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Benchmarks for further revisions of the antitrust legislation in Ukraine

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LIST OF ABBREVIATIONS

CEECs	Central and Eastern European Countries
EC	European Community
ENP	European Neighbourhood Policy
EU	European Union
FTA	Free Trade Agreement
PCA	Partnership and Co-operation Agrement
SAA	Stabilisation and Association Agreement
WTO	World Trade Organisation

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1. Introduction

A detailed gap analysis concerning the approximation of the antitrust rules to those of the EU has been carried out by the State Department for Legislative Approximation at the Ministry of Justice in 2006[1]. This assessment, which covers only legal measures, concludes that the antitrust rules in the Ukrainian legislative and regulatory framework[2] (restrictive practices, abuse of dominant position and concentrations) is broadly in line with the European legislation.

Moreover, in January 2008 the OECD will publish the results of a "peer review" requested by Ukraine to evaluate progress in the area of competition policy.

The current study does not therefore intend to assess the concordance of the Ukrainian legal framework with the EC legislation and does not either address the functioning of the current legal framework in terms of effectiveness and efficiency.

It is a comparative study of which the purpose is twofold:

- to indicate the margin of discretion of the law-makers to enact rules on competition that depart to some extent from the EC rules since the EC rules cover only the operation with an European dimension.
- to determine areas of improvements in the context of the implementation of the future Enhanced Agreement.

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1 Chapter "Competition Rules" of the Annual Review 2006 on "The state of play of the approximation of the Ukrainian legislation to the EU legislation.

2 The in depth analysis of the SDLA considers the comprehensive legal framework on antitrust matters:

- Law of Ukraine on the Protection of Economic Competition of 11 January 2001 No 2210-III
- Law of Ukraine on the Natural Monopolies of 20 April 2000 No 1682-III
- Law of Ukraine on the Protection against Unfair Competition of 7 June 1996 No 236/96-
- Law of Ukraine on the Antimonopoly Committee of Ukraine of 26 November 1993 No 3659-XII
- Resolution of the Cabinet of Ministers of Ukraine on Approval of the Procedure of Issuing by the Cabinet of Ministers of Ukraine Permission for Concerted Actions and Concentration of Business Entities of 28 February 2002 No 219
- Instruction of the Cabinet of Ministers of Ukraine on Approval of the Concept of Competitive Procedure Code of Ukraine of 18 March 2002 No 145
- Rules for investigation of cases on violation of legislation on the protection of economic competition (Rules for investigation of cases), approved by Decision of Antimonopoly Committee of Ukraine of 19 April 1994 No 5
- Provision on the Procedure of Submitting Application to Antimonopoly Committee of Ukraine for Prior Receipt of Permission for Concerted Actions of Business Entities (Provision on Concerted Actions), approved by Decision of Antimonopoly Committee of Ukraine of 12 December 2002 No 26-r
- Typical Requirements for concerted actions of business entities related to general exemption from Prior Receipt of Permission of Antimonopoly Committee of Ukraine for Concerted Actions of Business Entities (TypicalRequirements for concerted actions), approved by Decision of Antimonopoly Committee of Ukraine of 12 December 2002 No 27-r
- Provision on the Procedure of Inspection over observance of legislation on the protection of economic competition (Provision on Inspections), approved by Decision of Antimonopoly Committee of Ukraine of 25 December 2001 No 182-r

It includes also the draft code on procedural rules applicable in the area of competition prepared by Antimonopoly Committee of Ukraine.

The scope covers all provisions of the Act "On Protection of Economic Competition" which are put into perspectives with provisions in the legislation of 17 Countries:

- Ten new Member States after the fifth EU enlargement (all of them except Cyprus and Malta)
- One candidate country: Croatia
- Six old Member States (countries of civil law, German law and common law): Belgium, France, Germany, Ireland, the Netherlands and the United Kingdom.

2. Level of legislative approximation in antitrust matters and international commitments undertaken by Ukraine

2.1. PCA and ENP-AP requirements

Commitments undertaken by Ukraine towards the EU derive from the Partnership and Cooperation Agreement of June 1994 and the EU-Ukraine Action Plan (European Neighbourhood Policy Action Plan, ENP-AP) adopted by the Cooperation Council on 21 February 2005.

Provisions on competition policy in the PCA are rather flexible. Apart from the "best endaveour" clause of article 51 of the PCA on the areas of gradual legislative approximation, article 49 of the PCA envisages a process of exchange of information upon requests and a process of consultation within the Co-operation Committee that may comprise questions on the interpretation of restrictions on competition by enterprises that have to be remedied or removed according to the national legislation. The only obligation of results concerns the distortion of competition caused by public undertakings or undertakings granted with exclusive rights which could affect the trade between the Community and Ukraine.

More importantly, since the PCA has been rejuvenated by the ENP, measures agreed in the EU-Ukraine Action Plan have also to be considered as international commitments to the same extent as the PCA. Here, the expected results in antitrust matters within a 3-year period are clearly expressed under the objectives 16 and 40[3].

Actually the ENP-AP targets in the field of competition relate more to the establishment of the market economy and the same level playing field granted to foreign operators in the context of WTO accession than the correct transposition of the EC legislation.

2.2. Commitments for WTO accession and post-accession

As a general rule, negotiations for WTO accession may focus on subsidies but they do not address directly antitrust issues or control of concentration.

3 ENP-AP extracts:

(16) Continue progress in the establishment of a fully functioning market economy, including price-formation, control of state aid, and a legal environment that ensures fair competition between economic operators.

(40) Implement, and build upon, the commitment under Article 49.2.1 of the PCA by ensuring adequacy and compatibility with the EU, of the domestic anti-trust legislation and control regime.

- Assess adequacy, and compatibility with EU, of current legislative framework, in practice, in particular its respect of the principles of non-discrimination, transparency and procedural fairness;
- Continue to reinforce independence of the Anti-monopoly Committee, ensure adequate legal powers and resources; and reinforce staff training.

No multilateral framework on competition policies has been established so far on the WTO level but during the Doha round of negotiation, WTO members agreed that objectives of such a multilateral framework would include a limited number of core principles to be reflected in domestic competition laws. Those principles are the following:

- a domestic legislative framework based on the principle of non-discrimination (national treatment and most-favoured-nation treatment);
- transparency, as regards laws, regulations and guidelines of general application;
- guarantees of procedural fairness in competition investigations (including protection of confidential information) and the right of petition to competition authorities and/or the judiciary;
- administrative competition decisions subject to judicial review.

Most of those principles are already enshrined in the Ukrainian legal framework of are duly considered in the current drafting of the procedural code (consolidation of the existing provisions and addition of implementing rules).

Nevertheless, the national legal framework does not yet meet the desirable level of transparency and that is an area of concern in the ENP-AP.

Beside the annual report on competition, mainly designed to provide general information to the Verkhovna Rada[4] which is rather short compared to similar reports prepared by competition authorities in the EU Member States, the website of the Antimonopoly Committee contains also practical information useful for foreign operators. In the future it is expected that this information or relevant extracts will be available at least in English language.

The main shortcoming is that the Act of Ukraine of January 2001 "On Protection of Economic Competition" does not contain requirements on mandatory publications and that the general legal framework (administrative procedural rules applicable to decisions taken by administrative authorities) does not help to overcome this lack of transparency.

Article 31(6) of the Act "On Protection of Economic Competition" provides for the publication of decisions of the Antimonopoly Committee in a very flexible way. First, that is not an obligation. Second, the means of publication are left to the discretion of the Antimonopoly Committee (Official Gazette or other printed or electronic media).

Article 56(1) gives some importance to the publication of decisions since the calculation of the time-limit to appeal such decisions runs from the date of this publication but what is addressed in this case is the notification to parties to the proceedings and not the dissemination to the general public. It is also debatable how legal situations could derive from a publication in one of the many media mentioned in the law (Official Gazette or Newspaper of the Verkhovna Rada or Newspaper of the Secretariat of the Cabinet of Ministers). There should be only one official publication to which parties to the proceedings could refer easily without wondering in which paper the notification will be made.

4 The requirement for the submission of an annual report of activity to the Verkhovna Rada is contained in the article 20(1) of the Law of 1993 on the Antimonopoly Committee.

Compared to the reports submitted by competition authorities in the EU Member States which contain detailed information on results achieved, institutional and organisational development, studies, summary of the stance taken by the Competition Authority for cases of the previous years and case-law concerning judicial review of decisions of Competition Authority, the content of the annual report of the Antimonopoly Committee is rather short and cannot provide any concrete guidance for economic operators.

The widespread practice of individual letters sent to the parties and possible other stakeholders is not sufficient to streamline the representation of all interested parties and to secure the right of defence.

This transparency has not been always considered as a priority by candidate countries to EU accession. In Romania, it is under the pressure put by the EU that the law has been amended just before accession to introduce the necessary transparency of the decisions of the competition authority[5].

Still a few new EU Member States consider that this transparency of the decisions of the competition authority, beyond the production of an annual report, only matters in the cases of concentration. In the Slovak Republic, the duty of publication covers only the notification of concentration. As regards, Bulgaria it is question of the publication of the initiation of proceedings and publication of appeal and in the Estonian legislation the scope of publications refers to all decisions in concentration matters alongside provisions to grant the right of interested parties to participate in the related investigation.

In other countries the scope of the duty to disclose the information is much wider. Sometimes this duty is expressed in a very general way. That is the case in the Czech Republic where the law just specifies that the Competition Office publishes notifications of concentration and its decisions which has come into force. In Hungary the measures subject to publications are not more detailed but there is the interesting provision that when the opening of an investigation has been disclosed the result of this investigation has to be published as well.

In the last group of new EU Member States, the law sets out the list of decisions subject to compulsory publication. While in Lithuania the scope of publications is limited to the notification of concentration and the termination of proceedings (penalties and other resolutions) in Latvia the scope of those publications covers initiation and termination of proceedings, notified agreements, concentrations, determination of violations, legal duties and imposition of fines. In Croatia, the duty of publication concerns assessments of agreements, individual exemptions, compatibility of concentrations and remedies thereof.

In Poland, the duty covers all decisions and resolutions of the President of the Office together with any information having significant importance for the application of the competition law. Worth stressing as well as a best practice the provisions contained in the law of Slovenia, since those provisions clearly focus on the participation in the proceedings of any interested party having a legal interest and are detailed to this end.

In the context of publications, the protection of business secrets or other confidential information is mentioned in a number of countries (Croatia, Poland, Romania, Slovak Republic and Slovenia). In other countries, the general provisions of the antitrust law on the protection of confidential data may suffice for this purpose.

The disclosure of information does not entail the publication of the full text of the decisions of the competition authority but summaries, extracts, operative parts of them (e.g. Lithuania, Poland, Slovenia).

5 See, in Annex XI to this study - Variations in the national legislation on the cases where publications of decisions of the competition authority are mentioned in the law.

Ideally, the duty of disclosure should be extended to the publication of the rulings of the Courts in all matters pertaining to competition law (Poland) or at least rulings of the Courts on the decisions of the competition authority (Croatia).

The choice of the means of publication is quite open as far the interested parties know exactly where to find the information. It could be the Official Gazette together with the competition authority' website (Bulgaria, Croatia, Slovak Republic) or only the Official Gazette (Latvia, Lithuania, Slovenia) or one or the other (Romania) or even an Official Journal of the Antimonopoly Committee (Official Journal of the Office of Competition and Consumer Protection in Poland).

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3. New obligations deriving from the next stage of European integration

3.1. Assumptions regarding the future legal framework between the EU and Ukraine

In the framework of agreements concluded with third countries, the EU institutions are keen to use models that have proven to be successful in the past. It is assumed accordingly that most of the provisions of the future Enhanced Agreement with Ukraine will derive from provisions already experienced in Europe Agreements or in SAAs.

That may give some indications on the future targets to implement the competition policy in Ukraine.

The next legal framework governing relations between the EU and Ukraine for the protection of competition will presumably include the following principles:

- Prohibitions of restrictive agreements and abuses of dominant position which distort or threaten to distort competition are expressed in the same terms as those in the EC Treaty (in particular articles 81, 82 and 86).
- The prohibition applies to domestic industries including services industry.
- Criteria for the assessment of the compatibility of anticompetitive practices in the sectors of fisheries and agriculture are derived from the articles 36 and 37 of the EC Treaty.
- Competition rules are interpreted in accordance with the criteria set in the EU secondary legislation and the decisions of the European Court of Justice[6].
- Diverging interpretations, inadequate applications or difficulties to implement the Community acquis are settled by the Association Council.
- A deadline is set to apply the competition rules to public enterprises and to enterprises granted with special or exclusive rights.
- The partner country is committed to empower an operationally independent public body to ensure the full application of the antitrust rules.

If the intention of the parties is to go still further, the framework could contain commitments similar to those agreed by the joint bodies designated for the implementation of the Europe Agreement concluded between the EU and CEECs[7]. Those more detailed obligations relate to the following:

- Designation of the competent authority of each party which is dealing with cases relating to antitrust legislation and mention of the applicable legislation of each party.
- Procedures to be applied (notifications, consultations, requests to take remedial actions) in cases which may affect both parties.
- Exchange of information in cases falling within the exclusive competence of one competition authority or where none of the competition authority is competent to handle a case on the basis of its legislation.
- Partner country authorised to express its views in the course of the procedure for the control of concentration between enterprises in accordance with the Council Regulation (EC) No 139/2004, where the concentration may impact the economy of the partner country.

6 Within the framework of the Europe Agreements, the implementing rules for the application of provisions on competition are set out in Decisions of Association Councils but SAAs directly refer to "interpretative instruments adopted by Community institutions".

7 See, for example the Decision No 2/97 of 7 October 1997 of the Association Council, for the implementation of the competition provisions of the Europe Agreement with Bulgaria.

- Principles contained in the block exemption regulations in force in the Community to be applied in full.
- Consultations held in the Association Council in the case of any change of the EU antitrust legislation.
- Determination of the thresholds (aggregate annual turnover and market share) for the application of an exemption concerning anticompetitive activities whose effects on trade or on competition between the parties are presumed to be negligible.

3.2. Consequences on the desirable level of approximation

Improvement of the functioning of the antitrust legislation is firstly a matter of national interest for it relates to the performances of the market economy. It is also a matter of competitiveness of the economic operators in Ukraine who have to be prepared to withstand the competitive pressures of foreign operators[8].

On the other hand, the gradual creation of an Internal Market between the EU and Ukraine presupposes guarantees that the discipline in the Internal Market of the EU will not be lessened by new comers. The point is therefore *"to ensure that all economic operators are working under the same rules and thus not enjoying any unfair advantage over competitors operating in the same market, and to create a climate of confidence comparable to that which exists between EU Member States"*[9].

Consequently, the *"exercise is not confined to the sole adoption of laws and regulations or structure building. There must be a continued effort to ensure enforcement of the policy and to make the policy widely known and accepted by all economic agents involved i.e. by governments, companies and by the workforce."*

To summarise, further efforts will have to target the effectiveness of the legislative and administrative framework.

Above all, the issue will be to make companies and public authorities in Ukraine fully accustomed to a competition discipline[10] similar to that of the EU.

The emphasis put on results will be one of the novelties for the practical implementation of the future Enhanced Agreement.

Deeper economic integration will lead also to a number of antitrust and concentration cases where the EC legislation will apply concurrently with the Ukrainian legislation. In this context, it would be desirable to anticipate the familiarisation of the EU competition rules by the national courts.

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8 This Copenhagen criterion set for candidate countries to EU accession is valid also for any country seeking for an economic integration with the EU.

9 "White Paper on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union"- COM(95) 163 of 10 May 1995.

10 This theme of "competition discipline" is expressed in a number or documents. See, in particular:

EU Common positions on the negotiation of the Chapter 6 Competition Policy during the 5th enlargement.

Competition Policy Newsletter, No 1 Spring 2003 "Accession negotiations brought to successful conclusion" by Janne KÄNKÄNEN, Directorate-General Competition, unit A-4 in EC.

The situation of Ukraine is however different from the situation of candidate countries which had to be prepared to accomplish full application of the EU competition rules from one day to the next. In the case of Ukraine, closer approximation of the antitrust legislation would mean an enhanced compatibility of the Ukrainian and EU systems but not necessarily the reproduction of the EU legislation. Nevertheless, practitioners (Antimonopoly Committee staff, judges and lawyers) would find a considerable advantage to be in position to interpret the national legislation and to assess individual cases on the ground of the experience gained by the European Commission and the Member States. The condition for that is a closer approximation of the legal terms and concepts.

4. Options and directions to be envisaged for reforming the legal framework

4.1. Scope of the legislation

As a general rule, national laws on competition cover at least concerted practices, restrictive agreements, abuse of dominant positions and control of concentration. That is also the case of the Act of Ukraine "On Protection of Economic Competition".

In some countries, law-makers exclude specific sectors or categories of activities from the scope of the general rules or, on the contrary they extend the scope of the law on competition to deal also with connected issues such as state aids or unfair competition.

With regard to the subject-matters expressly excluded from the scope of the law on competition, it is sometimes specified that antitrust rules apply only to the extent there is no other specific legislation (e.g. Croatia, Lithuania, Poland).

It is also common that the law mentions specifically the areas that do not fall within the scope its application:

- Relationships in the labour market (e.g. Croatia, Estonia, Latvia, Romania)
- Production and trade in agricultural products (e.g. Czech Republic)
- Monetary market and the market on securities (e.g. Romania)
- Intellectual property rights when they are not used to restrict or distort competition (e.g. Bulgaria).

That does not entail that some sectors of the economy are exempt from competition rules but only that other rules to prevent restriction or distortion of competition apply.

Where, Services of General Economic Interest are mentioned it is to state that they fall within the scope of the competition law as far as the application of the law does not impede the fulfilment of the tasks assigned to these enterprises (e.g. Bulgaria, Croatia, Czech Republic, Slovak Republic).

Similar restrictions in the scope of the application of the general antitrust legislation exist in the old EU Member States. For example, the German Act against Restraints of Competition lays down "Special Provisions for Certain Sectors of the Economy" to deal with agriculture[11] and newspapers[12].

11 § 28 of the Act against Restraints of Competition specifies that the prohibition of restrictive agreements and concerted practices

"(1) § 1 shall not apply to agreements between agricultural producers or to agreements and decisions of associations of agricultural producers and federations of such associations of agricultural producers which concern:

1. the production or sale of agricultural products, or

Conversely, the legislation may cover additional areas. Some new EU Member States do not use this option (e.g. Croatia, Czech Republic, Slovak Republic, Slovenia) but all the others introduce provisions in the general anti-trust law to cover one or more of the following fields: state aids, unfair competition, other issues related to consumer protection.

In a number of new EU Member States and candidate countries state aid control and enforcement of antitrust rules are under the responsibility of the same authority (Poland, Czech Republic, Lithuania and Romania, Croatia) and sometimes the competition law contains the comprehensive legislative framework applicable to state aids (Estonia).

Very often, specific sections of the competition legislation in the EU Member States cover unfair competition. With this regard procedural rules differ from the rules applied in antitrust or concentration matters but the competition authority have the power to investigate cases initiated by complaints and to take actions in parallel to other judicial remedies.

Within the definitions laid down in those pieces of legislation "unfair competition" consists of several of the following[13]:

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2. the use of joint facilities for the storage, treatment or processing of agricultural products, provided that they do not fix prices and do not exclude competition. Plant breeding and animal breeding undertakings as well as undertakings operating at the same level of business shall also be deemed to be agricultural producers.
(2) § 1 shall not apply to vertical resale price maintenance agreements concerning the sorting, labelling or packaging of agricultural products
(3) Agricultural products shall be the products listed in Annex I to the EC Treaty as well as the goods arising from the treatment or processing of such products, insofar as they are commonly treated or processed by agricultural producers or their associations".

12 § 30 of the Act against Restraints of Competition deals with "Resale Price Maintenance for Newspapers and Magazines".

13 Chapter 7 of the Law on Competition in Bulgaria deals with unfair competition. This concept includes inter alia: misleading, counterfeiting, unfair attraction of clients, disclosure of industrial or trade secrets.

Chapter 7 of the law Competition Act of Estonia prohibits unfair competition resulting from the following:
- Misleading information
- Misuse of confidential information obtained from employees of a competitor
- The provisions of another law "the Advertising Act" apply to misleading and disparagement as a method of advertising.

Long provisions in the Competition Act in Hungary deal with the "Prohibition of Unfair Competition" and the "Prohibition of Unfair Manipulation of Consumer Choice".
Unfair competition includes:
- Disparagement of competitors
- Acquisition or use of business secrets in an unfair manner
- Incitement to boycott
- Counterfeit goods or services and other unfair imitations
- Unfairness in any bidding process (competitive tenders, auctions).

Prohibition of Unfair Manipulation of Consumer Choice" includes misleading of consumers.

Section 18 of the Competition law in Latvia considers as unfair practices the following:
- Imitation of the name, external appearance, labelling, or packaging of goods produced or sold by a competitor or the utilisation of trademarks
- Dissemination of false, incomplete or distorted information regarding other market participants or their employees
- Acquisition, utilisation or distribution of information, which includes the commercial secrets of another market participant
- Coercion on employees of another market participant with threats or bribery to cause damage to a competitor

- Misleading information
- Counterfeiting or imitations not protected by an intellectual or industrial property right
- Unfair acquisition or use of confidential information or other business secrets.
- Disparagement of competitors
- Incitements to boycott
- Unfair recruitment of employees of competitors or practices encouraging the misconduct of those employees towards their employer.

Worth noting in this respect that "unfair competition" in the competition laws of the new EU Member States does not necessarily correspond to the definitions given in the EC legislation. The EC legislation does not regulate unfair practices between businesses ("B to B")[14]. It covers indirectly the related behaviours through a number of Directives applicable in the relations between enterprises and final consumers ("B to C")[15].

The Act of Ukraine "On Protection of Economic Competition" does not contain any extension of its scope beyond antitrust and concentration subject-matters. Nevertheless, the articles 15 and 16 of the Act provide for a broad legal basis to tackle competitive advantages granted by public authorities to enterprises. The expression is not used in the text of the Act but the concern is to regulate what is called in the EU "Services of General Economic Interest" and this issue is usually connected to the control of state aids.

On the occasion of further revisions of the Act, the question whether the Act may have vocation to deal with unfair practices or other issues of protection of legal interests of consumers could be asked. It will be noted for example that the Law of Poland on Competition and Consumer Protection, alongside the legislative framework on antitrust and concentrations, implements also the EC Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests

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Unfair competition in the Chapter III of the Law on Competition in Lithuania covers the following:

- Counterfeiting or use of commercial name or other distinguishing features of another enterprise not protected by copyright.
- Misleading advertising
- Disclosure of a commercial secret
- Unfair recruitment of employees of competitors or practices encouraging the misconduct of those employees towards their employer
- Imitation of products or their packaging
- Disclosure of false information.

14 There is no harmonisation of commercial law on the EU level (see however, an attempt to address indirectly some areas of commercial law in the Communication from the Commission (2003/C 63/01) on "A More Coherent European Contract Law - An Action Plan). In some old EU Member States of civil law (e.g. France, Belgium, Luxemburg, Italy) unfair competition between economic operators (misappropriation, false advertising, "bait and switch" selling tactics, unauthorized substitution of one brand of goods for another, use of confidential information by former employee to solicit customers, theft of trade secrets, breach of a restrictive covenant, trade libel, and false representation of products or services) is not globally regulated by law. It is mainly seen as a matter of case-law that derives from the general application of the principle that anybody who causes damage is obliged to pay a compensation for it (e.g. art 1382 of the Civil Code in France). In countries of common law there is no "tort of unfair competition" but economic operators may use the "tort of passing off". As for Germany, where there is no general concept of unfair competition, the related matters are regulated by the "Gesetz gegen den unlauteren Wettbewerb-UWG" of 7 June 1909.

15 See in particular the "Unfair Commercial Practices Directive" 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and the Council Directive 84/450/EEC of 10 September 1984 on the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising as amended by Directive 97/55/EC so as to cover also the concept of comparative advertising.

and the EC Regulation 2006/2004 of 27 October 2004, on cooperation between national authorities responsible for the enforcement of consumer protection laws.

4.2. Prohibitions

4.2.1. Concerted practices and restrictive agreements

The Act of Ukraine "On Protection of Economic Competition" includes in the same definition of "concerted actions" the EU concepts of concerted practices and restrictive agreements. This terminology has no legal implications and is therefore permitted. Furthermore, the indicative list of prohibited concerted actions under the article 6(2) of the Act strictly reflects the practices listed under the article 81(1) of the EC Treaty and adds three other categories of concerted actions:

- Bid-rigging [article 6(2) indent 4].
- Removal of other businesses from the market or limitation for their entry into the market [article 6(2) indent 5].
- Substantial limitation of the competition without objectively justified reasons [article 6(2) indent 8].

Moreover, Article 6(3) of the Act seems to address not only positive actions but also abstentions.

Even, if some of the additional categories are so vague that they do not provide any legal certainty comparable variations are laid down in the competition law of a number of EU Member States[16]. Sometimes, additional categories of concerted practices are well targeted. That is the case for instance of collusive practices during a tendering process (Latvia, Poland, Romania and the Slovak Republic) or boycott (Czech Republic). There are also additional categories of concerted practices that are expressed in such broad terms that they are overlapping with the prohibitions listed in the EC Treaty and it is questionable whether they are really useful:

- Exchange of information which restricts competition (Estonia).

- "Action (inaction), due to which another market participant is forced to leave a relevant market or the entry of a potential market participant into a relevant market is made difficult" (Latvia).

- Limiting access to the market or eliminating from the market undertakings which are not parties to the agreement (Poland).

In some of the old Member States, the legislation applicable to concerted practices and restrictive agreements with a domestic dimension does not either follow the indicative list of prohibitions enumerated in the EC Treaty (e.g. France, Germany, the Netherlands)[17].

4.2.2. Abuse of a dominant position

16 See Annexes I to this study on the variations in the national laws of new EU Member States and candidate countries on the categories of concerted practice and restrictive agreements that are explicitly prohibited.
Among the 17 countries covered by this study it is observed that the verbatim transposition of the article 81(1) of the EC Treaty concerns the following countries: Bulgaria, Croatia, Slovenia, Lithuania, Belgium, Ireland, and the UK.

17 See Annexes II to this study on the variations in the national laws of selected old EU Member States on the categories of concerted practice and restrictive agreements that are explicitly prohibited.

Exemplative list of abuse of a dominant position

Article 13 (2) of the Act of Ukraine "On Protection of Economic Competition" reflects with a slightly different wording the exemplative list of abuse of dominant position laid down under the second paragraph of the article 82 of the EC Treaty. However, the law adds other categories of prohibited practices which are expressed in such broad terms[18] that their effective scope has to be refined by the case-law so as not to extend the prohibition of abuse of a dominant position to practices that derive from common practices of enterprises that struggle in a competitive environment. The law adds also a new category which refers to "the refusal to purchase of to sale goods if there are no alternative sources of sale or purchase"[19].

In this respect the provisions of the Ukrainian legislation are no so different from the provisions contained in the legislation of a number of EU Member States where frequently, national laws depart to some extent from the provisions of the EC Treaty on the abuse of dominant position[20].

Among the new EU Member States, the verbatim transposition may be observed only in Lithuania. Elsewhere, there are some variations in the wording (more detailed descriptions) and mention of additional categories of abuse of a dominant position.

Additional categories may relate to general behaviours[21] (to be tackled hopefully more precisely by the case-law) or to concrete practices. Among concrete practices, some of them may refer to situations that have been already caught by the case-law of the European Commission or the European Court of Justice such as the refusal to sale under certain conditions[22] or the predatory prices[23], but other categories look rather strange for foreigners and probably reflect debates during the adoption of the law or the focus put on secondary considerations in the European case-law or the expression of national legal traditions[24].

18 See, Article 13 (2) paragraph 6 which addresses the "substantial restriction of the competitiveness of other business entities on the market without objectively justified reasons" and Article 13 (2) paragraph 7 which speaks about "the creation of entry market barriers or the removal of sellers, buyers or other business entities from the market".

19 See, Article 13 (2) paragraph 5.

20 See comparative charts in Annexes VI and VII to this study.

21 For example, are considered as an abuse of a dominant position the fact "to influence the business decisions of the other party in order to gain unjustified advantages"(article 21(d) of the Competition Act in Hungary), and "counteracting formation of conditions necessary for the emergence or development of competition (article 9 (2) of the Polish antitrust law).

22 With regard to refusal to sale or to enter into transaction with other market players, see competition law in Bulgaria, Czech Republic, Estonia and Latvia.

23 With regard to predatory prices, see competition law in the Czech Republic, Hungary, Poland and Romania.

24 For example:

In the Czech Republic the termination of production is assimilated to the limitation of production, sales or research.

In Poland "delayed payment terms" may be considered as unfair prices. Moreover, "unjustified profits" is linked with the "imposition of onerous agreement terms and conditions".

In Romania, article 6(e) of the Competition law includes in the list of the cases liable to be considered as an abuse of a dominant position "importing such products and services that determine the overall price and tariff level in the economy, without the usual bids and technical-commercial negotiations".

This differentiation vis-à-vis the EC law may be also observed in the legislation of some old EU Member States (e.g. France and Germany[25]).

Abuse of a dominant position determined by the percentage of the market shares

In addition to the provisions indicated above, the Act of Ukraine "On Protection of Economic Competition" specifies that a certain market share may entail a presumption of an abuse of a dominant position. Related thresholds (or combined thresholds) are determined by taking into consideration the number of undertakings involved (35% for one undertaking, 50% for 2 or 3 undertakings, 70% for 4 or 5 undertakings). By doing so the Ukrainian legislation follows the scheme established by the German Act against Restraints of Competition[26]. Other Member States which refer to the percentage of the market share set out one threshold (e.g. 35% in Bulgaria, 40% in Estonia, the Czech Republic and Poland) or two (40% for an individual undertaking or 60% for a group of undertakings in the Slovenian law).

Abuse of a dominant position and control of essential facilities

The competition authorities or the courts on the EU or the national levels consider that the restriction of access to essential facilities may constitute an abuse of a dominant position. Sometimes, provisions of the national laws address this specific issue. Among the new EU Member States, only Estonia introduces provisions in the competition law to deal with the public and private undertakings controlling essential facilities beside undertakings with have been granted special or exclusive rights ("Services of General Economic Interest" in the EU terminology). In the antitrust legislation of the Czech Republic, the focus is put mainly on the natural monopolies (utilities). Among the old EU Member States, worth mentioning the German antitrust law which rules that an abuse of a dominant may stem from the refusal to allow another undertaking access to its own networks or other infrastructure facilities against adequate remuneration.

It is recommended to insert similar provisions in the Act of Ukraine "On Protection of Economic Competition".

4.2.3. Impact on the relevant market

In a number of countries[27] the law does not provide for a definition of the relevant market (Bulgaria, Croatia, Romania, Slovenia) or the definition is so concise (Czech Republic, Estonia, Hungary Latvia, Lithuania, Poland, Slovak Republic) that it is not helpful to apply the proper methodology in case of investigation. Guidelines are the most appropriate means to ensure a uniform treatment of cases and predictability for businesses (Bulgaria, Croatia, Romania, Lithuania, Slovenia). The same approach has been followed by Ukraine. Definition of the relevant market in the article 1 of the Act of Ukraine "On Protection of Economic Competition" is contained in a single sentence which

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25 *A contrario,* other old Member States may also transpose faithfully the EC legislation to facilitate the implementation of the antitrust rules on the national level (e.g. Belgium, Ireland, the UK).

26 In the German law the thresholds expressing the market positions are: 1/3 for one undertaking, 50% for 2 or 3 undertakings, 2/3 for 4 or 5 undertakings.

27 See Annex VI to this study - Variations in the national laws of new EU Member States and candidate countries on the definition of the relevant market.

stresses the role of demand and supply, the substitutability of goods and the geographical territory. Implementing rules laid down in an Order of the Antimonopoly Committee provides a more detailed analysis which draws on the approach exposed in the EC soft law (Commission Notice 97/C 372/03) where the main elements for the determination of the relevant market relate to the analysis of competitive constraints: demand substitutability, supply substitutability and potential competition by taking each time into consideration both product and geographic dimensions.

4.3. Scope of exemptions and how to operate them

4.3.1. General requirements to grant exemptions and block exemptions

General conditions to grant exemptions to prohibitions

Article 10 of the Act of Ukraine "On protection of Economic Competition" lists the cases where concerted practices or restrictive agreements may be authorised. Actually there are two series of criteria representing two levels of assessment. The first one refers to criteria to be taken into account by the Antimonopoly Committee. Those reflect partially the criteria laid down under the article 81(3) of the EC Treaty. The second group of general exemptions addresses the appraisal of "public interests" which could be made by the Cabinet of Minister in case of review of the decision taken by the Antimonopoly Committee.

As a result, the Act of Ukraine "On protection of Economic Competition" overlooks that the four criteria of exemptions in the EC legislation are cumulative[28] and that one of them is the "fair share for consumers".[29]

As it has been said before[30], the EU law does not impose any direct legal obligations to the Member States with regard to the content and mechanisms in their domestic legislation to deal with competition issues that have a purely national dimension.

In the case of countries which have entered a FTA with the EU or candidate countries to EU accession the situation is different. There are requirements for a closer approximation of the competition law applicable to domestic situations. That could be seen as a paradox but it is not. The rationale behind this requirement is that partner countries must show their capacity to deal with competition issues which would affect not only their domestic market but also the market in the EU.

In this respect, major discrepancies in the Ukrainian legislation compared to the EU legislation could be interpreted as a lack of compatibility to enforce effectively the future FTA between the EU and Ukraine. For sure, competition law along with protection of intellectual property rights and public procurement law are always considered as key issues to trade on a level playing field in a FTA. In our views, the implications of the existing discrepancies do not put at risk a classic FTA. The issue would become sensitive only in the context of an Agreement in which would be expressed the perspective of a full integration in the Internal Market of the EU (with or without a Customs Union) or EU accession.

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28 Communication from the Commission (2004/C 101/08) - Guidelines on the application of Article 81(3) of the Treaty.

29 In its Annual Review 2006 on "The state of play of the approximation of the Ukrainian legislation to the EU legislation" the State Department for Legislative Approximation at the Ministry of Justice already highlighted that article 81(3) of the EC Treaty is not fully caught by the article 10 of Law of Ukraine on the Protection of Economic Competition because the law omits to reflect one the criteria laid down in the EC Treaty and sets out additional criteria to grant exemptions from the prohibition of restrictive practices.

For more developments on this issue, see the study "Proposed adjustments to the Article 10 of the Act of Ukraine On protection of Economic Competition to comply with the provisions of Article 81(3) of the EC Treaty" by Mr Valentin Dereviankin, UEPLAC IV, Kyiv, December 2007.

30 See Section 3.2 of this study.

The description below provides examples of variations in the legislation of the new EU Member States[31].

In a number of countries the criteria for exemptions reflect strictly the provisions of the article 81(3) of the EC Treaty (e.g. Croatia, Czech Republic, Poland, Latvia, Lithuania, Slovak Republic). In some instances, in order to mirror the Commission's Guidelines on the application of Article 81(3), it is also stated that the criteria are cumulative (e.g. Poland, Romania) and that they refer not only to goods but also to the provision of services (e.g. Bulgaria).

The competitiveness of SMEs enters within the definition of economic progress in Romania and in Bulgaria.

The protection of the environment is considered as a form of progress in Estonia and in Hungary.

In the old EU Member States[32], criteria for exempted agreements may be identical to those described in the EC Treaty (e.g. Germany, Ireland, the Netherlands) or almost the same in the UK[33] but they may also include variations to extend explicitly the concept of progress to the strengthening of the competitiveness of SMEs (e.g. Belgium) or better employment (e.g. France). Lastly, it is observed that the domestic legislation may provide other criteria inherited from the history of the national legislation and the related case-law applied in the country before the existence of the EC rules (e.g. France).

[31] See, comparative chart in Annex III to this study - Variations in the national laws of new EU Member States and candidate countries on the scope of exemptions.

[32] See, comparative chart in Annex IV to this study Variations in the national laws of selected old EU Member States on the scope of exemptions.

[33] The Office of Fair Competition in the UK explains that the phrase "of goods" is not included to make consistent with the practice of the European Commission in relation to Article 81(3) that services are also covered by the EC legislation.

Block exemptions

Article 11 of the Act of Ukraine "On protection of Economic Competition" empowers the Antimonopoly Committee to adopt block exemptions. This capacity has been used to a limited extent[34]. Therefore the economic operators in Ukraine are not provided with the same level of information as their colleagues in the EU to determine whether their "concerted actions" complies or not with the prohibitions laid down in the law. The purpose is probably to encourage notifications to the Antimonopoly Committee[35].

Benchmarks taken from the practice implemented in candidate countries to the fifth EU enlargement demonstrate the need to establish clear and detailed rules to help economic operators in carrying out a self-assessment of their restrictive agreement. The related rules are scattered in the competition law[36] and the secondary legislation or guidelines.

As a whole the legislative and regulatory framework of new EU Member States draws on block exemptions adopted on the Community level (Regulations of the European Commission on vertical and horizontal agreements, specialisation, research and development, technology transfer, motor vehicles sector, and related Guidelines). Estonia, Latvia and Romania show a rather comprehensive set of implementing measures including measures concerning air transport and shipping[37] (Latvia and Romania) and the insurance sector[38] (Latvia). Worth noting that Romania has also introduced guidelines to prevent anticompetitive practice for the access to the telecommunications network[39] and that the secondary legislation of Estonia tackles the issue of competition for enterprises granted with Special or Exclusive Rights.

Just before accession to the EU, some candidate countries decided to repeal their domestic block exemptions (e.g. Lithuania[40]) or started to refer to the EC block exemptions beside the domestic

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[34] "Block exemptions" Orders of the Antimonopoly Committee concern horizontal agreements and vertical agreements.

[35] There might be considerations of financial sustainability of the Antimonopoly Committee in this issue. Financial sustainability of any competition agency is always a serious matter of concern for the effective enforcement of the competition law but that does not imply administrative burden to be placed on enterprises just for the sake of the collection of fees.

[36] Competition rules enacted by Parliaments contain the following:
- Block exemption determined in broad terms by reference to the general conditions for exemption (Bulgaria, Croatia, Estonia, Poland, Lithuania, Slovak Republic, Slovenia)
- Specific conditions such as the general layout of the secondary legislation (Slovenia Bulgaria, Croatia, Estonia Poland), the specification that exemptions are temporary (Estonia, Latvia, Poland) or that the cumulative effect of agreements covered by a block exemption have to be assessed to check whether the block exemption is still applicable (Hungary).
- The list of categories of agreement subject to block exemption (Croatia and Slovenia).

[37] Measure taken in relation to the EC Regulations in the sectors of shipping and air transport.

[38] Implementing measure of the EC Regulation No 1534/91 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector.

[39] Measure connected to the Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communication networks and services.

40 In Lithuania, the secondary legislation repealed in September 2004 consisted of the following:

- notification of agreements falling within the scope of a block exemption and applications for an individual exemption
- block exemption to vertical agreements
- individual exemption to certain categories of agreements in the insurance sector

block exemptions (e.g. Czech Republic). In doing so, they were following a general tendency in the old EU Member States where little interest is paid to the domestic block exemptions. Either, the law refers to limited categories of block exemptions (SME in France[41]) or despite wide powers granted to the competition authority to enact such block exemptions (e.g. in the Netherlands, UK and Ireland) in the same terms as in the EC Treaty (Belgium), the national competition authority does not find relevant to use this power. More significantly some Member States are making this issue quite simple when the law specifies that European Community block exemption apply mutatis mutandis (for example in the § 2 (2) of the German Act against Restraints of Competition) or that a "parallel exemption" exists on the domestic market when the agreement would be covered by an EC block exemption regulation if the agreement had an effect on trade between Member States (UK).

4.3.2. De minimis rule

Article 7 of the law of Ukraine "On Protection of Economic Competition" sets forth an exemption for SMEs, as far as there is no "substantial restriction of competition" and when the joint purchase of products may enhance the competitiveness of enterprises. Definition of SMEs is given under the Article 1 (annual turnover below EUR 500,000).

This approach is far to encompass the detailed requirements of the EC legislation (soft law) which are based non only on the exemptions for SMEs below a certain size but also on the distinction of agreements between competitors and non-competitors, the percentage of the market share held cumulatively by the participants in the agreement, the cumulative effects of parallel agreements and hardcore provisions in agreements that are always prohibited regardless of the size of enterprises or their market shares.

In the new EU Member States or Candidate countries[42] where exemptions for agreements of minor importance are set out into the law (Bulgaria, Czech Republic, Estonia, Hungary, Poland, Romania, Slovak Republic and Slovenia) requirements fall short as well from the level of details in the EC legislation but criteria are mostly based on market shares (sometimes with lower thresholds than those laid down in the EC legislation) with distinction being made between horizontal and vertical agreements. It is only where requirements are set out in the secondary legislation that the conditions for exemptions broadly reflect the EC rules applicable for agreements which impact competition on the community market (e.g. Croatia).

Since, their national economies are already integrated to a large extent in the Internal Market, old EU Member States do not show the same interest to set out formal "de minimis" rules applicable for agreements which affect only their national market. The old Member States seem to rely more on the margin of discretion granted to their competition authority and the capacity of enterprises to carry out their own appraisal of the anticompetitive content of their agreements. In France, the "de minimis" rule (Articles L 464-6- 1 and L 464-6-2 of the Code of Commerce) is viewed as a power of the Competition Council to discharge enterprises from the prohibition of restrictive agreements. Corresponding rules are less detailed than in the EC legislation but they do not contradict them (same thresholds with distinction made between agreement concluded by competitors and

- individual exemptions to horizontal co-operation agreements
- block exemption to categories of agreements concluded between users of agricultural land
- individual exemptions to categories of technology transfer agreements.

41 In the EC legislation, there is no block exemption for SMEs but the same result is achieved by the Commission' Notice on the de minimis rule.

42 See Comparative Chart in Annex IX to this study.

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agreements concluded by non-competitors, hardcore restrictions which are prohibited in all cases with the precision that concerted practices in the area of public procurement cannot be exempted). In Germany, where the "Act against Restraints of Competition" specifies that the system of EC block exemptions applies mutatis mutandis to the national market there is a general provision (§ 3 of the Act) dealing with the agreements that do not affect significantly the competition and which are therefore exempted from the prohibition of restrictive agreements[43]. In the UK, Ireland and Belgium, despite the powers granted to the competition/regulatory authority to establish a system of exemptions and to publish guidelines, no decision has been taken so far to address the "de minimis" rule on the national level. In the Netherlands, such exemption exists but the Act "Providing new rules for Economic Competition"[44] contains provisions that are based on the combined aggregate turnover or enterprises involved in the restrictive agreement.

4.3.3. General system of notification of restrictive agreements

The Act of Ukraine "On Protection of Economic Competition" implements a system of centralised authorisation based on prior notification to the Antimonopoly Committee. Such a system has been also put in place by the candidate countries during the process of the fifth EU enlargement but just before accession all of them have switched to a system based on legal exceptions alongside the strengthening of ex-post controls. Actually the trigger for this move has been the new legal framework established by the EC Regulation of 16 December 2002[45] whereby Member States participate to the enforcement of the EU law. As a result of this closer integration of the national and EU systems, the national laws have been reviewed and, on this occasion amendments have also been introduced to reflect the simplification of the EC rules.

Today there are no requirements for notification of concerted practices and restrictive agreements in the legislation of the new EU Member States and Croatia (see comparative chart in Annex V). The formulation is rather vague in the laws of Bulgaria, Czech Republic and Baltic Countries. By contrast, the idea that in the course of an investigation the undertakings or the associations of

43 "Agreements between competing undertakings and decisions by associations of undertakings, whose subject matter is the rationalisation of economic activities through cooperation among enterprises, fulfil the conditions of § 2(1) if:

1. competition on the market is not significantly affected thereby, and

2. the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises."

44 Section 7 of the Dutch Act of 22 May 1997 "Providing new rules for Economic Competition" (version in force as of 1 August 2004):

"1. Section 6(1) shall not apply to agreements, decisions and concerted practices, as referred to in the said section, if:

(a) no more than eight undertakings are involved in the agreement or concerted practice in question, or if no more than eight undertakings are involved in the respective association of undertakings; and

(b) the combined turnover of the undertakings party to the respective agreement or the concerted practices in the preceding calendar year, or the combined turnover of the undertakings which are members of the respective association of undertakings does not exceed:

1° € 4,540,000, if the agreement, concerted practice or association involves only undertakings whose core activity is the supply of goods;

2° € 908,000, in all other cases.

2. If separate agreements with the same purpose are entered into between an undertaking or association of undertakings and two or more other undertakings, such agreements shall be regarded jointly as a single agreement for the purpose of the application of subsection (1).

3. By Order-in-Council, if necessary subject to conditions and restrictions, section 6(1) may be declared inoperative in respect of categories of agreements, decisions or practices, as referred to in the said section and described in that order, which are clearly of minor significance from the point of view of competition.

4. The figures stipulated in subsection (1)(a), and the amounts stipulated in subsection (1)(b), may be amended by Order-in-Council."

45 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

undertakings alleging a block exemption are held to prove they meet the conditions is well expressed in the laws of Poland, Hungary and Romania.

With the exception of the Slovak Republic and Bulgaria, where the competition authority is still empowered to deliver an opinion on specific agreements following a request of economic operators, the system of individual exemptions/ negative clearance has fully disappeared in the legislation of the new EU Member States. This system will expiry as well after a transition period in the old Member States[46].

Sometimes, national laws may however entrust the competition authority in issuing opinions not connected to investigations or proceedings. This ability mirrors the practice envisaged by the European Commission in its Notice on "guidance letters"[47]. For example, in the UK, where the Office of Fair Trade considers there is an interest in issuing clarification for the benefit of a wider audience (novel or unresolved questions about the application of the EC or the domestic legislation) it may publish written guidance in the form of an opinion. This Opinion cannot prejudge the assessment of the same question by the European Commission or the Courts and does not either bind the subsequent assessment of the same issues by the OFT.

What has been exposed above does not have to be interpreted as a sign to encourage Ukraine to abolish immediately the system of notifications. As said before, in transition economies, the central issue is first to anchor deeply the culture of competition. Rules which may be currently burdensome for businesses may help in contributing to this objective. Reliance on self-enforcement will inevitably come later.

4.4. Concentrations[48]

Thresholds for prior authorisation of concentrations

Provisions contained in the Chapter V of the Act of Ukraine of 11 January 2001 (as last amended in 2006) "On Protection of Economic Competition" sets forth the thresholds above which concentrations have to be authorised:

- Combined aggregate worldwide turnover or value of assets of all the undertakings concerned is more than EUR 12 million, and
- Worldwide turnover of each of at least two participants in the concentration is above EUR 1 million, and
- Individual turnover or value of assets in Ukraine of at least one undertaking concerned is above EUR 1 million

46 In the UK, individual exemptions, all of them being granted for a limited period of time, will not be renewed after their expiry. In Germany the system of individual exemptions will become ineffective on June 30th 2009.

47 The Commission Notice (2004/C 101/06) "on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases". sets out the framework for assessing whether to issue a guidance letter (indications on how to request guidance, processing of the request, content and effects of guidance letters).

48 To get an analytic picture or the situation in new the EU Member States and candidate countries on the thresholds for prior notification and appraisal of concentrations, see Annex X to this study.

Where the aggregate market share of the participants in the relevant market and adjacent market[49] exceeds 35%, the concentration is also subject to prior authorization.

Similar mechanisms of compulsory authorization are implemented by the EU Member States with some variations pertaining to the importance of the market position. A number of EU Member States take into consideration both the worldwide and the domestic markets (e.g. Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, the Netherlands, Romania, Slovak Republic and Sweden). Others consider only the domestic market (e.g. Belgium, Bulgaria, Estonia, Hungary, Italy, Lithuania, Malta and Portugal).

It is observed also in a number of instances (Austria, Czech Republic, Denmark, Spain, Italy, Latvia, Portugal, Slovak Republic, Slovenia and the UK) that the antitrust legislation sets alternative criteria (or series of cumulative criteria) whereby the worldwide turnover might be considered (Austria) or only the national turnover (Italy, Portugal, Spain and the UK) or both (Austria, Czech Republic, Latvia, Poland and Slovak Republic). More rarely, those alternative criteria may be also combined with thresholds expressed in percentage of the market share (25% in the UK and Spain, 30% in Portugal, 40% in Slovenia and Latvia).

With regard to the definition of thresholds in the Ukrainian law there are two areas where further improvements would be desirable.

A questionable peculiarity in the Ukrainian law is the reference made to the "assets" of the participants in the concentration. The importance of fixed or moveable assets does not impact by itself the competitive environment. What is important is how those assets are used and the extent to which, this use may form an obstacle to competition. That is why unanimously the EU Member States retain the single criterion of the turnover.

The second observation relates to the low level of the notification thresholds. In comparison with the thresholds set by the new EU Member States and candidate countries, the threshold concerning the domestic turnover is 7 times lower than in Bulgaria, 13 times lower than in Croatia and 50 times lower than in Poland. Furthermore, the legislation does not contain of a provision which would allow a fast adjustment of the thresholds by way of regulations[50].

Criteria for appraisal of concentrations

Article 25 of the Act of Ukraine "On Protection of Economic Competition" conveys in broad terms the criteria for the assessment of concentrations. On the level of the appraisal made by the Antimonopoly Committee it is question of "substantial restriction of competition" and where this assessment is referred to the Cabinet of Ministers, the criterion used relates to the "positive effect produced by the concentration with regard to the public interest outweighs the negative consequences of restricting competition".

In a number of EU Member States, criteria for the appraisal of concentration of national dimension are also expressed in the law in a very concise way. That leaves a wider margin of discretion to take

49 It seems that "adjacent market" has to be understood as downstream or upstream market. The same concept is laid down under the Article 2 (5) of the Council Regulation (EC) No 139/2004 on the control of concentrations.

50 As benchmarks, see, for example, Art. 7§ 2 and 3 of the Belgian law of 10 June 2006 on the protection of economic competition which specifies that thresholds may be increased by secondary legislation and subject to revision by the Competition Council every 3 years to be adjusted to the economic situation or Section 29 of the Dutch Act of 22 May 1997 Providing new rules for Economic Competition (as last amended in August 2004) which rules that the thresholds may be increased by the Government.

a decision on the validity of concentrations. In Poland it is stated that the concentration is authorised where it "is expected to contribute to economic development or technical progress" and it has "a positive impact on the national economy"[51]. In France[52], the criteria are international competitiveness of enterprises and creation/preservation of employment and in Germany[53] it is ruled that a concentration which may create or strengthen a dominant position shall be prohibited by the Competition Authority "unless the undertakings concerned prove that the concentration will also lead to improvements of the conditions of competition and that these improvements will outweigh the disadvantages of dominance".

Some Member States model strictly their domestic rules on the provisions of Article 2 of the Council Regulation EC No 139/2004 on the control of concentrations between undertaking (e.g. Art. 8§ 2. of the law of 10 June 2006 on the protection of economic competition in Belgium) but in most instances the competition law of the new EU Member States and candidate countries are drawn only partly on the criteria set by EC Regulation above (Bulgaria, Croatia, Czech Republic, Hungary, Slovenia) or identical criteria are organised in a different way (Romania, Estonia).

Appraisal made or reviewed by the Government

The Ukrainian legislation sets out a possible review of the decision of the Antimonopoly Committee. Cases of non-authorisation may be referred to the Cabinet of Ministers[54].

There are no equivalent provisions in the legislation of the new EU Member States and that may be explained by the fact that those countries have been duly requested to prevent any political influence in the appraisal of concentrations. By contrast, the control of concentrations may be a shared responsibility of a Minister and the competition authority in old Member States.

In France, the primary control of concentration is the responsibility of the Minister in charge of the Economy[55] but where there are indications that concentration may affect competition by creating or strengthening a dominant position towards suppliers or purchasers, the Competition Council is requested to deliver an opinion. This opinion assesses to which extent benefit for the economy offsets anticompetitive impact.

In other old Member States, as it is the case also in Ukraine, the first assessment is the responsibility of the competition authority, the referral made to the Government is limited to the cases of negative opinions of the competition authority and the decision of the Government is based on the test of "public interest".

In Germany, the *"Federal Minister of Economics and Labour shall, upon application, authorise a concentration prohibited by the Competition Authority (Bundeskartellamt) if, in a specific case, the restraint of competition is outweighed by advantages to the economy as a whole following from the*

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51 Article 20(2) in fine of the Law of 16 February 2007 on Competition and Consumer Protection.

52 Code of Commerce, Article L. 430-6.

53 § 36 of the Act against Restraints of Competition.

54 See, in particular, Article 10(3), 25 (2) and 33 of the Act of Ukraine "On Protection of Economic Competition".

The Cabinet of Ministers is assisted, where appropriate, by a Commission of independent experts.

55 Code of Commerce, Article L. 430-5.

concentration, or if the concentration is justified by an overriding public interest. In this context the competitiveness of the participating undertakings in markets outside the scope of application of this Act shall also be taken only if the scope of the restraint of competition does not jeopardize the market economy. system…"[56]

In Belgium, the Council of Ministers may authorise a concentration despite a negative opinion of the Competition Council[57] when the "public general interest" outweighs the risk of restricting the competition. This review may include the removal of some conditions laid down by the Competition Council. Assessment and statement of reasons take account in particular of the following public interest: National Defence and Security, competitiveness of the concerned sector with regard to international competition, consumers' interests and employment. Involvement of the Minister of Economic Affairs exists also in the Netherlands[58].

Under the Entreprise Act 2002, the system put in place in the UK to consider the public interest is slightly different. The Office of Fair Trading - OFT (body in charge of the appraisal of concentrations) informs the Secretary of State (Head of the Department Business, Enterprise and Regulatory Reform - BERR, formerly Department of Trade and Industry – DTI) on issues of public interest (at the moment, the Entreprise Act 2002 acknowledges only national security as a public interest criterion, although the Secretary of State is empowered to identify additional public interest areas). Further to this notification the Secretary of State may issue an intervention notice to the OFT whereby the OFT has a duty to publicise this fact and to invite representations on the public interest issues from interested parties. If it is considered that public interest issues are material to the outcome of the case, the Secretary of State is required to publish reasons for public interest decisions. Otherwise, the case is returned to the OFT, which makes a decision consistent with its advice on competition issues.

5. Procedural rules and enforcement

5.1. Overview

Under the objective (40) the Ukraine- EU Action Plan seeks for a better adequacy and compatibility of the domestic anti-trust legislation with the EU and mentions in particular the "procedural fairness" as an area for further improvement.

The Act of Ukraine "On Protection of Economic Competition" and the implementing secondary legislation already contains a number of procedural rules and a new codification is underway. The State Department for Legislative Approximation at the Ministry of Justice has evaluated this draft code[59] in the light of the procedural rules laid down in the EC legislation (antitrust and

56 See § 42 of the Act against Restraints of Competition.

57 See Articles 8§ 6 and 60§ 1 of the law of 10 June 2006 on the protection of economic competition.

58 Section 47 of the Dutch Act of 22 May 1997 specifies that beside the administrative and judicial appeals against the decision of the Competition Authority, this decision may be reviewed by the Minister of Economic Affairs where "reasons s in the public interest outweigh the expected restriction of competition".

59 Annual Review 2006 on "The state of play of the approximation of the Ukrainian legislation to the EU legislation".

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concentrations)[60] and has concluded to a faithful transposition of the principles enshrined in the EC legislation. The only non-compliance found by the SDLA relates to the omission of the requirements of the Council Regulation (EC) No 1/2003 (applicable to restrictive agreements) and Council Regulation (EC) No 139/2004 (applicable to concentrations) as far is concerned the inspection of premises distinct from business premises.

Article 13 of Council Regulation (EC) No 139/2004[61] and Articles 20 of Council Regulation (EC) No 1/2003[62] provide that officials and other persons authorized by the Commission have the power to enter and to seal any premises, land and means of transport of undertakings in order to examine, to collect or to seal relevant records and to ask to members of staff of the undertaking for explanations on facts or documents. Article 21 of the Regulation (EC) No 1/2003 grants explicitly the same power to conduct inspections of other premises, land and means of transport, including private homes.

First it has to be stressed that there is no obligation to apply in the domestic legislation the same procedural rules as those applied by the European Commission. Within the same purpose to collect evidences, to open the proceedings to all interested parties and to safeguard the contradictory principle and other rights of defence, the Ukrainian procedural code in antitrust and concentrations matters may develop other rules compatible with the national legal traditions and constitutional rights. It is not even required to strictly mirror rules applicable in criminal matters (except where a violation of the law has been duly established and that the infringement is a criminal offence) since, basically the antitrust legislation concerns the economic order more than the security of persons of patrimony.

For the time being the Ukrainian legislation does not need either to foresee assistance to formal inspections by the European Commission as it should be the case for Member States[63]. However, after the conclusion of the Enhanced Agreement, provisions on exchange of information between the Antimonopoly Committee, competition authorities of the Member States and the European Commission will have probably to be streamlined in a more formal manner in the law or other acts of the Government.

5.2. Coercive measures to conduct investigations

Even if the solution cannot be found in the EC legislation, the observations made by the SDLA concerning the non-conformity of the Ukrainian legal framework with that of the EU as regards the absence of powers of the Antimonopoly Committee to conduct inspection of premises distinct from

60 The scrutiny made by the SDLA has covered the compliance with the following pieces of the EC legislation: Council Regulations (EC) No 1/2003 and No 139/2004, Commission Regulations (EC) No 773/2004 and No 802/2004, Commission Notice (2004/C 101/05) on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty.

61 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

62 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

63 See, for the procedures of assistance and co-operation with the EU and its Member States: Article 68 of the Law on Competition and Consumer Protection in Poland, Chapter XVI of the Competition Act in Hungary, Articles 47, 49 and 50 of the law on Competition in Lithuania, Article 21(b) of the Act on the Protection of Competition in the Czech Republic, Sections 32 and 33 of the Competition law in Latvia, Article 56 of the Competition Act in Estonia.

business premises could be underpinned by the needs expressed by the Recitals (26) and (27) of the EC Regulation No 1/2003:

"Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes. However, the exercise of this latter power should be subject to the authorisation of the judicial authority.

Without prejudice to the case-law of the Court of Justice, it is useful to set out the scope of the control that the national judicial authority may carry out when it authorises, as foreseen by national law including as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking or the execution of the decision to carry out inspections in non-business premises. It results from the case-law that the national judicial authority may in particular ask the Commission for further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures."

In the new EU Member States [64]the cases where courts must authorise inspections are more or less detailed. They may be summarised as follows:

- Poland and Estonia: inspections of premises distinct from business premises.
- Croatia: business and private premises (including premises occupied by third persons).
- Slovenia: residential or business premises.
- Czech Republic: private premises of the staff or the management.
- Slovak Republic: where investigation is extended to third parties or private premises and private means of transport of the employees.
- Hungary: any site or any land, buildings and premises closed (business and private premises including vehicles) as far as they are used by current and former executives or other person who exercises or exercised control as a matter of fact or by employees.
- Romania: any premises, lands or transportation means belonging to undertakings, residence of managers (including the residence of natural persons responsible for the financial, accounting or marketing departments) and employees. The inspection and related acts shall be carried out under the authority and control of the judge who issued the ruling (possibility of appeal without suspending effect).

Very frequently, the competition law provides also that the authorisation is granted by judges only where there is a reasonable suspicion that any of the parties to the proceedings or a third person, holds documents or other instruments relevant to the findings (e.g. Bulgaria, Czech Republic, Hungary Slovenia) or when other measures have failed (for example obstacles to conduct inspections in the Czech Republic) or would fail (Hungary).

Should they be provisions in the new draft procedural code to address the issue of the collaboration of the Antimonopoly Committee in connection with the duty of courts to review the proportionality of the measures of investigation requested, it would be instructive to consider the application

64 See, comparative chart in Annex XII to this study - Variations in the national laws of new EU Member States and candidate countries on the organisation of inspections in business or private premises.

mutatis mutandis of the reasoning of the European Court of Justice in the cases “Hoechst AG v Commission of the European Communities”[65] and “Roquette Frères SA”[66].

65 Judgment of the Court of 21 September 1989. - Hoechst AG v Commission of the European Communities. - Joined cases 46/87 and 227/88.

66 Judgment of the Court of 22 October 2002 - Roquette Frères SA - Case C-94/00.

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5.3. Other issues for effective enforcement

Private enforcement of competition rules is frequently a neglected aspect of the competition policy. Provisions in the competition law to tackle this issue could be a strong signal to encourage enforcement by the economic operators themselves. Such provisions exist for example in the Competition Act of 25 June 1996 in Hungary[67].

Another issue to deter cartels and to achieve effective results lies with the development of the so called "leniency programme". The Act of Ukraine "On Protection of Economic Competition" initiates briefly a policy of immunity to encourage parties to a prohibited concerted action to disclose the facts to the Antimonopoly Committee[68]. Further provisions would be welcome. The principles could draw on the European Commission Notice (2006/C 298/11) on immunity from fines and reduction of fines in cartel cases.

Parallel to that, it would be desirable to streamline the co-operation between the courts and the Antimonopoly Committee. Article 61 of the Act of Ukraine "On Protection of Economic Competition" provides for a notification of courts cases to the Antimonopoly committee. Moreover the Economic Procedural Code does not prevent the participation of the Antimonopoly Committee in proceedings in which it would not be a party. "Amicus Curiae" Guidelines or where appropriate, compulsory provisions could be further developed to govern the relationship between the Antimonopoly Committee and the national courts[69].

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67 Competition Act of 25 June 1996 in the version in force in January 2007:

Article 88/A

The competence of the Hungarian Competition Authority, determined by Article 45 of this Act and used to safeguard, pursuant to Article 70(1), the public interest, shall not prevent civil law claims, arising out of the infringement of the provisions laid down in Chapters III to V of this Act and mentioned in Articles 11(3) and 93, from being enforced directly in court.

Article 88/B

(1) For lawsuits to be assessed under the provisions laid down in Chapters IV and V of this Act, the provisions of Act III of 1952 on the Code of Civil Procedures shall apply with the exceptions defined in this Chapter.

(2) The court shall notify, without delay, the Hungarian Competition Authority of lawsuits before it, which are to be assessed under the provisions laid down in Chapters III to V of this Act.

68 Article 6(5) of the Act.

69 Such steps forwards have to be seen in relation to the modernisation of the EC legislation (Council Regulation 1/2003) which makes possible for national courts to apply Article 81 (3) of the EC Treaty directly if a case falls within their jurisdiction. In particular Article 15 (3) of Regulation 1/2003 makes it possible for the European Commission and the national competition authorities to "submit written observations to the national courts of their Member State".

In this context, see also See also Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 of the EC Treaty, OJEC 2004, C101/54.

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6. Conclusion

This study has showed that the antitrust legal framework in Ukraine is very similar to the domestic legislation in the EU Member States. Benchmarks and margin of discretion to address a few shortcomings in the normative acts have been identified. Nevertheless, the criterion of the compatibility of the legal measures does not suffice to assess whether the functioning of the legal framework ensure the same results as those obtained in the EU Member States. That will be the point during the negotiation of the future Enhanced Agreement.

Provisions contained in the Enhanced Agreement will be the starting point of strong commitments that are going to be closely monitored by the European Commission in terms of credible enforcement records.

Moreover, the competition policy is impacted by the horizontal weaknesses faced by the Government, the Parliament and the Judiciary in all spheres of State activities (e.g. rule of law, influence of politicians and lobbies on public bodies).

One of the general deficiencies recognised by local observers and international institutions represented in Ukraine is the lack of consistency of the legal order. Pieces of legislation conflict with each other or they are not harmonised sufficiently to allow their joint application for specific operations. In doing so, they give room to unpredictable interpretations by enforcement bodies or other undesirable effects. Applied to the sector of competition policy that may lead for example that a concentration is not approved because the deadline to complete the file is over by reason the authorisation to conduct the related economic activities is not issued on time by the line institution in charge of licensing for that particular activity.

That is the occasion to remind there is currently a draft law on Joint Stock Company which will be submitted shortly to the Verkhovna Rada. A concrete exercise would be to ensure that the concept of “control” for the application of the provisions on mergers in the company law is compatible with the notion of control for the application of the rules on the notification of concentrations.

Benchmarks for further revisions of the antitrust legislation in Ukraine

Comparative charts

Prepared by

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LIST OF ANNEXES

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Annex I

Variations in the national laws of new EU Member States and candidate countries on the categories of concerted practice and restrictive agreements that are explicitly prohibited

Reminder

Article 81 of the EC Treaty:

"1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void."

Country	National legislation	Relevant provisions Where provisions of national laws are reproduced below they result from unofficial translations made available by the authorities of the related Countries
Bulgaria	Law on Competition Protection No 52/1998, as last amended by law No 107/2003	Article 9 of the law reflects faithfully the provisions laid down under Article 81 (1) and (2) of the EC
Croatia	Competition Act of 15 July 2003	Article 9 of the Act reflects faithfully the provisions laid down under Article 81 (1) and (2) of the EC Treaty. .

Variations in the national laws of new EU Member States and candidate countries on the categories of concerted practice and restrictive agreements that are explicitly prohibited (continued)

Czech Republic	Act of 4 April 2001 on the Protection of Competition, as last amended by Act of 4 April 2007	Apart from the paragraph f) of the article 3(2) of the Act which considers a new category of prohibited practice (boycott), the Act reflects faithfully the list of restrictive agreements and concerted practice of the article 81(1) of the EC Treaty.
Estonia	Competition Act of Estonia of 5 June 2001, including amendments until May 2005	Article 4 (1) of the Act sets forth more detailed provisions than in the EC Treaty to describe examples of prohibited practices: *"1) directly or indirectly fix prices or any other trading conditions, including prices of goods, tariffs, fees, mark-ups, discounts, rebates, basic fees, premiums, additional fees, interest rates, rent or lease payments applicable to third parties;* *(...)* *3) share goods markets or sources of supply, including restriction of access by a third party to a goods market or any attempt to exclude the person from the market;"* It contains also an additional category of anticompetitive practices: *"4) exchange information which restricts competition;"*
Hungary	Competition Act of 25 June 1996, as amended till January 2007	The indicative list of restrictive agreements s is more detailed than in the EC Treaty. The prohibition which addresses the "share markets or sources of supply" in the EC Treaty (item (c) of the second paragraph of article 81 (1) is translated in the Article 11(2) of the Act by the following: *"c) the allocation of sources of supply, or the restriction of their choice as well as the exclusion of a specified group of consumers from purchasing certain goods;* *d) the allocation of markets, exclusion from sales, or restriction of the choice of marketing possibilities;* *f) the hindering of market entry"* "

Variations in the national laws of new EU Member States and candidate countries on the categories of concerted practice and restrictive agreements that are explicitly prohibited
(continued)

Latvia	Competition law of 4 October 2001, as amended by law of 22 April 2004	Section 11(1) of the law further develops the concept laid down in the second paragraph, item (a) of article 81(1) of the EC Treaty : Section 11 (1) mentions *"the direct or indirect fixing of prices and tariffs in any manner, or provisions for their formation, as well as regarding such exchange of information as relates to prices or provisions regarding sale".* Section 11 contains also additional categories of anticompetitive practices: *"5) the participation or non-participation in competitions or auctions or regarding the provisions for such actions (inactions), except for cases when the competitors have publicly announced their joint tender and the purpose of such a tender is not to hinder, restrict or distort competition.* *7) action (inaction), due to which another market participant is forced to leave a relevant market or the entry of a potential market participant into a relevant market is made difficult."*
Lithuania	Law on Competition of 23 March 1999, as amended by law of 15 April 2004	Article 5 of the law reflects with a slightly different wording the provisions of the Article 81 (1) of the EC Treaty.
Poland	Law of 16 February 2007 on Competition and Consumer Protection	Article 6 (1) of the law reflects the provisions of the Article 81 (1) of the EC Treaty but it indicates also 2 new categories of prohibited practices: - *"limiting access to the market or eliminating from the market undertakings which are not parties to the agreement;* - *"collusion between undertakings entering a tender, or by those undertakings and the undertaking being the tender organiser, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price".*

Variations in the national laws of new EU Member States and candidate countries on the categories of concerted practice and restrictive agreements that are explicitly prohibited
(continued)

Romania	Competition law No 21/1996, as last amended in 2004	Article 5 (1) of the law reflects the provisions of the Article 81 (1) of the EC Treaty but it indicates also 2 new categories of prohibited practices: *"f) participating, in a concerted manner, with rigged bids in auctions or any other forms of competitive tendering;* *g) eliminating competitors from the market, limiting or preventing access to the market and the free exercise of competition between other undertakings, as well as agreements not to buy from or to sell to certain parties without reasonable justification."*
Slovak Republic	Law of 27 February 2001 on Protection of Competition, as last amended in 2004	Article 4 of the law reflects the provisions of the Article 81 (1) of the EC Treaty but it indicates also a new category of prohibited practices: *"signs of collusive behavior as a result of which undertakings coordinate their bids, especially in the process of public procurement."*
Slovenia	Law on the prevention of restriction of competition (2000)	Article 5(2) of the law reflects faithfully the provisions of the Article 81 (1) of the EC Treaty.

Annex II

Variations in the national laws of selected old EU Member States on the categories of concerted practice and restrictive agreements that are explicitly prohibited

Country	National legislation	Relevant provisions Where provisions of national laws are reproduced below they result from unofficial translations made available by the authorities of the related Countries
Belgium	Law of 10 June 2006 on the Protection of Economic Competition	Article 2 of the law reflects faithfully the article 81(1) of the EC Treaty.
France	Code of Commerce	Description of prohibited anticompetitive practices under the Article L. 420-1 and 420-5 of the Code of Commerce does not reproduce the indicative list of article 80(1) of the EC Treaty. Only items (b) and (c) of article 81, second paragraph are strictly mirrored. Item (a) is captured by a narrower formulation (artificial increase or decrease of prices). Item (e) is not caught at all but is reflected in the Consumer law (Article 122.1 of the Consumer Code where are addressed “Business to Consumer” relationships). Item (d) on the application of dissimilar conditions is addressed with the enumeration of a number of prohibited practices under the article 442-6 of the Code of Commerce but the related cases are not under the responsibility of the competition authority. They are cases to seek for damages for breach of the rules. Article 420-5 of the Code of Commerce deals with prices that are artificially low.
Germany	Act against Restraints of Competition	The principle of prohibition of agreements restricting competition set out in the first article of the law is not supplemented by the indicative list of prohibited agreements (sub-items (a), (b), (c), (d) and (e) of the second paragraph of article 81(1) of the EC Treaty). However, below in the text, § 20 (Prohibition of Discrimination, Prohibition of Unfair Hindrance) and § 21 (Prohibition of Boycott and Other Restrictive Practices) there is a description of prohibited practices which may match the categories of prohibited practices (a) and (c) listed under the article 81(1) of the EC Treaty (fixing of prices, application of dissimilar conditions) with the focus put on the dependence of SMEs. Compared to the provisions of the EC Treaty, the German law also introduces – at least formally - new categories of prohibited practices: restrictions regarding the membership of professional organisations or quality mark associations, boycott, refusal to sale or purchase.

Ireland	Competition Act 2002	The prohibition of concerted practices in subsection (1) of Section 4 reflects faithfully the provisions of the EC Treaty.
The Netherlands	Act of 22 May 1997 Providing new rules for Economic Competition (version in force as of 1 August 2004)	Section 6 of the Dutch Act sets forth the prohibition of anticompetitive agreements but does not contain any indicative list of prohibited practices.
UK	Competition Act 1998	Section 2 of the Act on the list of prohibited agreements reflects faithfully the provisions of the EC Treaty.

Annex III

Variations in the national laws of new EU Member States and candidate countries on the scope of exemptions

Reminder

Article 81(3) of the EC Treaty specifies that the provisions of Article 81(1) on the prohibition of concerted practice or restrictive agreements “*may be declared inapplicable in the case of:*
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

Country	National legislation	Relevant provisions Where provisions of national laws are reproduced below they result from unofficial translations made available by the authorities of the related Countries
Bulgaria	Law on Competition Protection No 52/1998, as last amended in 2003	***Exemption from Prohibition*** Article 13 *“(1) In case of authorisation by the Commission, an exemption of the prohibition referred to in Article 9, paragraph (1) may be granted with respect to agreements, decisions or concerted practices, which contribute to increasing or improving the production of goods and the provision of services or promoting technical and economic progress, while ensuring a fair share of the resulting benefits for the consumers, and which do not:* *1. impose on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives set and* *2. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the market concerned.*

		(2) The Commission may exempt from the prohibition referred to in Article 9 agreements, decisions and concerted practices of small and medium-size enterprises, when they lead to enhancing their competitiveness." ***Block Exemption*** Article 14. *"(1) The Commission may adopt a decision that the prohibition provided for in Article 9, paragraph (1) shall not apply to certain types of contracts where they satisfy the requirements set forth in Article 13, paragraph (1).* *(2) The decision referred to in paragraph (1) shall enter into force following its publication in the State Gazette.* *(3) In its decision for block exemption from the prohibition provided for in Article 9, paragraph (1) the Commission shall lay down the terms and conditions that the contracts may contain and those whose application is inadmissible.* *(4) The decision referred to in paragraph (1) may provide that the prohibition under Article 9, paragraph (1) shall not apply to contracts concluded prior to its entry into force in case that within 3 months they are brought in compliance with the requirements contained in the Commission decision and the Commission is forthwith notified of the modifications made."* ***Alignment of General Conditions*** Article 15 *"(1) Undertakings which offer the conclusion of identical contracts, containing general conditions, may align those general conditions in advance, provided that they do not restrict the free negotiation of prices and other trading conditions and do not affect the interests of consumers.* *(2) Alignment of general conditions shall be allowed only in case of an authorisation of the Commission, unless in cases when the alignment is approved by competent authority, which carry out regulation and control.( ) The authorization shall be granted within two months following the submission of the request of the undertakings in accordance with paragraph (1)."*

<table>
<tr>
<td>Croatia</td>
<td>Competition Act of 15 July 2003</td>
<td>Article 10 reproduces to a large extent the Article 81(3) of the EC Treaty

Block Exemptions
Article 11

"(1) The regulations stated in Article 10 paragraph (1) of this Act referring to block exemption relate to the following categories of agreements:
1. agreements between undertakings not operating on the same level of production or distribution, and in particular, agreements on exclusive distribution, selective distribution, exclusive purchase and franchising;
2. agreements between undertakings operating on the same level of the production or distribution, and in particular, research and development and specialization agreements;
3. agreements on transfer of technology, license and know-how agreements;
4. agreements on distribution and servicing of motor vehicles, and 5. insurance agreements.
(2) The regulation referred to in paragraph (1) of this Article sets out the following:
1. provisions that such agreements must obligatorily contain;
2. restrictions or conditions such agreements must not contain;
3. other provisions such agreements must comply with.
(3) Agreements fulfilling the conditions laid down in Article 10 of this Act do not need to be submitted to the Agency for assessment in respect of individual exemption under Article 12 of this Act.
(4) The Agency may, ex officio, initiate the proceedings to assess the compatibility of a particular agreement referred to in paragraph (3) of this Article, if it should find that the particular agreement, in itself or due to the cumulative effect with other similar agreements in the relevant market, does not comply with the conditions set out in Article 10 of this Act."</td>
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<tr><td>Czech Republic</td><td>Act of 4 April 2001 on the Protection of Competition, as last amended by Act of 4 April 2007</td><td>Article 3(4) reproduces faithfully the Article 81(3) of the EC Treaty.

Article 4 refers to "Community Block Exemptions" (deriving from the EC legislation) and possible other block exemptions granted by the Office.</td></tr>
<tr><td>Estonia</td><td>Competition Act of Estonia of 5 June 2001, including amendments until May 2005</td><td>§ 4 (2) refers to a general exemption applicable to the agricultural production: "Clauses (1) 2)–6) of this section do not apply to agreements and practices of agricultural producers or to decisions by associations of agricultural producers, which concern the production or sale of agricultural products or the use of joint facilities, unless competition is substantially restricted by such agreements, practices or decisions."

§ 6. Exemption
"(1) The prohibition provided in subsection 4 (1) of this Act shall not be imposed concerning an agreement, activity or decision which:
1) contributes to improving the production or distribution of goods or to promoting technical or economic progress or to protecting the environment, while allowing consumers a fair share of the resulting benefit;
2) does not impose on the undertakings which enter into the agreement, engage in concerted practices or adopt the decision any restrictions which are not indispensable to the attainment of the objectives specified in clause 1) of this subsection;
3) does not afford the undertakings which enter into the agreement, engage in concerted practices or adopt the decision the possibility of eliminating competition in respect of a substantial part of the goods market.
(2) An undertaking which makes use of the conditions arising from this section is required to provide proof concerning compliance with all the conditions set forth in section (1) of this section."

§ 7. Block exemption
"(1) A block exemption is general permission granted by a regulation of the Government of the Republic on the proposal of the Minister of Economic Affairs and Communications to enter into a certain category of agreements, engage in a certain category of concerted practices or adopt a certain category of decisions which complies with the conditions provided for in § 6 of this Act and restricts or may restrict competition.
(2) A block exemption is established for a specified term and may designate:
1) the name of the category of agreements, practices or decisions to which the block exemption applies;
2) restrictions or conditions which shall not be included in such agreements, practices or decisions;
3) conditions which must be included in such agreements, practices or decisions, and restrictions and conditions which may be included in such agreements, practices or decisions;
4) other conditions which such agreements, practices or decisions must comply with."</td></tr>
</table>

Hungary	Competition Act of 25 June 1996, as amended till 1 January 2007	Article 16 *"Certain categories of agreements may be exempted from the prohibition of Article 11 by Government regulations. The Government may adopt regulations about the group exemption of agreements taking into account the provisions of Article 17 of this Act."* Article 16/A(1) *"The group exemption from the prohibition on the restriction of competition does not apply to agreements where, by the cumulative effect of those agreements and similar other agreements on the relevant market, the requirements provided for by Article 17 are not satisfied."* Article 17 *"Agreements caught by Article 11 shall not be prohibited, provided that:* *a) they contribute to a more reasonable organisation of production or distribution, the promotion of technical or economic progress, or the improvement of competitiveness or of the protection of the environment;* *b) they allow consumers a fair share of the resulting benefit;* *c) the concomitant restriction or exclusion of competition does not exceed the extent necessary to attain economically justified common goals;* *d) they do not create the possibility of excluding competition in respect of a substantial part of the products concerned."*
Latvia	Competition law of 4 October 2001, as amended by law of 22 April 2004	Section 11(2) *"The Competition Council may permit, or permit with conditions for a specified time period, if according to the procedures specified by the Cabinet the market participants have submitted to the Competition Council a notification regarding agreement and a matter has not been initiated in respect of it, and the agreements referred to in Paragraph one of this Section if it determines that the agreement promotes improvements in the production or sale of goods or economic progress and thereby benefits consumers, and, in addition, such agreement:* *1) does not impose on the market participants concerned restrictions which are not necessary for the achievement of these objectives; and* *2) does not afford the possibility of eliminating competition in a substantial part of the relevant market."*

Lithuania	Law on Competition of 23 March 1999 as amended by law of 15 April 2004.	Article 6. Exemption *"1. Article 5 of this Law shall not apply where the agreement promotes technical or economical progress or improves the production or distribution of goods, and thus creates conditions for consumers to receive additional benefit, also where: 1) the agreement does not impose restrictions on the activity of the parties thereto, which are not indispensable to the attainment of the objectives referred to in this Article; 2) the agreement does not afford contracting parties the possibility to restrict competition in a large share of the relevant market. 2. An agreement complying with terms and conditions of paragraph 1 of this Article shall be effective from the moment of conclusion thereof (ab initio) without any prior decision by the Competition Council. In case of any dispute concerning the compliance of the agreement with the provisions of paragraph 1 of this Article, the burden of proof concerning the compliance shall fall upon the Party to the agreement benefiting from the exemption. 3. The Competition Council shall have a right to pass regulations and define the groups of agreements, as well as conditions under which the agreement shall be deemed in compliance with the conditions of paragraph 1 of this Article."*

Poland	Law of 16 February 2007 on Competition and Consumer Protection	Article 8. *"1. The prohibition of agreements referred to in Article 6, Paragraph 1 shall not apply to agreements which at the same time:* *1) contribute to improvement of the production, distribution of goods or to technical or economic progress;* *2) allow the buyer or user a fair share of benefits resulting thereof;* *3) do not impose upon the undertakings concerned impediments which are not indispensable to the attainment of these objectives;* *4) do not afford these undertakings the possibility to eliminate competition in the relevant market in respect of a substantial part of the goods in question.* *2. The burden of providing evidence to circumstances referred to in Paragraph 1 shall rest upon the undertaking concerned.* *3. The Council of Ministers may, by way of a regulation, exempt from the prohibition referred to in Article 6, Paragraph 1, certain types of agreements which meet the conditions referred to in Paragraph 1 above, taking into consideration the benefits resulting from such types of agreements. In the regulation, the Council of Ministers shall specify:* *1) conditions which are to be satisfied for the agreement to be considered exempted from the prohibition;* *2) clauses, the existence of which in the agreement constitutes the infringement of Article 6;* *3) a period during which the exemption shall apply* *and may specify clauses, the existence of which in the agreement is not considered to infringe Article 6.*"

Romania	Competition law No 21/1996, as last amended in 2004	Article 5 *“(2) Agreements, decisions by associations of undertakings or concerted practices may be excepted from the prohibition stipulated in paragraph 1, if the conditions listed in paragraphs (a)-(d) and one of the conditions listed in paragraph (e) are met cumulatively, as follows:* *a) the positive effects prevail over the negative ones or are sufficient to compensate the restriction of competition caused by the respective agreements, decisions by associations of undertakings or concerted practices;* *b) customers or consumers are assured a benefit corresponding to that realized by the parties from the respective agreement, decision made by an association of undertakings or concerted practice;* *c) the possible restrictions of competition are critical to obtain the expected advantages, and the respective agreement, decision made by an association of undertakings or concerted practice does not impose upon the parties restrictions that are not necessary to attain the objectives mentioned in letter e);* *d) the respective agreement, decision made by an association of undertakings or concerted practice does not allow the undertakings or the associations of undertakings to eliminate competition from a substantial part of the product or service market in question;* *e) the agreement, the decision made by an association of undertakings or concerted practice in question contributes, or may contribute to:* *1. improving the production or distribution of goods, executing work operations or supplying services;* *2. promoting technical or economic progress, improving the quality of goods or services;* *3. consolidating the competitive position of the small and medium-sized undertakings on the domestic market;* *4. charging, over the long run, substantively lower prices to the consumers.* *(3) The exemptions provided for in par. (2) shall be granted by decision of the Competition Council for individual cases of agreements, decisions made by associations of undertakings or concerted practices, and they shall be established through Competition Council regulations for cases of block exemptions, decisions made by associations of undertakings or concerted practices. The undertakings or the associations of undertakings may request individual exemption from the Competition Council, showing that the conditions in par. (2) are met; the regime for requesting and granting individual exemption, deadlines, information to be presented, the period of exemption and the conditions of the individual exemption shall be established through Competition Council regulations and guidelines.* *(4) Categories of agreements, decisions made by associations of undertakings or concerted practices that are exempted from the provisions in par. (1), as well as the criteria and conditions for qualification within the categories, are established through Competition Council regulations.”*

Slovak Republic	Law of 27 February 2001 on Protection of Competition, as last amended in 2004	Article 6 (3) reflects the wording of the Article 81(3) of the EC Treaty Article 6 *"(4) The ban pursuant to Article 4 shall not apply to groups of agreements restricting competition that cannot influence trade between European Union Member States, whose objective or effect is or may be restriction of competition on the domestic market and which meet the conditions for exemption from the ban pursuant to special legislation. (reference made to community block exemptions)* *(5) The Authority shall issue a decision that the exemption referred to in paragraph 4 will not apply to an agreement restricting competition if it meets the conditions according to which the Commission may withdraw an exemption in accordance with special legislation, provided that this agreement restricting competition meets its conditions for exemption from the ban.* *(6) The Authority may ask undertakings to prove that their agreement restricting competition meets the conditions laid down in paragraph 1, 3 or 4."*
Slovenia	Law on the prevention of restriction of competition (2000)	Article 5(3) reflects the wording of the Article 81(3) of the EC Treaty Article 9 (Block exemptions) *"(1) The Government shall specify by decree the categories of agreements referred to in the first paragraph of Article 5 meeting the conditions from the third paragraph of Article 5.* *(2) The decree referred to in the preceding paragraph must specify the categories of agreements to which it shall apply, and in particular:* • *the restrictions or contractual provisions which may or may not be contained in the agreement;* • *the contractual provisions which must be contained in the agreement;* • *other conditions which must be fulfilled.* *(3) The decree shall regulate in particular the following categories of contracts:* • *licensing contracts;* • *contracts on the use of other industrial property rights;* • *know-how contracts;* • *other contracts on the transfer of technology;* • *research and development contracts;* • *specialisation contracts;* • *distribution contracts;* • *franchising contracts;* • *exclusive purchasing contracts;* • *joint venture contracts.*

		(4) Contracts fulfilling the conditions determined in the decree on block exemptions shall not be notified in order to be granted a decision on an individual exemption. *(5) If the effects of an individual agreement are incompatible with the provisions of the third paragraph of Article 5, the Office may use the procedure specified in part VI of this Act to eliminate the benefit of a block exemption."* Article 61 (Block exemptions and the application form for notifying a concentration) *"The Government shall adopt regulations within six months of the entry into force of this Act and shall set out the categories of agreements referred to in the first paragraph of Article 5 fulfilling the conditions referred to in the third paragraph of Article 5, and the content of the application form and elements required for notifying a concentration."*

Annex IV

Variations in the national laws of selected old EU Member States on the scope of exemptions

Country	National legislation	Relevant provisions Where provisions of national laws are reproduced below they result from unofficial translations made available by the authorities of the related Countries
Belgium	Law of 10 June 2006 on the Protection of Economic Competition	**Criteria for exemptions** Exemptions of Article 81(3) of the EC Treaty are reflected in the Article 3 of the law. Beside improvement of production or distribution or the promotion of technical or economic progress, the law adds measures which allow strengthening competitiveness of SMEs on the domestic or international market. **Block exemptions** Article 5 of the law on the application of the EC block exemptions is complemented by Article 50 which lays down provisions for the adoption of domestic block exemptions and the content and duration of such block exemption regulations (the same requirements as those existing in the Council Regulations empowering the European Commission to adopt block exemptions).
France	Code of Commerce (Article L. 420-4)	**Criteria for exemptions** Justifications for exemptions include the economic progress together with the fair share of the resulting benefits for consumers. Creation or maintenance of jobs is understood as an economic progress. The law does not mention the improvement of the production or the distribution and the promotion of the technical progress but grant a specific exemption for organisations of farmers. Concerted practices on volume, quality, marking and prices of agricultural products are authorised as far as they are proportionate to meet the objective of progress. Other exemptions may stem from the consequences of the direct application of specific pieces of legislation. **Block exemptions** Block exemptions, the purpose of which is, in particular, to improve the operation of SMEs may be adopted by decree.

<table>
<tr><td>Germany</td><td>Act against Restraints of Competition</td><td>Criteria for exemptions
Exempted agreements in the § 2 of the Act are the same as those in the EC Treaty.

Block exemptions
European Community block exemptions apply mutatis mutandis. "This shall also apply where the agreements, decisions and practices mentioned therein are inappropriate to affect trade between Member States of the European Community (§ 2.2 of the Act).</td></tr>
<tr><td>Ireland</td><td>Competition Act 2002</td><td>Criteria for exemptions
Criteria to grant exemptions in Section 4 (5) of the Act are the same as those of article 81(3) of the EC Treaty.

Block exemptions
Section 4 (3)
"The Authority may declare in writing that in its opinion a specified category of agreements, decisions or concerted practices complies with the conditions referred to in subsection (5); such a declaration may be revoked by the Authority if it becomes of the opinion that the category no longer complies with those conditions."</td></tr>
<tr><td>The Netherlands</td><td>Act of 22 May 1997 Providing new rules for Economic Competition (version in force as of 1 August 2004)</td><td>Criteria for exemptions
In section 6 (3) of the Act, criteria to grant exemptions are the same as those of article 81(3) of the EC Treaty.

Block exemptions
In Section 15 (1) of the Act, Domestic Block exemptions by Order of the Competition Council may be granted under the same criteria as those laid down under article 80(3) EC Treaty that are reproduced faithfully for this purpose.

Other exemptions in relation to the performance of special tasks
Section 11
"Section 6(1) shall apply to agreements, decisions or practices, as referred to in that section, involving at least one undertaking or association of undertakings entrusted with the provision of services in the public economic interest, by law or by an administrative body, only in so far as the application of the said section does not prevent the performance of the special task entrusted to the said undertaking or association of undertakings."</td></tr>
</table>

UK	Competition Act 1998	**Criteria for exemptions** In Section 2 of the Act, criteria to grant exemptions in are the same as those of article 81(3) of the EC Treaty. The phrase 'of goods' is not included to make consistent with the practice of the European Commission in relation to Article 81(3) that services are also covered by the EC legislation. Section 9 of the Act on the criteria for individual and block exemptions mirrors the Article 81(3) of the EC Treaty (that removed also the word "goods"). **Domestic block exemptions** The Secretary of State may, acting on the Office of Fair Trading' recommendation, makes domestic block exemptions that specify particular categories of agreement which the OFT considers are likely to be exempt from the Chapter I "prohibition" as a result of section 9(1). In practice the Competition Authority does not exercise this power. **Parallel exemptions in relation to EC block exemptions** Where an agreement has no effect on trade between Member States but it would be covered by an EC block exemption regulation if the agreement had an effect on trade between Member States, this agreement benefits from a "parallel exemption".

Annex V

Variations in the national laws of new EU Member States and candidate countries on the duty to notify concerted practices and restrictive agreements

Country	National legislation	Relevant provisions Where provisions of national laws are reproduced below they result from unofficial translations made available by the authorities of the related Countries
Bulgaria	Law on Competition Protection No 52/1998, as last amended by law No 107/2003	***Notification*** Article 11. *"(1) The undertakings may inform the Commission of the existence of agreements, decisions or concerted practices, as referred to in Article 9, paragraph (1), within thirty days following the day of their conclusion, adoption or application.* *(2) The notification under paragraph (1) should contain information about:* *1. the participating undertakings;* *2. the legal form of the agreement or decision, or the type of concerted practice;* *3. the overall share of the participating undertakings on the market concerned.* *(3) The notification shall contain requirement for exemption from prohibition by the order of Art. 13."* ***Appraisal of Agreements, Decisions or Concerted Practices*** Article 12 *"(1) Within two months after the receipt of the notification, the Commission shall issue a decision whereby it shall declare:* *1. that no grounds exist for the application of the prohibition referred to in Article 9;* *2. a prohibition of the agreement, decision or concerted practice.* *(2) Pending the decision of the Commission under paragraph 1 any action in fact or in law in regard of the notification shall be prohibited."*

Croatia	Competition Act of 15 July 2003	Article 11 *“(3) Agreements fulfilling the conditions laid down in Article 10 of this Act do not need to be submitted to the Agency for assessment in respect of individual exemption under Article 12 of this Act.* *(4) The Agency may, ex officio, initiate the proceedings to assess the compatibility of a particular agreement referred to in paragraph (3) of this Article, if it should find that the particular agreement, in itself or due to the cumulative effect with other similar agreements in the relevant market, does not comply with the conditions set out in Article 10 of this Act.”* Article 12 *“(1) At the request of the parties to the agreement in question, the Agency may take a decision granting individual exemption from the application of the provision of Article 9 paragraph (1) of this Act, if that particular agreement fulfils the conditions set out in Article 10 paragraph (1) of this Act.* *(2) The Agency shall decide upon the exemption referred to in paragraph (1) of this Article, its decision to be applicable for a limited period of time, which as a rule may not exceed five years.”*
Czech Republic	Act of 4 April 2001 on the Protection of Competition, as last amended by Act of 4 April 2007	The law does not envisage requests for individual exemptions. The law mentions only the withdrawal of the benefits of block exemptions.
Estonia	Competition Act of Estonia of 5 June 2001, including amendments until May 2005	Since the law does not set out procedural rules for individual exemptions it seems that only block exemptions apply.
Hungary	Competition Act of 25 June 1996, as amended till 1 January 2007	Since the law does not set out procedural rules for individual exemptions it seems that only block exemptions apply. Article 20 *“The burden of proving that an agreement is exempted pursuant to Article 16 or Article 17 from the prohibition shall rest on the person claiming the benefit of exemption.”*

Latvia	Competition law of 4 October 2001, as amended by law of 22 April 2004	It seems that individual exemptions/opinions are maintained (power of the Competition Council to examine submitted notifications) beside block exemptions.
Lithuania	Law on Competition of 23 March 1999, as amended by law of 15 April 2004	In the last version of the law, there is no system to request and to grant individual exemptions. The law mentions only the withdrawal of the benefits of block exemptions.
Poland	Law of 16 February 2007 on Competition and Consumer Protection	The law does not provide for notification of agreements or negative clearance. The burden of proof that agreements meet the conditions of exemptions rests with the concerned enterprises.
Romania	Competition law No 21/1996, as last amended in 2004	Article 5 *"(5) Agreements, decisions made by associations of undertakings or concerted practices belonging to any of the categories exempted from the provisions of paragraph. (1) are deemed legal, without the obligation to notify or to obtain a decision from the Competition Council. The undertakings or the associations of undertakings alleging the block exemption are held to prove they meet the conditions and the criteria provided in pars. (3) and (4)".*
Slovak Republic	Law No 136/2001 of 27 February 2001 on Protection of Competition, as last amended in 2004	Article 6 *"(6) The Authority may ask undertakings to prove that their agreement restricting competition meets the conditions laid down in paragraph 1, 3 or 4.* *(7) Undertakings may ask the Authority to issue an opinion on whether or not their draft agreement or draft decision by an association of undertakings constitutes an agreement restricting competition. For this purpose, the Authority shall not assess a draft agreement between undertakings or a draft decision by an association of undertakings pursuant to paragraphs 1, 3 or 4. The Authority shall issue an opinion within 30 working days following the day of delivery of the request; in complicated cases it shall issue an opinion within 60 working days."*
Slovenia	Law on the prevention of restriction of competition (2000)	Since the amendments introduced in 2004 the provisions of the law concerning procedures for awarding a negative clearance or individual exemptions are repealed.

Annex VI

Variations in the national laws of new EU Member States and candidate countries on the definition of abuse of dominant position

Reminder

Article 82 of the EC Treaty:

"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Country	National legislation	Relevant provisions Where provisions of national laws are reproduced below they result from unofficial translations made available by the authorities of the related Countries
Bulgaria	Law on Competition Protection No 52/1998 as last amended by law No 107/2003	Article 17 *"(1) The position of an undertaking which, in view of its market share, financial resources, possibilities for access to the market, level of technology and economic relations with other undertakings may hinder competition in the market concerned, since it is independent of its competitors, suppliers or purchasers, shall be dominant.* *(2) An undertaking shall be considered to have a dominant position if it has a market share higher than 35 per cent of the market concerned, unless the requirements provided for in paragraph (1) exist."* Article 18 The prohibition against abuse of dominant position is expressed in the same terms as in the EC Treaty,

		However, among the cases that are listed, Article 18 (5) of the law adds "*unjustified termination of established long-term trade relations or unjustified refusal to conclude a contract when the possibilities for production or supply are available"*
Croatia	Competition Act of 15 July 2003	Definition of abuse of dominant position (Article 16) is the same as in the EC Treaty
Czech Republic	Act of 4 April 2001 on the Protection of Competition, as last amended by Act of 4 April 2007	Article 10 (3) lays down a refutable presumption of abuse of dominant position: *"Unless proven contrary by means of the indices pursuant to paragraph 2 above, an undertaking or undertakings in joint dominance shall be deemed not to be in dominant position, if its/their share in the relevant market achieved during the examined period does not exceed 40%."*. Art 11(1) provides for more detailed conditions than those laid down in the EC Treaty. It prohibits in particular (Art 11.1.a) "*direct or indirect enforcement of unfair conditions in agreements with other participants in the market, especially enforcement of performance, which is at the time of conclusion of contract conspicuously inadequate to the counter-performance provided"* and (Art 11.1.d) "*termination or limitation of production, sales or research and development to the prejudice of consumers"*. In addition, Art 11(1) adds new categories of prohibited practices: *"e) consistent offer and sale of goods for unfairly low prices, which results or may result in distortion of competition,* *f) refusal to grant other undertakings access, for a reasonable reimbursement, to own transmission grids or similar distribution networks or other infrastructure facilities, which are owned or used on other legal grounds by the undertaking in dominant position, if other undertakings are unable for legal or other reasons to operate in the same market as the dominant undertakings without being able to jointly use such facilities, and such dominant undertakings fail to prove, that such joint use is unfeasible for operational or other reasons or that they cannot be reasonably requested to enable such use; the same proportionately applies also to the refusal of access, for a reasonable reimbursement, of other undertakings to the use of the intellectual property or access to the networks owned or used on other legal grounds by the undertaking in a dominant position, if such use is necessary for participation in competition in the same market as the dominant undertakings or in any other market."*

Estonia	Competition Act of Estonia of 5 June 2001, including amendments until May 2005	§ 13. ***Undertaking in dominant position on market*** *"(1) For the purposes of this act, an undertaking in a dominant position is an undertaking or several undertakings operating in the same market whose position enables it/them to operate in the market to an appreciable extent independently of competitors, suppliers and buyers. Dominant position is presumed if an undertaking or accounts for at least 40 per cent of the turnover in the market or several undertakings operating in the same market if it/they account for at least 40 per cent of the turnover in the market."* *(2) Undertakings with special or exclusive rights or in control of essential facilities specified in §§ 14 and 15 of this Act are also undertakings in a dominant position."* § 14. ***Undertaking with special or exclusive rights*** *"(1) For the purposes of this Act, special or exclusive rights are rights granted to an undertaking by the state or a local government which enable the undertaking to have a competitive advantage over other undertakings in a goods market or to be the only undertaking in the market.* *(2) The procedure for the organisation of public competitions for granting special or exclusive rights shall be established by the Government of the Republic. If legislation on the basis of which special or exclusive rights are granted does not provide the procedure for the grant of a special or exclusive right, a public competition for the grant of such right shall be organised pursuant to the procedure established by the Government of the Republic."* § 15. ***Undertaking controlling essential facilities*** *"An undertaking is deemed to control essential facilities or to have a natural monopoly if it owns, possesses or operates a network, infrastructure or any other essential facility which other persons cannot duplicate or for whom it is economically inexpedient to duplicate but without access to which or the existence of which it is impossible to operate in the goods market."* § 17. ***Restrictions on activities of undertakings with special or exclusive rights or in control of essential facilities*** *"(1) The state agency or local government which grants special or exclusive rights to an undertaking may designate the prices to be used or impose other conditions or obligations on the undertaking so that the buyers of the goods of such undertaking or sellers of goods to such undertaking are not placed in a substantially worse situation than they would be if competition were present in the corresponding area of activity.*

		(2) A state agency prescribed by law, the Government of the Republic or, in the case of an undertaking in control of essential facilities which provides services within the territory of a local government, the local government may designate the prices to be used by an undertaking in control of essential facilities or impose other conditions or obligations on the undertaking so that the buyers of the goods of such undertaking or sellers of goods to such undertaking are not placed in a substantially worse situation than they would be if competition were present in the corresponding area of activity. *(3) If the procedure for price regulation applicable to undertakings with certain categories of special or exclusive rights or in control of essential facilities has not been established by an Act or legislation established on the basis thereof, the Government of the Republic may establish the corresponding procedure.* *(4) If the procedure for price regulation applicable to undertakings with special or exclusive rights or in control of essential facilities which provide services within the territory of a local government has not been established by an Act or legislation established on the basis thereof or if the procedure does not extend to such undertakings, the local government may establish the corresponding procedure."* § 18. ***Obligations of undertakings with special or exclusive rights or in control of essential facilities*** *"(1) An undertaking with special or exclusive rights or in control of an essential facility shall:* *1) permit other undertakings to gain access to the network, infrastructure or other essential facility under reasonable and non-discriminatory conditions for the purposes of the supply or sale of goods;* *2) draw a clear distinction in its accounts between primary and secondary activities (for example production, transportation, marketing and other activities of the undertaking), thereby ensuring accounting transparency.* *(2) An undertaking with special or exclusive rights or in control of an essential facility may refuse to grant other undertakings access to the network, infrastructure or other essential facility if the refusal is based on objective reasons, including cases where:* *1) the safety and security of the equipment connected with the network, infrastructure or other essential facility or the efficiency and security of the operation of such network, infrastructure or facility are endangered;* *2) maintenance of the integrity or the inter-operability of the network, infrastructure or other essential facility is endangered;* *3) equipment to be connected to the network, infrastructure or other essential facility is not in conformity with the established technical standards or rules;* *4) the undertaking applying for access lacks the technical and financial capability and resources to provide services efficiently and safely to the necessary extent through or with the assistance of the network, infrastructure or other essential facility;* *5) the undertaking applying for access does not hold the permit prescribed by law for the corresponding*

		activity; *6) as a result of such access, data protection provided by law is no longer ensured."* § 16. ***Abuse of dominant position*** Compared to the provisions of the EC Treaty, the law adds new categories of prohibited practice: *"5) forcing an undertaking to concentrate, enter into an agreement which restricts competition, engage in concerted practices or adopt a decision together with the undertaking or another undertaking;* *6) unjustified refusal to sell or buy goods;* *7) failure by an undertaking with special or exclusive rights or in control of essential facilities to perform the obligation specified in clause 18 (1) 1) of this Act."*
Hungary	Competition Act of 25 June 1996, as amended till January 2007	The list of cases liable to be considered as abuse of dominant position under the article 21 of the law is more developed than in the EC Treaty. Same cases as those mentioned in the EC Treaty: *"a) in business relations, including the application of standard contractual terms, to set unfair purchase or selling prices or to stipulate in any other manner unjustified advantages or to force the other party to accept disadvantageous conditions;* *b) to limit production, distribution or technical development to the prejudice of consumers;* *f) to make the supply or acceptance of goods subject to the supply or acceptance of other goods, furthermore to make the conclusion of contracts subject to the acceptance of obligations which, by their nature or according to commercial usage, do not belong to the subject of such contracts;"* New categories of prohibited practice or extension of categories mentioned in the EC Treaty: *"c) to refuse, without justification, to create or maintain business relations appropriate for the type of transaction;* *d) to influence the business decisions of the other party in order to gain unjustified advantages;* *e) to withdraw, without justification, goods from circulation or withhold them from trade prior to a price increase or with the purpose of causing a price increase or in any other manner which may possibly produce unjustified advantages or to cause competitive disadvantage;* *(...)* *g) in the case of transactions which are equivalent in terms of their value or character to discriminate, without justification, against trading parties including in relation to the application of prices, periods of payment, discriminatory selling or purchase terms and conditions or methods thereby placing certain*

		trading parties at a competitive disadvantage; *h) to set extremely low prices which are not based on greater efficiency in comparison with that of competitors and which are likely to drive out competitors from the relevant market or to hinder their market entry;”* *i) to hinder, without justification, market entry in any other manner; or* *j) to create, without justification, disadvantageous market conditions for competitors, or to influence their business decisions in order to obtain unjustified advantages.* The law provides also criteria for the assessment: Article 22 (2) *“In assessing whether a dominant position exists, the following factors shall be considered, in particular:* *a) the costs and risks of entry to and exit from the relevant market, and the technical, economic and legal conditions that have to be met;* *b) the property status, financial strength and profitability of the undertaking or the group of undertakings (Article 15(2)), and the trends in their development;* *c) the structure of the relevant market, the comparative market shares, the conduct of market participants and the economic influence of the undertaking or the group of undertakings on the development of the market.”*
Latvia	Competition law of 4 October 2001, as amended by law of 22 April 2004	The list of cases liable to be considered as an abuse of dominant position is more developed than in the EC Treaty. Under the Section 13 “Prohibition of the Abuse of Dominant Position” the law lays down new categories of prohibited practices: *“1) refusal to enter into transactions with other market participants or amending the provisions of a transaction without an objectively justifiable reason,* *(…)* *3) imposition of provisions according to which the entering into, amendment or termination of transactions with other market participants makes such participants dependent on them or these market participants accept such additional obligations as, by their nature and commercial usage, have no connection with the particular transaction.”*
Lithuania	Law on Competition of 23 March 1999, as amended by law of 15 April 2004	Article 9 on the prohibition of dominant position mirrors the Article 82 in the EC Treaty.

Poland	Law of 16 February 2007 on Competition and Consumer Protection	Article 4 (10) on definitions: *"dominant position shall mean a position of the undertaking which allows it to prevent the efficient competition within a relevant market thus enabling it to act in a significant degree independently of competitors, contracting parties and consumers; it is assumed that the undertaking holds a dominant position if its market share exceeds 40%.".* The list of cases liable to be assessed as an abuse of dominant position is more developed than in the EC Treaty. Under the Article 9 (2), the law lays down new categories of prohibited practices: *"1) direct or indirect imposition of unfair prices, including predatory prices or prices glaringly low, delayed payment terms or other trading conditions;* *(...)* *5)counteracting formation of conditions necessary for the emergence or development of competition;* *6) imposition by the undertaking of onerous agreement terms and conditions, yielding to this undertaking unjustified profits;* *7) market sharing according to territorial, product, or entity-related criteria."*
Romania	Competition law No 21/1996, as last amended in 2004	The list of cases liable to be considered as an abuse of dominant position is more developed than in the EC Treaty. Under the Article 6, the law lays down new categories of prohibited practices: *"a) (...) refusing to deal with certain suppliers or customers;* *(...)* *e) importing such products and services that determine the overall price and tariff level in the economy, without the usual bids and technical-commercial negotiations;* *f) charging excessive prices or charging predatory prices, below costs, with the aim of driving competitors out of the market or of selling on the export below production costs, recovering differences by imposing increased prices to the domestic consumers;* *g) taking advantage of the state of economic dependence of another undertaking towards such an undertaking or undertakings and who does not have an alternative solution under equivalent conditions, as well as breaking contract relations for the sole reason that the partner is refusing to submit to certain unjustified commercial conditions."*

Slovak Republic	Law of 27 February 2001 on Protection of Competition, as last amended in 2004	Article 8 (2) of the law is broadly expressed in similar terms to those used in the Article 82 of the EC Treaty but it adds a new category of prohibited practice: the "*temporary abuse of economic power with a view to excluding competition.*"
Slovenia	Law on the prevention of restriction of competition (2000)	Article 10 of the law defines the abuse of dominant position in the same terms as in the EC Treaty except with regard to the following: *"(2) A dominant position in the market shall be deemed to be a position where with respect to relevant goods or services an undertaking either has no competitors or the existing competition is insignificant, or it has a substantially better position vis-a-vis competitors in terms of market share, financing possibilities, possibilities for purchase or sale, or when an undertaking has a substantially better position with regard to facts which impede other undertakings upon their entry into the market.* *(3) An undertaking shall be deemed to have a dominant position on the market if its share of purchasing or selling goods or services in the Republic of Slovenia exceeds 40 per cent threshold.* *(4) Two or more undertakings shall be deemed to have a dominant position on the market if no significant competition exists between them, and if their aggregate share of purchasing or selling goods or services in the Republic of Slovenia exceeds 60 per cent threshold.*

Annex VII

Variations in the national laws of selected old EU Member States on the definition of abuse of dominant position

Country	National legislation	Relevant provisions Where provisions of national laws are reproduced below they result from unofficial translations made available by the authorities of the related Countries
Belgium	Law of 10 June 2006 on the Protection of Economic Competition	Article 3 of the law mirrors the article 82 of the EC Treaty
France	Code of Commerce (Article L. 420-2)	There is no general definition of the abuse of a dominant position but the provision of an indicative list of prohibited practices which does not encompass the wide range of situations captured by the article 82 of the EC Treaty: • refusal to sale products or a full a range of product (assortment) • linked sales • discriminatory sales • break of relationship based on unjustified requirements
Germany	Act against Restraints of Competition	§ 19 ***Abuse of a Dominant Position*** After providing for the definition of the abuse of a dominant position, the law sets out a presumption: *"(3) An undertaking is presumed to be dominant if it has a market share of at least one third. A number of undertakings is presumed to be dominant if it:* *1. consists of three or fewer undertakings reaching a combined market share of 50 percent, or* *2. consists of five or fewer undertakings reaching a combined market share of two thirds,* *unless the undertakings demonstrate that the conditions of competition may be expected to maintain substantial competition between them, or that the number of undertakings has no paramount market position in relation to the remaining competitors."* The exemplative list of article 82 EC Treaty is not reproduced. It is replaced by another list which pursues the same objectives as the sub-items (a) and (c) of the second paragraph of article 82 of the EC Treaty (fixing of prices, application of dissimilar conditions) and creates a new category of dominant position, the restricting access to networks or other infrastructure facilities:

		“(4) *An abuse exists in particular if a dominant undertaking as a supplier or purchaser of certain kinds of goods or commercial services:* *1. impairs the ability to compete of other undertakings in a manner affecting competition in the market and without any objective justification;* *2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition prevails shall be taken into account;* *3. demands less favourable payment or other business terms than the dominant undertaking itself demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation;* *4. refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate remuneration, provided that without such concurrent use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market; this shall not apply if the dominant undertaking demonstrates that for operational or other reasons such concurrent use is impossible or cannot reasonably be expected.”*
Ireland	Competition Act 2002	The prohibition of the abuse of a dominant positions in subsection (1) of Section 5 is worded in the same terms as in the EC Treaty.
The Netherlands	Act of 22 May 1997 Providing new rules for Economic Competition (version in force as of 1 August 2004)	Apart from a short definition of the abuse of a dominant position given with other definitions applicable in the Act, Section 24 of the Act just rules: *“1. Undertakings are prohibited from abusing a dominant position.* *2. The implementation of a concentration, as described in section 27, shall not be deemed to be an abuse of a dominant position.”* Significantly, the concept of dominant position is cleared linked to the concept of Service of General Economic Interest in the Section 25 of the Act: *“1. The Director-General may, on request, declare section 24(1) inoperative in respect of a designated practice, in so far as the application of section 24(1) prevents the provision of a service in the public economic interest, entrusted to an undertaking by law or by an administrative body.* *2. A decision, as referred to subsection (1), may be issued subject to restrictions; a decision may be issued subject to conditions.”*
UK	Competition Act 1998	In the Section 18 of the Act, the indicative list of cases of abuse of a dominant position is expressed with the same wording as the article 82 of the EC Treaty.

Annex VIII

Variations in the national laws of new EU Member States and candidate countries on the definition of the relevant market

Reminder

In the EC legislation (Commission Notice 97/C 372/03) the main elements for the determination of the relevant market relate to the analysis of competitive constraints: demand substitutability, supply substitutability and potential competition by taking each time into consideration both product and geographic dimensions.

Country	National legislation	Relevant provisions Where provisions of national laws are reproduced below they result from unofficial translations made available by the authorities of the related Countries
Bulgaria	Law on Competition Protection No 52/1998, as last amended by law No 107/2003	No general definition in the law. Methodology on the Investigation and Definition of the Market Position of Undertakings in the Relevant Market is set out in the secondary legislation.
Croatia	Competition Act of 15 July 2003	Article 7 refers to Regulations to be adopted by the Government. The Regulation on the Definition of Relevant Market of 15 April 2004 is a simplified version of the methodology of the European Commission with contains the core elements of this methodology.
Czech Republic	Act of 4 April 2001 on the Protection of Competition, as last amended by Act of 4 April 2007	Article 2(2 of the law lays down a very concise definition: *" Relevant market shall be deemed to mean the market of goods, which are identical, comparable or mutually interchangeable from the point of view of its characteristics, price and their intended use in the area, where the competition conditions are sufficiently homogenous and which can be clearly distinguished from neighbouring areas".*

Variations in the national laws of new EU Member States and candidate countries on the definition of the relevant market (continued)

Estonia	Competition Act of Estonia of 5 June 2001, including amendments until May 2005	In Chapter 1 "General provisions, "goods market" are defined as follows: "*(1) A goods market is an area covering, inter alia, the whole of the territory of Estonia or a part thereof where goods which are regarded as interchangeable or substitutable (hereinafter substitutable) by the buyer by reason of price, quality, technical characteristics, conditions of sale or use, consumption or other characteristics are circulated.* *(2) In order to define a goods market, the turnover of substitutable goods shall, as a rule, be assessed in money. If this is not possible or expedient, the market size and the market shares of the undertakings participating in the goods market may be assessed on the basis of other comparable indicators."*
Hungary	Competition Act of 25 June 1996, as amended till 1 January 2007	Article 14 *"(1) The relevant market shall be defined by taking into account the goods that are subject to the agreement and the geographical area concerned.* *(2) In addition to the goods, which are subject to the agreement any goods that can reasonably be substituted for them, in view of their intended use, price and quality and the terms and conditions of the fulfilment (demand-side substitutability) and the aspects of supply-side substitutability shall be taken into account.* *(3) The term „geographical area" means the territory outside which:* *a) a consumer is unable to purchase goods or is able to purchase them only under considerably less favourable conditions; or* *b) the seller of goods is unable to sell goods or is able to sell them only under considerably less favourable conditions."*

Variations in the national laws of new EU Member States and candidate countries on the definition of the relevant market (continued)

Latvia	Competition law of 4 October 2001, as amended by law of 22 April 2004	In Section 1 of the law “Terms used in the law”: *“3) relevant geographical market – a geographical territory in which competition conditions in a relevant market of a good are sufficiently the same for all participants in such market and therefore this territory can be separated from other territories;* *4) relevant market – a market of a concrete good which is evaluated in connection with a relevant geographical market;* *5) relevant market of a good – a market of a particular good which also includes all those goods which may be substituted for this specific good in a relevant geographical market, taking into consideration the factor of substitution of demand and supply, the specific features of the good and its utilisation characteristic.”*
Lithuania	Law on Competition of 23 March 1999, as amended by law of 15 April 2004	Article 3 of the law introduces the two dimensions of the concept of relevant market (product dimension and geographic dimension): *“Relevant market” means the market of certain goods in a relevant geographic territory.* *“Product market” means the aggregate of goods which from the consumers’ point of view are appropriate substitutes according to their characteristics, application and prices.* *“Geographic territory (geographic market)” means the territory in which the conditions of competition in a relevant product market are in essence similar to all undertakings and which, taking into consideration said fact, may be distinguished from adjacent territories.”* More detailed considerations are set out in the secondary legislation (still in force after accession as far the definition of the relevant market is concerned).

Variations in the national laws of new EU Member States and candidate countries on the definition of the relevant market (continued)

Poland	Law of 16 February 2007 on Competition and Consumer Protection	Article 4 (9) on "Definitions": *"relevant market shall mean a market of goods, which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes, and are offered in the area in which, by reason of their nature and characteristics, the existence of market access barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous".*
Romania	Competition law No 21/1996. as last amended in 2004	The relevant market is defined in guidelines adopted by the Competition Council.
Slovak Republic	Law of 27 February 2001 on Protection of Competition, as last amended in 2004	Article 3 *"(3) Relevant market means a geographical and temporal concurrence of the supply of and demand for goods that are identical or mutually interchangeable with respect to the satisfaction of certain needs of users. (4) A relevant market in goods shall comprise identical or mutually interchangeable goods that can satisfy a certain need of users. (5) Mutually interchangeable goods shall be goods that are interchangeable, especially from the viewpoint of their physical and technical characteristics, price, and purpose of use. (6) Relevant geographical market shall be defined as a territory in which the conditions for competition are homogeneous to such an extent that this territory can be separated from other territories with different conditions for competition."*
Slovenia	Law on the prevention of restriction of competition (2000)	There is no definition in the law. The concept is developed in the secondary legislation: "Instructions on the Method and Conditions for Defining the Relevant Market".

Annex IX

Variations in the national laws of new EU Member States and candidate countries on the manner agreements of minor importance are addressed

Reminder

In the EC legislation (Commission Notice - last version referenced 2001/C 368/07) the criteria for exemption under the “de minimis” rules” are as follows:

Are deemed not to appreciably restrict competition the agreements for which the aggregate market share held by the parties on the market affected by this agreement is less than 10% where the parties are potential or actual competitors or 15% where the parties are not competitors. The two thresholds above are reduced to 5% for agreements having a cumulative effect (parallel networks of agreements).

By contrast there are no thresholds for agreements between small and medium-sized enterprises. SMEs are defined by the Commission Recommendation of 3 April 1996 (for the purpose of the application of the EC legislation) as having fewer than 250 employees, an annual turnover not exceeding EUR 40 million and an annual balance-sheet not exceeding EUR 27 million.

The exemption does not apply to agreements between competitors aimed at the fixing of selling prices, and/or the limitation of production or sales, and/or the allocation of markets or consumers and does not apply either to agreements between non-competitors relating to minimum or fixed sale price, and/or imposing some restrictions relating to sales into an exclusive territory or to an exclusive consumer group and/or, in the case of a selective distribution system, agreements restricting active or passive sales to end users or cross-supplies between distributors, and/or restrictions imposed to suppliers of components of a final product to sale those components as spare-parts for end users and repairers.

Variations in the national laws of new EU Member States and candidate countries on the manner agreements of minor importance are addressed
(continued)

Country	**National legislation**	**Relevant provisions** Where provisions of national laws are reproduced below they result from unofficial translations made available by the authorities of the related Countries
Bulgaria	Law on Competition Protection No 52/1998 as last amended by law No 107/2003	Article 10: *"(1) The prohibition referred to in Article 9, paragraph (1) shall not apply to agreements, decisions or concerted practices of negligible effect on competition.* *(2) The effect shall be insignificant when the aggregate share of the undertakings participating on the market of goods or services, forming the subject matter of the agreement, the decision or the concerted practice, does not exceed:* *1. five per cent of the relevant market, where the participants are competitors;* *2. ten percent of the relevant market, when the participants are not competitors;* *(3) Para 1 shall not apply when the agreements, decisions and concerted practices have as their object or effect in:* *1. directly or indirectly fixing of prices or other trading conditions;* *2. sharing of markets or sources of supply*"
Croatia	Competition Act of 15 July 2003	Article 13: conditions to be determined by secondary legislation (Government Regulation upon proposal of the Competition Council). Regulation adopted on 15 April 2004 is closely modelled on the European Commission Notice 2001/C 368/07) although the structure of the text is organised differently.

Variations in the national laws of new EU Member States and candidate countries on the manner agreements of minor importance are addressed
(continued)

Czech Republic	Act of 4 April 2001 on the Protection of Competition, as last amended by Act of 4 April 2007	In addition to the applicability of Community Block exemptions the Act provides: Article 6 *“(1) The prohibition of agreements pursuant to Article 3(1) shall not apply to:* *a) a horizontal agreement where the combined share in the relevant market of the parties to the agreement does not exceed 10%,* *b) a vertical agreement where the combined share in the relevant market of the parties to the agreement does not exceed 15%,* *c) agreements of sales organizations and associations of agricultural producers on sale of unprocessed agricultural commodities.* *(2) The exemption from the prohibition of agreements pursuant to paragraph 1 shall not apply to the following agreements, even though they fulfil conditions laid down in paragraph 1:* *a) horizontal agreements on direct or indirect price fixing, restriction or control of production or sales or division of market or sources of supply or customers,* *b) vertical agreements on direct or indirect price fixing relating to resale of goods by the purchaser or granting the purchaser full protection for such resale in a defined market,* *c) individual agreements, forming a part of system of agreements pertaining to identical, comparable or substitutable goods, provided that* • *the aggregate share in the relevant market of the parties to agreements forming such system, where at least one and the same undertaking is party to all these agreements, exceeds percentage limits set in paragraph 1 above, or* • *the system of vertical or mixed agreements restricts access to the relevant market for undertakings which are not parties to such agreements and the competition in the relevant market is significantly restricted by the cumulative effect of parallel networks of similar vertical or mixed agreements entered into for the purpose of distribution of identical, comparable or substitutable goods provided the combined share of parties to the horizontal agreement or the share of any of the parties to the vertical agreement exceeds 5% in the relevant market.”*

Variations in the national laws of new EU Member States and candidate countries on the manner agreements of minor importance are addressed
(continued)

Estonia	Competition Act of Estonia of 5 June 2001, as last amended in May 2005	§ 5. of the Act: *"(1) The provisions of clauses 4 (1) 4)–6) of this Act do not apply to agreements, practices and decisions of minor importance.* *(2) Agreements, practices or decisions are considered to be of minor importance if the combined market share of the total turnover of the undertakings which enter into the agreement, engage in concerted practices or adopt the relevant decision does not exceed:* *1) 15 per cent for each party of in the case of a vertical agreement, practice or decision;* *2) 10 per cent in total for all parties of a horizontal agreement, practice or decision;* *3) 10 per cent in the case of an agreement, practice or decision which includes concurrently the characteristics of both vertical and horizontal agreements, practices or decisions."*
Hungary	Competition Act of 25 June 1996, as last amended on 1 January 2007	Article 13: *"(1) Agreements, which are of minor importance, shall not be prohibited.* *(2) An agreement shall be deemed to be of minor importance if the joint share of the participating undertakings and undertakings which are not independent of them does not exceed ten per cent on the relevant market unless its object is* *a) to fix, directly or indirectly, purchase or selling prices between competitors, or* *b) to share markets between competitors.* *(3) The market share must not exceed ten per cent for as long as the agreement is in force, or should it be in force for more than one year, in the particular calendar year.* *(4) Notwithstanding the provisions set out in Sections (1) to (3), agreements shall be caught by the prohibition where competition is significantly prevented, restricted or distorted by the cumulative effect of those agreements and similar other agreements on the relevant market. The Hungarian Competition Authority may establish during the course of its proceedings that such an agreement falls under the prohibition. In such cases no fines may be imposed."*
Latvia	Competition law of 4 October 2001, as amended by law of 22 April 2004	Block exemptions to be adopted by way of Regulations.

Variations in the national laws of new EU Member States and candidate countries on the manner agreements of minor importance are addressed
(continued)

Lithuania	Law on Competition of 23 March 1999, as amended by law of 15 April 2004	Not mentioned in the law but included in block exemptions set out in the secondary legislation.
Poland	Law of 16 February 2007 on Competition and Consumer Protection	Article 7: *"1. The prohibition of agreements referred to in Article 6, Paragraph 1 shall not apply to agreements concluded between:* *1) competitors whose combined market share in the calendar year preceding the conclusion of the agreement does not exceed 5%;* *2) undertakings which are not competitors, if the market share of any of them in the calendar year preceding the conclusion of the agreement does not exceed 10%.* *2. The provisions of Paragraph 1 shall not apply to cases specified in Article 6, Paragraph 1, Subparagraphs 1 to 3 and Subparagraph 7."*
Romania	Competition law No 21/1996 as last amended in 2004	Article 8: *"(1) The provisions of Arts. 5 and 6 are not applicable to undertakings or groups of undertakings if their turnover for the fiscal year prior to the alleged anticompetitive behavior does not exceed the threshold annually set by the Competition Council, and:* *- if the market share of the undertakings or the group of undertakings involved in the agreement, the decision made by an association of undertakings or the concerted practice does not exceed 5% on any of the relevant affected markets, for cases of agreements, the decisions made by associations of undertakings of concerted practices among competing undertaking; or* *- if the market share of each undertaking involved in the agreement, the decision made by an association of undertakings or the concerted practice does not exceed 10% on any of the relevant affected markets, for cases of agreements, the decisions made by associations of undertakings of concerted practices among undertakings which do not compete."*

Variations in the national laws of new EU Member States and candidate countries on the manner agreements of minor importance are addressed
(continued)

Slovak Republic	Law No 136/2001 of 27 February 2001 on Protection of Competition, as last amended in 2004	Article 6: *“(1) The ban pursuant to Article 4 shall not apply to an agreement restricting competition where the combined market share of the parties thereto or the share of neither of the respective parties exceeds 10% of the total share for goods in question on the relevant market of the Slovak Republic, except for:* *a) agreements restricting competition referred to in Article 4 (3) (a) to (c); or* *b) restriction of competition by means of the cumulative effect of agreements restricting competition which contain a similar type of competition restriction and lead to similar effects in the relevant market, and their combined share exceeds 10% of the total share for goods in question in the relevant market.”*
Slovenia	Law on the prevention of restriction of competition (2000)	Article 6: *“(1) The first paragraph of Article 5 shall not apply to agreements of minor importance.* *(2) Agreements between undertakings whose aggregate market share of the relevant products or services, including the products and services of both controlled and controlling undertakings, does not exceed 10 per cent threshold where the agreement is made between undertakings operating at the same level of production or trading (»horizontal agreements«), or 15 per cent threshold where the agreement is made between undertakings operating at different levels of production or trading (»vertical agreements«) shall be deemed to be agreements within the meaning of the preceding paragraph. In the case of mixed horizontal-vertical agreements or where it is difficult to determine whether an agreement is horizontal or vertical, the 10 per cent threshold shall be applicable.”*

Annex X

Variations in the national laws of new EU Member States and candidate countries on the threshold for prior notification and appraisal of concentrations

Reminder

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings:

A concentration has to be notified to the European Commission:
- where the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 billion **and,**
- where the aggregate turnover in the EU of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned generates more than two thirds of its aggregate EU-wide turnover within a single Member State.

or

- where the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2.5 billion;

or

- where in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million and the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million. **and,**
- the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned generates more than two thirds of its aggregate EU-wide turnover in one and the same Member State.

Country	National legislation	**Relevant provisions** Where provisions of national laws are reproduced below they result from unofficial translations made available by the authorities of the related Countries
Bulgaria	Law on Competition Protection No 52/1998, as last amended by law No 107/2003	**Prior notification to the Commission on Competition and State Aid** Article 24(1) During the year preceding the concentration the combined aggregate turnover of the participants in the concentration on the market concerned in the territory of Bulgaria is more than BGN 15 million (approximately EUR 7.67 million in 2003).

		Appraisal of concentrations Article 27(1) Are taken into consideration *“circumstances, such as: the position of the undertakings on the market concerned before and after the concentration, their economic and financial power, access to supply and markets for the relevant goods and services, the legal or other barriers to entry the markets”.* Article 28(2) *“The Commission may authorise a concentration which, although creating or strengthening a dominant position, aims at modernisation of production or of the economy as a whole, improvement of the market structures, attraction of investments, creation of new jobs, better satisfying of the interests of the consumers, and as a whole outweighs the negative impact on competition on the market concerned”.*
Croatia	Competition Act of 15 July 2003	**Prior notification to the Competition Agency** Art 22(4) During the year preceding the concentration: • The combined aggregate turnover “in the global market” of the participants in the concentration is at least 1 billion Kuna (approximately EUR 133 million in 2003) **and**; • The total domestic turnover of each of at least two parties to the concentration is at least 100,000,000.00 Kuna (approximately EUR 13.3 million in 2003). **Appraisal of concentrations** Article 25(2): *“In the course of the assessment of concentration, the Agency shall take into consideration possible advantages and effects that would occur in the case of implementation of concentration, as well as probable hindrances to enter the market, in particular:* *1. the structure of the relevant market, actual and possible future competitors in the relevant market, supply and the potential market supply, costs, risks, technical, economic and legal conditions necessary to enter or to withdraw from the relevant market, possible effects of the concentration concerned on competition in the relevant market;* *2. market share and position, economic and financial power, business operations of the undertaking concerned in the relevant market, internal and external advantages for the parties to concentration in relation to their competitors, and possible changes in business operations of the parties to concentration, following the completion of the transaction;* *3. the effects of the concentration on other undertakings, especially relating to the consumer benefit, as well as other objectives and positive effects of the proposed concentration, such as: decrease in prices of goods and/or services, shorter distribution courses, lowering of transportation, distribution and other costs, specializing in production, and other benefits directly deriving from the implementation of the concentration.”*

<table>
<tr><td></td><td></td><td>Secondary legislation
Beside the provisions of article 45 of the law, the secondary legislation sets out detailed rules on the content and form of the notification of concentrations (Regulation of the Government of 15 April 2004).</td></tr>
<tr><td>Czech Republic</td><td>Act of 4 April 2001 on the Protection of Competition, as last amended by Act of 4 April 2007</td><td>Prior notification to the Competition Office
Article 13
During the year preceding the concentration:
• The combined aggregate turnover of all undertakings concerned in the market of the Czech Republic is more than CZK 1.5 billion (approximately EUR 53.5 million in 2007) and;
• The turnover in the market of the Czech Republic of each of at least two of the undertakings concerned is more than CZK 250 million(approximately EUR 8.9 million in 2007).
Or
• The turnover in the market of the Czech Republic of at least one of the parties to the concentration is higher than CZK 1.5 billion and at the same time
• The worldwide turnover by another undertaking concerned is more than CZK 1.5 billion.

Appraisal of concentrations
Article 17(1) "When deciding on concentration notification, the Office shall in particular assess the necessity of preservation and further development of effective competition, the structure of all markets affected by the concentration, the shares of the parties to the concentration in such markets, their economic and financial power, legal and other barriers to entry by other undertakings into the relevant markets, the alternatives available to suppliers and customers of the parties to the concentration, the development of supply and demand in the affected markets, the needs and interests of consumers and research and development provided that it is to the consumers' advantage and does not form an obstacle to effective competition".</td></tr>
</table>

Estonia	Competition Act of Estonia of 5 June 2001 (including amendments until May 2005)	**Prior notification to the Competition Board** § 21(1) During the year preceding the concentration: • The aggregate turnover in Estonia of the parties to the concentration is more than 100 million kroons (approximately EUR 6.39 million in 2005), **and**; • The aggregate turnover in Estonia of each of at least two parties to the concentration is more than 30 million kroons (approximately EUR 1.92 million in 2005). **Appraisal of concentrations** § 22(1): *"Appraisal of a concentration shall be based on the need to maintain and develop competition, taking into account the structure of goods markets and the actual and potential competition in the goods market, including:* *1) the market position of the parties to the concentration and their economic and financial power and opportunities for competitors to access the goods market;* *2) legal and other barriers to entry into the goods market;* *3) supply and demand trends for the relevant goods;* *4) the interests of the buyers, sellers and consumers."* **Secondary legislation or soft law** Guidelines for Submission of Notices of Concentration Guidelines for Calculation of Turnover of Parties to Concentration
Hungary	Competition Act of 25 June 1996, as amended till January 2007	**Prior notification to the Competition Authority** Article 24(1) During the year preceding the concentration: • The aggregate turnover of all the groups of undertakings concerned is more than HUF 15 billion (approximately EUR 59.54 million in 2007) **and**; • The turnover of each of at least two of the groups of undertakings concerned is more than HUF 500 million. (approximately EUR 1.98 million in 2007). **Appraisal of concentrations** Article 30*(*1): *"When assessing an application for authorisation of a concentration, both concomitant advantages and disadvantages shall be considered. In the course of this consideration, the following aspects shall be examined, in particular:*

		a) the structure of the relevant markets, existing or potential competition on the relevant markets, procurement and marketing possibilities, the costs, risks and technical, economic and legal conditions of market entry and exit, the prospective effects of the concentration on competition on the relevant markets; *b) the market position and strategy, economic and financial capacity, business conduct, internal and external competitiveness of the undertakings concerned and likely changes in them;* *c) the effect of the concentration on suppliers and on intermediate and final consumers."*
Latvia	Competition law of 4 October 2001, as amended by law of 22 April 2004	**Prior notification to the Competition Council** Section 15(2) "If one of the following conditions exists: 1) the combined turnover of the participants in the merger during the previous financial year was not less than 25 million lats (approximately EUR 38 million in 2004).**or**; 2) the combined market share of the market participants involved in the merger in a concrete market exceeds 40 per cent." **Secondary legislation:** procedures for Submission and Examination of Notification of Concentrations (criteria for appraisal of concentrations and form of notification).
Lithuania	Law on Competition of 23 March 1999, as amended by law of 15 April 2004	**Prior notification to the Competition Council** Article 10 During the year preceding the concentration: • The combined aggregate turnover of the undertakings concerned is more than LTL 30 million (approximately EUR 8.69 million in 2004) **and**; • The turnover of each of at least two undertakings concerned is more than LTL 5 million (approximately EUR 1.45 million in 2004). **Criteria for appraisal of concentrations** They are not included in the law and there is no mention that the secondary legislation will provide for it. (with regard to the implementing rules to be adopted by the Competition Council, only is mentioned the calculation of the turnover).

<table>
<tr><td>Poland</td><td>Law of 16 February 2007 on Competition and Consumer Protection</td><td>Prior notification to the President of the Office of Competition and Consumer Protection
Article 13(1)
During the financial year preceding the concentration:
• The combined worldwide turnover of undertakings participating in the concentration exceeds the equivalent of EUR 1 billion, or;
• The combined turnover of undertakings participating in the concentration in the territory of the Republic of Poland exceeds the equivalent of EUR 50 million.

Article 14: “The obligation to notify the intention of concentration shall not apply where the turnover of the undertaking over which the control is to be taken did not exceed in the territory of the Republic of Poland in any of the two financial years preceding the notification, the equivalent of EUR 10 million.”

Criteria for appraisal of concentrations
Article 20(2) in fine
1-“The concentration is expected to contribute to economic development or technical progress”
2-“It may exert a positive impact on the national economy.”

Secondary legislation: Regulation of the Council of Ministers on the method for the calculation of the turnover.</td></tr>
<tr><td>Romania</td><td>Competition law No 21/1996, as last amended in 2004</td><td>Prior notification to the Competition Council
Article 15
• The combined aggregate turnover (worldwide) of the undertakings concerned is more than 10 million Euro, and;
• The turnover of each of at least two undertakings involved in the operation on the Romanian territory is more than EUR 4 million.

Criteria for appraisal of concentrations
Article 14(1)
“(a) necessity to maintain and develop competition on the Romanian market, taking into account the structure of all markets in question and the existing or potential competition among undertakings from Romania or abroad;
b) market share held by the undertakings, their economy and financial power;
c) available alternatives for suppliers and users, their access to markets and supplies, as well as any legal or other barrier to entry on the market;</td></tr>
</table>

		d) the supply and demand trends for the relevant goods and services; *e) the extent to which end-users' and consumers' interests are harmed;* *f) contribution to technical and economic progress."* Article 14(2) *"Economic concentrations susceptible of leading to a significant restriction, prevention or distortion of competition on the Romanian market or a part of it may be allowed if parties involved in the economic concentration can prove they meet cumulatively the following conditions:* *a) the concentration is to contribute to the increasing economic efficiency, enhancing production, distribution or technical progress or increasing export competitiveness;* *b) the positive effects of the concentration compensates for the negative effects restricting competition;* *c) to a reasonable extent, consumers benefit from the resulting gains, especially through lower real prices."* **Secondary legislation** Regulation on the notification and assessment of economic concentration. Guidelines on remedies acceptable in case of conditional authorization of certain economic concentrations. Guidelines on the calculation of turnover in the cases of anti-competitive practices and in economic concentrations cases**.**
Slovak Republic	Law of 27 February 2001 on Protection of Competition, as last amended in 2004	**Prior notification to the Authority for the Protection and Promotion of Competition** Article 10 *"(1) Concentration shall be subject to control by the Authority if:* *a) the combined global turnover of the parties to the concentration is at least SKK 1,200,000,000* (approximately EUR 27.5 million in 2001) *for the closed accounting period preceding the establishment of the concentration and at least two of the parties to the concentration attain a turnover of at least SKK 360,000,000* (approximately EUR 8.24 million in 2001) *each in the Slovak Republic for the closed accounting period preceding the establishment of the concentration; or* *b) at least one of the parties to the concentration attains a total turnover of at least SKK 500,000,000*(approximately EUR 11.45 million in 2001) *in the Slovak Republic for the closed accounting period preceding the establishment of the concentration and at least one other party to the concentration attains a total global turnover of at least SKK 1,200,000,000 for the closed accounting period preceding the establishment of the concentration*."

Slovenia	Law on the prevention of restriction of competition (2000)	**Prior notification to the Office for Protection of Competition** Article 12 (1) *“A concentration must be notified to the Office by the participants in the transaction:* • *if the combined aggregate annual turnover of all the undertakings concerned, including affiliated undertakings, is more than 33,300.000 euro before tax in the Slovenian market in each of the last two years; or* • *if all the undertakings participating in the transaction, including affiliated undertakings, jointly achieve more than 40 per cent of sales, purchases, or other transactions in a substantial part of the Slovenian market, with goods or services which are the subject of the transaction, or with their substitutes.”* **Criteria for appraisal of concentrations** Article 13(1) *“The Office shall appraise the concentrations within the meaning of this Act primarily with a view to establishing whether or not it exists a threat of creating or strengthening of a dominant position as a result of which effective competition could be excluded or significantly impeded. The threat shall be appraised in view of competition parameters, and in particular in view of:* - *the choice available to suppliers and users;* - *the market positions of affected undertakings;* - *the access to sources of supply and to the market itself;* - *the structure of market shares;* - *the competitive position on the market;* - *the barriers to entry in the market for competitive undertakings;* - *the financial capability of affected undertakings;* - *the level of international competitiveness of the undertakings under appraisal;* - *increase in supply and demand of goods and services covered by the concentration.”* **Secondary legislation** Decree “Defining the Contents and Elements Required for the Notification Form for the Concentration of Undertakings” which comprehensively describes the information on the basis of which the Office assesses the compatibility of a concentration with the rules on competition.

Annex XI

Variations in the national laws of new EU Member States and candidate countries on the publications of decisions of the competition authority

Note: rules on the publication of decisions of the competition authority could be also included in the general administrative law or specific provisions in the legislation on the access to public information

Country	National legislation	**Relevant provisions** Where provisions of national laws are reproduced below they result from unofficial translations made available by the authorities of the related Countries
Bulgaria	Law on Competition Protection No 52/1998 as last amended by law No 107/2003	Article 29 *“(1) The Commission shall decide to initiate an investigation provided that the concentration falls within the scope of Article 21 and raises serious doubts that its implementation would result in the creation or strengthening of an existing dominant position, and that effective competition in the market concerned would be prevented, restricted or distorted.* *(2) The decision under paragraph (1) shall be published in the State Gazette.* *(3) Within three months after the publication the Commission shall complete the investigation and issue a decision.”* Article 43 (in the context of appeal) *“(3) The decisions taken under Article 27 paragraph 2, subparagraphs 2 and 3* (in the area of concentrations) *shall be published in the official Commission’s Internet site and shall be promulgated in State Gazette. The time limit under paragraph (1) runs from the day of promulgation.”*

Croatia	Competition Act of 15 July 2003	Article 59 *"(1) Decisions of the Agency referred to in Article 57 items 1 to 7 of this Act shall be published in the Official Gazette. (2) Rulings and decisions of the Administrative Court in matters concerning claims against the decisions of the Agency referred to in paragraph (1) of this Article shall be also published in the Official Gazette. (3) Decisions and rulings referred to in paragraphs (1) and (2) of this Article, as well as other legislative documents of the Agency, may be published in the official gazette of the Agency i.e. on its website. (4) Data considered to be an official secret, in the sense of Article 51 of this Act, shall be excluded from the publication within the meaning of paragraphs (1), (2), and (3) of this Article"* Article 57 (administrative decisions of the Agency subject to publications) *"1. assesses the compliance of the agreement with the provisions of this Act; 2. authorizes the exemption of an agreement pursuant to Article 12 of this Act; 3. determines the existence of abuse of a dominant position pursuant to Article 15 and Article 16 of this Act; 4. estimates the compatibility of concentrations pursuant to Article 26 of this Act; 5. imposes interim measures pursuant to Article 55 of this Act; 6. annuls, cancels or amends the decision of the Agency by means of a separate decision, pursuant to Article 14 and Article 27 of this Act; 7. determines particular measures to be taken in order to restore efficient competition in cases of prohibited concentrations, pursuant to Article 28 of this Act"* Appeal against the decisions of the Agency before the Administrative Court of Croatia of which decisions are published also in the Official Gazette.
Czech Republic	Act of 4 April 2001 on the Protection of Competition, as last amended by Act of 4 April 2007	Article 20 (1) concerning the scope of competencies of the Office lays down that the Office "publishes notifications of concentration and its decisions that are come into force".

Estonia	Competition Act of Estonia of 5 June 2001 (including amendments until May 2005)	Article 27 *"(12) The Competition Board shall publish a notice concerning receipt of a notice of concentration and the decisions made based on subsection (1) or (2) of this section in the publication Ametlikud Teadaanded. The notice to be published shall set forth the names and business names of the parties to the concentration, their countries of residence and the manner of concentration pursuant to the appropriate clause of subsection 19 (1) of this Act.* *(13) Interested parties have the right to submit opinions and objections to the Competition Board within seven calendar days as of publication of a notice concerning receipt of a notice of concentration specified in subsection (12) of this section."*
Hungary	Competition Act of 25 June 1996 as amended till 1 January 2007	Article 80 *"The competition council bringing proceedings shall publish its decisions and it may publish its injunctions. This shall not be prevented by applications initiating a court review of the resolutions; however, the fact of a court review having been initiated shall be indicated when the publication is made. If the injunction ordering the opening of an investigation has been published, the resolution concluding the proceedings shall also be published."* Article 70(3) *"The fact that an investigation has been opened may be disclosed. Where the opening of an investigation is disclosed to the public, the results of this investigation shall also be published."*
Latvia	Competition law of 4 October 2001, as amended by law of 22 April 2004	Section 6 (2) *"The Competition Council shall inform the public regarding performance of the tasks of the Competition Council and other issues relating to the protection, maintenance and development of competition, as well as by 1 March of each year publish in the newspaper Latvijas Vēstnesis [the official Gazette of the Government of Latvia] a report regarding the decisions taken by the Competition Council in the previous year. The Competition Council shall publish the decisions taken by it in the newspaper Latvijas Vēstnesis not later than ten days after the taking of a decision."*

		Section 8 (1) *“The Competition Council shall take decisions regarding:* *1) to initiate or not initiate a matter;* *2) the extension of the time period for the taking of a decision;* *3) the determination of violations, legal duties and imposition of fines;* *4) the termination of the investigation of a matter;* *5) mergers of market participants;* *6) notified agreements; and* *7) violations of the Advertising Law”* .
Lithuania	Law on Competition of 23 March 1999, as amended by law of 15 April 2004	Article 13. ***Examination of Notifications by the Competition Council*** *“1. Having received notification of concentration, the Competition Council shall publish an announcement to the effect in “Valstybės žinios” (the “Official Gazette”), indicating the nature of concentration and the parties concerned.”* Article 37. ***Announcement of Resolutions of the Competition Council*** *“1. The Competition Council resolution or its extract shall be delivered to the parties to the proceedings.* *2. The operative part of the resolutions adopted by the Competition Council pursuant to Article 36 of this Law shall be published in “Valstybės žinios” (the “Official Gazette”).”* Article 36. ***Resolutions of the Competition Council Adopted upon the Completion of Hearing of the Case*** *“1. Upon completing the hearing of the case, the Competition Council shall have the right to adopt a resolution:* *1) to impose the penalties provided for by this Law;* *2) to refuse to impose penalties where there are no legally established grounds;* *3) to close the case in the absence of infringements of the Law;* *4) to remand the case for supplementary investigation.”*
Poland	Law of 16 February 2007 on Competition and Consumer Protection	Article 31 (Scope of the activities of the President of the Office) *“(15) collecting and disseminating judgements pronounced in the cases in the field of competition and consumer protection, in particular placing the decisions issued by the President of the Office on the Office’s website; “*

		Article 32 *"1. The President of the Office shall issue the Official Journal of the Office of Competition and Consumer Protection.* *2. The following information may be published in the Official Journal of the Office of Competition and Consumer Protection, in its entirety or part:* *1) decisions and resolutions of the President of the Office,* *2) judgements of the District Court in Warsaw – the court of competition and consumer protection, hereinafter referred to as "the court of competition and consumer protection",* *3) judgement of the Court of Appeal in appeal cases concerning the judgements of the court of competition and consumer protection,* *4) judgments of the Supreme Court in cases of cassation of the judgements of the Court of Appeal,* *- or their conclusions.* *3. The publications referred to in Paragraph 2 shall be made with the omission of information constituting a business secret and other secret protected under separate provisions.* *4. Information, communications, notices, explanations and interpretations having significant importance for the application of the provisions encompassed by the scope of the activities of the President of the Office, shall be also published in the Official Journal of the Office of Competition and Consumer Protection."*
Romania	Competition law No 21/1996, as last amended in 2004	Article 53 (2) in the context of concentrations *"Within 30 days after the notification of the decision under par.(1), the Government may, following a proposal from the line minister, make a different decision from that of the Competition Council on its own responsibility and for reasons of public interest. The decision shall be executed and shall be published in the Official Gazette of Romania, together with the Competition Council's decision."* Article 62 *"(1). The decisions issued under Arts. 50, 51(decision for concerted practice and concentrations), 59 and 60 (fines) shall be transmitted to the parties involved, by the Competition Council's Secretariat-General, and shall be published in the Official Gazette of Romania, Part I, at the expense of the perpetrator or of the applicant, as the case may be, or on the Competition Council's website.* *(2). The legitimate interests of the concerned undertakings shall be taken into consideration when publishing the decisions, so that no business secret be revealed."*

Slovak Republic	Law of 27 February 2001 on Protection of Competition, as last amended in 2004	Article 24 *"(1) The Authority is required to publish a legally valid decision of the Authority, a notification of concentration and, if the nature of the matter does not exclude it, a notice on the commencement of proceedings regarding all other matters resulting from the provisions of this Act. In respect of this publication, the Authority shall take due account of preserving the undertakings' right to the protection of their business secrecy and confidential information.* *(2) Regarding the publishing of a notification of concentration, the Authority shall publish the names of the parties to the concentration, the character of the concentration pursuant to Article 9 (1), and the industry in which the concentration has been established.* *(3) The publication obligation within the meaning of paragraph 1 shall be considered fulfilled if the publication is made in the Commercial Bulletin and on the Authority's official website and legally valid decisions of the Authority are made available."*
Slovenia	Law on the prevention of restriction of competition (2000)	Article 25 ***(Publication of the order on the commencement of procedure)*** *"(1) A summary of the order on the commencement of procedure shall be published in the Official Gazette of the Republic of Slovenia unless the Director of the Office determines that this would be in contravention with the interests of the investigation.* *(2) The summary of the order must contain:* - *an allegation of the subjects to which the order applies;* - *an allegation of the reason underlying the commencement of procedure, and of the provisions of this Act which are a basis for commencement; and* - *an invitation to the natural and legal persons having a legal interest in participating in the procedure to apply for participation within 30 days of publication, and to send to the Office their written opinions on the procedure, and the documents which might be important for adopting a decision without formally requesting for the status of a participant in the procedure."* Article 26 ***(Applying for participation in the procedure)*** *(1) On the basis of the summary of the order, all natural or legal persons demonstrating a legal interest may apply for participation in the procedure within 30 days of publication in the Official Gazette of the Republic of Slovenia.* *(2) The application referred to in the preceding paragraph must contain statements and evidence which demonstrate the applicant's legal interest in participating in the procedure.* ***(3)*** *If an applicant fails to demonstrate his legal interest, or if the application is belated, or if it is*

		incomplete, the Office shall issue an order to dismiss the application. Article 35 ***(Service of process and publication of the decision)*** *"(1) The decision shall be served on all participants in the procedure. If the decision contains data of the undertaking against which procedure has been initiated on business secrecy, this data shall be deleted from the explanation of the decision served on the other participants in the procedure.* *(2) The operative part of the decision shall be published in the Official Gazette of the Republic of Slovenia."* **Article 39** ***(Publication of decisions issued on the basis of examination of the notification of concentration)*** *"A summary of the decisions referred to in the second and third paragraphs of Article 38 shall be published in the Official Gazette of the Republic of Slovenia. The summary must contain:* - *a specification that the concentration has been notified;* - *the participants in the concentration;* - *the nature of the concentration;* - *the commercial areas to which it applies;* - *the reasons for which the decision has been issued, and other data related to notification which the Office considers necessary to be published for achieving the purposes of this Act."*

Annex XII

Variations in the national laws of new EU Member States and candidate countries on the organisation of inspections in business or private premises

<u>Note</u>: other substantive rules may be contained in other pieces of national legislation with a more general scope (e.g. Civil, Administrative or Procedural Codes)

Country	National legislation	Relevant provisions Where provisions of national laws are reproduced below they result from unofficial translations made available by the authorities of the related Countries
Bulgaria	Law on Competition Protection No 52/1998, as last amended by law No 107/2003	***Court authorisation*** Article 41(b)(1) *“The collection of evidences referred to in Article 41(a) shall be conducted upon request by the Commission chairperson after an authorisation by a judge in the competent District court at the seat of the undertaking, where there are deemed sufficient grounds that in the premise or in the vehicle there are evidences of importance for the procedure before the Commission.”*
Croatia	Competition Act of 15 July 2003	***Right to Search Apartment, Business Premises and Seizure of Property*** Article 49(1) *“If there is a reasonable doubt that any of the parties to the proceedings or a third person, holds in possession documents or other instruments relevant to the establishing of the material truth in the proceedings, the Agency shall request the competent misdemeanor court in Zagreb to issue a written warrant ordering the search of particular persons, apartments, or business premises, and the seizure of objects and documents in possession of the undertakings concerned or a third person”.*

Czech Republic	Act of 4 April 2001 on the Protection of Competition, as last amended by Act of 4 April 2007	Article 21 *"(5) If a reasonable suspicion exists that books or other business records are being kept in other than business premises, including the homes of natural persons that are statutory bodies or their members or employees (hereinafter referred to as "other than business premises"), the investigation may be, with a prior authorisation from the court), conducted also in these premises.* *(6) For the purpose of investigation in business or other than business premises, the Office shall be empowered to obtain access to these premises or to open any closed cabinets or cases. Any person, in the estate of which the business or other than business premises are situated, shall be obliged to abide the investigation in these premises; in case it fails to fulfil this obligation the Office's officials shall be empowered to obtain access to the business or other than business premises."*
Estonia	Competition Act of Estonia of 5 June 2001, including amendments until May 2005	§ 60. ***Inspection of seat or place of business of undertaking*** "*(1) In order to establish a violation or possible violation of this Act, an official or representative of the Competition Board authorised by a directive of the Director General of the Competition Board or his or her deputy (hereinafter person conducting an investigation) has the right, without prior warning or special permission, to inspect the seat and place of business of an undertaking, including the enterprises, territory, buildings, rooms and means of transport of the undertaking, both during working hours and at any time the place of business is used. With the consent of the undertaking, the seat, place of business or enterprises of the undertaking may also be inspected at any other time.* *(2) An inspection provided for in subsection (1) of this section shall be conducted with the knowledge of the undertaking, or a representative or employee thereof, and they have the right to be present during the inspection.* *(3) At the seat of the undertaking or the location of the place of business of an undertaking under inspection, the person conducting such inspection shall present to the undertaking, its representative or employee the directive issued by the Director General of the Competition Board or his or her deputy concerning the authorisation of the person conducting the inspection.* *(4) During an inspection provided for in subsection (1) of this section, the person conducting the inspection has the right to:* *1) immediately examine documents relating to the activities of the undertaking, drafts thereof and other materials and to obtain, at the expense of the person under inspection, copies or transcripts thereof, the authenticity of which shall be certified by the signature of the person submitting them;* *2) immediately examine data or databases kept in electronic form on computer at the seat or place of business of the undertaking under inspection and electronic data media held at the seat or place of*

		business and to make printouts and electronic copies thereof at the expense of the undertaking under inspection, the authenticity of which shall be certified by the signature of the person under inspection or the representative thereof or employee on the printout or on a separate page."
Hungary	Competition Act of 25 June 1996 as amended till 1 January 2007	Article 65/A *"(1) In the course of proceedings started ex officio based on Article 11 or 21 of this Act or on Article 81 or 82 of the EC Treaty, the investigator may search, and enter on his own, against the will of the owner (possessor), any site or open to this end any land, buildings and premises closed. It may oblige the party or its agent or former agent, employee or former employee to provide information and explanation orally or in writing, or collect information on the spot in any other manner.* *(2) In premises used for private purposes or privately used, including vehicles and other land, investigative measures within the meaning of this Article may only be carried out, if they are in the use of any executive official or former executive official, employee or former employee, agent or former agent of the party or of any other person who exercises or exercised control as a matter of fact.* *(3) Carrying out the investigative measures specified by this Article shall be subject to the attainment in advance of a judicial authorisation. The application for such an authorisation of the Hungarian Competition Authority shall be considered out of lawsuit by the Municipal Court of Budapest, within seventy two hours of receipt of the application. There is no appeal against the injunction of the court and no review is possible.* *(4) The court shall authorise the investigative measure applied for to be taken where the Hungarian Competition Authority is able to show that other investigative measures would be likely to result in failure, and there are reasonable grounds to presume that a source of the information relating to the specified infringement is kept on the site indicated by the application and it would presumably not be made available voluntarily, or would be made unusable. The court may authorise the investigative measure to be taken partially, specifying the target persons of the particular investigative measures.* *(5) Investigative measures may be carried out, based on the decision of the court, within ninety days of the issuance."*

Latvia	Competition law of 4 October 2001 as amended by law of 22 April 2004	Section 9(5) *"The Bureau is entitled in the name of the Competition Council:* *1) to request from any person and person association, information necessary to perform the tasks specified in this Law, also restricted access information or information containing commercial secrets, as well as to receive from the relevant persons explanations either in writing or orally;* *2) to visit market participants (also without prior warning). During the visit to the market participant, Bureau officials on the basis of an authorisation have the right to receive from the relevant persons explanations either in writing or orally, become acquainted on site with all documents (also documents prepared in an electronic way) and to receive such documents, the true copy (copies) thereof or extracts thereof;* *3) on the basis of a substantiated decision of the Bureau director, to remove property and documents of a market participant and the employees thereof which may be of importance in a matter;* *4) on the basis of a court decision, without prior warning in the presence of police, to enter the means of transport, dwellings, non-residential premises, structures and other immovable and movable property of a market participant and the employees thereof, to open them and the existing storage facility thereof, and perform an inspection of the existing property and documents therein, and an inspection of the property and documents of the market participant and the employees thereof. During the inspection the Bureau is entitled to request explanations either in writing or orally from officials and employees of the market participant, receive true copies (copies) of documents or extracts thereof, as well as to remove property and documents, which may be of importance in clarifying the issue under investigation. Officials of the Bureau have the right to seal means of transport dwellings, non-residential premises, structures and other immovable and movable property and storage facilities in order to ensure the preservation of evidence;* *5) on the basis of a court decision, if there are justifiable grounds for suspicion that documents, which may serve as evidence for a violation of the Competition Law, are being stored in the means of transport, dwellings, non-residential premises, structures and other immovable and movable property belonging to another person or in the possession of another person, the Bureau in relation to such persons the property thereof is entitled to perform the activities referred to in Clause 4 of this Paragraph in the presence of police; and* *6) to compile reports regarding administrative violations if the information referred to in Clauses 1, 2 and 4 of this Paragraph is not provided in the time and amount specified, or also the duties referred to in Paragraph six of this Section are not implemented. Such reports shall be compiled and signed by the Bureau director or his or her authorised official."*

		Section 9(6) *"Upon a request from the Bureau, market participants, the representatives and employees thereof, and other persons have a duty to provide full and truthful information and to ensure for the employees of the Bureau and the State police access to any of the means of transport, dwellings, non-residential premises, structures and other immovable and movable property owned or in the possession thereof, to open them and their existing storage facilities, as well as to in any form compiled or stored documents."* Section 9(7) "*The State police shall provide assistance to employees of the Bureau for the implementation of the investigatory activities referred to in Paragraph five of this Section."*
Lithuania	Law on Competition of 23 March 1999, as amended by law of 15 April 2004	Article 26**. *Rights and Duties of the Authorised Officers of the Competition Council in the Process of Investigation*** *"1. The authorised officers of the Competition Council, carrying out the investigation, shall be empowered:* *1) to enter and to check any premises, land and means of transport used by the undertaking;* *2) to examine the documents of the undertaking under investigation required for investigation, get their copies and extracts, be given access to the notes of the employees of the undertaking, also copy the above notes as well as information stored in computers and magnetic disks;* *3) to get oral and written explanations from the persons connected with the activity of the undertakings under investigation, summon them to the office of the investigating officer to give explanations;* *4) to get from other undertakings, regardless of their subordination, data and documents or copies thereof relating to the economic operations of the undertaking under investigation, also from public and local authorities;* *5) to audit (carry out an inspection of) the economic activity of the undertaking and obtain findings regarding the material of inspection from the institutions responsible for expert examination;* *6) to take possession of any documents and articles having evidential value in the investigation of the case;* *7) to enlist the assistance of specialists and experts in carrying out the investigation;* *8) acting in compliance with the procedure established by law, use technical means for investigation purposes.*

		2. The actions of investigation specified in subparagraphs 1 and 2 of paragraph 1 hereof may be carried out only with the warrant of the judge. *3. For the maintenance of order the investigating officers of the Competition Council may enlist police officers.* *4. Before commencing the actions specified herein, the authorised officers of the Competition Council must produce a document issued by the Competition Council confirming their powers, purpose and time limits of investigation.* *5. While exercising their rights granted by law and the Competition Council, the officers authorised by the Competition Council shall register investigation actions in writing, i.e. shall draw up documents (acts, records, requests, etc.) the form and filling in procedure whereof shall be established by the Competition Council.* *6. Instructions given by the authorised officers of the Competition Council while performing actions provided for in paragraph 1 hereof shall be obligatory to undertakings and to their management and administrative staff. Penalties provided for in laws shall be applied for failure to fulfil the instructions.* *7. The authorised investigating officers shall warn the persons providing explanations in writing of their liability for giving false information or for refusal to provide information to the Competition Council."*
Poland	Law of 16 February 2007 on Competition and Consumer Protection	Article 63 empowers inspectors to enter premises and means of transportation belonging to the inspected person. That is not expressly worded as such, but it seems that for private premises a warrant from a judge is necessary. Article 68 organises the co-operation in case of inspections requested by the European Commission.
Romania	Competition law No 21/1996 as last amended in 2004	Article 43 *"According to the judicial competence granted through ruling, according to the provisions of Art. 44, competition inspectors may perform inspections on any premises, including domiciles, lands or transportation means belonging to managers, administrators, executives and other employees of undertakings or associations of undertakings submitted to investigations.* *a) the premises, grounds or professional means of transportation belonging to the undertakings, if any signs indicate that information or documents can be found to help the investigation;*

		b) the residences of head executives, managers, directors of the investigated companies, as well as to the residence of natural persons responsible for the financial, accounting or marketing departments, under conditions stipulated in Art. 27, par. (3) of the Romanian Constitution." Article 44 *"(1). The competition inspectors may start investigations, in accordance to the provisions of Art. 43, provided they are part of an inspection requested by the President of the Competition Council, and provided they have judicial ruling granted by the president of district court having jurisdiction over the premises to be controlled, or by a judge mandated by the court president. When such places fall under different court jurisdictions and simultaneous investigations should be conducted in all of them, a unique ruling may be issued by any of the court presidents having jurisdiction.* *(2). In the request for judicial ruling, the Competition Council shall provide all information justifying the inspection, and the judge is held to check if the request is grounded.* *(3). The inspection and related acts shall be carried out under the authority and control of the judge who issued the ruling.* *(4). The judge may inspect the searched places, and may decide to suspend or to terminate the search, at any moment.* *(5). Whatever the circumstances, the search shall not begin before 8:00 or after 18:00 hours, and must be conducted in the presence of the occupant of the searched premises, or his representatives; only the competition inspectors, the occupant of the premise or his representative may take notice of the evidence and documents before capture and retrieval.* *(6). Inventories and application of seals shall be done according to the Criminal Procedure Code; the original minute and inventory of the search shall be transmitted to the judge who had ordered the search, while the evidence and documents no longer necessary to establish the truth shall be returned to the occupant of the searched premises.* *(7). The authorization mentioned in par. (1) may be appealed at the Bucharest Court of Appeal; the appeal does not suspend the execution.* *(8). The Competition Council or, as the case may be, the Head of the Competition Office shall be informed without delay about the beginning of the inspection and of the performed operations.* *(9). According to the above mentioned provisions, the procedure is plenary contradictory during the whole duration of the inspection."*

Slovak Republic	Law of 27 February 2001 on Protection of Competition, as last amended in 2004	Article 22 *“(3) When fulfilling their tasks pursuant to this Act, Authority employees shall have the right, on the basis of written authorization by the Authority Chairperson, to enter any buildings, premises and means of transport of an undertaking, which are related to the activities or actions of the undertaking pursuant to Article 3 (2), in order to carry out an inspection.* *(4) If there exists a reasonable suspicion that information or documents related to the activities or actions of an undertaking according to Article 3 (2), based on which a serious restriction of competition may be proven, are located in an undertaking's buildings, premises or means of transport other than those listed in paragraph 3, as well as in private buildings, private premises or private means of transport of the undertaking's employees, the Authority shall issue a decision on an inspection to be performed by Authority employees.* *(5) The statement section of a decision of the Authority pursuant to paragraph 4 shall primarily contain the definition of the purpose of the inspection, specification of the buildings, premises or means of transport in which the inspection will be performed, the date and time period within which the inspection will be performed, and the specification of the persons who will perform the inspection, including their powers related to the performance of the inspection. In the explanatory part of the decision, the Authority shall also specify the facts giving grounds for a justified suspicion according to paragraph 4. An appeal may be lodged against a decision on the performance of an inspection, which, however, shall not have a suspensive effect.* *(6) An inspection under paragraph 4 may only be performed on the basis of a court's approval of the inspection, which shall be issued following a proposal from the Authority according to special legislation. 22b) The Authority shall deliver the court's approval of the inspection to the person at whose premises the inspection will be performed at the beginning. If the person at whose premises the inspection is to be performed is not available, the Authority shall leave the court's approval of the inspection, accompanied by a copy of the record of the inspection performed, with the post Office within 24 hours after the performance of the inspection.* *(7) The Authority shall invite a custodian appointed by the court that has decided on the approval of an inspection to attend the inspection according to paragraph 4.*

		(8) Following an unsuccessful request for entry, Authority employees are entitled to enforce an entry into all buildings, premises and means of transport according to paragraph 3 or 4. During an inspection according to paragraph 3 or 4, Authority employees are entitled, following an unsuccessful request for information and documents according to paragraph 2, to inspect the buildings, premises, or transportation means and enforce access to information and documents by breaking down resistance or a created obstacle. The Authority is entitled to invite other persons able to ensure the obstacle is overcome. The Authority shall make a record of this in the form of minutes. *(9) Pursuant to special legislation, 22c) a police department is required, at the request of the Authority, to provide protection and cooperation to the Authority employees in the fulfillment of tasks according to this Act or, at the request of the Authority, also to employees of other competition authorities responsible for the implementation of the provisions of special legislation 5b) (hereinafter referred to as the "national competition authority") if they participate in an inspection according to paragraph 3 or 4, or to Commission employees and persons authorized by the Commission when fulfilling tasks pursuant to special legislation."*
Slovenia	Law on the prevention of restriction of competition (2000)	Article 27 ***(Investigative procedure)*** *"(1) Investigative action shall be carried out by a person employed at the Office on the basis of a written authorisation issued by the Director of the Office.* *…* *(6**)** The investigative action referred to in the second and third paragraphs shall be carried out by the Office between 8 a.m. and 6 p.m. The Office must carry out its investigative action in such a way as to disturb the undertaking's operations to the smallest extent possible.* Article 28 ***(Investigative action)*** *(1) If the Office has a well-founded reason to believe that a certain person is in possession of information or data necessary for the issuing of the decision, it may propose to the misdemeanors judge to approve a personal body search, or it may apply to obtain a warrant for the search of residential or business premises from the competent investigative judge."*

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Comment
On adjustment of provisions of Article 10 of the Law of Ukraine "On protection of economic competition" to comply with the Article 81(3) of the EC Treaty.

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According to the conclusions of the Review on legislative approximation in Ukraine prepared by the State Department for Legislative Approximation under the Ministry of Justice of Ukraine (2006)[70] provisions of Article 10 of the of Ukraine "On protection of economic competition" (hereinafter – the Law) dealing with the application of the exception rules for restrictive agreements and practices should be brought in compliance with Article 81(3) of the EC Treaty. The Antimonopoly Committee of Ukraine (AMCU) is well aware of the existing legal inconsistencies and, as far as we understand, it is currently considering relevant amendments to the Law.
This paper is aimed at the provision of the AMCU, SDLA and other public institutions involved in adaptation of the competition legislation of Ukraine to the EU standards with some references and recommendations that may be useful for the discussion of amendments to the Law and to the relevant implementing regulations.

Second condition of Article 81(3)- "a fair share of benefits for consumers"

The most evident need for adjustment of Article 10 of the Law stems from the incompliance of its provisions with *the four cumulative conditions* established in Article 81(3) of the EC Treaty for the application of the exception rule to the concerted agreements and practices. The scope and the meaning of each legal condition of Article 81 (3) are interpreted in details by the European Commission in the relevant regulations[71], notices[72] and in the case law[73].
The underlying principle of Article 81 of the Treaty is that the competition policy should be viewed as a means of enhancing consumer welfare[74]. Therefore, the concept of "a fair share of benefit for consumers" is an important indicator to assess particular *impact of an agreement on existing or potential competition* as a value for consumers.
The competition law of Ukraine has no explicit references to the consumer welfare as an objective for the state competition policy. Consequently consumer interest is not an obligatory component for assessment of the applicability of the exception rule for anticompetitive concerted actions. In legal terms a restrictive agreement can be permitted by the AMCU if undertakings concerned have proven that their agreement or a concerted practice is likely to produce one of the six economic efficiencies[75] listed in Section 1 of Article 10 and provided that existing or potential competition in the relevant market will not be significantly restricted. It is also worth noting that the term "consumers" in the relevant AMCU Regulation 26-p[76] is viewed as a category of persons related to final consumption of products, whereas in the EU rules, for the purposes of Article 81(3), consumers are particularly interpreted as a wider category, including wholesalers and retailers[77].

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[70] Ref. to the Review of the progress of legislative adaptation in Ukraine to the *acquis communautaire* in 2006
[71] Commission Regulations (EC) No 19/65/EEC , No.1215/1999
[72] Communication from the Commission: Notice on Guidelines on the application of Article 81(3) of the Treaty (2004/C101/08)
[73] *Metropole télévision SA and Reti Televisive Italiane SpA v Commission,* Case T-528/93
[74] Ref. to Sections 13 and 34 of the Commission's Notice: Guidelines on the Application of Article 81(3) of the Treaty C101/97.
[75] The Law contains specific additional conditions non-existent in the EU, namely: optimization of export or import operations and facilitation of SME development. In fact, the latter is a duplication of objective covered by Article 7 of the Law, which is addressed by *de minimis* concept in the EU competiton rules.
[76] Section 8.9 of the AMCU Regulation 26-p
[77] Section 84 of the Commission Guidelines (2004/C101/08)

In fact, from the legal provisions of Section 3 Article 10 it can be assumed that the consumer interest and overall welfare can be considered within the procedure for the review of the particular AMCU decisions by the Cabinet of Ministers within the broadly formulated legal concept *"the effect on public interest*". But the difference the application of exception rules as provided under the Law and under the Article 81(3) of the EC Treaty is the following: in the construction of EC rules the consumer interest is assessed as a competition policy consideration ("the second cumulative condition") and in the Law it is a rather vague "general public interest". To demonstrate how this difference in the legislative approach may impact the decision - making model for the application of exception rules to the anticompetitive agreements and concerted practices compulsory conditions established by Article 81 (3) of the EC Treaty should be analyzed from *a narrow* and *a broad* perspective.

Competition analysis and exemptions on public interest considerations

Under *the narrow (technical) approach* it is assumed that economic efficiencies attained from restrictive agreements (technical and economic development, improvement of production or distribution, which are basically relevant to the industrial policy rather then to competition considerations) can compensate the consumers for certain negative effects on the market competition. It is also assumed that such compensation is only possible if elimination of competition is present for a comparatively limited period of time and it is not excessive. Therefore, economic efficiencies attained as a result of the agreement and its anticompetitive effects *may be balanced.* The right balance between the industrial or economic gains and the loss of competition can be measured with the help of particular indicators. In the meaning of Article 81(3) the following indicators are considered to be pertinent to the analysis of competition aspects: 1) *substantiality* of the negative impact on existing or potential competition; 2*) indispensability* of the anticompetitive restrictions for achievement of the particular efficiencies and, finally, 3) *impact on consumers*, as the central interest for any effective competition policy. These indicators are established as *compulsory set for testing* of the impact on competition and they must be assessed cumulatively in order to satisfy conditions for the applicability of the exception rule.
It is worth emphasizing therefore that:

a) "A fair share for consumers" is a condition *pertinent to the competition analysis (*and not to assessment of impact on any other state policies such as employment, social, environmental that could be legitimate in exceptional public interest cases. It is therefore only logical that this cumulative condition must be assessed by *the public authority specifically dealing with competition analysis* and not by any other public authorities dealing with industrial or any other legitimate public policies;

b) *The right balance* between the negative impact and positive effects of restrictive agreements for the economy can be achieved if weighing of all elements is done *within a single procedure* against clear, quantifiable indicators and all elements are tested *cumulatively (i.e*. is only one of the compulsory conditions is not fulfilled the agreement cannot be exempt under no circumstances).

The broad approach to the application of Article 81(3) is that (additional) considerations other than competition should be allowed in order to establish the adequate balance between the anticompetitive restrictions and economic efficiencies resulting from the proposed concerted actions.

Thus certain benefits are believed to be possible for employment[78], environmental[79] policies. There have been certain cases when benefits for such policies were assessed by the European Commission within the scope of Article 81(3) and the ECJ supported those arguments as valid additional considerations for the application of exception rules to restrictive agreements (especially with regards to the employment policy[80]). At the same time those public interest arguments were considered to be exceptional and the EU Commission used them in the early years of the application of the exception rule for the restrictive agreements. Finally in *Ford/Volkswagen (Para.36)* case the Commission underscored that such arguments related to the industrial or employment policy in iself *would not be enough to make an exemption possible unless all other conditions of Article 81 (3) were fulfilled*[81].
Therefore, if such additional arguments are to be used within assessement procedure for the applicability of the exception rule they should not become an argument that outweights the competition considerations and only as an additional benefit that can be attained form the restrictive agreement or a concerted practice.
The public interest considerations in the sphere of concerted actions and in the sphere of mergers have different motivation. The legal mechanism of the Law is practically identical for the application of exception rule to restrictive agreements and to control of concentrations. At the same time, the exception rule for concerted actions is applied to find the right balance between economic efficiencies and competition considerations for a limited period of time. In mergers it is only competition considerations (i.e. monopolization and substantial restriction to competition) that are relevant for the application of the proibitions to mergers. No other policies or economic efficiencies are to be taken into consideration as arguments for not applying the prohibition to an anti-competition merger case. It is therefore assumed that neither technical, nor economic progress that might result from an anticompetitive concentration can compensate for the elimination of competition in the relevant market. But quite naturally, structural changes in the structure of important markets may raise concerns of the government and protection of competition is not the only consideration that is of importance when long term structural changes may take place in the economy. Therefore, it is not unusual that special procedures for investigation of particular public interests that can be affected by mergers are established in several EU Member - States (examples: UK, France, Netherlands). These legal mechanisms are aimed at empowering the highest governmental body to consider legitimate public interests as argumentation not to find the right balance but to *outweigh* competition concerns and support formation of the market structure that seems to be required for relevant governmental policy.
As regards public interest argumentation for the application of exception rules to concerted actions, the competition authority should be able to legitimately consider them within a single assessment procedure as additional indicators of the economic efficiencies. For that purpose the narrow (technical) approach to the application of Article 81(3) has proven to be quite adequate and effective.
The Law provides for a possibility to consider such arguments as higher employment, environmental benefits, energy saving etc. within a rather broadly expressed condition of “economic development” (Article 10, Section 1 paragraph 3). At the same time, the legal certainty of the application of exception rules to the restrictive agreements and concerted practices will be improved provided that the testing of such aspects is performed against other competition considerations by professionals of the competition authority within a single testing procedure, on the basis of quantifiable indicators.

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[78] Commission decision from December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/33.814 - *Ford/Volkswagen*
[79] Case IV.F.1/36.718. *CECED,* OJ L 187, 26/07/2000, p. 47-54, paras. 55-57
[80] *Metro vs Commission* Case 26/76 (1977) European Court Reports 1977, Page 01875
[81] See Ref. 9 above.

It is important that clear limitations for the scope of competence for the authorities passing decisions on the basis of public interests other than competition are established. In the EU context the narrow (technical) approach over time has proven to be more effective for establishing efficient mechanism for the application of provisions of Article 81(3) of the EC Treaty and for finding the right balance between positive and negative effects of the concerted actions subject to individual exemption.

Third condition of Article 81(3) –" indispensability of the restrictions"

"A fair share for consumers" is not the only compulsory condition that seems to be missing in the legal mechanism for the application Article 10 of the Law as compared to the concept for the exception rule under Article 81(3) of the Treaty. Another cumulative condition to be added into the legal test is *"indispensability of a restriction to competition for attainment of particular economic efficiencies"*. In fact, the said condition for indispensability is included in Section 4 of Article 10 but unlike the mechanism applied by the competition authorities in the EU this condition must be analyzed according to the law within a separate procedure aimed at assessment of public interest by the Cabinet of Ministers: AMCU analyzes economic efficiencies and the impact on the competition in the relevant market, whereas indispensability and relevance of public interest (even if consumer benefits are included) are analyzed within another procedure used by the temporary Commission under the Ministry of Economy of Ukraine[82].
Further approximation of the Law with the EU rules would therefore require also *certain restructuring of the legal provisions in Article 10 and redistribution of competences,* so that the four conditions could be *exhaustively and cumulatively* tested by the AMCU to apply the exception rules.

Conclusive comments

Further convergence of the legal provisions of Article 10 of the Law with Article 81(3) of the EC Treaty, will improve transparency and legal certainty of the legal testing mechanism applied by the AMCU and by the Cabinet of Ministers. It would be appropriate to at least make the following adjustments to Article 10 of the Law:
Section 1: To consider

- Whether a duplication of the legal concept expressed in Article 7 is necessary and that its objectives can be achieved through further development of the block exemptions concept;
- The EU law allows national legislators to include *additional* conditions for testing the applicability of exception rules for concerted actions, but condition as facilitation of the exports and imports in Section 1 is incompatible with the EU rules.

Section 2: To include two compulsory conditions (both of them are competition related):

- a fair share of benefits for consumers; and
- indispensability of restrictions for attainment of economic efficiencies;
- All conditions for the test on applicability of the exception rules should be considered cumulatively and exhaustively. Other conditions may be considered by the AMCU as additional elements in the test but non-competition considerations cannot overweight the failure of the agreement to fulfill any of the compulsory cumulative conditions.

[82] According to the Decree of the Cabinet of Ministers No 219 (20.02.2002).

Sections 3 and 4: Could be excluded

- Most of the arguments related to the employment, environmental or regional policies could be legitimately considered as elements of the concept “economic development” provided that the parties to the agreement can submit quantifiable evidence of benefits for particular public interests;
- Paragraph 2 of Section 4 could be fully encompassed by Sections 1 and 2 (a “threat to the whole system of market economy” is beyond the scope of any quantifiable assessment of public interest).

The proposed legislative adjustments should be targeted to achieve the following:

- To establish a set of rules similar to those currently applied by all EU Member-States and thus *to ensure legal certainty and consistency* of the Ukrainian competition rules with the EU practice,
- To ensure *simplicity and transparency* of the legal testing applied in Ukraine for the application of the exception rule for restrictive agreements and concerted practices.