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Concept Paper

Institutions and mechanisms governing the control of State aids at various stages of European integration

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The views expressed in this report do not necessary reflect the position of the European Commission

LIST OF ABBREVIATIONS

CEECs	Central and Eastern European Countries
EC	European Community
EU	European Union
SAA	Stabilisation and Association Agreement
SAP	Stabilisation and Association Process
FTA	Free Trade Agreement

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Introduction

Priorities agreed in the EU-Ukraine Action Plan (ENP-AP) under the point 39 are worded as follows:

“Implement, and build upon, commitments on state aid under Art.49.2.2 and 49.2.3 of the PCA, and develop legislation and control regime compatible with that of the EU

Draft and adopt state aid legislation, including in particular:

- *a definition of state aid compatible with that of the EU;*
- *a principle of prohibition of state aids which distort trade between Ukraine and the EU.*
- *the establishment of transparency as regards state aid granted in Ukraine (particularly by establishing a list of all aid grantors and an independent surveillance body, a regular report on the amounts, types and recipients of aid).”*

It appears that the adoption of the corresponding legislation has been delayed and that none of the other activities foreseen will be carried out before the expiry of the Action Plan.

In other words, a comprehensive system of State aid control has still to be established in Ukraine.

In this context, the State Department for Legal Approximation at the Ministry of Justice has expressed the need to clarify key institutional, organizational and legal issues to build up the system of State aid control. The main area of concerns could be summarized as follows.

Who controls whom?

Who is doing what?

What is the appropriate link with other pieces of domestic legislation to create the new legal framework for State aid control? Does the new legal framework on State aid need to be set up through a new section of the law on the Protection of Economic Competition, or as a separate piece of legislation, or may be, incorporated in the Budgetary law?

The purpose of this Concept Paper is to provide a wide range of solutions experienced in 10 new EU Member States and Croatia (SAP country) at various stages of European integration.

Ukraine has not been offered perspectives of accession to the EU, but having in view the level of commitments undertaken in the EU-UA Action Plan and the provisions which are usually laid down in Association or Free Trade Agreements between the EU and partner countries, the proposed models could be gradually implemented in Ukraine in the framework of the future Enhanced Agreement between the EU and Ukraine.

1. From PCA obligations to obligations deriving from a FTA with the EU

1.1. The obligations in the field of State aids contained in the PCA between the EU and Ukraine are quite limited. 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 or caused by State intervention that have to be remedied or removed according to the national legislation.

Nevertheless, article 49 (2.5) provides for an obligation of results with regard to the removal of any distortion of competition caused by public undertakings or undertakings granted with exclusive rights which could affect the trade between the Community and Ukraine as far as this obligation does not obstruct the performance, in law or fact, of the particular tasks assigned to such undertakings.

1.2. After the accession of Ukraine to the WTO, considered as a prerequisite for the conclusion of the Enhanced Agreement with the EU, Ukraine will be committed to comply with the Agreement on Subsidies and Countervailing Measures. Among the three categories of subsidies defined by the Agreement defines, only one category of subsidies (or State aids¹) is prohibited. They are subsidies that require the recipient to meet certain export targets or to use domestic goods instead of imported goods. This kind of subsidies may be challenged under the WTO procedure of dispute settlement. As a general rule there is no specific national body, apart from the WTO national contact point, to monitor the implementation of the Agreement on Subsidies and Countervailing Measures

1.3. Entering into a FTA with the EU will give an extended and more concrete institutional and legal dimension to the control of State aids.

1.3.1. The new objectives to be met will be based on the provisions of the EC Treaty, namely Articles 87 to 89 (Rules applicable to State aid) as they are implemented by the secondary EC legislation (Regulations of the Council or of the Commission and “soft” acquis such as notices or communications)².

1.3.2. 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 gives some indications on the future targets to implement the State aid policy in Ukraine. The next legal framework governing relations between the EU and Ukraine for the control of State aids will presumably include the following principles:

¹ There is no widely accepted of what constitutes a subsidy. An OECD study considers the terms subsidy and State aid are equivalent (see, Competition Policy in Subsidies and State Aid, OECD, DAFFE/CLP(2001)24, 12 November 2001.

² In the field of State aid, specific rules may also cover certain sectors such as transport, agriculture and fisheries.

- Prohibitions of aids which distort or threaten to distort competition expressed in the same terms as those in the EC Treaty (in particular articles 85, 86, 87 and 92).
- The prohibition applies to domestic industries including services industry.
- Sectors of fisheries and agriculture are excluded from the scope of the general rules on the prohibition of State aids.
- A new deadline is set to apply the competition rules to public enterprises and to enterprises granted with special or exclusive rights.
- Competition rules are interpreted in accordance with the criteria set in the EU secondary legislation and the decisions of the European Court of Justice³.
- Diverging interpretations, inadequate applications or difficulties to implement the Community acquis are settled by the Joint Body established by the agreement.
- The partner country is committed to establish an **operationally independent authority with the powers necessary for the full application of rules on State aid** (after a transition period determined in the agreement). In particular this authority has the powers⁴:
 - a) to **authorise** State aid schemes and individual aids where they are compatible with the functioning of the agreement,
 - b) to **order the recovery** of State aid that has been unlawfully granted.
- An **inventory** of aid schemes is established by the partner country (within a certain deadline specified in the agreement).
- For the assessment of the compatibility of a state aid, the entire territory of the partner country is regarded as an area where the standard of living is abnormally low or where there is serious underemployment⁵. Nevertheless, after a transition period determined in the agreement, the partner country will have to provide to the European Commission statistical data⁶ to evaluate jointly the eligibility of regional aids and their maximum intensity. A regional aid map will be drawn up accordingly.
- Communication by each party of an annual report to the other party on the total amount and the distribution of the aid given.
- Upon request, provision of information on aid schemes or individual public aids
- Exchange of information is covered by professional and business secrecy
- The provision of GATT 1994 and the WTO Agreement on Subsidies and Countervailing measures remain applicable.

1.3.3. It will be noted an evolution in the provisions of SAAs regarding the power to be granted to the national authority dealing with State aid in comparison with the provisions of the Europe Agreements. While in the SAAs it is question of **prior authorisation** given by the authority, the

³ 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”.

⁴ There is some evolution in the provisions of SAAs regarding the power to be granted to the national authority dealing with State aid in comparison with the provisions of the Europe Agreements. While in the SAAs it is question of prior authorisation given by the authority, the Europe Agreements speaks about a national institution or administration appointed as a monitoring authority for State aid matters. This monitoring authority a) is responsible for the analysis of existing and future aid schemes and individual aid awards and gives an opinion as to their compatibility, b) has to receive in due time all the relevant information from the other government departments at central, regional and local level.

⁵ Criterion of the article 92(3)(a) of the EC Treaty.

⁶ The EU Technical Assistance will help to introduce the methodology used in the EU to provide the figures per capita harmonised at NUTS II level (Nomenclature of Territorial Units for Statistics in the EU).

Europe Agreements speaks about a national institution or administration appointed as a **monitoring authority**⁷ for State aid matters.

An ex-ante authorisation without which the State aid – even decided by the Parliament - cannot be awarded is quite more stringent than a system limited to the transparency of State aids. Actually, most of the New Member States introduced a system of ex-ante authorisation, where sometimes the government or the Minister of Finance had some influence to review the decisions taken by the technical body in charge of the assessment of the compatibility of State aids.

1.3.4. Having in views Decisions taken by Association Councils to implement State aid rules may also give some indications on possible future developments of the State aid control in Ukraine, in the long run.

For example it will be observed that the Decision No 2/2001 of the EU-Bulgaria Association Council of 23 May 2001 provides for the following:

- Designation of the responsible monitoring authority of each party
- Guidance for dealing with cases:
 - Effects and procedure of information to be applied in case of change in the EC legislation on State aid.
 - Criteria and threshold of de minimis aid set out in the EC legislation are used to determine the effect of State aids on the trade between the parties
- Procedure for consultation and problem solving
 - To prevent commercial defence measures, Aid schemes or individual aid of which the amount would be over a determined figure (EUR 3 million, in 2001 in the case of Bulgaria) may be referred to the Association Council after examination by the subcommittee dealing with competition policy and State aids.
 - Where a monitoring authority considers that the award of State aid on the territory of the other authority affects its important interests, it may request the other authority to take remedial actions.

1.3.5. Another assumption is that as long as Ukraine will not get the status of possible candidate country, the requirements concerning the level of approximation of the domestic legislation in the field of State aid will be slightly lower. Originally the first Europe Agreements and Stabilisation and Association Agreements were not considered as pre-instruments for the accession to the EU. Later on, the change in the geo-political situation made that the Association Agreements cited above **became** the main instruments for accession to the EU together with respective Accession Partnerships (CEECs) or European Partnerships (SAP countries). As a result, the requirements set by the European Commission for the implementation of the Association Agreements were taking account of the highest level of approximation to the EC legislation. The purpose was to **introduce a discipline** allowing the candidate countries to **switch immediately to the system applicable to the EU Members States** upon the date of accession.

⁷ According to the Europe Agreements, the monitoring authority a) is responsible for the analysis of existing and future aid schemes and individual aid awards and gives an opinion as to their compatibility, b) has to receive in due time all the relevant information from the other government departments at central, regional and local level.

2. Adoption and scope of the national legal framework on State aid control in the context of a Free Trade Agreement with the EU

2.1. Purpose and scope of provisions on State aid control

As it is expressed, the purpose of the domestic legislation dealing with State aid control addresses the implementation of the international commitments undertaken by the country and more specifically, the international commitments undertaken under the requirements of the Europe Agreements (for CEECs) or SAA (for SAP countries).

The rules are set out to regulate the conditions for the authorisation of State aid, to monitor the implementation of State aids and to recover unlawful or misused State aid.

The first step is to define the concept of State aid and the grantors of State aid to which the rules will apply.

To prevent long and controversial discussion before the Parliament which will have to enact the law on State aid control, it is recommended to set out a concise definition of State aid. For example, the Bulgarian State Aid Act of March 2002 lays down the following definition expressed in broad terms:

Article 1(3) “State aid” is any aid, granted by the State or through state or municipal resources, or on behalf of state or municipal resources, directly or through other persons, in any form whatsoever, which distorts or threatens to distort free competition by favouring certain enterprises, the production or the trade of certain goods, or the delivery of certain services.

Usually, the provisions of the legislation on State aid are made applicable to enterprises entrusted by the State or by regional/local authorities with the operation of services of public interest (Services of General Economic Interest, in the EC Treaty).

One of the main points is to include expressly in the scope of the law the widest range of possible grantors of State aids.

To this end, just before the accession to the EU, probably under the pressure of European Commission, Romania had to amend the law on State aid⁸ in order add to the sphere of State aids grantors “other bodies which administer State’s resources or local communities’ resources ” beside state and local administrative authorities which were already mentioned in the law.

State aid for agriculture or fisheries is always excluded from the scope of the general provisions on State aid control.

Other countries exclude also defence industry (Bulgaria) or general measures (Lithuania). We do not think that is necessary because those additional exclusions result from the correct application of the provisions of the EC Treaty.

⁸ Government Order No. 94/2004.

2.2. Place of the provisions regulating State aid control in the national legal order

The next step is to decide what will be the most appropriate place in the national legal order to introduce the rules on State aid control. Various solutions have been experienced by New Member States and SAP countries but the vast majority of countries has opted for the adoption of a specific law on State aid control.

Separate law on State aid

- Czech Republic: Act No 59/2000 on State aid
- Slovak Republic: State aid law of August 1999
- Poland: framework law on State aid of June 2000
- Bulgaria: initially the same law was governing antitrust and state aid matters but the State Aid Act of 7 March 2002 repealed Article 20 of the Competition Act. Beside the State Aid Act, worth mentioning the Ordinance No 6/2002 of 25 July 2002 lastly amended in 2004, dealing exclusively with monitoring activities of the Minister of Finance in the field of State aid
- Lithuania: Law on monitoring of State aid to undertakings of 18 May 2000
- Romania: Law on State aid No 143/1999, amended and completed by the Law no. 603/2003 and the Government Ordinance No 94/2004 on settlement of certain financial measures
- Latvia: Law on control of aid for commercial activity of 19 December 2002 (amended on 1 April 2004)
- Croatia: State Aid Act of 17 November 2005

Incorporation of provisions on State aid control in a specific section of the law dealing with protection of competition

Estonia: Competition Act of 5 June 2001 (including amendments till March 2003), which contains a Chapter 6 on State aid.

Other

Hungary: law XXXVIII of 1992 on Public Finance

3. Establishment of the State Aid Authority in the existing institutional framework

For practical and logical reasons the New Member States and SAP countries had the choice between two options: designation of the Minister of Finance to act as the State Aid Authority or extension of the activities of the Competition Authority dealing with anti-trust matters.

Before the accession to the EU, the panorama was the following:

Minister of Finance as the State Aid Authority

- Latvia: State aid control is the responsibility of the State Aid Surveillance Commission (SASC). The duties of the SASC's secretariat are performed by the Department of state aid control of the Ministry of Finance.
- Hungary: the Minister of Finance is responsible for the control of State aid through the State Aid Monitoring Office (SAMO) and it is supported by an inter-ministerial advisory committee.
- Estonia: the national State aid monitoring authority is the Division for Competition and State Aid at the Ministry of Finance.

State aid control as a new responsibility of the Competition authority dealing with anti-trust matters

- Poland: after the entry into force of the law on State aid of June 2000, the State aid control has been devolved to the Office of Competition and Consumer Protection.
- Czech Republic: after the entry into force of the law of 2000 on State aid, the responsibilities of the Minister of Finance for the assessment and monitoring of State aids has been handed over to the Office for the Protection of Competition.
- Lithuania and Romania: State aid authority is the Competition Council.
- Croatia: State aid authority is the Competition Agency.

Some New Member States made the assessment that the independence of the State Aid Authority would be better ensured by the Competition Authority than by the Minister of Finance. However, in the Slovak Republic, a Government proposal to merge the State Aid Office with the Anti-Monopoly Office was rejected by the Slovak Parliament in June 2002. Furthermore, having in view the main criterion of the effectiveness of State Aid Control, the European Commission reported in 2001: *“The State Aid Monitoring Office in Hungary does not take binding decisions, its assessments appear in practice to have been respected. Contested assessments are referred to the Government for decision. The Office has a good enforcement record as to quality, but is insufficient in scope.”*

Worth mentioning also the dual-system put in place in Bulgaria. Its main features may be summarised as follows:

- The State Aid Department established at the Ministry of Finance is responsible for the overall co-ordination of State aid control. In particular, this Department prepares a Consolidated Annual Report, maintains the Central State aid Register, collaborates with the European Commission in preparing the regional map of state aid and notifies subsidies for the needs of the WTO Secretariat.
- Implementation and enforcement of State aid rules is the responsibility of the Commission for Protection of Competition (CPC).
- Relationships between the Ministry of Finance and the CPC are regulated by an inter-institutional Memorandum of understanding signed in September 1999.

4. Competences of the State Aid Authority and duties of State aid grantors

4.1. Panorama of tasks carried out by a State Aid Authority

Models of provisions listing the duties and responsibilities of National Authorities in charge of State aid control are attached in Annex II to this Concept Paper.

The main duties of those National Authorities relate to the following areas of activities:

- Reception of the notifications for authorisation of State aid schemes or individual Compliance assessment of the draft State aid after the collection of relevant data
- Monitoring of the correct implementation of the rules, ex-officio or further to a complaint
- Recovery of unlawful or misused State aids
- Keeping of a permanent inventory of the existing aids
- Submission of an annual report

In the Croatian model (Article 6 of State Aid Act of 17 November 2005) provided in the Annex II mentioned above, it will be observed that the State Aid Authority will have also to co-operate with other State bodies:

- with the authority responsible for state aid to agriculture and fisheries in the preparation of annual reports on state aid;
- in the budget preparation process with the authorities responsible for the preparation of the state budget and the budgets of regional and local self-government units, in compliance with the separate law;
- with the financial supervision authorities responsible for financial transactions relating to state aid in the Republic of Croatia.

4.2. Principle of ex-ante control of new aids or amendments to existing aids

Before the granting of any State aid which is not covered by an exemption for notification, the written authorisation of the State Aid Authority is always required. The State Aid Act of Croatia specifies that this principle supersedes provisions of Budget Act and General Administrative Procedure Act.

In Croatia, there is no exemption for the duty to notify.

As a general rule, New Member States exempt from the duty of notifying State aid where:

- “de minimis” rule applies, or
- State aid are said to be “compatible” in the EC Treaty and reflected as such in the national legislation on State aid.

In Bulgaria and Romania, exemption from notification is extended to the cases where a block exemption may apply. This practice is more in line with the simplification recommended by the European Commission and which is implemented between the Member States and the European Commission.

4.3. Exemptions taken into account for the assessment of State aid

National legislations on State Aid before accession to the EU mirror to a large extent the exemptions laid down in the EC Treaty⁹ or “block exemptions” allowed by the secondary EC legislation.

Block exemptions in the national legislations are subject to the adoption of normative acts by the State Aid Authority or by the Government¹⁰ but the “de minimis” rule is always detailed in the main law on State Aid (with the same threshold as that in force in the EU).

⁹ Article 87 of the EC Treaty

1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

2. The following shall be compatible with the common market:

- (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
- (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the common market:

- (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;
- (e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

¹⁰ However Lithuania has followed another approach. In the law on monitoring of State aid to undertakings, there is no generic definition of the categories of aids that “may be considered to be compatible” but the description of specific schemes (Aid to Export; State Aid to Small or Medium-Sized Enterprises; State Aid for the Promotion of Environmental Protection, Energy Efficiency and Production of Energy from Renewable Sources; State Aid to Promote Employment; State Aid for Rescue and Restructuring of an Enterprise; State aid for Research, Acquisition of Patents and Transfer of Technologies; State Aid for Regional Development). Nevertheless, the law empowers the competition Council to develop also other rules for block exemptions.

It will be noted that in the Romanian Legislation the related secondary legislation may be challenged before Courts of Appeal (administrative procedure) and that during the year 2004 the Competition Council in Romania adopted 18 regulations and 3 guidelines.

To limit the tasks of drafting block exemptions and guidelines which should have to be repealed upon the date of accession to the EU, Croatia has developed a quite different approach. In a Regulation of the Government of 28 April 2006 on “State Aid, key elements of assessment of compatibility of state aid” it is specified the following:

- Assessment of compatibility of state aid shall be carried out on the basis of the rules arising from the Stabilisation and Association Agreement
- Upon the proposal of the minister of finance, the Government of the Republic of Croatia shall issue decisions on the publication of the lists of relevant rules in the Official Gazette.
- Decisions on the publication of the rules referred to in Article 3 hereof shall entail the translation into Croatian of the rules in force in the EU and the manner of implementation of the rules in question. A specific committee consisting of five members shall be appointed by the minister of finance for this purpose.

4.4. Application for an authorisation to grant a State aid

Procedural rules to handle applications for an authorisation are not always developed with the same level of details but generally, the procedure implies the following operations:

- Notification of draft State aid (normative act or agreement) in the format established by State Aid Authority.
- Written requests of the State Aid Authority to complement the information on the State aid within a given deadline.
- Communication of data and documents by the State aid grantor that may be followed by a new request of the State Aid Authority to eliminate the deficiencies.
- Decision of the State Aid Authority.

Certain provisions included in national legal framework deserve to be highlighted:

In Romania the notification of State aids is a joint responsibility of the initiator of the act and of the grantor of the aid.

In Croatia:

- Draft proposals of normative acts containing State aid elements are subject to a preliminary binding opinion of the Competition Agency. This opinion is communicated to the Government and the Parliament. Without a positive opinion, the draft is returned to its initiator for revision.
- Requests of information not satisfied within the prescribed time-schedule imply that application for State aid approval has been withdrawn.
- The absence of response of the State Aid Authority after 90 days is considered as an authorisation.

4.5. Monitoring of the implementation

At its own initiative or on the ground of a complaint, the State Aid Authority may conduct investigations to uncover unlawful State aids (non-authorised) or misused State aids (which do not meet anymore the conditions for their authorisation). The sensitive point is to determine the range of the parties that are allowed to lodge a complaint or to provide observations during the assessment of a State aid. Since the European Commission thinks that any legal or natural person may contribute to the enforcement of the rules, the New Member States have been encouraged to open widely the right of any interested party to inform the State Aid Authority on certain malpractices.

4.6. Existing aids

Any legislation on State aid provides for the procedure applicable to assess the State aids implemented before the entry into force of the law.

The basic provisions may include the duty of all grantors to notify the existing aids, the compatibility assessment of the State Aid Authority with the right of the grantor to present its observations, the consequences of non-compliance with the decision taken by the State Aid Authority including the right to recover the State aid.

At an early stage of European integration, the legislation on State aid could contain also the duty of the State Aid Authority to draw up within a certain time-schedule a list of existing aids, to assess their conformity and to report accordingly to the Government (Croatia).

At a more advanced stage of the process of accession to the EU, provisions of the legislation on State aid contain requirements on the establishment of the Regional Aid Map (Lithuania).

A recent tendency is to make provisions on the creation of a State Aid Register (Croatia) with a computerised national network (Bulgaria).

4.7 Other monitoring activities

The State Aid Authority is sometimes empowered to supervise the transparency of financial relations between authorities granting State aid and recipients.

In Bulgaria, the beneficiaries of State aid (of which the turnover goes beyond a certain threshold) have to prepare a specific financial report annexed to their annual accounts to verify the use of the State aid. That is not applicable to Services of General Economic Interest for it is assumed that State aid received has been granted with sufficient transparency.

Obligations of the same nature exist in Romania. Public undertakings are required to keep records of their financial relations with the public authorities. The enterprises operating in the manufacturing sector and enterprises granted with of special or exclusive rights or providing services of general economic interest have the same obligation of keeping records and to justify by financial reports the correct use of the state aid.

4.8. Recovery of unlawful and misused State aids

The European Commission pays a specific attention to the recovery of illegal State aids in the Member States. That is why the mechanisms put in place by the partner countries to recover the amount of State aids which are not compatible with the functioning of the Associations Agreement are closely scrutinised by the European Commission.

The legislation on State aid contains more or less detailed provisions to organise the recovery of State aids. The time-limit beyond which the recovery is no more allowed is always specified. The legislation on State aid provides also for the procedure of notification of the order to recover the aid and the calculation of the amount or the recovery increased with interests.

In most cases, the recovery is ordered by the State Aid Authority. In Romania, the recovery of unlawful or misused State aids takes the form of an action of the Competition Council before a Court against the grantor or the beneficiary of the State aid in question¹¹. In Estonia the judicial recovery is only applicable against the recipient of the unlawful or misused State aid.

4.9. Appeal against the decisions of the State Aid Authority

The State aid legislation of some countries only refers to the application of the common administrative procedure to appeal a decision (Croatia). Elsewhere the law designates a high level existing Court: Supreme Administrative Court (Bulgaria), Bucharest Court of Appeal, acting in administrative matter (Romania), Higher Administrative Tribunal (Lithuania).

Estonia has put in place an ingenious system. Appeal against the decisions of the Minister of Finance is made to a State aid committee of which the task is to issue a proposal submitted to the Government for a decision. Some political issues may impact the final decision.

Compensation for damage resulting from an unlawful State aid may be claimed by enterprises in accordance with the general common rules applicable to the case (Lithuania) or before the Administrative Court of Appeal competent to order the recovery of the State aid (Romania).

4.10. Transparency of decisions and opinions of the State Aid Authority

Transparency is ensured by publication in the Official Gazette (general case) or by any means of information (Romania). In addition the final assessment of a specific aid is communicated to the Council of Ministers and/or Parliament - where the aid has been granted by the Government- (Bulgaria).

The publication may cover a wide range of acts of the State Aid Authority: preliminary binding opinions, prior authorisations, opinions on legislative proposals containing State aid, notification

¹¹ The Competition Council may initiate proceedings before the Court of Appeal having jurisdiction in the area where the grantor of the State Aid or the beneficiary has its principal offices, to annul the administrative act granting the aid and, therefore, to order the recovery, repayment or suspension of payment of any illegal aid. The ordinance of the president of the Court may be appealed to the High Court of Cassation and Justice.

made by grantors of State aids, positive or negative decisions, recovery and ex- post authorisation of State aids, other decisions to remedy irregularities (Croatia). It may be limited to the main acts of the State Aid Authority: positive or negative decisions made by the Minister of Finance or decisions regarding the termination of supplementary proceedings, recovery of State aids (Estonia). Sometimes the law specifies that the mandatory publication applies to Judgements of Courts referring to opinions or decisions of the State Aid Authority (Croatia).

4.11. Annual report

One of the key moments, especially for the European Commission, is the production of the annual report on the State aids granted during the previous year.

The format is established by the State Aid Authority and it generally reflects the requirements applicable in the EU.

The annual report is based on the contributions of the grantors of state aid. In Croatia it contains also the contributions of grantors of State aid in the sector of agriculture and fisheries that are not covered by the general requirements of the framework law on State aids.

This report takes stock of all State aids granted, including State aids exempted from the notification (for example, State aids awarded by the application of the “de minimis” rules. It is submitted to the Government for approval and sometimes, additionally, to the Parliament.

Given the dual-system of State aid control in Bulgaria, two reports are prepared. The Minister of Finance submits a Consolidated State aid annual report to the Government, the Parliament, the Commission for the Protection of Competition and the European Commission. The Commission for the Protection of Competition presents an annual report to the Parliament.

4.12. Cooperation with the European Commission

Usually, the legal framework of the New Member State before accession to the EU does not contain specific rules on the collaboration of the State Aid Authority with the European Commission¹². The related procedures are already described in the Europe Agreements and Decisions of the Association Councils.

8. State aid control after accession to the EU

Old Member States have Contact Points to deal the European Commission on State aid issues (very often the contact point is the Ministry of Finance) but, it seems that none of them has

¹² Nevertheless, the Bulgarian legislation contains measures on the collaboration with the European Commission on the occasion of the preparation of the regional map of state aid or where the country may institute a dialogue with the EU on state aids granted in Bulgaria and other Member States.

established a State Aid Authority¹³. Moreover, with the exception of Denmark, none of the Old Member States felt the necessity to adopt a framework law on State aids.

That is an area of concern for the European Commission. In its State Aid Action Plan 2005–2009, the European Commission encourages the Old Member States to follow the practice of the independent monitoring authorities in the new Member States¹⁴.

After accession to the EU, New Member States keep a State Aid Authority but since, the main responsibilities have been handed over to the European Commission in accordance with the EC legislation, the role of national State Aid Authorities is considerably reduced at the national level and extended at the EU level and the legal framework is amended accordingly.

Most of the secondary State aid legislation, especially with regard to block exemption, is repealed¹⁵. What remains is the following:

- State Aid Authority becomes an advisory body for State aid grantors and the contact point for the European Commission via the Permanent Representation of the country to the EU.
- Information on the conformity of specific State aids is circulated between the State Aid Authority and State aid grantors but the State Aid Authority is no more empowered to reject a notification of State aid to the European Commission where the grantor of State aid (or the government) takes the final decision to do so¹⁶.

¹³ The State Aid Unit at the Department of Enterprise, Trade and Employment does not supervise the award of State aids but it publishes guidance

¹⁴ State Aid Action Plan - Less and better targeted state aid: a roadmap for state aid reform 2005–2009, COM(2005) 107 final of 7 June.2005, Point 51:

*In the context of enlargement, the screening of state aid measures was conducted by operationally independent monitoring authorities in the new Member States. This has been a valuable experience which should be taken into account when considering further cooperation between the Commission and all Member States. In this context, the Commission will examine whether **independent authorities** in Member States could play a role as regards facilitating the task of the Commission in terms of state aid enforcement (detection and provisional recovery of illegal aid, execution of recovery decisions).*

¹⁵ For example, in Romania, after accession are remaining in force the following normative acts:

- Regulation concerning the repeal of certain regulations and guidelines adopted by the Competition Council in the field of State aid, published in the Official Gazette No.1057 of 30 December 2006
- Regulation regarding the procedures on State aid monitoring
- Governmental Decree no. 946 of July 19, 2006 on the maximum intensity of the regional State aid for the initial investment, published in the Official Gazette no. 663 of 2 August 2006
- Regulation of February 24, 2006, amending and completing the Regulation on the transparency of financial relations between public authorities and public undertakings as well as on financial transparency within certain undertakings
- Regulation on the transparency of financial relations between public authorities and public undertakings and on financial transparency within certain undertakings

¹⁶ Nevertheless, it has to be observed that some residual powers are still entrusted to the State Aid Authority in Slovenia. Article 7 (block exemptions and *de minimis* rule) of the Monitoring of State Aid Act (ZSDrP) of 2004 reads as follows:

*Irrespective of the provision of the previous article, the ministry shall handle block exemptions and aid under the *de minimis* rule and shall provide an **opinion** on its compliance with the rules in the area of state aid. The opinion on compliance for block exemptions shall be issued within 45 days of the aid being received, and that for aid under the *de minimis* rule shall be issued within 15 days.*

- Where appropriate, the format of annual report and the deadline to submit the annual report is adjusted to the requirements of the EC legislation.
- The establishment of the regional aid map and its regular updating together with the keeping of a Central Register of the notification of State aids are central issues for which new requirements are set out to collect the proper information on due time.
- New provisions are inserted to facilitate the on-site monitoring of the European Commission.

Annex I

Definitions of State aid

Estonia

Competition Act of 5 June 2001

§ 30. General provisions

(1) State aid is an advantage granted directly or indirectly in any form whatsoever by the state or a local government (hereinafter grantor of state aid) or from their resources which favours certain undertakings or the production or sale of certain goods or which distorts or threatens to distort competition by prejudicing trade between Estonia and the Member States of the European Union or between Estonia and other states with which Estonia has entered into an international agreement containing provisions concerning state aid. Financial aid, postponement of the payment of tax arrears, debt write-offs, the grant of loans under more favourable conditions than usually granted to other undertakings, and other forms of aid may be considered state aid.

(2) The following shall also be deemed to be grantors of state aid:

- 1) foundations which directly or indirectly use the resources of the state or a local government;
- 2) non-profit associations which directly or indirectly use the resources of the state or a local government;
- 3) legal persons in public law which directly or indirectly use the resources of the state or a local government;
- 4) companies in which the state, a local government or any other legal person in public law holds more than one-half of the share capital or votes represented by shares;
- 5) companies belonging to the same group as a company specified in clause 4) of this subsection.

Croatia

State Aid Act of 17 November 2005

In the event of non-compliance the ministry shall call on the manager of the state aid to rectify it, setting a deadline for bringing it into accordance. If the manager fails to adapt the state aid by the given deadline, the ministry shall inform the relevant ministry or head of department of such.

Until a positive opinion is issued by the ministry, the implementation of the state aid shall be withheld and prohibited.

The ministry shall inform the European Commission of the granting of state aid for block exemptions.

Article 3 (1) Within the meaning of this Act, state aid shall mean any actual and potential expenditures or decreased revenue of the state granted in any form whatsoever by the aid provider, which distorts or threatens to distort competition by favouring certain aid beneficiaries, insofar as it may affect the international commitments undertaken by the Republic of Croatia referred to in Article 1 hereof.

Annex II

Panorama of activities carried out by a national State aid Authority

Croatia

State Aid Act of 17 November 2005

Article 6

(1) The Agency shall perform the following activities:

- a) assess and consider state aid proposals and aid schemes within annual and multi-annual state aid approval plans;
- b) monitor the implementation and effects of state aid granted and order the recovery of unlawfully granted state aid or aid used in contravention of the rules;
- c) collect, process and register the data on state aid;
- d) collect the data on the use and effects of state aid granted;
- e) keep the state aid register;
- f) cooperate with the authority responsible for state aid to agriculture and fisheries in the preparation of annual reports on state aid;
- g) cooperate in the budget preparation process with the authorities responsible for the preparation of the state budget and the budgets of regional and local self-government units, in compliance with the separate law;
- h) submit the annual report on state aid to the Croatian Parliament;
- i) cooperate with international authorities, in compliance with the international commitments undertaken by the Republic of Croatia;
- j) participate in the preparation of draft proposals for laws and other regulations concerning state aid, as well as promote and encourage improvements in the state aid system;
- k) perform other activities relating to the implementation of this Act.

(2) In the performance of the activities referred to under paragraph (1) the Agency shall be vested with public powers and shall cooperate with the financial supervision authorities responsible for financial transactions relating to state aid in the Republic of Croatia.

(to be continued)

(continuation)

Panorama of activities carried out by a national State aid Authority

Lithuania

Law on Monitoring of State Aid to Undertakings of 18 May 2000

Article 19. Powers of the Competition Council

1. The Competition Council:

1) upon notification of State aid, may act on its own initiative or following the receipt of complaint lodged by the third parties;

2) shall have the right to obtain from the providers and recipients of State aid all the information necessary for the assessment of State aid,

3) shall determine the type and nature of State aid (new aid, existing aid or non-notified aid) on the basis of the information obtained and in accordance with this Law;

4) in order to determine the economic situation in different regions may draw up a map of the social and economic condition of the country on the basis of the data of the Department of Statistics under the Government of the Republic of Lithuania. The map shall be drawn up on the basis of the GDP per capita, and on the basis of other specifically selected criteria reflecting the social and economic condition of the regions. In accordance with this map the Competition Council, with the consent of the Government of the Republic of Lithuania or a body authorised by it, shall determine the maximum intensity of State aid provided to each region. The map shall be revised every three years;

5) may require that, pursuant to paragraph 1, Article 18 of this Law, providers of State aid do not provide aid temporarily before the Competition Council has taken a decision authorising such aid;

6) shall have the right to require that the provider of State aid, with account of the conditions specified in the decision of the Competition Council, change his decision to grant State aid or revoke a decision taken pursuant to subparagraphs 2 and 3, paragraph 1 of Article 18 of this Law;

7) may require suspension of State aid and require to recover State aid if the provider of State aid is granting it in contravention of paragraph 7, Article 14 of this Law or of decisions of the Competition Council taken pursuant to subparagraphs 2 and 3, paragraph 1, Article 18 of this Law, or if the provider of State aid is not complying with the instruction of the Competition Council to suspend State aid provisionally;

8) may appeal to the Higher Administrative Tribunal against the actions of the provider of State aid when he fails to comply with the decision of the Competition Council to suspend or recover State aid.

2. Decisions of the Competition Council referred to in paragraph 1, Article 18 of this Law shall enter into effect on the next day after the publication of their operative part in the “Valstybės žinios” (Official Gazette).