy framework. This review applies a rigorous analysis and benchmarking of the legal framework and enforcement practice, comparing the situation in Uzbekistan with observed international enforcement practice and best practice policies, as established by OECD instruments and work by the Competition Committee. Such a review is inevitably challenging for an economy in transition, and it is not surprising that it concludes that there remains substantial room for improvement.

The review has identified issues that, when addressed, could help Uzbekistan improve the effectiveness of its competition law and policy:

Uzbekistan should **clarify the goals of its competition policy** to ensure focus and prioritisation in enforcement. Currently, multiple goals seem to be pursued, including non-competition ones, which can lead to conflicting outcomes and adverse effects on the core competition enforcement related tasks.

Furthermore, Uzbekistan can improve ACRU's effectiveness by ensuring financial stability and independence from political interference. A **sufficient and secure financial budget** to execute its mandate allows ACRU to attract and to retain well-qualified staff (including both lawyers and economists), independently take decisions and setting its own priorities. Improving ACRU's **institutional setup** can further ensure maximum independence. This includes the implementation of a clearly defined and merit-based appointment procedure for the Chairperson, who should serve a fixed term in office, and should be dismissed only in exceptional, clearly pre-defined circumstances. Within ACRU's current broad mandate, organisational measures and additional resources could allow ACRU to better **focus on its core competition mandate**. Other stakeholders, most notably the President or the Cabinet of Ministers, should refrain from designing implementing legislation on often very detailed and technical enforcement and

procedure related issues, which result in being operationally too prescriptive for ACRU. At the same time, ACRU should **make use of its soft-law making powers**, and should increase transparency by publishing substantive guidelines and fully reasoned enforcement decisions. This will increase flexibility, transparency, legal certainty and trust. When co-operating with other government agencies, ACRU's role should be strengthened to allow it to **pro-actively promote competition and competitive neutrality** in other policy areas. Another important pillar of a sound institutional setting is an effective and high-quality judicial review. Judges of the relevant **courts could benefit from increased knowledge of the use of economics**, to allow for an effective review of often complex competition matters.

Finally, ACRU would benefit from more active engagement in **international co-operation**. This can be achieved by actively participating in international fora, such as the OECD or the ICN, as well as by establishing bilateral or multilateral relationships with other competition authorities around the world. Competition authorities in jurisdictions with a similar socio-economic background can particularly beneficial, to share experiences and to allow for peer learning in competition enforcement.

Box 1 summarises the main recommendations identified in this review.

Box 1. Summary of OECD recommendations to Uzbekistan

Recommendation 1	Clarify the focus and goals of the competition policy
Recommendation 2	Ensure that the appointment of ACRU's Chairperson is based on objective, transparent and qualitative criteria, including the experience and expertise of the candidate, and determine an exhaustive list of grounds for the early dismissal from office.
Recommendation 3	Ensure that ACRU's institutional set-up allows for (i) sufficient separation between competition and non-competition related mandates, and (ii) sufficient staff to execute the competition (and non-competition) related tasks
Recommendation 4	Ensure a sufficient and securely funded budget for ACRU to execute its mandate effectively and independently
Recommendation 5	Increase ACRU's operational independence to allow for more effective enforcement
Recommendation 6	Increase the judiciary's and courts' knowledge of, and familiarity with, economic concepts and principles in the application of competition enforcement decisions
Recommendation 7	Engage more actively in international co-operation
Recommendation 8	Improve substantive provisions on cartels and abuse of dominance
Recommendation 9	Ensure adequate powers for effective antitrust enforcement
Recommendation 10	Clarify the substantive merger test; extend assessment time limits
Recommendation 11	Increase transparency of ACRU's enforcement decisions and principles
Recommendation 12	Ensure effective powers and procedures for ACRU to promote competitive neutrality
Recommendation 13	Ensure continuous optimisation of the enforcement framework through international benchmarking

Further to improving the institutional set-up, substantive provisions in the **competition legislation can be improved, both for antitrust provisions and for merger control.** The antitrust provisions comprise anti-competitive agreements and abuses of dominance. Related to ***anti-competitive agreements***, the provisions for hard core cartels (including bid rigging) merit improvement to ensure they cover all relevant

infringements, can be prosecuted regardless of actual effects, and exemptions are limited. The provisions on ***abuse of dominance*** show an overreliance on market shares and on exploitative types of abuses and should instead focus more on exclusionary practices. Enforcement is heavily based on the registry of pre-defined dominant undertakings. As a result, enforcement quantity is high but may be achieved at the expense of depth and quality. Procedural limitations further contribute to this potential lack in depth and quality and include the inability of ACRU to set enforcement priorities, investigation time-limits being too short, insufficient inspection powers, and the absence of fining powers until 1 September 2022, with the prospective "ceiling" of fines likely being too low to ensure deterrence.

Merger control will benefit from increased turnover thresholds for merger notifications as proposed by the draft law. Meanwhile, the legal test for merger appraisal remains ambiguous. Merger review, despite having decided on over 500 merger notifications in the past 3 years, has not yet resulted in a single prohibition. This may, at least partly, be explained by the extremely short investigation deadlines, which do not allow for an in-depth investigation and analysis. The extended deadlines as proposed in the draft law are welcome but may still be insufficient.

Finally, ACRU's role in promoting **competitive neutrality** and **pro-competitive reform** could be strengthened. When advising the State Asset Management Agency (UzSAMA) in privatisation processes, more can be done to achieve better competitive outcomes. Limitations in ACRU's role in legislative impact assessments reduce its ability to promote competition neutrality and pro-competitive reform. State aid assessments suffer from possibly too short investigation deadlines. A more prominent role for ACRU in safeguarding competitive neutrality at the stage of designing public tenders should be envisaged.

This review details the above-mentioned findings in its analysis parts (chapters 1 and 2), and summarises the recommendations from the analysis (chapter 3). As most recommendations address the institutional and legislative framework, their implementing falls primarily within the mandate and responsibility of the government of Uzbekistan.

To ensure steady improvement and reform, Uzbekistan is invited to continue its engagement with its international counterparts, including the OECD. Engagement with the OECD could be continued and strengthened by considering adherence to and implementation of relevant OECD Recommendations (see Box 1), participating in OECD events and meetings, and by continuing to submit annual data to OECD CompStats.

Introduction

There is broad consensus that competition creates significant benefits for consumers in terms of more choice, advanced products and services, higher quality, and lower prices. Competition enhances economic growth and innovation (OECD, 2014[1]) as well as promotes consumer welfare (OECD, 2008[2]) and plays an important role in combatting economic inequality (Zac et al., 2021[3]). These benefits materialise by implementing robust competition policies, notwithstanding geographic location, the size of the national economy, and the development level of the country in question (OECD, 2014[1]).

Building an effective competition framework is a challenging task for economies in transition from a centrally planned to a market economy.[1] Suppression of competition was integral to the socialist system, and the industrial structures bequeathed to the transition countries by central planners were often highly concentrated. Yet successful, competition-oriented reform has been rewarded: where reformers have been more successful in fostering competition, performance has improved (EBRD, 2002[4]), (Carlin, 2001[5]), (Vagliasindi, 2001[6]). Major tasks include fitting the competition policy in a wider national economic framework, strengthening the legal and institutional foundations of competition enforcement, and ensuring the establishment of the competition culture on national markets to allow for sustainable development of the competition system.

These challenges are well known to Uzbekistan – a formerly planned economy in Central Asia that has been operating a national competition framework since 1992. Throughout the last 30 years, the framework has undergone multiple changes to increase its effectiveness (Box 2). Progress made includes the establishment of an independent competition enforcer, a reduction of the role of the state-owned enterprises (SOEs) and moves towards a more competitive environment in domestic markets.

The OECD has a long tradition of reviewing competition law and policy regimes in jurisdictions across the world, and provides Recommendations for further improvement to policy makers and competition authorities.[2] This introduction to Competition Law and Policy in Uzbekistan is part of a larger OECD project "Fair Market Conditions for Competitiveness in six OECD partner countries",[3] which is supported and financed by the Siemens Integrity Initiative.

The assessment presented in this report is based on desk research, conversations with multiple stakeholders in Uzbekistan,[4] and data and information submitted by ACRU in response to various input and data requests by the OECD. Prior work in countries with a similar socialist heritage (OECD, 2020[7]),[5] and a comprehensive set of data related to competition enforcement from more than 70 jurisdictions around the world (OECD, 2022[8]) allows to benchmark the Uzbek competition law and policy framework and the enforcement activity of ACRU, as well as the institutional setup, against findings in other jurisdictions. In terms of substance and procedures, OECD standards and related analytical work undertaken by the OECD's Competition Committee provide the assessment framework.[6]

The report takes into account the legislative situation that existed in the country as of 31 January 2022. Legislative acts adopted after this date are not analysed in this report, unless particular provisions proved to be of specific relevance.

1 Recent developments and overall assessment

1.1. Recent developments

Recent developments of the competition law and policy take their roots in an ambitious reform agenda pursued by Uzbekistan since 2017, when the country adopted a four-year National Strategy of Development (NSD 2017). The NSD 2017 aims at establishing better public governance to support economic advancement, enhancement of the democratic state, and an increase in public-private interactions for attaining a higher level of trust in regulatory institutions. It comprises five key areas, including economic development and liberalisation. Enhancing competitiveness via comprehensive reforms of existing market and government structures is one of the primary tasks.[7]

Box 2. Major Milestones of the Competition Law and Policy Development in Uzbekistan

1992 – Adoption of the Law on Limitation of Monopolistic Activities (LLMA 1992): the first competition law of Uzbekistan.

1992 – Creation of the first competition enforcement body: a department within the Ministry of Finance, responsible for the anti-monopoly and price-regulating policies (MFCompDept).

1996 – Replacement of the LLMA 1992 by a new law on Competition and Limitation of Monopoly Activities on Product Markets (LCLMA 1996).

- Introduction of concentration control.
- Transformation of the MFCompDept into the Committee for De-monopolisation and Competition Enhancement (CDCE): a legal entity operating under the umbrella of the Ministry of Finance.
- Addition of the Oversight of the consumer and advertisement legislations to the CDCE portfolio.

1997-1999 – Adoption of the Law on Natural Monopolies (LNM 1999).

2000 – Awarding the CDCE a status of an independent national regulator.

2005 – Major reorganisation of the CDCE, transforming it into the State Committee for De-monopolisation, Enhancement of Competition and Entrepreneurship (SCDECE). Addition of a deeper market analysis and entrepreneurship support tasks to the SCDECE portfolio.

2012 – Replacement of the LCLMA 1996 by a new Law on Competition (UzLC 2012). Making financial markets subject to competition regulation, overseen by SCDECE Shift of the enforcement mandate: merging SCDCEE with other regulators.

2017 – Adoption of the National Strategy of Development for 2017-2021, with competition enhancement being one of its key aspects.

2019 – Regulatory de-centralisation: creation of the Antimonopoly Committee (ACRU) as an independent regulator. Introduction of competition impact assessment and commodity exchanges regulation

2020 – Adoption of a strategy and action plan (roadmap) for the development of competition on product and financial markets for 2020-2024; task of controlling the establishment of SOEs added to ACRU mandate

Source: (SCDCEE, 2009[9]); https://antimon.gov.uz/en/about-the-committee/committee-history/; http://tashkenttimes.uz/national/541-uzbekistan-s-development-strategy-for-2017-2021-has-been-adopted-following-discussion be; https://lex.uz/docs/4887659

A key step was the establishment of the State Anti-monopoly Committee of the Republic of Uzbekistan – ACRU - in 2019,[8] by de-centralising a larger regulator overseeing both competition and privatisation policies. ACRU, intended as an independent regulator, is tasked with overseeing the implementation of competition and other market-related policies, including consumer protection, advertising, and combatting corruption that distorts market competition. Despite its young age, the regulator is very active. It has assessed more than 5 500 legislative acts in terms of their (potential) impact on market competition (Figure 5), conducted more than 2 000 antitrust investigations (Figure 8), cleared around 500 mergers (Figure 11), and organised approximately 100 advocacy events aimed at improving the awareness of public bodies regarding the importance of respecting market competition.

Following the introduction of the NSD 2017, a new law on competition was drafted, to introduce changes to both substantive and procedural provisions (Box 3). The draft is currently under discussion in the Cabinet of Ministers. It is anticipated that it will be transferred to the legislative chamber of the Oliy Majlis – the Parliament of Uzbekistan – by June 2022.

Box 3. Key changes proposed by the draft law on competition

- New rules for vertical agreements
- Extended list of behaviours considered abuse of dominance
- Merger control in cases of establishment of joint ventures
- Enhanced enforcement powers, including fines on undertakings
- Inclusion of state aid regulation with ACRU responsible for its oversight
- Regulation of the extent of state intervention in economy
- Framework for regulating digital markets

Source: Draft Law on Competition (unpublished version; October 2021).

While it is not within the scope of this report to provide a detailed assessment of the draft law, the report will comment on some of the intended changes, where relevant.

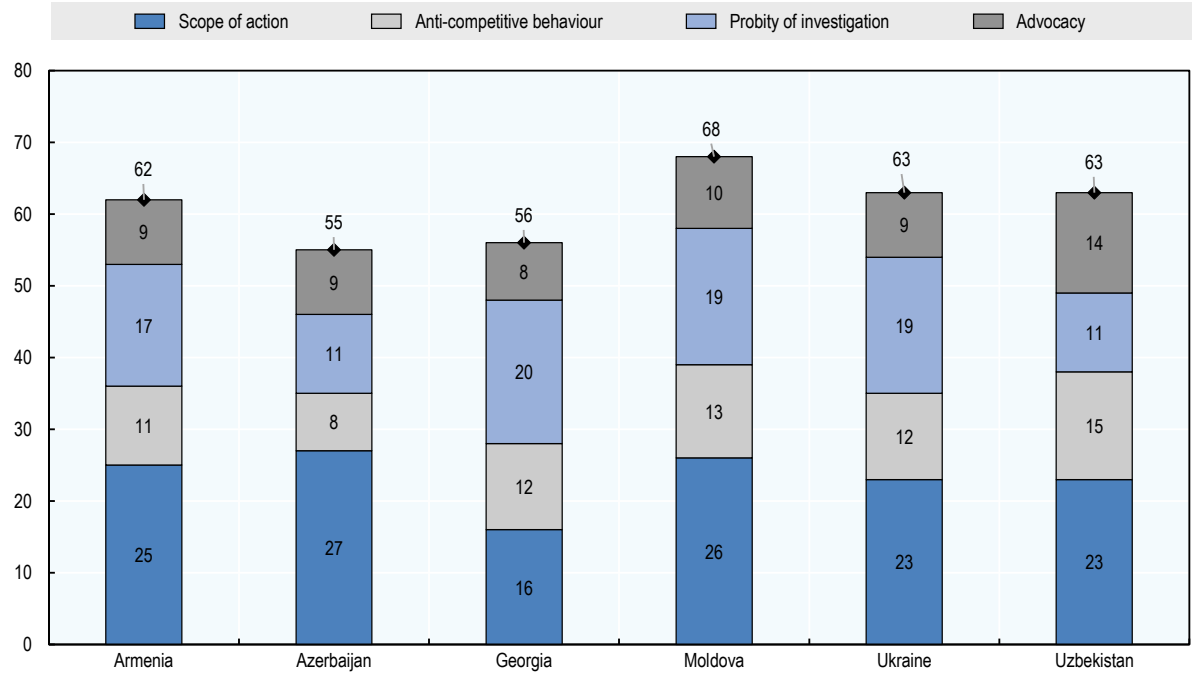
The intended changes aim to guarantee a healthy competitive environment at national markets that are still characterised by a strong state presence. They also aim at encouraging domestic SMEs to become better fit for international trade – an area where, despite intense reforms, Uzbekistan seems to be still struggling (OECD, 2021[10]).

1.2. Overall assessment of the competition law and policy framework

Based on 73 criteria (see also subchapter 2.1), a baseline assessment of competition law and policy framework in Uzbekistan was conducted (Figure 1). This allows for a comparison with other jurisdictions

that can be considered to be in a similar peer group, based on their shared history as post-Soviet economies.

Figure 1. Peer comparison with Eastern Partnership Countries



Note: The maximum number of adopted criteria is 73. The data refer to the number of competition policy criteria formally adopted in the legal framework rather than actual enforcement activity in terms of relevance or quantity. Much also depends on the relevance of the criteria lacking or met, which is not reflected here. It must be noted that the data for the other jurisdictions was gathered in 2019, and changes that may have occurred since are not reflected.
Source: *SBA assessment questionnaire 2019, see* (OECD, 2020[7]).

In terms of the *de jure* characteristics of a well-functioning competition law regime, Uzbekistan is already in a very good position and ranks high within the selected peer group. It scores highest in the categories of enforcement policies against anti-competitive behaviour and advocacy, and lowest in the area of probity of investigation in the cross-country comparison. The following sections will show that there is still work to do to fill legal frameworks with life and to improve, as is the case in the selected peer jurisdictions (Box 4). However, the necessary first step was done by Uzbekistan submitting itself to this analysis.

Box 4. Competition Policy Recommendations to Eastern Partnership Countries

In the 2020 analysis, a number of policy recommendations applied to most of the Eastern Partnership countries. In particular, for all it was found that they should boost their competition enforcement efforts, especially in the areas of cartels and merger control, and should improve advocacy efforts and the institutional framework conditions:

- Cartels are the most clear-cut and undisputedly harmful competition law violation, and they affect every country. Determined enforcement against cartels is essential.
- Competition authorities need to ensure that all mergers that meet the legal thresholds are notified, and that they are analysed using sound economic methods. Prohibitions and structural remedies should be applied in appropriate cases.
- Competition agencies need to have sufficient investigation and sanctioning powers as enabling conditions for strong enforcement.
- Effective and impartial enforcement requires highly qualified enforcers who act in an institutional environment that assures independence from public or private stakeholder interventions and guarantees an absence of corruption.
- Governments should ensure that their competition authorities are always involved in drafting or reviewing laws and regulations that have the potential to affect competition in a sector.
- Jurisdictions should start or enhance activities to train and educate public procurement officials to draft tenders in a way that prevents bid rigging, and to detect suspicious signs of bid rigging.

Source: (OECD, 2020, pp. 105-106[7]).

2 Analysis of the existing competition framework

2.1 Methodology

Throughout the Report, various benchmarks are used to guide the basic assessment of competition law and policy in Uzbekistan. We use quantitative and quantified qualitative benchmarks that were developed for similar assessment purposes in other jurisdictions and from available global enforcement statistics. OECD Recommendations and Roundtables serve as the most important qualitative benchmarks.

Quantitative benchmarks

Enforcement, budget and staff data are benchmarked against data from the OECD CompStats database,[9] for which the OECD publication OECD Competition Trends (OECD, 2022[8]) presents unique insights into global competition trends. The data provided and the analysis performed allow for informed policy making and contribute to improving competition law and policy around the world by providing multi-year data on a large number of economic and legal indicators, including the number of anti-trust decisions, the sanctions imposed, the unannounced inspections performed, activity on merger review and competition advocacy.

Quantified qualitative benchmarks

In addition to the quantitative analysis, an analytical framework that is widely agreed across the OECD as reflecting the foundations of an effective competition policy regime is used. It investigates four sub-dimensions: scope of action, anticompetitive behaviour, probity of investigation, and advocacy. Scope of action assesses to what degree competition authorities are invested by law with the powers to investigate and sanction anticompetitive practices. The second area, anti-competitive behaviour, reviews policies to prevent and prosecute exclusionary vertical and horizontal agreements and anti-competitive mergers. The third, probity of investigation, examines the independence and accountability of institutions that enforce competition law and the fairness of their procedures. The fourth, advocacy, looks at further actions to promote a competitive environment (OECD, 2021, p. 224[11]).[10] It draws on a questionnaire ACRU completed, and it broadly measures the scope and strength of competition policy regimes. This assessment framework has a much stronger focus on the de jure characteristics of a regime than on its de facto enforcement and implementation. It has been used by the OECD in a number of cross-country analyses.[11] The actual enforcement activity, as measured through the enforcement numbers (see above), and an in-depth qualitative analysis (see below) are necessary complements to this type of analysis.

Qualitative assessment

Background research, conversations with ACRU and other governmental as well as non-governmental stakeholders complement the findings and allow for a well-rounded view of the current state of competition law and policy in Uzbekistan. The baseline for the qualitative assessment are recommended practices as

they follow from competition related OECD Recommendations (Box 5),[12] and best practices as they emerged from a large number of discussions at the OECD Competition Committee.[13]

Box 5. OECD Recommendations on Competition

The OECD Council has adopted as of now eleven non-binding Recommendations aiming to promote competitive neutrality, transparency and procedural fairness, international co-operation and other best practices on competition law and policies. Below are the most recent ones.

1. **Recommendation on Merger Review** – adopted on 23 March 2005, it aims to contribute to greater convergence of merger review procedures, including co-operation among competition authorities, towards internationally recognised best practices. It should thus help to make merger review procedures more effective, while at the same time helping competition authorities and merging parties to avoid unnecessary costs in multinational transactions.
2. **Recommendation on Fighting Bid Rigging in Public Procurement** – adopted on 17 July 2012, the Recommendation promotes more effective procurement and risk reduction of bid rigging in public tenders through providing instruments to assess and change the procurement laws and practices.
3. **Recommendation concerning International Co-operation on Competition Investigations and Proceedings** – adopted on 16 September 2014, the document calls governments to improve their competition laws and practices in order to promote further international co-operation among competition authorities and to reduce the harm arising from anticompetitive practices.
4. **Recommendation concerning Effective Action against Hard Core Cartels** – adopted on 2 July 2019, it reflects the most salient developments in cartel enforcement of the last 20 years, including amnesty/leniency programmes, proactive investigation tools and investigation powers, settlements, effective fines and private enforcement actions.
5. **Recommendation on Competition Assessment** – adopted in December 2019, the Recommendation calls on governments to establish institutional mechanisms to conduct competition assessments. In this framework, several approaches are available; all of them are described in OECD's Competition Assessment Toolkit.
6. **Recommendation of the Council on Competitive Neutrality** – adopted on 31 May 2021, calls for ensuring equal treatment of state-owned and privately-owned enterprises emphasising benefits of competition, such as lower prices, better quality and higher economic growth.
7. **Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement** – adopted on 6 October 2021, the Recommendation establishes common standards for transparent and fair competition law enforcement. It aims to support the impartial and reasonable treatment of investigated parties and the exercise of their rights of defence. It also aims to strengthen the accuracy and effectiveness of enforcement decisions.

Source: Recommendations and Best Practices on Competition Law and Policy, https://www.oecd.org/competition/recommendations.htm

2.2. Competition policy goals

Goals for competition policy are not always explicitly reflected in national legislations, but they are of utmost importance. Namely, policy choices not only determine the exact role of competition regulation in the process of creating the national market economy, but they also shape the priorities and methods of

enforcement (Hyman and Kovacic, 2013[12]). International practice recognises multiplicity and diversity of competition policy goals. The choices made often depend on the characteristics of the choosing jurisdiction, including the development level of its national economy, the age of the competition regulator, and the degree of its decision-making independence (OECD, 2003[13]).

The vast majority of the countries pursues several economic goals of competition policy. These can, for example, aim at:

- preserving and enhancing the functioning of the economic system (such as protection of competitive market structures, promoting economic efficiency and/or consumer welfare)
- producing a particular market outcome (such as reduction of product prices or decrease in economic inequality)
- protecting the economic freedom of market participants.

Countries also pursue social and political objectives, such as fairness (towards both competitors and consumers), equality of opportunity between competitors, and democracy-building (Gerber, 2020[14]). Finally, they may pay attention to certain other policy considerations (for example, environment, employment, or public health). The latter could be incorporated in the competition enforcement if their pursuit does not jeopardise the implementation of "core" competition policy goals (Rompuy, 2012[15]).

Setting policy goals can be a challenging task for young competition agencies (OECD, 2009[16]). Problems include possible conflicts between these goals (OECD, 2020[17]), blurring of their meaning (OECD, 2008[18]),[14] overfocusing on outcome-oriented goals that yield reverse results in the long run (Gerber, 2020[14]),[15] and rendering enforcement ineffective by prioritising other policy considerations (OECD, 2020[19]).[16]

In Uzbekistan, the objectives of the competition policy are not stated in the legislation. However, they can be inferred from the mandate of ACRU. An overview of the mandate leads to three key conclusions.

First, in practice, the national competition regulation seems to serve multiple (and somewhat conflicting) objectives. For example, the UzLC 2012 indicates that:

- Actions by dominant companies are abusive if they go against "interests of consumers" (article 10), indicating a consumer welfare objective.
- Anti-competitive agreements are exempted from the general prohibition if they stimulate "technical and economic growth" (article 11), indicating objectives of economic growth or economic efficiency.
- The law is concerned with the actions of public bodies which, inter alia, restrict market access (article 12), indicating an objective of protecting competitive market structures.
- Fairness of market practices and the prohibition of discrimination are listed in multiple provisions (for example, articles 12 and 13), indicating objectives of fairness and equality of opportunity.

It is not set out how to act in case of conflicting policy objectives. For example, if a discriminatory practice of the dominant company contradicts the objective of fairness but increases market efficiency, there is no guidance as to which objective should be prioritised.

Next, pursuit of outcome-oriented goals predominates national competition enforcement. Price regulation is one of the major tasks under the national competition policy. Up to this date, the regulator controls prices for natural monopolies[17] and for 45 commodity exchange markets.[18] Additionally, pricing abuses are given special attention under the UzLC 2012. Despite price reductions being one of the positive outcomes of competitive markets, it is doubtful whether focusing on the outcome (low prices) instead of the competitive process (that could lead to low prices) is the right way to go (OECD, 2011[20]).

Lastly, the competition authority is given additional enforcement tasks. For example, ACRU is responsible for implementing consumer protection policy, possesses certain anti-corruption policy implementation powers, and oversees unfair competition rules that closely relate to intellectual property law and policy.[19]

While each of the above-mentioned policies is important, the setup where their whole or partial implementation depends on the competition regulator leaves little room for the latter to focus on "core" economic goals during enforcement (see subchapters 2.3 and 2.4).

Key takeaways – competition policy objectives for Uzbekistan

- Ensure a clear focus of competition policy – multiple goals can be pursued but priorities should exist to avoid enforcement inconsistencies
- Give preference to ensuring that the competitive process works over outcome-oriented goals (such as price reductions)
- Ensure that other policy considerations do not jeopardise the attainment of "core" competition policy goals

2.3. Institutional setup and international co-operation

The following public bodies are involved (albeit with varying intensity) in the implementation of competition policy in Uzbekistan:

- **ACRU** is the principal competition regulator, overseeing the implementation both at national and regional levels.
- **Oliy Majlis** – parliament of Uzbekistan – is one of the two supervisory bodies of ACRU (alongside with the President). It is also responsible for adopting competition and related laws (ex. Law on Natural Monopolies).
- **The president** and **the government** (Cabinet of Ministers) of Uzbekistan are entitled to issue by-laws regulating the daily work process of the ACRU.
- Selected **ministries** and other **public bodies** co-operate with ACRU in their activities that require joint effort for completion, such as anti-corruption investigations, competitive public procurement, and privatisation.
- **Administrative courts** undertake judicial review of ACRU decisions.

ACRU

Since 2019, Uzbekistan has put in place several measures to guarantee basic institutional independence for the principal competition regulator – ACRU. This is in line with best international practices that view such independence as a source of "regulatory certainty and stability" (OECD, 2016[21]). Nowadays, ACRU operates as a public body accountable to the senate (higher chamber) of the Oliy Majlis and to the president of Uzbekistan,[20] making the regulator formally independent from the government and other state bodies and organisations. ACRU is also empowered to engage in the decision-making process on wider economic matters in par with other public bodies.[21] Finally, decisions of ACRU are subject to independent judicial review as opposed to government oversight.[22]

Several characteristics of the institutional setup of ACRU have the potential to jeopardise its independence and operational effectiveness. These can be broken down into five key areas: (a) appointment/dismissal procedure of the management, (b) regulatory mandate (list of functions), (c) human resources, (d) funding, and (e) transparency and legal certainty.

(a) Management Appointment/Dismissal

Two legislative omissions could be seen as problematic. First, **appointment criteria and reasons for dismissal** of the Chairperson of ACRU are not substantiated in the law. The legislation simply states that both powers are exercised by the President (whereas appointment happens based on the recommendation of the Prime Minister).[23] Second, the law stipulates **no fixed term for the Chairperson appointment, nor grounds for dismissal**.

Procedures that grant wide discretion when choosing and dismissing/replacing the head of a formally independent enforcer are widely considered as problematic among OECD member countries and beyond (OECD, 2015[22]).

These appointment and dismissal powers are one of the key pressure points when it comes to political influence on regulatory activities (Kovacic, 2011[22]). The absence of a fixed appointment term coupled with absolute discretion of an appointing/dismissing entity might make the management more compliant to the political will of the government and diminish the credibility of the regulator, as the impartiality (freedom from political pressure) of its management could become questionable. Hence, international experience suggests making the appointment process dependent on several stakeholders, as well as to base this process on objective, merit-based qualitative criteria (OECD, 2016[21]). Similarly, longer fixed terms of appointment will increase independence in decision-making. Finally, mid-term dismissals should be possible in exceptional circumstances only, and as defined by the law to guarantee the absence of political motives (UNCTAD, 2008[23]).[24] The draft law does not address this problem.

(b) Regulatory mandate (functions)

ACRU has a broad mandate. It includes both, the tasks classically associated with competition enforcement, and responsibilities concerning areas that are related but not directly connected to competition policy and enforcement (Box 5).

Competition regulators tasked with the enforcement of multiple policy areas are not uncommon (Hyman and Kovacic, 2013[24]). However, simultaneous implementation bears the risk of diffusing the mandate, prioritising one enforcement area over another, or contradictory policy objectives and enforcement outcomes (see sub-chapter 2.2). Such risk is exacerbated when the available resources in terms of staff and funding are low (see sub-chapters 2.3.c-d).

A relatively young competition regime may benefit from a focus on the core mandate of a competition enforcer, which is not the case in Uzbekistan now. The consumer protection mandate seems to enjoy a higher priority in terms of enforcement, which could be linked to it being relatively easier to implement than the often more complex competition cases. A multitude of additional mandates compete for staff time and enforcement resources in addition. As a result, under enforcement of competition rules may be observed. While it is not uncommon that enforcement authorities exercise several mandates, in particular competition and consumer protection, recent observations indicate that economies in transition/formerly planned economies struggle in this respect (Martyniszyn and Bernatt, 2019[25]) (Kaufman, 2021[26]). Uzbekistan can ease this struggle by introducing clear operational separation of competition policy implementation and other mandates within ACRU, both at national and regional levels. This would ensure a better focus on each of the respective policies, while still allowing synergies of implementing these policies under the “umbrella” of the same organisation/management. When introducing such separation, it should be ensured that **all** enforcement tasks are allocated adequate staff and resources. Particular attention should be paid to ensuring that staff for core competition tasks is not reduced, at the very least.

Box 6. Mandate of the ACRU

National legislation empowers the regulator to oversee the enforcement in the following areas.

"Core" competition tasks:

- Anti-competitive agreements/concerted practices (including bid-rigging)
- Abuse of dominance
- Market concentrations
- Competition Impact Assessment (both ex-ante and ex-post)
- Market analysis
- Antitrust compliance

Other tasks:

- Unfair competition (principally, protection of IP rights), including unfair advertisement control
- Public procurement (public side – i.e. ensuring the competitiveness of the public bidding process)
- State aid
- Regulated prices (tariffs) and margins of goods (works, services) – for 45 commodity exchange markets in total
- Regulation of natural monopolies
- Control of stock trading
- Overseeing the enforcement of legislation related to advertisements
- Overseeing SOEs in terms of competitive neutrality
- Consumer protection (via a special agency)

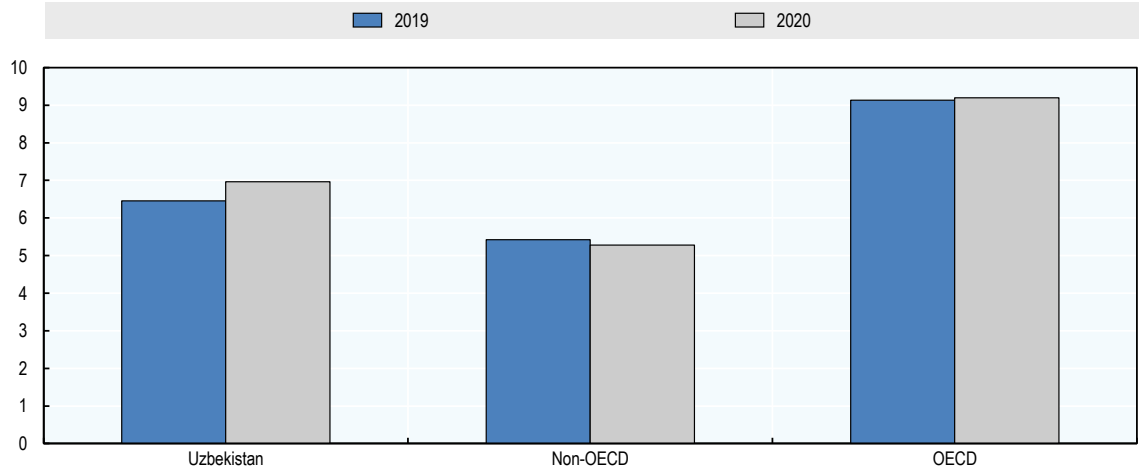
Source: https://antimon.gov.uz/en/

Handling multiple policies may also obscure the primary role of ACRU in the public eye. It seems that currently the regulator is better known for its other tasks (advertisement and unfair practices, price regulation, public procurement, etc.) than for its core competition mandate. Again, international experience shows that this may negatively affect competition enforcement in the long run, including by causing re-direction of the staff to more "popular" matters and under-prioritising competition law-related tasks (Hyman and Kovacic, 2013[24]).

(c) Human resources

One of the preconditions for the effective performance of a competition regulator is the availability of adequate staff – in numbers and quality (OECD, 2016[21]). For ACRU, the picture is blurred, as, prima facie, overall staff numbers are higher compared to other non-OECD jurisdictions (Figure 2). ACRU has a central office and 14 regional/territorial units, with the wide mandate as described above. In addition, the Agency of the Protection of Consumer Rights (UzAPCR) functions as a separate legal body under the central office of the competition regulator.[25]

Figure 2. ACRU staff numbers, International comparison (2019-2020)

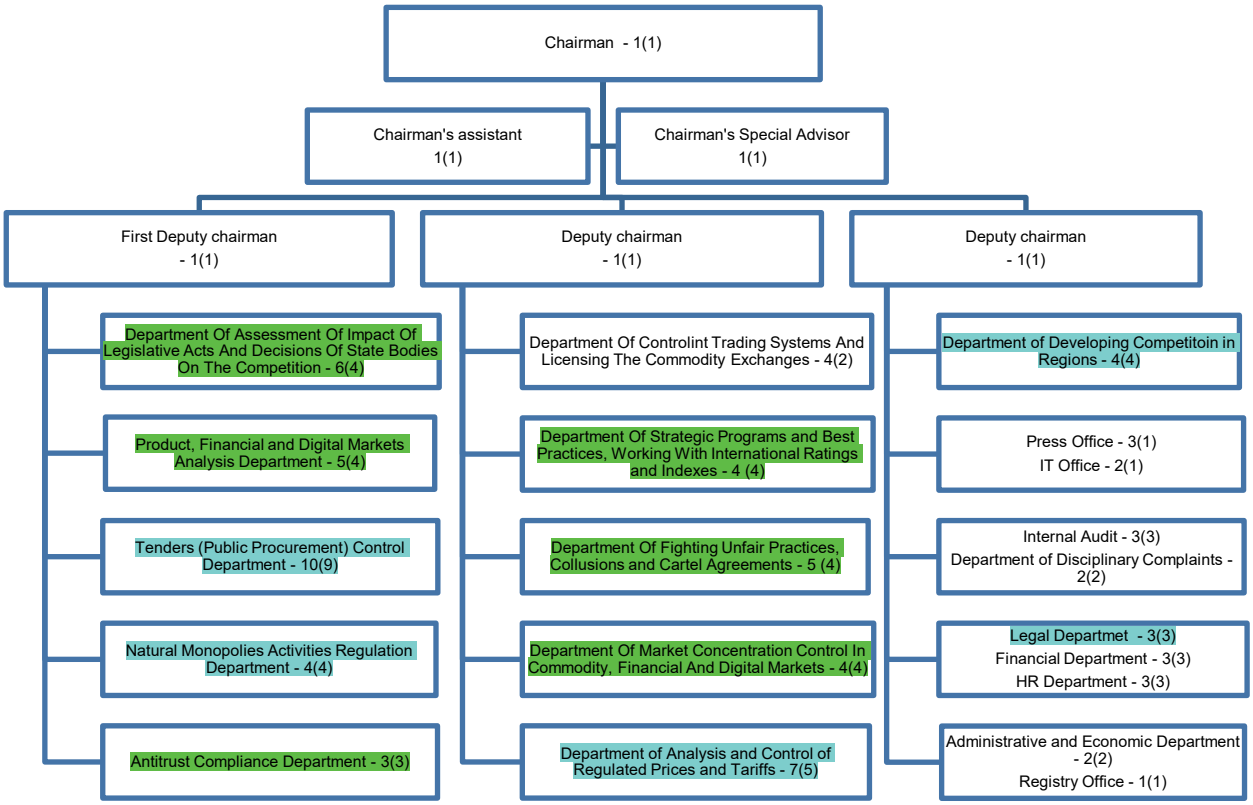


Sources: Numbers provided by ACRU, (OECD, 2022[8]).

The total number of ACRU staff was 223 in 2021, not including staff working on consumer protection. However, this number does not represent the number of staff engaged with core competition tasks, due to three qualifiers provided below:

- 223 is a number of staff allotted to ACRU by legislation, as opposed to actual staff numbers. ACRU reports a significant number of vacant positions.[26] This number is partially explained by the lack of availability of sufficiently qualified applicants. In particular, ACRU has difficulties finding qualified lawyers.[27] There is also a visible staff shortage in the IT department,[28] which can raise concerns in an enforcement area dealing with often sophisticated international enterprises and increasingly digitised markets.
- Employees of ACRU work in all areas covered by its broad mandate. The majority is engaged in activities not related to the implementation of the core competition mandate. Others have to perform both core mandate alongside other tasks (Infographic 1). The latter situation is a rule in regional/territorial units, where implementation of competition and consumer mandates is not separated at the structural level.
- Staff numbers also include employees engaged in administrative tasks, such as registry, HR department, and internal audit. Consequently, while the overall staff number may seem high, the number of employees engaged in core competition matters is significantly lower (Infographic 1).

Infographic 1. The central office of the Antimonopoly Agency, breakdown of staff numbers



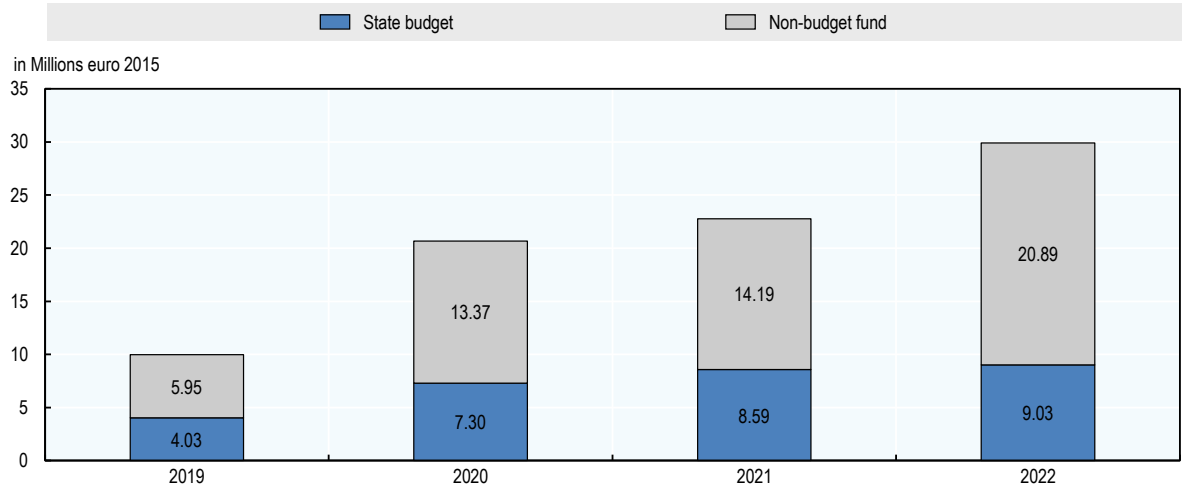
Note: Departments engaged in core competition matters are highlighted in green. Departments engaged in core competition matters **alongside other tasks** are highlighted in blue. The numbers include department heads and depict staff numbers as foreseen by legislation and actual staff numbers (in brackets).

When contrasted with the actual case numbers per year (147 mergers; 162 cartel cases; 853 abuse cases; 145 market studies; 1 551 impact assessments; 44 advocacy events),[29] it becomes obvious that the limited number of dedicated staff (i.e. the staff working on core mandate only) will only be able to carry out very superficial assessments and analyses in the vast majority of cases. Staff shortage limits competition enforcement – both qualitatively and quantitatively – and delays the development of a competition culture (Gal, 2010[27]). It also endangers the process of independent decision-making as it curbs the capacity of a regulator to produce high-calibre work and develop standing and credibility (OECD, 2016[21]).

(d) Funding

The annual funding of ACRU has increased since 2019 (Figure 3). The legislation provides two sources for funding the regulator – the state budget and a Non-budgetary Fund for Competition Promotion (NFCP). The NFCP consists of fines and other charges collected from various entities and individuals for the violation of competition legislation as well as of merger filing fees.[30]

Figure 3. Budget of ACRU, development (2019-2022)



Note: The budget for the year 2022 is an estimate, numbers provided by ACRU.

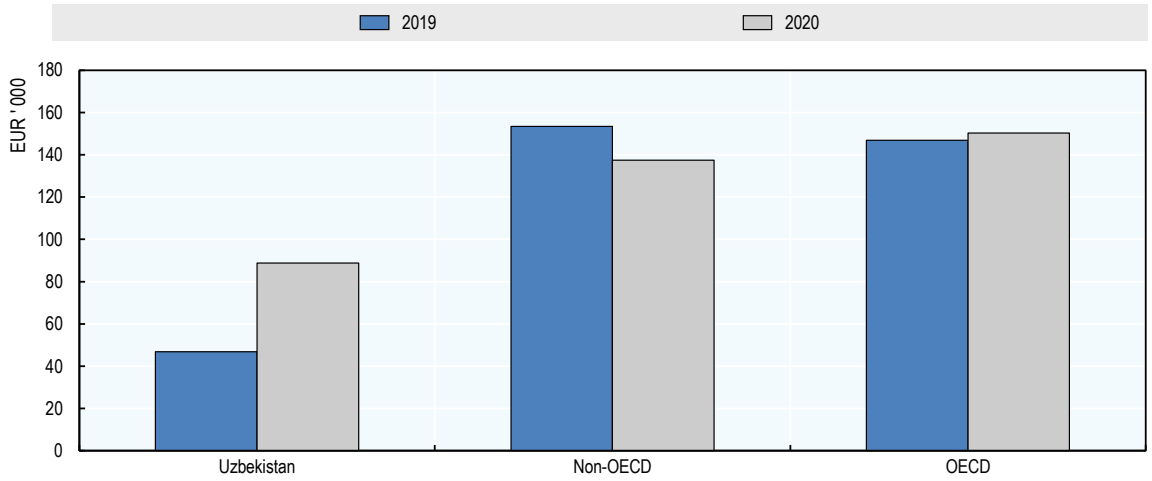
- The NFCP resources cover 60%+ of ACRU expenses (Figure 3). This poses risks, as the fund is currently mostly based on the financial inheritance that ACRU received upon being split from a larger regulator in 2019, to allow for the funding of office equipment etc. These funds are expected to be depleted by the end of 2022. The remaining income from fines and merger filing fees is not a sufficient source at the moment, and would fluctuate since ACRU cannot impose fines for antitrust infringements at the moment. This will change due to a recent Presidential Order that envisages antitrust fining powers from 1 September 2022.[31] However, using these fines as a source of budgetary income is considered a sub-optimal solution due to potential conflicts of interests. A regulator should not aim to "earn back" its budget (OECD, 2020[28]).
- Although ACRU has received around 500 merger notifications since 2019, filing fees make up only a marginal part of the NFCP income – not even 0.5%.[32] ACRU could not depend solely on these fees for budget funding, unless fees increased considerably.

Despite a comparatively high absolute budget, the average salary of ACRU officials is very low compared to its international counterparts (Figure 4).

Low average salaries seem to be at least one explanation for frequent rotation of (primarily younger) staff. According to ACRU, officials leaving the authority usually continue working in the public service, albeit with agencies that offer more competitive salaries. This is a worrisome trend, considering the large mandate of the regulator and the level of multi-area expertise required by the staff for effective performance. Until it is able to offer competitive salaries, ACRU faces a continuous risk of losing an organisational memory and will have difficulties retaining a sufficient number of experienced and qualified staff.

For a competition agency to be fully functional and independent, the budget needs to be sufficient and stable, and should not depend on meeting the government's expectations with regard to specific enforcement outcomes, or on the type and level of enforcement action. A multi-annual budget, an enterprise tax, or mixed financing from state budget and enforcement related fees are viable options (OECD, 2016, pp. 14-15[21]) (OECD, 2016[29]). Regarding the size of the budget, it should allow for recruitment and retainment of sufficiently qualified staff – economists, lawyers, specialised IT personnel – and for adequate equipment with hardware and software to keep pace with an increasingly digitised economy (see also Box 7). Salaries should be of a size and composed in a way that they prevent corruption risks (OECD, 2019[30]). Budget and salaries as awarded to employees of a country's central bank can be a useful benchmark.

Figure 4. ACRU budget per competition staff member, International comparison (2019-2020)



Sources: Data provided by ACRU, (OECD, 2022[8]).
Note: Numbers include salary and non-salary budget.

Box 7. ECN+ Directive

Articles 4 and 5 of the DIRECTIVE (EU) 2019/1 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (ECN+ Directive) require EU member states to ensure that national enforcers applying EU law have sufficient independence and resources to do so effectively.

This includes freedom of political influence and instructions when exercising their powers; provisions on conflict of interest and dismissal and appointment procedures; and discretion to determine enforcement priorities (Art. 4).

On resources, Art. 5 requires EU member states to ensure that national competition authorities have *"a sufficient number of qualified staff and sufficient financial, technical and technological resources that are necessary for the effective performance of their duties, and for the effective exercise of their powers…"*. Competition authorities shall be independent in spending their allocated budget and shall report on their activities as well as on appointment or dismissals of decision-making staff and on their resources and changes thereof.

Source: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0001&from=EN

(e) Transparency and legal certainty

UzLC 2012 enables ACRU to issue "explanations on the application of competition law".[33] However, ACRU has not used this power during the past three years. Instead, Oliy Majlis, the President and the Cabinet adopt detailed legislation on competition in a number of procedural and substantive enforcement areas, starting from market definition and ending with antitrust enforcement and merger clearance procedures (see below). Meanwhile, even the most detailed legislation cannot cover every aspect of substantive and procedural assessment. This is noted by legal and business circles, who still experience uncertainty regarding the question on what establishes market transactions with an anti-competitive nature.

In international practice, soft law is used to provide additional guidance (Box 8). "Soft law" refers to a set of documents establishing "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects" (Snyder, 1993[31]). Such documents can be public guidance material,[34] explanatory texts,[35] notices,[36] or studies,[37] for example. Competition regulators use soft law to clarify legal provisions, in line with selected policy objectives, and based on the best national and international practices. Soft law explains the decision-making process and the substantive assessment applied. It can be updated relatively easily to adjust for changes in practice, as opposed to legislative amendments. This ensures consistency and flexibility in decision-making process, increases transparency and regulatory independence. In addition, soft law provides market participants with additional legal certainty of how the legislation will be applied and hence, promotes compliance.

Box 8. Soft law measures in EU competition enforcement

EU competition legislation provides rather basic provisions, which are not easy to change. In contrast, soft law is used extensively and undergoes regular revisions and changes. For example, articles 101 and 102 TFEU lay down general prohibitions for anti-competitive agreements and abuse of dominance. These articles are supplemented by several soft law tools, including guidelines on vertical restraints, guidelines on horizontal co-operation agreements, and guidance on Commission's enforcement priorities in applying article 102. By combining legislative and soft law measures, the EU competition system ensures both the durability of its basic principles and flexibility of their application.

The application of Article 101 TEFU to vertical agreements provides a good example. The article prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between [EU] Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market." The EU Guidelines on Vertical Restraints (2010) clarify that this general provision includes vertical agreements and (a) explains which vertical agreements that fall outside of the scope of article 101 altogether (for example, agreements of minor importance); (b) clarifies conditions of exempting vertical agreements from the prohibition; (c) explains the importance of market definition and market share calculation for applying "safe harbours" and indicates their unavailability for hard core agreements; (d) elaborates on positive and negative effects of vertical agreements; (e) provides specific guidance for the most widespread vertical agreements in the EU, including single branding, exclusive distribution, exclusive customer allocation, exclusive supply, franchising, tying and resale price restrictions. Overall, the guidelines provide market participants with detailed information about the approach of the EU Commission in handling vertical restraints.

The European Commission continuously ensures updating its guidelines to reflect market and case law developments. In 2021, it published draft guidelines on vertical restraints that, among other issues, include refined provisions based on the enforcement experience of 10 years and address vertical agreements on digital markets, which are expected to replace the 2012 guidance later in 2022.

Source: (European Union, 1957[32]); (EU Commission, 2004[33]); (EU Commission, 2008[34]); (EU Commission, 2009[35]); (EU Commission, 2010[36]); (EU Commission, 2011[37]); (Commission, 2021[38]).

Transparency and legal certainty can also be improved by publishing full investigation and merger assessment decisions, as this helps legal and business circles to better understand the regulatory rationale and to comply with it. In Uzbekistan, both existing and draft legislation allow ACRU to publish decisions. However, this relates only to the results, without making the full texts and reasoning of decisions public.[38]

While such publications would not eliminate the necessity of the soft law measures, they significantly assist the regulator in increasing market participants' awareness and compliance with competition rules. Fully reasoned decisions, cleared from business secrets and confidential information, could be published on the website of ACRU. This measure could also bridge the time it would take the regulator to prepare necessary guidelines and other soft law documents. The effect of such publications could be significantly increased if ACRU pro-actively reached out to business circles and other interested parties, explaining the approaches taken during the enforcement, in particular in high profile and complex cases.

Key takeaways – Institutional setup of ACRU

Appointment/dismissal of the Chairperson

- The appointment of the Chairperson should be based on objective and qualitative criteria prescribed by legislation and based on the merits of a candidate
- Fixed appointment terms can support managerial independence
- Reasons for early dismissal should pre-determined narrowly to provide for exceptional circumstances, and not allow for political interference

Mandate

- The existing mandate seems too broad for effective implementation by a single regulator.
- ACRU's should be provided the opportunity to focus on the core competition related tasks, such as anti-competitive agreements (including bid rigging), abusive conduct by dominant enterprises, merger control, market inquiries, and competition impact assessment and competition compliance.
- Operational separation of competition and consumer mandates, and the various other mandates ACRU enforces, at both central and regional levels, within the agency would facilitate a proper focus on the implementation of each policy, while maintaining potential synergies in their implementation.

Human Resources

- While the overall number of ACRU staff is higher than in many of its international counterparts, the number of staff members engaged in core competition tasks is very low.
- Staff shortage endangers the process of the effective implementation of competition law and policy and the development of a competition culture.
- Recruitment of more qualified competition lawyers could significantly benefit the effectiveness of the enforcement process.

Funding

- ACRU's budget is not secured and depends heavily on the soon depleted NFCP. Independent operation requires a stable and securely funded budget.
- Incomes from fines should only be a minor component of ACRU funding.

- Merger filing fees could be increased to reflect the complexity of merger assessment procedures and the size of the merging parties.
- The budget and the salaries should allow for recruitment and retainment of qualified staff to effectively carry out all tasks bestowed on ACRU. Salaries should be competitive at least within the public sector.

Transparency and Legal Certainty

- ACRU has soft law-making powers but does not use them – this should change to ensure better alignment with policy objectives, to increase regulatory independence, and to provide more transparency and legal certainty to businesses.
- ACRU should publish its fully reasoned decisions and make them accessible on its website. In addition, it should reach out and explain approaches and decisions in important cases.

Other bodies engaged in competition policy implementation

Oliy Majlis

Apart from the legislating powers in the field of competition, both existing and draft legislation designate Oliy Majlis, alongside with the President of Uzbekistan, as the body to which ACRU is accountable. However, the parliament does not participate in appointment/dismissal of the ACRU Chairperson, which is at the sole discretion of the President of Uzbekistan.

President and Cabinet of Ministers

Despite the formal organisational independence of ACRU, both the President and the Cabinet of Ministers have a strong influence on the implementation of competition policy, primarily by enacting by-laws. While both existing and draft legislation enable ACRU to issue soft law documents, in practice, competition enforcement is regulated either by Presidential Decrees or the Cabinet Resolutions. This concerns even the by-laws regulating very technical aspects of competition enforcement, such as the rules of market definition and establishing dominance,[39] as well as procedures of antitrust investigations[40] and concentration appraisals.[41] This significantly limits the abilities of ACRU to optimise procedures and to apply the competition rules with the required flexibility to adjust to a specific case, market or changing economic circumstances.

The President and the Cabinet of Ministers can also approve concentrations without the consent of ACRU, including on the basis of non-competition considerations (see subchapter 2.4).

Selected public bodies

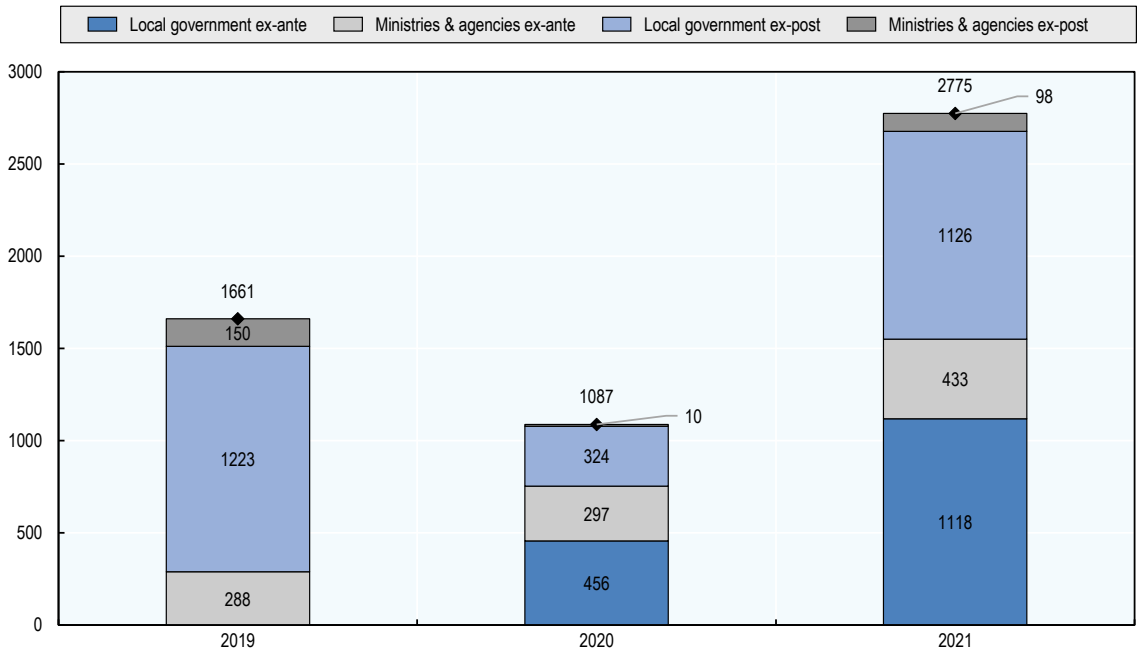
ACRU is actively engaged with several ministries and public bodies while performing its duties, including:

- Ministry of Economic Development and Poverty Reduction (MoEDPR) – key collaboration happens during the legislative impact assessments, where the two entities need to produce complementary reports.
- Ministry of Justice (MoJ) – the central collaboration concerns the assessment of existing legislative acts and standards to see whether they create unnecessary barriers to market entry and participation.
- Ministry of Investments and Foreign Trade (MIFT) – during concentration assessment, MIFT is empowered to comment on benefits and risks from the investment/foreign trade viewpoint.
- State Asset Management Agency (UzSAMA) – ACRU assists UzSAMA in matters of competition during the privatisation process.

The above-listed collaborations are vital for the development of legislative and enforcement frameworks supportive of competitive markets, but there is room for improvement. One example is the collaboration with UzSAMA, which seems to be mostly reactive on the part of ACRU. While ACRU will perform concentration assessments in the context of privatisation projects, it does not engage in suggesting alternative ways of privatisation, or alternative buyers. Such recommendations could create more competition on markets, for example by structurally separating privatisation objects instead of selling them as one unit, with obvious benefits for privatisation processes in a formerly planned economy, helping avoid the creation of private monopolies (see subchapter 2.5).

The co-operation with MoEDPR and MoJ suffers from the limited powers and resources of ACRU that prevents it from taking a stronger influence on the process of legislative impact assessment. ACRU is actively engaged in competition impact assessment on a daily basis (more than 5 000 formal opinions so far). Opinions are issued on normative acts and their drafts, on both central and regional levels (Figure 5). However, three principal problems seem to significantly reduce the impact of such activity: (1) the government has no obligation to follow ACRU's recommendations on draft legislation nor to provide reasons for not following them; (2) there is no mechanism to measure the level of voluntary compliance; (3) the sheer number of opinions issued, mostly for local level legislation, leaves little room for ACRU to carry out an in-depth the assessment of legal acts/drafts with a larger, nationwide impact.

Figure 5. Formal opinions of ACRU regarding legislative impact assessment (2019-2021)



Source: Information provided by ACRU, March 2022.

Box 9. Legislative (ex-ante) impact assessment by ACRU

The following is a summary example of ex-ante legislative impact assessment by ACRU:

The Antimonopoly Committee provided an ex-ante assessment of the competitive impact of the **draft resolution of the President of the Republic of Uzbekistan "On measures to develop the system of training qualified personnel in the field of water supply"**, based on the Methodology for Competitive Impact Assessment of Legislation Registered on April 19, No. 3155. This one page-long assessment concluded with *two key recommendations*:

(a) The draft resolution foresaw the establishment of "the Water Academy" – a science centre tasked with (re)training specialists in the field of water supply. The centre was supposed to be the only institution operating in the relevant market. *ACRU suggested to remove the reference to the exclusivity of the centre to open up the market for other educational institutions.*

(b) The draft resolution permitted to a specific undertaking – JSC "Uzsuvtaminot" – to demolish buildings on specified land in order to subsequently build the premises for the Water Academy. The permission was to be granted without a public tender for the services. *ACRU noted that this development contradicted competition legislation and proposed the selection of demolishing and building companies based on a competitive tender.*

Considering the high number of formal opinions issued every year and the low number of staff working on this task (see Infographic 1), it would be safe to assume that most of the issued opinions are quite brief and highlight only the most obvious legislative problems, translating directly into the infringement of market competition (Box 9). A deeper, more detailed analysis of the legislative provisions with a high, nationwide impact that might not seem anti-competitive at the outset but could create such effects in the long run can hardly take place. The 2019 OECD Recommendation on Competition Assessment[42] and the associated Toolkit[43] provide valuable guidance on systematic and focused assessment (see Box 10).

Box 10. OECD Recommendation on Competition Assessment

The 2019 Recommendation on Competition Assessment recommends that assessments should focus on policies that limit:

- The number or range of market participants;
- The actions that market participants can take;
- The incentives of market participants to behave in a competitive manner;
- The choices and information available to consumers;

It also recommends that public policies should be subject to competition assessment even when they pursue the objective of promoting competitive outcomes and especially when they:

- Set up or revise a regulatory body or regime (e.g., the assessment could make sure that, among other things, the regulator is appropriately separated from the regulated industry);
- Introduce a price or entry regulation scheme (e.g., the assessment could make sure that there are no reasonable, less anticompetitive ways to intervene);
- Restructure incumbent monopolies (e.g., the assessment could make sure that the restructuring measures actually achieve their pro-competitive objectives);
- Introduce competition-for-the-market processes (e.g., the assessment could make sure that the bidding process provides incentives to operate efficiently to the benefit of consumers);
- Provide an exception from competition law for any specified objective (e.g., the assessment could make sure that any exception is absolutely necessary to achieve the stated policy objectives).

Source: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0455.

Administrative Courts

Independent judicial review is the primary mechanism to ensure the accountability of a competition regulator (OECD, 2016[21]). Uzbekistan already has this mechanism in place: the decisions of ACRU are subject to appeal on three levels – first instance, appellation and cassation – of the national Administrative Court system.

It is a common experience (Jenny, 2016, p. 22[39]) that the judiciary is not particularly well equipped to handle complex economic analyses, which are a necessary part of competition investigations. This may lead to unsatisfactory judicial review. First, it increases the possibility of error in evaluating the merits of ACRU's economic assessment and therefore, the danger of incorrect decisions during the review process. Next, it might incentivise judges to focus on procedural questions to avoid an evaluation of the economic rationales underlying regulatory decisions (Box 11).

Box 11. Case study – Antimonopoly Committee v UzAutoMotors

The state-owned company UzAutoMotors was created in 1992 for car production for the local market. Since its creation, the company enjoyed a monopolistic position in Uzbekistan's automobile market, without foreign competition. To change this situation, the Uzbek government decided to create a new factory, Peugeot Citroën Automotive, in 2018 and to expand car production through KIA in 2020 and Volkswagen in 2022. However, the Peugeot Citroën project was soon suspended, while KIA and Volkswagen continued operation with a limited focus. Consequently, the market changes did not significantly impact the state incumbent.

During the last years, UzAutoMotors car prices increased. In 2017, prices grew by 30%, a year after by 7.7%, and in 2020 by 10.3%. Consumer complaints led to an antitrust investigation by ACRU. The regulator found the price increase to be abusive and ordered the company to reduce their prices by 10.3%. UzAutoMotors disagreed with the decision and argued that ACRU had violated procedural rules. It asked the Tashkent City Administrative Court to invalidate the cease-and-desist order.

In October 2020, the Tashkent City Administrative Court ruled that the pricing policy of UzAutoMotors was regulated by separate decisions of the head of state and was justified. In turn, ACRU filed an appeal, but lost it. The judge argued that: *«such normative-legal documents (referring to decisions of the head of state) actually exist. The reason why they were not presented in court is that they are confidential. The jury came to this conclusion after reviewing these documents, as it has the appropriate permission. In addition, the documents the Antimonopoly Committee used to conduct public audits (Government Resolutions No. 239, No. 249 and No. 54) contradict other relevant decisions of the government and the head of state. After comparing the documents, the eligibility of the committee to conduct an audit against the JSC was questioned».*

The merits of the case – the rationale behind deeming the price increase anti-competitive – were not assessed by the Court in detail.

Sources:https://kun.uz/en/news/2020/12/19/antimonopoly-committee-loses-the-cases-against-uzauto-motors; http://uzbekistanlawblog.com/why-did-the-antimonopoly-committee-lose-the-battle-against-the-biggest-monopoly-in-uzbekistan-uzautomotors/

While it is not uncommon that competition authorities (rightly) lose cases due to procedural mistakes, effective judicial review still requires the evaluation of the soundness of *both legal and economic analysis* undertaken by the respective regulator (Kalintiri, 2016[40]) and the adherence to proper procedure. This is less likely to happen without a judicial corpus that is well-trained in competition law and economics.

Key takeaways – role of legislative, executive and judiciary bodies in competition policy implementation

- Appointment and dismissal procedures for ACRU management should be transparent and based on objective and qualitative criteria. The process would benefit from involvement of multiple stakeholders and clear rules.
- ACRU is severely limited in exercising its mandate by numerous and detailed, often technical Presidential Decrees and Cabinet Resolutions. The responsibility for designing appropriate procedures and assessment frameworks within the given competition legislation should be conferred on ACRU.
- Co-operation with other public bodies is often hindered by limited powers, limited resources or a more passive role of ACRU.
- Legislative impact assessment suffers from lack of staff resources, the high volume of acts assessed, and lack of a minimum required degree of responsiveness of governmental bodies.
- The judicial review system could benefit from an improved economic education of the judiciary and/or specialised economic courts.

International co-operation

International co-operation is an essential component of every competition regime to allow for effective enforcement in the light of a globalised economy, large multinational firms being active on numerous national markets, and an increasingly borderless digital economy (OECD, 2022[41]). Uzbekistan, while still in the process of increased integration into the global economy, will have to engage more with its international counterparts. A lack of international co-operation will allow for cross-border competition infringements to go unpunished, as national enforcement powers usually stop at national borders. This harms national consumers and the national economy. A lack of interaction with its international counterparts also deprives ACRU of the benefits of peer learning and benefitting from international best practices in applying its national competition law.

As of today, ACRU, apart from co-operating with international institutions such as UNCTAD, World Bank, EBRD or OECD, has only very few established links to other competition authorities, for example through Memoranda of Understanding (MoU).[44] Participation in the International Competition Network (ICN)[45] or the OECD's Global Forum on Competition should take place on a regular basis.[46]

Key takeaways – international co-operation

- ACRU should participate actively and on a regular basis in in the International Competition Network and the OECD Global Forum on Competition, and similar fora.
- Partnerships with competition authorities with a similar socio-economic background should be sought to benefit from their experience in implementing effective competition laws.
- Funding should be provided to allow for regular participation of ACRU management and enforcement level staff in regional and international competition events.

2.3. Antitrust Regulation

Both existing and draft legislation provide the basic norms for fighting both anti-competitive agreements and abuse of dominance, as well as for the enforcement process associated with their implementation. However, several areas require refinement to ensure enforcement effectiveness, and we focus on only on the most relevant points.[47]

Substantive Provisions

Anti-competitive agreements

UzLC 2012 prohibits both horizontal and non-horizontal anti-competitive agreements/concerted practices, including various forms of price-fixing, production control, market access restrictions, and imposing conditions that are not related to the subject of contract. Similar provisions are foreseen in the draft law. Both existing and draft provisions would benefit from refinement in (at least) three respects: (a) definition of anti-competitive agreements; (b) the relationship of dominance and vertical agreements; (c) the list of exemptions.

Definition of anti-competitive agreements. UzLC 2012 does not contain a general clause prohibiting horizontal anti-competitive agreements. Instead, it provides an arguably open list[48] of agreements that are deemed anti-competitive. Agreements that are anti-competitive but not included in the list could thus be difficult to prosecute. The draft law provides an improvement in this respect, stating that "[i]t is prohibited to restrict competition and (or) discriminate consumer interests" by various agreements. However, the wording does not clarify whether effects analysis is necessary to establish competition restriction. According to international best practices and experience, it should not be necessary to establish anti-competitive effects (including consumer harm) for a certain type of agreements – so called hard core cartels (Box 12).

Box 12. OECD Recommendation Concerning Effective Action Against Hard Core Cartels

All OECD members (Adherents) agree that hard core cartels should be illegal regardless of the existence of proof of actual adverse effects on markets, and design their anti-cartel laws, policies and enforcement practices with a view to ensuring that they halt and deter hard core cartels and provide effective compensation for cartel victims.

Hard core cartels refer to anticompetitive agreements, concerted practices or arrangements by actual or potential competitors to agree on prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by, for example, allocating customers, suppliers, territories, or lines of commerce. They do not include: (a) agreements, concerted practices, or arrangements that are reasonably related to a legitimate efficiency-enhancing integration of economic activity; (b) agreements, concerted practices or arrangements that might otherwise qualify as hard core cartels, which are directly or indirectly exempted from the coverage of Adherents' competition laws or are mandated in accordance with Adherents' laws.

Source: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452.

Agreements that are not categorised as hard core cartels are usually assessed based on their actual or potential effects on market competition. Unlike hard core cartels, these require a comprehensive economic analysis to establish that such effects either already took place or will likely materialise in the near future.[49]

The current wording would also establish a violation when competition is not restricted - agreements that discriminate consumer interests. Such agreements should be covered by consumer law, unless they have a competition restriction element to qualify as infringements under competition legislation.

Box 13. Antimonopoly requirements for public bidding – Article 17 of the draft law

Article 17 prohibits competition infringements during the public bidding. It provides an open list (almost 25 entries) of scenarios that could jeopardise this process. Around 15 out of these entries directly or indirectly concern bid-rigging activities. The list essentially revolves around two ideas: prohibition of various price collusions and us of established business links to influence the bidding process.

While guaranteeing fair and competitive public bidding should be on the agenda of a competition regulator, a detailed regulation under the Article 17 might overburden the draft law, as the latter already contains provisions of anti-competitive agreements/concerted practices (article 12), which should apply to public tender collusion equally.

To provide more detailed guidance, instead of including inevitably incomplete lists of unlawful behaviours in the law, ACRU could issue guidelines on public bidding. These could be based international best practice (OECD, 2009[42]).

Particular attention should be paid to collusive practices affecting public tender processes (bid rigging). Under the draft law, the detailed list of anti-competitive activities rightly includes bid rigging (see Box 13). Collusion affecting public tenders is a hard core anti-competitive agreement and receives special attention both in Uzbekistan[50] and abroad.[51] When public procurement is victim of bidder collusion, the public tenderer will pay more, receive lower quality, and may forego more innovative solutions. This also means that public – taxpayer – money is wasted and diverted into the pockets of colluding bidders. This money cannot be spent on providing more public services, for example in healthcare, education or welfare benefits. ACRU seems to have a strong focus on bid rigging in terms of the number of cases addressed (see Figure 6), which is commendable. The OECD Recommendation on Fighting Bid Rigging (Box 14) calls on governments to ensure that such anti-competitive practices are addressed in various ways.

Box 14. OECD Recommendation on Fighting Bid Rigging and Guidelines

Bid rigging is an illegal practice in all OECD Member countries and can be investigated and sanctioned under the competition law and rules. In a number of OECD countries, bid rigging is also a criminal offence. The OECD Recommendation Fighting Bid Rigging recommends that governments should:

- assess the various features of their public procurement laws and practices and their impact on the likelihood of collusion between bidders. Members should strive for public procurement tenders at all levels of government that are designed to promote more effective competition and to reduce the risk of bid rigging while ensuring overall value for money;
- ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour and unusual bidding patterns which may indicate collusion, so that these suspicious activities are better identified and investigated by the responsible public agencies;
- encourage officials responsible for public procurement at all levels of government to follow the Guidelines for Fighting Bid Rigging in Public Procurement set out in the Annex to this Recommendation, of which they form an integral part; and
- develop tools to assess, measure and monitor the impact on competition of public procurement laws and regulations.

The Guidelines for Fighting Bid Rigging in Public Procurement set out:

- Common forms of bid rigging;
- Industry, product and service characteristics that help support collusion;
- They provide two detailed checklists on tender design that will help prevent bidder collusion and on ways to detect suspicious bidder behaviour.

This OECD instrument and the related guidelines are the agreed global standard in the fight against bidder collusion. The OECD has applied them to carry out reviews of procurement laws and procurement practices around the world, and very recently in Ukraine (OECD, 2021[43]), which is also available in Russian language.

Sources: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0396, (OECD, 2009[44]) ; https://www.oecd.org/competition/fightingbidriggininpublicprocurement.htm.

Experience suggests that more could be done to address bidder collusion in public tenders – by raising awareness of public tenderers on how to minimise risks of bidder collusion through pro-competitive tender design, and on common patterns that indicate bid rigging. In addition, advocacy to undertakings active in public tenders should explain which practices are prohibited, and what the legal consequences would be.

Vertical agreements and dominance. Under UzLC 2012, vertical agreements may be prohibited only if one of the participants holds a dominant position. While well in line with established practices, insofar as vertical agreements will be considered problematic mostly if one or both sides to the agreement enjoy a certain degree of market power (for example, (OECD, 2021[45])), limiting the application to cases of dominance may unduly narrow the number of agreements that can be assessed for their anti-competitive effects and leaves a potential gap in enforcement. This requirement would be removed by the draft law that allows investigations of vertical agreements between non-dominant participants, which is a welcome development.

Exemptions. The draft law expands the list of exemptions compared to UzLC 2012 (Box 15). A major concern in this regard is the “de minimis” exemption in both the existing and the draft law. The exemption

would seem to apply to hard core cartels when they are below a certain market share (current law) or below a certain turnover threshold (draft law). Such a policy is unusual for hard core cartels in the international comparison, and the 2019 OECD Recommendation advises to restrict exemptions on hard core cartels to those that are indispensable to achieve a jurisdiction's overriding policy objective.[52] In addition, the exemption for public-private partnerships may bear risks for competitive neutrality (see subchapter 2.5).

Box 15. Exempted agreements: law in force vs draft law

UzLC 2012

- Article 11 lists several exemptions from the prohibition of anti-competitive agreements. These are:
- Agreements/concerted practices, with an aggregated market share below 35%
- Public-private partnership agreements
- Agreements between business entities belonging to the same corporate group
- Agreements aimed at improving production, increasing production volumes, and selling goods or stimulating technical and economic growth
- Agreements increasing the competitiveness of goods on the global commodity market.

Draft Law

Article 12 expands and changes the list of exemptions. In addition, exemptions apply to:

- Agreements that lead to consumer profit in accordance with the profits received by undertakings and result in the improvement of production and marketing
- Granting and (or) alienation of the right to use the results of intellectual activity, means of individualisation of a legal entity, and means of individualisation of goods, works and services
- Joint activities concluded between undertakings based on prior consent of ACRU
- Agreements between undertakings whose total revenue from the sale of goods for the last calendar year does not exceed four thousand five hundred times the basic calculation value (this provision replaces the requirement of 35% or more aggregated market share of all market participants).

Notes: Means of individualisation are the company name, trademark (service mark) and the name of the place of origin of goods. (Chapter 65 of the Civil Code of the Republic of Uzbekistan, in force since March 1, 1997; the basic calculation currently equals 270 000 Uzbek Soums (approximately 23 EUR).
Source: UzLC 2012; Draft Law on Competition

Abuse of dominance

Abuse of dominance is prohibited both under UzLC 2012 and the draft law. Under both sets of rules, attention should be paid to three key respects: (a) definition of dominance; (b) operation of the registry of dominant undertakings; (c) the strong focus on two types of pricing infringements – predatory and excessive pricing.

Definition of dominance. Under the UzLC 2012, dominance is defined as "the position … giving [undertaking] an opportunity to carry out its activities independently of competing economic entities and have a decisive influence on the state of competition, impede access to the relevant market to other business entities or otherwise restrict freedom of their economic activities."[53] The draft law includes a

similar definition.[54] Under the current law, an entity is considered dominant when it has market shares of 50% or higher, or when the share is stable and between 35-50%, and competitors are relatively small, with little probability for market entry.[55] Under the draft law, undertakings with 35% or more market share would be automatically dominant, while undertakings holding market shares between 20% and 35% might be declared dominant when the shares are stable for a year or more, high entry barriers exist, or consumer switching is either impossible or difficult/unprofitable. While the lower range presumptions seem to allow for an economic assessment of the actual market situation, this would not be the case for the market share thresholds that are equated with dominance.

Box 16. The role of market shares in determining dominance – international experience

Market shares play an important role in determining dominance. However, they do not usually present a decisive factor in this respect. The reason is that, apart from market share, market power of a particular entity might also depend on the shares of its competitors, market entry and expansion barriers, countervailing buyer power and other factors. Hence, high market shares do not always translate into market power (dominance). Economic analysis is essential for a proper assessment of cases of presumed dominance (OECD, 2021[46]), and high market shares will usually only establish presumptions of dominance, not proof.

International practice shows various approaches. Some countries (for example, Czech Republic) determine a certain threshold of market shares below which an undertaking is **presumed not to be dominant** (safe harbour), unless the regulator proves otherwise. Other jurisdictions (for example, South Korea, EU) introduce market share thresholds above which an undertaking is **presumed dominant**, unless the undertaking proves the contrary. Safe harbours vary greatly across the globe – between 10-50%. Thresholds above which the presumption of dominance arises usually amount to 50% or more.

Sources: (OECD, 2007[47]); (EU Commission, 2009[35]).

The register of dominant undertakings. ACRU is required by law to operate a register that includes all dominant undertakings.[56] Inclusion takes place either ex-officio (for example, upon discovery of dominance during market studies) or based on a complaint regarding a particular abuse. It is a two-step process: (1) a relevant market is defined; (2) dominance is established – largely based on market shares, as noted above. Depending on the change of market conditions, the Chairperson can remove undertakings from the register.[57] Registered undertakings are subject to constant monitoring – especially regarding their pricing practices. To this end, both the existing and the draft law include provisions on monopolistically high (excessive) and monopolistically low (predatory) pricing.

A register of dominant undertakings may raise a number of concerns. It not only binds large amounts of human resources to run, but it also prevents a case by case assessment in presumed abuse cases and exposes all economic activity of dominant undertakings to regulatory intervention. Given the rapidly changing nature of some markets and potentially large areas of perfectly legitimate business activity by dominant undertakings, this can have an unwanted chilling effect on otherwise efficient business operations. The OECD usually advises against reliance on such a register (see also Box 17).

Box 17. Register of dominant undertakings – OECD Recommendation to Kazakhstan

The OECD has conducted peer reviews in other jurisdictions with a post-Soviet structure, and advises against the use of a register of dominant undertakings if a listing is sufficient to establish dominance in presumed abuse cases. The recommendation issued to Kazakhstan was

Dominance and monopolisation The competition authority has far reaching powers to control dominant undertakings. Dominance is established based solely on market shares and without any in-depth analysis of market conditions. Once undertakings cross the legal market share thresholds, they are entered into a "State Register for Dominant Undertakings". This results in a de facto system of price controls for all undertakings that are defined as dominant. The enforcement practice thus focuses on price and profit controls. Kazakhstan is encouraged to abolish the State Register for Dominant Undertakings. Identification of dominant undertakings should be based on an economic analysis of market structures as well as an analysis of the effects of alleged abuses. The authority should shift focus from price and profit controls to control of exclusionary practices.

Similarly, it was recommended to Russia to ensure that dominance in a competition case is determined on the basis of contemporaneous information and analysis. Among other things, this would mean that enrolment in the Register of firms with market shares exceeding 35% would not play a role in dominance determination.

Source: (OECD, 2016[48]); (OECD, 2013[49]).

A strong focus on two types of abuses. The current and the draft law, in addition to the general definition of an abuse of dominance (see above), focus on pricing abuses - monopolistically high (excessive) and low (predatory) prices. This fits with the traditional mandate of ACRU to control market prices. However, while pricing abuse case are not unheard of in the international practice, most competition authorities focus on addressing exclusionary abuses and market foreclosure by dominant undertakings (EU Commission, 2009[35]). The rationale is that a dominant undertaking must not implement practices that unduly restrict competition by forcing existing competitors out of the market or preventing new competitors from entering. By keeping markets open and contestable, excessive pricing practices can be prevented and markets can self-correct. Foreclosing practices come in many shapes and forms (Box 18), and pricing is just one of many. A focus on pricing abuses may miss the main point and can reduce incentives for market entry.

Box 18. Examples of non-price exclusionary abuses – refusal to supply and tying

Refusal to Supply

Refusal to supply (also called refusal to deal) is a non-price abuse whereas an undertaking - dominant on an upstream market - refuses to provide an objectively necessary input for manufacturing a product or providing a service to its downstream competitor. This covers a wide range of activities, including the refusal to deal with existing and new competitors, refusal to license IP rights, and refusal to grant access to essential facilities. The conduct is considered abusive because it leads to the foreclosure of the downstream market and eliminates otherwise efficient competitors to the detriment of consumers. Refusal to supply cases are not uncommon in formerly planned economies where large state owned enterprises (SOEs) have been transformed into private monopolies.

Tying

Tying is another non-price abuse where a dominant undertaking disables customers from purchasing one (tying) product without purchasing another (tied) product. A dominant undertaking may do this by integrating one product in the other so that: (1) it is impossible to purchase two products separately or (2) a tied product – a spare part – can be purchased separately but will not be compatible with the tying product (technical tying). Alternatively, a dominant undertaking may oblige customers to buy two products together by a contractual clause. Tying is considered an abuse if an undertaking holds a dominant position on the market of a tying product. The practice is abusive since it forecloses competition by disabling customers to buy a tied product elsewhere, with a better price and a higher quality, and thus precludes competition on that market.

Source: (OECD, 2007[47]); (EU Commission, 2009[35]); for an example of the refusal to deal in a formerly planned economy, see EU Case T-814/17, Lietuvos geležinkeliai AB v European Commission, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62017TJ0814&from=EN.

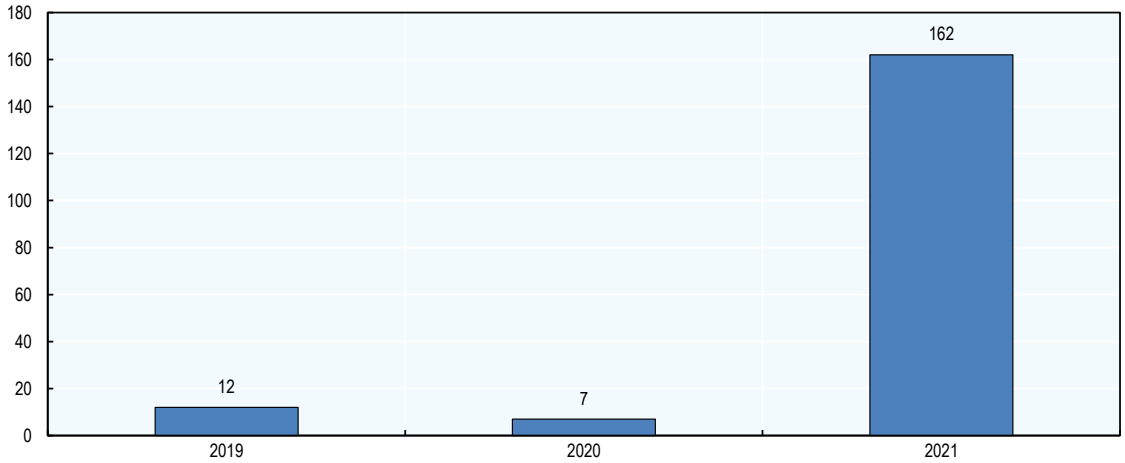
Key takeaways – substantive antitrust provisions

- The list of anti-competitive agreements under UzLC 2012 may not cover all potentially harmful agreements. Hard core cartels should be prosecuted without exemptions, and it should not be necessary to show their anti-competitive effects. Agreements causing consumer harm without restricting competition should be treated under consumer protection legislation instead of competition law.
- Bidder collusion in public tenders is already a focus area of ACRU. More should be done to help public tenderers to prevent and detect bidder collusion, and to make bidders aware of the legal risks of bidder collusion.
- Exemptions from anti-competitive agreements should be defined narrowly and should not violate principles of competition neutrality.
- Dominance is established mainly based on market shares, and abusive practices are mainly found in excessive or predatory pricing. International best practices suggest a case-by-case and effects based approach to abuse of dominance cases, and the focus should be on exclusionary abuses instead of pricing abuses.
- The register of dominant undertakings supports a mechanistic approach to abuse cases, can chill legitimate business activity, and binds valuable human resources that could be put to better use.

Enforcement practice

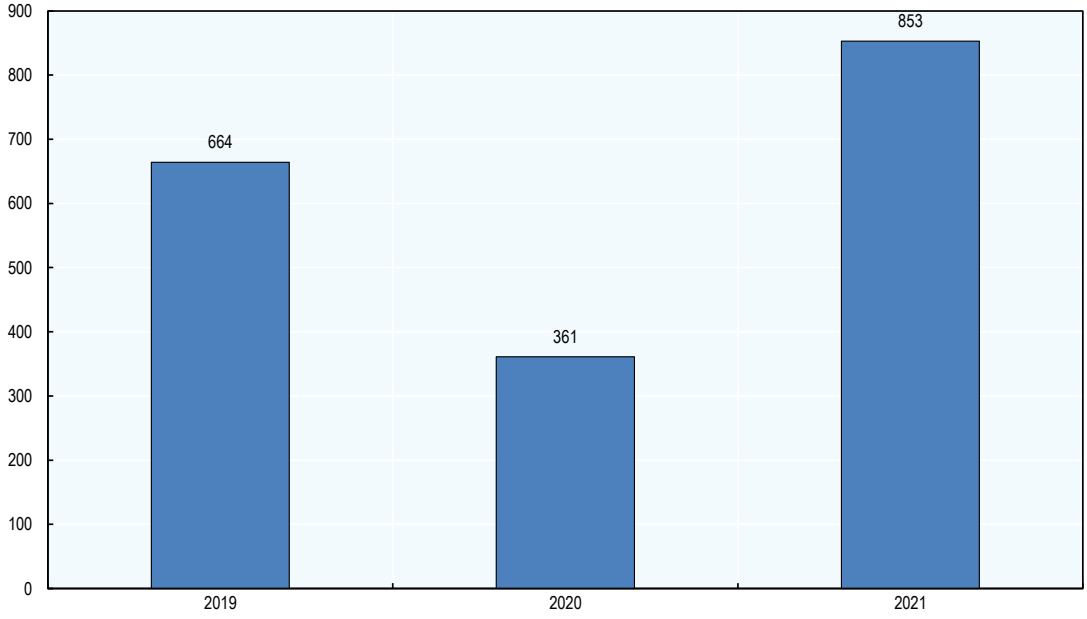
ACRU is a very active enforcer in the antitrust field. Overall, the regulator has completed 2 059 antitrust investigations between 2019 and 2021. Out of these, 181 investigations concerned anti-competitive agreements (see Figure 6) and 1 878 investigations concerned abuses of dominance (see Figure 7). These numbers are significantly higher than the international average. This may be explained by the current practice, where the majority of cases concerns undertakings that are part of the register of dominant undertakings. As of 20 October 2021, this register encompassed 93 entities.[58] According to the legislation, ACRU has to monitor these entities on an ongoing basis and starts an antitrust investigation whenever it notices the deviation from either the price or any contractual conditions that the dominant/monopoly companies are obliged to uphold.[59] Such monitoring powers, in combination with cases that are started based on a high number of complaints by consumers creates a busy enforcement schedule for the regulator.

Figure 6. Cartel decisions of ACRU (2019-2021)



Note: Total number of decisions – 181. A visible increase in caseload during 2021 is due to a stronger focus on bid rigging (129 cases).

Figure 7. Abuse of dominance decisions of ACRU (2019-2021)

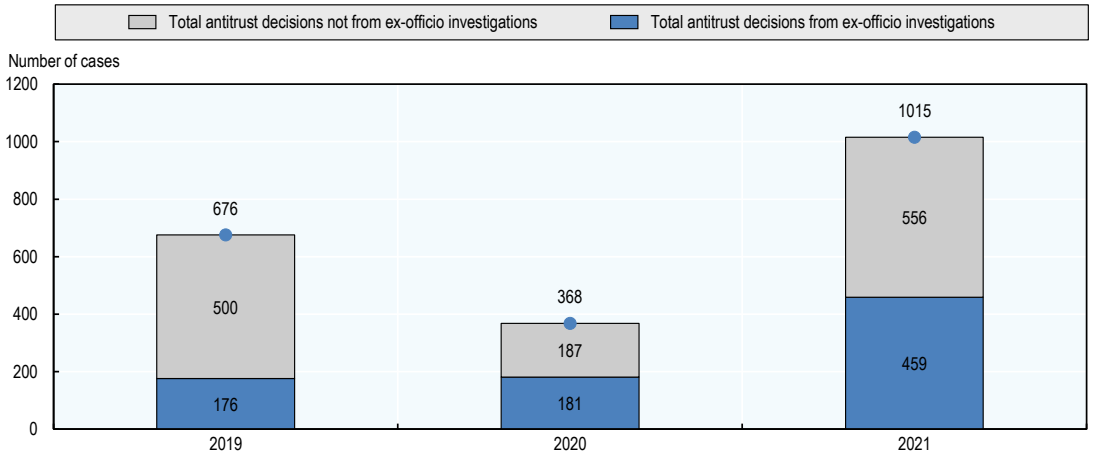


Note: Total number of decisions is 1878. Most of the caseload results from the monitoring duties of ACRU vis-à-vis dominant undertakings.

In the light of limited human resources (see subchapter 2.2), the large quantity of cases raises questions regarding the depth and quality of the investigations. It would seem very difficult to carry out a more economic and case by case type of assessment that goes beyond mere price control.

To address the quantity problem and the case overload, it could be beneficial to grant ACRU powers to determine its own **enforcement priorities**. Today, ACRU has to start an investigation based on every admissible complaint, no matter the size and importance of the alleged infringement, or in reaction to direct government orders.[60] The majority of cases 2019 - 2021 resulted from such complaints and orders (Figure 8). ACRU may not have sufficient room to determine its own enforcement priorities and to engage in more targeted investigations, which could give more weight to the gravity of a case, the importance to the national market development, its precedent value, or other priorities determined by the regulator.

Figure 8. Antitrust Decisions of ACRU, ex-officio and other cases (2019-2021)

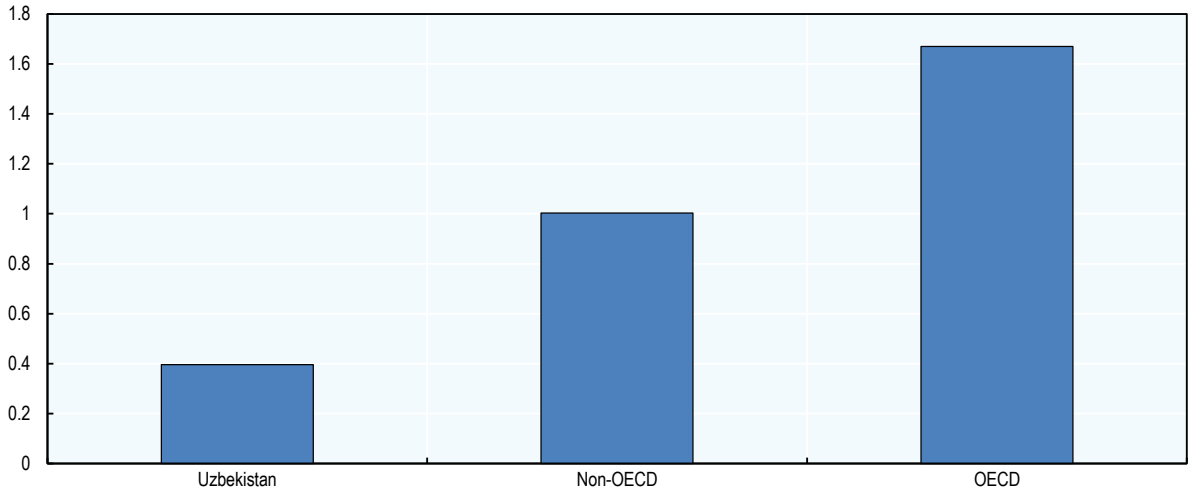


Source: Information provided by ACRU, March 2022.

The international comparison shows that, on average, in other jurisdictions a larger percentage of cases is initiated ex officio when compared to the overall number of decisions. This happens due to ability of national agencies to set their own enforcement priorities (Figure 9).

Figure 9. Ex-officio investigations, International comparison (2019-2021)

Number of ex-officio investigations over number of antitrust decisions, 3-year average



Sources: Information provided by ACRU, March 2022; (OECD, 2022[8]).

In addition, a few procedural rules and missing enforcement powers stand in the way of more effective enforcement by ACRU.

Investigation time-limits. ACRU has to issue an antitrust decision within one month of commencing an investigation. The time can be prolonged by one additional month for more complex cases, and no change is foreseen.[61] Such time limits are too short for conducting an adequate investigation, data/economic analyses and legal assessment. Overall, this compromises the quality of the investigations and increases

the risk that antitrust decisions will not hold up in court. Short time limits also compromise the defendants' right to be heard and to defend themselves. This is illustrated by a shortcoming in the existing legislation, where ACRU is not required to issue a formal Statement of Objections and give defendants sufficient time to respond. In addition, while the legislation foresees parties' general rights to access the case file, present evidence and explanations to ACRU, and ask questions,[62] the time-limits hardly allow for a proper exercise of these rights. These are basic due process requirements acknowledged by a large number of jurisdictions (see also Box 19).[63]

Box 19. OECD Recommendations on Transparency and Procedural Fairness in Competition Law Enforcement

Article 5 of the recommendation encourages intensive involvement of the parties in the competition law enforcement process, including by:

- ensuring that parties are notified in writing as soon as feasible and legally permissible that an investigation has been opened and of its legal basis and subject matter, to the extent that this does not undermine the effectiveness of the investigation
- explaining to the parties, as soon as reasonably possible and appropriate during the competition law enforcement process, the factual and legal basis, competition concerns, and the status of the investigation
- ensuring that any public notice by the competition authority of the opening of investigations and the publication of allegations against parties are not presented as a determination of the matter
- affording parties a reasonable opportunity to present views regarding substantive and procedural issues via counsel, in accordance with applicable laws, rules or guidelines. This includes not denying, without due cause, the requests of parties to be represented by a legal counsel of their choosing
- providing parties with meaningful opportunities at key stages to discuss with the competition authority the investigation's facts, progress, and procedural steps, as well as relevant legal and economic reasoning
- offering parties the opportunity to present an adequate defence before a final decision is made. This should include:
- informing parties of all allegations against them and granting them access to the relevant evidence collected by or submitted to the competition authority or court, subject to the protection of confidential and privileged information; and
- providing parties a meaningful opportunity to present a full response to the allegations and submit evidence in support of their arguments before the key decision makers.
- respecting parties' applicable rights against self-incrimination; and
- considering the views of third parties with a legitimate interest in the case before a final decision is taken.

Source: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0465; similarly, ICN Framework on Competition Agency Procedures, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf.

It is widely agreed that in particular in hard core cartel cases, but also in abuse of dominance investigations, competition authorities require the powers to conduct **unannounced inspections** (commonly known as "dawn raids") of business and private premises.[64] Such powers are required to enable competition authorities to obtain proof in cases of serious violations of the competition law. In such cases, where undertakings face serious monetary fines and individuals can often be charged criminally, information will

not be provided voluntarily. To the contrary, as soon as an undertaking or individual learns about a pending investigation, any existing proof will be destroyed. Uzbekistan's legislation does not allow for unannounced inspections. Only announced inspections are allowed upon registration in the unified electronic system of inspections and notification to the Business Ombudsman.[65] While ACRU has used this limited power 95 times in 2020, a 2021 nation-wide moratorium on inspecting business entities led to a drop also in announced inspections to a mere 12. The draft law envisages enhanced inspection powers but does not specify whether these inspections will be unannounced. In order to be fully effective as a sanction and deterrent, **fines** should be imposed on serious antitrust violations.[66] Many jurisdictions can even impose criminal sanctions on individuals engaged in such offences (OECD, 2020[50]). Currently, ACRU cannot impose fines, however, Presidential Decree N101 (adopted on 8 April 2022), effective from 1 September 2022, provides limited fining powers. Fining powers are also envisaged by article 38 of the draft law:

- For anti-competitive agreements, fines of **up to 5% of the revenues** on the affected market for the entire duration of the infringement. If infringement lasts for more than three years, only the last three years will be considered for the purposes of fine calculation.
- For abuse of dominance, the fining ceiling amounts to **5% of the same revenues**.
- Fines are doubled in case of repeated infringements.

While the introduction of sanctioning powers is a welcome development, their deterrent effect may prove insufficient, considering the relatively low maximum fine percentages (for international comparison, see (OECD, 2016b, p. 13[52])).

In competition regimes with an effective enforcement against hard core cartels, and deterrent sanctions, **leniency programmes** have become one of the main detection tools of otherwise secret and well-hidden illegal activity, and they are considered international best practice.[67] Leniency programmes allow for fine reductions of up to 100% for cartel participants that come forward and report the activity to the competition authority, to enable a cartel prosecution in the first place, and they have proven to be extremely effective in many jurisdictions (OECD, 2018[52]). While such a programme exists at the conceptual level in Uzbekistan, enshrined in the article 27(3) of the current law its details are not elaborated neither at the legislative nor at the soft law level. This limits the application of the programme in practice – up to date, no leniency application has been filed to ACRU. However, it is unlikely that a better elaborated programme would be effective, as long as ACRU lacks effective investigation and sanctioning powers.

Key takeaways – antitrust investigations

ACRU should be granted the power to set priorities when investigating antitrust violations, to allow for targeted and more in-depth investigations of high quality, and to reduce the overall caseload.

Existing time-limits are too short to allow proper in-depth investigation of complex economic matters associated with antitrust cases; in addition, timing constraints risk the violation of due process rights.

The absence of powers to conduct unannounced inspections (dawn raids) limits the ability of ACRU to obtain necessary information in cases of severe antitrust violations.

It is a welcome development that ACRU will be able to impose fines on undertakings, however, the maximum level of fines may still be insufficient to generate deterrence.

The existing leniency programme is not effective. It has not been used to date. No leniency programme will be effective unless proper investigation and sanctioning powers are introduced.

2.4. Merger control

UzLC 2012 provides ex-ante control for mergers and selected types of acquisitions.[68] The draft law expands control to joint ventures.[69] Mergers that were concluded without ACRU's consent can be invalidated.[70] Meanwhile, both substantive and procedural provisions require attention to guarantee the effectiveness of the merger assessment.

Notifiable transactions

Under the UzLC 2012, a transaction is notifiable if: (a) one of the parties holds a dominant market position; or (b) the total value of either participants' assets or their annual revenue exceeds the basic calculation value 100 000 times (i.e. approx. 2 300 000 EUR). While not extremely low, this threshold could still catch a large number of transactions that would pose little to no threat to market competition but would increase ACRU's workload at the same time. Hence, the proposition of the draft law to increase the amount to 300 000 times (i.e. approx. to 6 900 000 EUR) of the basic calculated value is a step in the right direction.

Substantive Provisions

Both the existing and the draft law include a somewhat vague legal test for concentrations. According to the law in force, a concentration is prohibited if it may lead to the acquisition/strengthening of a dominant position and/or restriction of competition. A similar requirement can be found in the draft law. The main problem with this legal test is that the phrase "restriction of competition" is very general and can be interpreted quite broadly. It can be argued that any concentration restricts competition to a certain extent as it reduces the number of competitors on a market. No guidelines exist that would clarify the application of the provision.

As to the criterion of acquisition or strengthening of a dominant position, international practise suggests that concentrations can harm market competition even in the absence of dominance (Box 20).

Box 20. Legal tests of concentration appraisal – international practice

While the legal test for the substantive assessment of concentrations differs across jurisdictions, most jurisdictions prohibit mergers if the competitive harm caused by them outweighs their potential benefits. Once the alleged benefits outweigh harm, most of the jurisdictions would clear a concentration, or clear it subject to conditions.

Different legal tests are used. For example, Australia and UK prohibit concentrations if they "significantly lessen competition" or are likely to have such effect. The US tends to prohibit horizontal concentrations if they show the likelihood of enhancing market power. The EU assesses if a concentration "significantly impedes effective competition". In each case, a simple restriction of competition is not enough – it should be of a level high/significant/substantial enough to warrant the intervention. Most jurisdictions provide guidelines to clarify their approach and analysis.

Source: (OECD, 2016c[53]); (OECD, 2016d[54]).

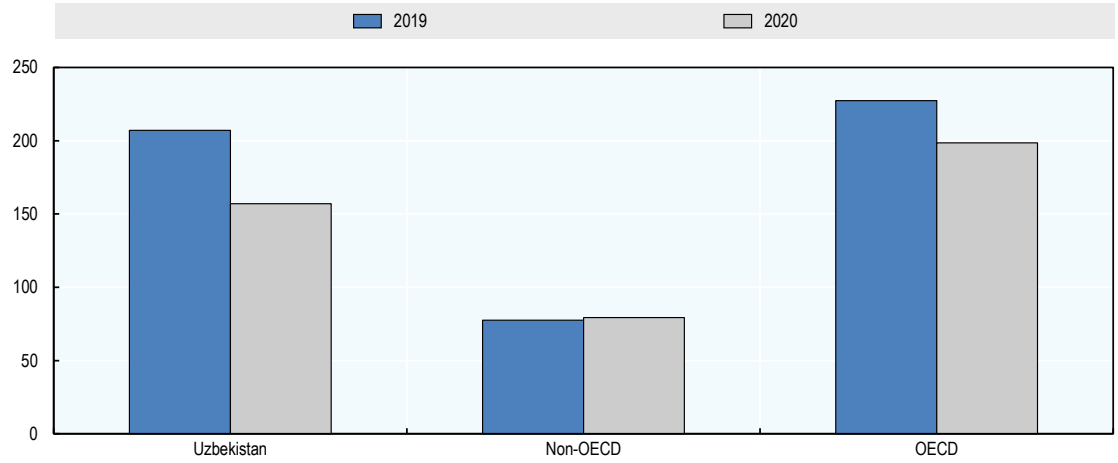
Enforcement practice

While the number of merger notifications has decreased between 2019 and 2020, ACRU still receives a higher number of notifications than many of its international counterparts (Figure 10). Two interesting observations stand out: (1) despite receiving more than 500 notifications over the past three years

(Figure 11), and markets being fairly concentrated in Uzbekistan, the regulator has not issued a single prohibition decision yet; and (2) while ACRU has conditional clearance powers, these were used only in a single case.

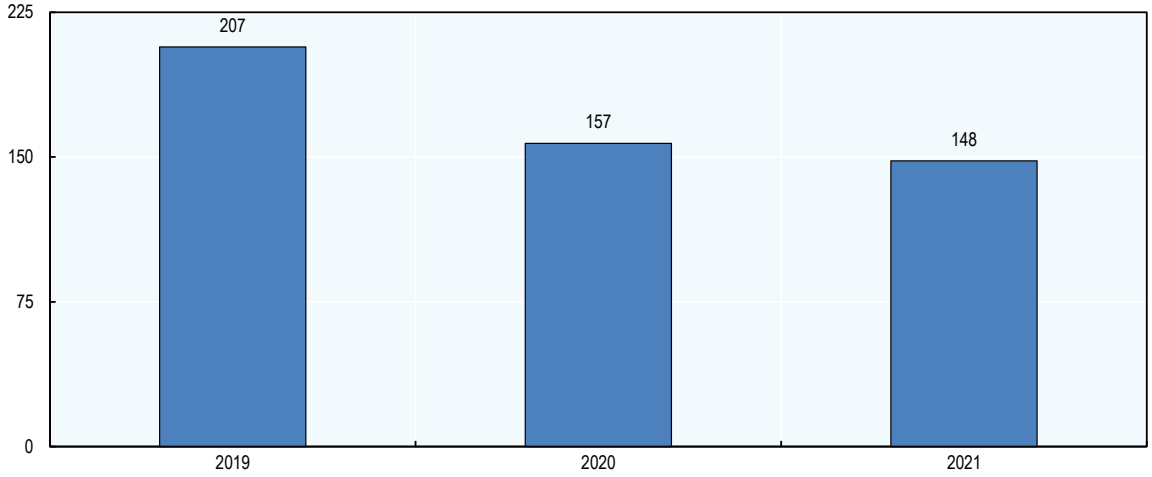
This may at least partly be explained by **extremely narrow time-limits** for concentration appraisals. UzLC 2012 foresees a one-phase procedure: 10 days for initial appraisals, with the option to prolong by a month for complex cases. Such a short time frame (a) does not leave room for appropriate investigations and information requests to merging parties and market participants; (b) it limits the substantive economic assessment for complex cases; (c) does not leave time to develop conditional clearances or sufficiently elaborated prohibition decisions; and (d), as in antitrust investigations, risks to violate due process rights of parties to merger procedures (see the sub-chapter on "Enforcement Practice").

Figure 10. Merger Notifications, International Comparison (2019-2020)



Note: For OECD and non-OECD, averages are provided.

Figure 11. Merger notifications in Uzbekistan, development (2019-2021)



Note: Overall numbers include withdrawn notifications. Number of withdrawals are: for 2019 - 3; for 2020 - 4; for 2021 - 1.

The draft law introduces a two-phase procedure. The initial time-limit is set at 30 days and can lead to three outcomes: (a) clearance; (b) prohibition if the emergence/strengthening of dominance and/or competition restriction is proven; (c) prolongation of investigation by up to 30 days if prohibition grounds are suspected.[71] While this is a significant improvement compared to the existing regulation, a prolongation to up to 30 days may still not be sufficient to properly scrutinise major and complex mergers. The international experience suggests that the second phase needs to be longer due to the depth of the required assessment (OECD, 2016d[54]).

Certain concentrations can be approved by the President and Cabinet of Ministers without ACRU consent.[72] The legislation does not provide any criteria or conditions under which such approval takes place, giving both the President and the Cabinet a broad discretion on the matter. Clearances without ACRU involvement may be granted, for example, based on a positive assessment by MIFT regarding the benefits of a merger for investment. While the existence of such exemptions is not problematic in itself, a clarification of the criteria under which it takes place is desired, and the procedure should include a competition assessment by ACRU to allow for a better informed decision by the President and the Cabinet.

Key takeaways – merger control

- The draft law has significantly improved the thresholds for concentration appraisal
- However, the legal test (dominance and/or competition restriction) remains vague and requires specification both at the legislative and soft law level
- Despite a high number of notifications, ACRU has not produced any prohibition decision yet. This could be principally attributed to the extremely narrow time-limits (10 days + 1 month) under UzLC 2012 that disable the regulator to conduct a comprehensive economic analysis
- Time-limits are improved under the draft law, which seems to be introducing a two-phase assessment. However, the length of the second phase (maximum 30 days) is still unsatisfactory, considering the level of analysis necessary at that stage of merger assessment

2.5. Competitive Neutrality

General Overview

Creating a level playing field is essential for countries to reap the benefits of competition, such as lower prices, better quality and higher economic growth. It helps ensure that the most efficient enterprises thrive in both domestic and international markets. If the state grants artificial advantages to certain enterprises, though, it might create or diminish a comparative advantage, hence distorting competition in domestic and international markets. These artificial advantages can be granted based on criteria such as an enterprise's ownership, for example whether or not it is state-owned, its public service obligations or its market position. Given their important role in achieving public policy objectives, State-Owned Enterprises (SOEs) often benefit from advantages granted to them by the state. For instance, these can be regulatory advantages, such as exemptions from certain legal requirements, or financial advantages, such as loans at preferential rates. Where achieving an overriding public policy objective requires an exception, this should be transparent to all, proportionate and periodically reviewed.[73]

In formerly planned economies, where a strong state presence on the market is part of the economic inheritance (for examples from Uzbekistan, see (Gafurov, 2021[55])), SOEs are often provided competitive advantages on markets. In a recent Recommendation, OECD members have agreed on a common set of principles to safeguard and enhance competitive neutrality (see Box 21.

Box 21. The OECD Recommendation on Competitive Neutrality

It is recommended that Adherents should:

- Ensure that the legal framework applicable to markets in which Enterprises currently or potentially compete is neutral and competition is not unduly prevented, restricted or distorted;
- Preserve Competitive Neutrality when designing measures that may enhance an Enterprise's market performance and distort competition; and
- Take steps to put in place suitable accountability mechanisms to support and monitor the implementation of the principles set forth in the Recommendation.

Further guidance on the effective implementation is provided for each part of the Recommendation.

Source: See https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462, and https://www.oecd.org/daf/competition/competitive-neutrality.htm.

In practice, the state can safeguard competitive neutrality by ensuring the impartiality of the market-related framework and the measures related to market participants.

- **Market-related framework** should include (a) neutral and impartially enforced competition (both antitrust and merger) legislation; (b) similar bankruptcy legislation; (b) a regulatory environment where all market participants face equally strict enforcement, no (potential) competitor has market-regulating powers, and legislative impact assessment is constantly ongoing; (d) open, fair, non-discriminatory and transparent public procurement, eliminating undue advantage to SOEs.[74]
- **Measures related to market participants** should: (a) exclude undue advantages for selected enterprises, including via loans, state investments, preferential tax treatments, grants and goods provided by government at favourable prices; (b) compensate public service obligations proportionately for the value of the services provided, including by precisely identifying the service in question, creating mechanisms for eliminating cross-subsidisation, and establish independent monitoring of the compensation process; (c) subjecting SOEs to the rules related their structure and governance that ensure the absence of undue advantage on markets.[75]

In addition, the state should establish adequate **accountability mechanisms** to support and monitor the adherence to above-listed provisions.[76]

Competitive neutrality in Uzbekistan

The equality of SOEs and private enterprises for the purposes of competition enforcement is implied by both the existing and the draft competition law.[77] To ensure this equality in practice, ACRU is tasked with several activity areas:

- ACRU participates in **achieving regulatory neutrality of market-related frameworks** by providing ex-ante and ex-post competitive impact assessment of the national and regional legislation (see figure 5 and related analysis). In addition, in collaboration with UzSAMA, it ensures the equal application of concentration procedures to public and private entities (Box 22).
- The draft law also enables the regulator to monitor the absence of undue advantages for SOEs by making it officially responsible to implement state aid policy.
- Finally, the regulator is involved in ensuring **competitive neutrality in public procurement**. Namely, the regulator is explicitly tasked to evaluate public tenders and ensure maintenance of competitive conditions in them. This includes detecting tender provisions that favour SOEs over

private entities, initiating investigations and sanctioning organisers for violating competition legislation in procurement procedures.

Box 22. Collaboration of the UzSAMA and ACRU in the privatisation process

UzSAMA and ACRU were part of one state body until 2019. After the split, UzSAMA was assigned privatisation and management of state assets with the goal to reduce state involvement in the economy by 75% (year 2025 inclusive) and to ensure long-term economic growth.

Since then, the UzSAMA has facilitated the privatisation of a significant number of state assets. In 2021, it privatised 750 state assets with a total value of more than UZS 7.2 trillion. As of now, the agency still oversees more than 3 000 SOEs.

ACRU plays a role in the privatisation process, as it conducts merger investigations when more than 50% of the shares of a state-owned enterprise are purchased (merger approval). During the process of privatisation, splitting up of companies for improving the competitive conditions is also possible. However, this option has not yet been considered.

As the state policy is directed towards the reduction of the total number of SOEs, any creation of a new state-owned enterprise should also be approved by the ACRU. According to a so-called “yellow page” rule, such approval will not be granted if five or more private competitors already operate on a particular goods/commodity market in question.

Source: Interview with the State Asset Management Agency; interview with the ACRU; Presidential Decree N6019.

The inclusion of **state aid rules** in the draft law is a welcome development. Two positive characteristics stand out. First, state aid is defined in general terms, enabling ACRU to cover a wide variety of activities apart from those provided as examples in the law.[78] Second, according to the draft law, the decision on approving the state aid is taken solely by the regulator – no other (higher) state body is involved in the process. This significantly reduces the role of political influence in the review of aid-granting. The time limits on investigations remain a point of slight concern – an initial one month for consideration can be further extended by up to two additional months. This should be a satisfactory time frame for the majority of cases. However, in exceptional circumstances, ACRU might find it problematic to conduct a full analysis.

Public procurement is one of the central tasks performed by ACRU. As of today, the largest department of the central office (10 employees) deals with infringements related to public bidding. Both existing and draft law prohibit any discrimination of bidders, including on the basis of their ownership status – public or private. In this respect, ACRU supports competitive neutrality by ensuring that SOEs do not enjoy favourable conditions when participating in public tenders.

However, ACRU only conducts ex-post assessments in relation to public bids This means that the case falls under its enforcement jurisdiction only at (or after) the stage of public bid implementation. This leaves the stage of public bid design and drafting outside of ACRU’s control. This competence belongs to the Ministry of Finance– a body responsible for the assessment of draft public bids.[79] Consequently, stronger co-operation between the two public bodies could help to ensure a full application of competition neutrality principles both at all stages of public tenders.

The collaboration could include both awareness-raising and guideline drafting. The key task for ACRU is to make public bodies aware of potential competition distortions at the tender design stage to ensure compliance. This could already result in fewer cases of public bids showing signs of discrimination in favour of SOEs.

Key takeaways – competitive neutrality

- The competition law applies equally to private undertakings and to SOEs
- ACRU is an important player in supporting principles of competitive neutrality in Uzbekistan
- Public bodies should have an obligation to at least respond to recommendations issued by ACRU when doing competition impact assessment
- ACRU should be given sufficient time to conduct a proper assessment when reviewing state aid measures
- ACRU's role in ensuring competitive neutrality in tender design could be strengthened

3 Conclusions and Recommendations

Uzbekistan is well advanced on its way to implementing an effective competition law and policy. The conditions for ACRU to thrive and to make a significant contribution to achieving competitive markets in Uzbekistan to the benefit of the country's consumers and businesses, and leading to increased productivity, innovation, growth and employment are mostly in place. To further improve the legal and policy framework in line with well-established international best practices, this review suggests a number of improvements to the competition policy setting, institutional setup of the competition authority, its funding, and substantive and procedural rules that apply to competition enforcement.

Most of the recommendations are directed at the government of Uzbekistan, as they target mostly policy decisions and legal and economic framework issues. ACRU itself should pay particular attention to recommendations 3 (regular review of mandate), 7 (engage more actively in international co-operation), 8 (effects based analysis and focus on exclusionary abuses), and 11 (transparency and outreach), where it could achieve improvements by changing its practice.

Based on the analysis provided in chapter 2, the following Recommendations can be summarised:

3.1. Competition policy

Recommendation 1 – clarify the focus and goals of the competition policy

- Ensure a clear focus of competition policy – multiple goals can be pursued but priorities should exist to avoid enforcement inconsistencies.
- Give preference to safeguarding and enabling competitive markets and processes over outcome-oriented goals (such as price reductions).
- Ensure that other policy considerations do not jeopardise the attainment of competition policy objectives.

3.2. Institutional design and framework conditions

Recommendation 2 – ensure that the appointment of ACRU's Chairperson is based on objective, transparent and qualitative criteria, including the experience and expertise of the candidate, and determine an exhaustive list of grounds for the early dismissal from office

- When appointing ACRU's Chairperson, due regard should be paid to any actual or perceived conflict of interest (e.g. shareholdings in a private company) and political affiliation.
- Fixed appointment terms can support managerial independence.
- Reasons for early dismissal should be narrow, pre-determined and transparent (for exceptional circumstances) and not allow for political interference.

Recommendation 3 – Ensure that ACRU's institutional set-up allows for (i) sufficient separation between competition and non-competition related mandates, and (ii) sufficient staff to execute the competition (and non-competition) related tasks

- Combining competition and non-competition mandates (such as sector regulation or consumer protection) is not uncommon around the world. However, the organisational structure should allow ACRU to effectively perform its core competition mandate, such as enforcement against anti-competitive agreements (including bid rigging) and abusive conduct by dominant enterprises, merger control, market inquiries, competition impact assessment and competition compliance. Competition and non-competition mandates should at least be clearly separated within ACRU to allow for more effective implementation of each of the multiple mandates., This would allow for clearly defined (separate) teams – both at central and at the regional level – to focus on their mandate only and staffing them sufficiently, while enabling to leverage possible synergies resulting from the execution of multiple mandates.
- ACRU should establish a process to regularly review the adequacy of its institutional design (e.g. mission, objectives, structures, processes and performances).
- The optimisation of ACRU's mandate should allow to create and maintain adequate staff numbers to perform the core competition tasks. The enforcement process would also benefit by increasing the number of qualified competition lawyers.

Recommendation 4 – ensure a sufficient and securely funded budget for ACRU to execute its mandate effectively and independently

- Provide a stable and securely funded budget to ensure structural and financial independence (avoiding, amongst others, political interference).
- Funding should not be dependent on enforcement outcomes to avoid conflict of interest. Consequently, incomes from fines should either not, or only to a minor extent, be a component of ACRU funding. Merger filing fees could be increased to reflect the complexity of merger assessment procedures and the size of the merging parties.
- The budget and the salaries should allow for recruitment and retainment of qualified staff to effectively carry out **all** tasks bestowed on ACRU, and to be competitive at least with other parts of the public sector.

Recommendation 5 – increase ACRU's operational independence to allow for more effective enforcement

- ACRU is often restricted in exercising its mandate by the large number of detailed, and often technical, Presidential Orders and Cabinet Decrees. The responsibility for designing appropriate procedures and assessment frameworks within the given competition legislation – both via by-laws and soft law measures – should be conferred on ACRU. Optimal usage of soft law powers by ACRU would increase the effectiveness of the latter as well as provide better transparency and legal certainty to businesses.
- Empower ACRU to co-operate more pro-actively and effectively with other public bodies to ensure that outcomes most favourable to competition and competitive neutrality can be achieved when implementing a public policy.
- Legislative impact assessment by ACRU should focus on most relevant and high-impact legislation, and governmental bodies should show a minimum required degree of responsiveness to ACRU's recommendations (including at the stage of assessing draft legislation).

Recommendation 6 – Increase the judiciary's and courts' knowledge of, and familiarity with, economic concepts and principles in the application of competition enforcement decisions

- The judicial review system would benefit from an increased familiarity of the judiciary and/or specialised economic courts with economic principles in the application of competition law.
- A programme could be developed for deciding judges and ideally, those judges attending the training should be the ones reviewing antitrust or merger decisions.

Recommendation 7 – engage more actively in international co-operation

- ACRU should regularly and actively participate in the ICN and OECD Global Forum on Competition, and similar enforcers' fora.
- Partnerships with competition authorities with a similar socio-economic background should be sought to benefit from their experience in effectively implementing and enforcing competition laws.
- Funding should be provided to allow for regular participation of ACRU management and enforcement level staff in regional and international competition events.

3.3. Legal framework and enforcement

Recommendation 8 – improve substantive provisions on cartels and abuse of dominance

- The list of anti-competitive agreements under UzLC 2012 and the draft law may not cover all potentially harmful agreements. Hard core cartels should be prosecuted without exemptions, and it should not be necessary to show their anti-competitive effects. Agreements causing consumer harm without restricting competition should be treated under consumer protection legislation instead of competition law.
- Exemptions from anti-competitive agreements should be defined narrowly and should not violate principles of competition neutrality.
- Move to a case by case and effects based approach to abuse of dominance cases, instead of establishing dominance mainly based on market shares, and focusing on excessive or predatory pricing cases. International best practices suggest that the focus of enforcement should be on exclusionary abuses instead of pricing abuses.
- Reconsider the use and utility of the register of (legally determined) dominant undertakings. It supports a mechanistic approach to abuse cases, can chill legitimate business activity, and binds valuable human resources that could be put to better use.

Recommendation 9 – ensure adequate powers for effective antitrust enforcement

- ACRU should be enabled to set priorities for investigating antitrust violations and consequently be able to reject taking up certain cases. This will allow for a focus on the most harmful conduct, more targeted and in-depth investigations of high quality, and reduce the overall caseload.
- Extend investigation time limits. Existing time-limits are too short to allow proper in-depth investigation of complex economic matters associated with antitrust cases. Timing constraints also risk violation of due process rights.
- Provide effective powers to carry out unannounced inspections of business and private premises. The absence of powers to conduct unannounced inspections (dawn raids) limits the ability of ACRU to obtain necessary information in cases of severe antitrust violations.

- Consider the adequacy of fining levels. It is a welcome development that ACRU will soon be able to impose fines on undertakings as a result of new legislation. However, the maximum level of fines may still be insufficient to generate deterrence.
- The existing leniency programme is not effective. It has not been used to date. No leniency programme will be effective unless proper investigation and sanctioning powers are introduced.

Recommendation 10 – clarify the substantive merger test; extend assessment time limits

- The legal test (dominance and/or competition restriction) remains vague and requires specification both at the legislative and soft law level.
- Extend the time limits that apply to merger control procedures. While they are improved under the new draft law, the length of the second phase (maximum 30 days) is still unsatisfactory, considering the level of analysis necessary at that stage of merger assessment.

Recommendation 11 – Increase transparency of ACRU's enforcement decisions and principles

- ACRU should publish its decisions and make them fully accessible on its website.
- In addition, it should reach out to the legal and business community and explain its approaches and decisions in important cases.
- Bidder collusion in public tenders is already a focus area of ACRU. More should be done to help public bodies to prevent and detect bidder collusions, and to make the market participants aware of the legal risks of bid rigging. ACRU should develop an active outreach and training programme.

Recommendation 12 – Ensure effective powers and procedures for ACRU to promote competitive neutrality

- Public bodies should have an obligation to at least respond to the recommendations issued by ACRU that refer to competitive neutrality concerns.
- ACRU should be given sufficient time to conduct a proper assessment of large-scale state aid measures.
- ACRU's role in ensuring competitive neutrality in public tender design should be strengthened.

3. 4 Continued improvement

Recommendation 13 – Ensure continuous optimisation of the enforcement framework through international benchmarking

- Uzbekistan could successfully monitor improvements of the national competition framework by being aware of, and adhering to, best international practices. It is invited to consider adhering to OECD Recommendations, in particular on hard core cartels and bid rigging, investigation procedures, transparency and fairness in enforcement, competition assessment and competitive neutrality (see Box 4).
- By submitting data to OECD CompStats on a continuous basis, Uzbekistan can continue to benchmark its enforcement practices and outcomes against its international counterparts.

Endnotes

[1] See for example Baltic (OECD, 2008b[56]), Polish (Martyniszyn and Bernatt, 2019[25]), and Croatian (Kaufman, 2021[26]) experiences, and OECD Reviews of Hungary (OECD, 1999[92]), Kazakhstan (OECD, 2016[93]), Poland (OECD, 2002[94]), or Ukraine (OECD, 2008[95]), (OECD, 2016[96]); also Review of Eastern Partnership Countries (OECD, 2020, pp. 95-106[7]).

[2] See Country reviews of competition policy frameworks, https://www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm.

[3] See https://www.oecd.org/global-relations/fair-market-conditions/.

[4] Several detailed interviews were held with the Antimonopoly Committee of the Republic of Uzbekistan (ACRU). In addition, interviews were conducted with the Ministry of Economic Development and Poverty Reduction (MoEDPR), Ministry of Investments and Foreign Trade (MIFT), State Asset Management Agency (UzSAMA), representatives of private legal counselling and academia.

[5] See also https://www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm.

[6] OECD Standards are embodied in OECD Recommendations. All competition related Recommendations can be accessed here: https://www.oecd.org/daf/competition/recommendations.htm. Analytical work is undertaken in the sessions of the Competition Committee and its Working Parties, in Roundtables where an analytical paper provides a background for discussion and contributions by Member countries. There is hardly any topic of relevance to competition that is not included in the list, and all related information and documentation can be accessed here: https://www.oecd.org/daf/competition/roundtables.htm.

[7] The Tashkent Times, 'Uzbekistan's Development Strategy for 2017-2021 has been adopted following public consultation' (2 February 2017), http://tashkenttimes.uz/national/541-uzbekistan-s-development-strategy-for-2017-2021-has-been-adopted-following-discussion

[8] President of the Republic of Uzbekistan, Decree N5630 on the Measures of Fundamental Upgrades to the System of Managing State Assets, Antimonopoly Regulation and Capital Markets (14 January 2019), https://lex.uz/docs/4160396; President of the Republic of Uzbekistan, Resolution N4126 on the Organisation of Activities of the Antimonopoly Committee of the State of Uzbekistan (24 January 2019), https://lex.uz/docs/4178990

[9] See https://www.oecd.org/daf/competition/oecd-competition-trends.htm. The database comprises data over 6 years (2015 – 2020) for 73 OECD and non OECD jurisdictions and allows to compare quantitative data from Uzbekistan with global averages and more specifically, with sets of data from comparable jurisdictions.

[10] For an in-depth explanation of the indicator, please see (OECD, 2020, pp. 96-98[7]).

[11] See for example (OECD, 2021[11]) and (OECD, 2020[7]).

[12] See https://www.oecd.org/daf/competition/recommendations.htm.

[13] Such discussions take place in various OECD fora, and all materials relating to specific substantive discussions can be found under “Best Practice Roundtables” - https://www.oecd.org/daf/competition/roundtables.htm.

[14] For example, a consumer welfare goal is used both by competition and consumer protection frameworks, albeit these frameworks have different implementation methods. This might cause an uncertainty of what exactly consumer welfare means for these separate yet interrelated policies.

[15] For example, pursuit of price reduction goal by direct price regulations might restrict markets and harm competition in the long run.

[16] These considerations should not be neglected though, as they might serve significant purposes.

[17] Oliy Majlis, Law on Natural Monopolies (N185-I, 19 August 1999), https://lex.uz/acts/79387.

[18] President of the Republic of Uzbekistan, Resolution N3386 on Measures to Improve the Competitive Environment, Eliminate the Conditions of Abuse and Theft in the Sphere of Provision of Fuel and Energy Resources and other Highly Liquid Products, Strengthening the Discipline and Reduction of Debit and Credit Liabilities (14 November 2017), https://lex.uz/docs/3409606.

[19] See https://antimon.gov.uz/en/what-we-do/.

[20] President of the Republic of Uzbekistan, Decree N6019 On additional measures to further develop the competitive environment and reduce government involvement in the economy (6 July 2020), article 1(a), https://lex.uz/docs/4887659.

[21] Cabinet of Ministers of the Republic of Uzbekistan, Resolution N402 on Measures to Organise the Activities of the Antimonopoly Committee of the Republic of Uzbekistan (15 May 2019), chapter 7.3, paras 39-40 https://www.lex.uz/docs/4342731#4347392.

[22] Oliy Majlis, Law of the Republic of Uzbekistan on Competition (N319, 6 January 2012), article 34, https://www.lex.uz/acts/1931450 (hereinafter – “UzLC 2012”).

[23] Cabinet of Ministers, Resolution N402 (fn 21), Chapter 7.1, para 31.

[24] These findings are well-aligned with OECD recommendations issued in the anti-corruption sphere, see (OECD, 2019[30]).

[25] Cabinet of Ministers, Resolution N402 (fn 21), Chapter 2, para 9.

[26] For example, as of March 2022, the overall number of staff allotted to the central office was 84 but 12 positions were vacant.

[27] The current ratio of economists and lawyers in the regulator is roughly 85%/15%. This is at least partially due to the relative novelty of competition law courses in the higher education system. This situation prevents the regulator from recruiting highly qualified legal personnel to engage in comprehensive legal analysis during antitrust investigations and merger procedures.

[28] As of March 2022, the central office has only 1 dedicated IT staff member.

[29] The data provided are for the year 2021.

[30] Cabinet of Ministers, Resolution N402 (fn 21), annex 2, chapter 2.

[31] President of the Republic of Uzbekistan, Decree N101 on Additional reforms to create conditions for stable economic growth by improving the business environment and developing the private sector (8 April 2022), https://lex.uz/ru/docs/5947782.

[32] Competition legislation sets the merger filing fees at 7 times the basic calculated value (i.e. 1 890 000 Soums/approx. 101 EUR). Based on the current merger notification numbers (147 mergers in 2021), this generates a budget contribution of 277 830 000 Soums per year, not even 0.5% of the annual budget. The

fees are too small to support the agency budget, and they do not reflect the amount of work necessary for the complex economic analysis necessary for the analysis of merger cases, or the size of merging parties paying it.

[33] UzLC 2012 (fn 22), Article 21.

[34] See for example a host of public guidance on antitrust enforcement issued by the European Commission, https://ec.europa.eu/competition-policy/antitrust/legislation/legislation-notices_en.

[35] See for example, German Bundeskartellamt guidance note on prohibition of vertical price fixing, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/Guidance_note_prohibition_vertical_price_fixing_LEH.pdf?__blob=publicationFile&v=2.

[36] See for example, UK CMA on investigation procedures, www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.

[37] See for example, studies by the French Autorité de la Concurrence on compliance or e-commerce, https://www.autoritedelaconcurrence.fr/en/publications.

[38] Cabinet of Ministers of the Republic of Uzbekistan, Resolution N225 on the Approval of the Procedural Regulations for Initiation and Consideration of Cases regarding Violations of the Legislation on Competition, on Natural Monopolies, on Protection of Consumer Rights and on Advertising (12 October 2005), para 24; https://lex.uz/docs/878601.

[39] Cabinet of Ministers of the Republic of Uzbekistan, Resolution N230 on Measures to Improve Anti-Monopoly Regulation in Commodity and Financial Markets (20 August 2013), http://www.lex.uz/docs/2225942.

[40] Cabinet of Ministers, Resolution N225 (n 34).

[41] Cabinet of Ministers of Republic of Uzbekistan, Resolution N338 on Approval of Some Administrative Regulations of Government Services in the Field of Anti-monopoly Regulation in Goods an Financial Markets 928 May 2020), https://lex.uz/docs/4841740.

[42] See https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0455.

[43] See https://www.oecd.org/competition/assessment-toolkit.htm.

[44] Many competition authorities have a wide network of MoU to facilitate exchange and co-operation with other national competition authorities, see https://www.oecd.org/competition/inventory-competition-agency-mous.htm and https://www.oecd.org/daf/competition/inventory-competition-agreements.htm.

[45] See https://www.internationalcompetitionnetwork.org/.

[46] See https://www.oecd.org/competition/globalforum/.

[47] This report focuses on selected main findings and potential shortcomings. It does not imply that any provision that is not mentioned is in line with international best practices or could not be improved.

[48] Upon reading the legal provision – article 11 of UzLC 2012 – the list appears to be closed. However, in practice, ACRU interprets it as an open one.

[49] Such distinction serves several purposes. First, it increases the legal certainty by signalling to market participants not to engage in certain agreements/practices under any circumstances. Next, it simplifies the enforcement process by relieving the competition regulator from proving harmful effects of agreements where such effects are certain to materialise based on the decades of antitrust experience and evidence. Finally, it optimally distributes the burden of proof between the regulator and market participants. The former must prove that a hard core cartel took place or that a non hard core agreement has (actual or

potential) effect on market competition. The latter must prove that the agreement generates consumer or other benefits that outweigh the competitive harm caused by the agreement in question. (Dunne, 2020[84])

[50] Bid rigging has been a focus of antitrust enforcement in Uzbekistan throughout 2021. For statistics, see Figure 6.

[51] For the OECD approach to bid rigging, see https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0396; for the EU approach, which is aligned with the OECD Recommendation, see a recently adopted Commission notice "on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground" at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XC0318(01)&from=EN.

[52] See https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452, II.8.

[53] UzLC 2012 (fn 22), article 6.

[54] Draft Law on Competition of the Republic of Uzbekistan (October 2021) Article 7. Note: the draft is currently under review by the Cabinet of Ministers. The latest version has not been made public yet. OECD was provided with the English translation of the draft law version of October 2021. The analysis is based on the text of this draft, in the light of clarifications made during interviews with ACRU in February and March 2022.

[55] UzLC 2012 (fn 22), article 6; Cabinet of Ministers, Resolution N230 (fn 35), Chapter II, para 11.

[56] Cabinet of Ministers, Resolution N230 (fn 35).

[57] After inclusion, a re-assessment is required from time to time to determine whether a particular entity should remain in the register.

[58] See https://antimon.gov.uz/en/open-data/the-state-register-of-business-entities-that-occupy-a-dominant-position-in-the-product-or-financial-market/

[59] The reporting duties of these entities are provided by: Cabinet of Ministers, Resolution N230 (fn 35), Chapter 7, paras 42-44.

[60] UzLC 2012 (fn 22), article 29; Cabinet of Ministers, Resolution N225 (fn 34), Chapter II, para 5.

[61] UzLC 2012 (fn 22), article 31; Cabinet of Ministers, Resolution N225 (fn 34), Chapter III, para 15; Draft Law on Competition (fn 50), article 45.

[62] Cabinet of Ministers, Resolution N225 (fn 34), Chapter III, para 13.

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[68] UzLC 2012 (fn 22), Article 18.

[69] Draft Law on Competition (fn 50), Article 24.

[70] UzLC 2012 (fn 22), Article 18.

[71] Draft Law on Competition (fn 50), article 27.

[72] UzLC 2012 (fn 22), Article 16.

[73] From https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462, see also the full OECD work on competition and competitive neutrality https://www.oecd.org/daf/competition/competitive-neutrality.htm.

[74] https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462, II.1.

[75] Ibid, II.2.

[76] Ibid, II.3.

[77] See UzLC 2012 (fn 22), article 3 and Draft Law on Competition (fn 50), article 3.

[78] Draft Law on Competition (fn 50), article 18.

[79] Oliy Majlis, Law on Public Procurement of the Republic of Uzbekistan (N684, 22 April 2021), https://lex.uz/docs/5382983; Article 18 of the law authorises Ministry of Finance of the Republic of Uzbekistan to carry out state regulation and state policy in the field of public procurement. Simultaneously, Article 75 of the law entrusts ACRU and other state bodies with powers to implement the public procurement legislation within their respective areas of oversight.

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