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P A R T I

EU Competition Policy and its Institutional Framework

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Contents

Introduction and Overview

The purpose of this paper is to offer an overview of competition policy in the EU, with a specific interest in its institutional incarnation. Competition policy represents one of the realms in which a European-wide approach has attained the highest degree of application. Since 1958, the year when the Treaty of Rome came into force, a continuous momentum towards common competition legislation and practices can be observed. This has been an essential, if not the most important, ingredient towards accomplishing the declared aim of the Treaty of Rome, freedom of movement of people, goods, services and capital.

Undoubtedly, the accomplishment of integration on the front of competition policy has not been without difficulties. While antitrust regulation has been at the centre of European-wide action since the early days of the Community, in particular with the enactment of Regulation 17 in 1962, vigorous and concerted intervention in other areas of competition policy was delayed until the Single European Act of 1986. The Act was promulgated as the direct expression of an intergovernmental determination to complete the European construction. In order to achieve substantive integration of European markets, it encouraged, among other provisions, the effective implementation of the provisions of the Treaty of Rome which concern the liberalisation of monopolistic sectors, and the monitoring of national State aid programmes. Since the late 1980s, significant progress was made with the enactment of various Directives, the purpose of which was the liberalizing of monopolies, primarily in network industries. On the front of State sponsored assistance to certain sectors of the economy, both European developments and international conditions entailed a decline in the magnitude of State aid. Within the Community, an important role was played by the decision to adopt a single currency, with the derived requirements in terms of budgetary discipline. On the international front, the conclusion of the Uruguay Round of trade negotiations, and the consequent establishment of the World Trade Organization, imposed international rules, including those concerning State subsidies.

In the area of antitrust policy, which concerns restrictive business practices and abuses of dominant positions, the arrangements in force since 1962 were recently deemed in need of reform. The primary motivations underlying this resolve were the increasing burden falling on the European Commission in the centralized system of enforcement laid out in Regulation 17/1962, and the perceived necessity to further harmonize the application of competition provisions across the Union. Regulation 1/2003, which becomes effective in May 2004,

attempts to address these issues. Its main innovations consist of decentralization of enforcement procedures, and remodelling of the underlying institutional architecture.

The present paper is structured as follows. First is a brief history of the origins of EU competition policy. The second section discusses the general objectives of competition policy, classified in the categories of efficiency and fairness, with an emphasis on the growing prominence of economic principles in the examination of competition cases. Certain specific features of EU practice are also highlighted, primarily in connection with the unique nature of the European Union as an international organization, and the economic doctrines which played a dominant role in the initial design of EU legislation. Third is a description of the institutional setting devised to implement competition provisions. The subsequent section presents an overview of the domains of EU competition policy. These are identified as antitrust policy; the derived area of mergers; liberalization of monopolies; and the discipline of State aids. The fifth section highlights the general issues associated with the functioning of competition policies in a complex organization of States, such as the European Union. Sixth is a detailed discussion of the recent developments concerning the enforcement of antitrust provisions, embodied in Regulation 1/2003. The various manifestations of the attempt to decentralize the system are examined from the standpoints of procedural innovations and institutional design. The concluding section is dedicated to the case studies of three current Members of the European Union. Germany is selected because of the crucial influence of German competition theory and institutional arrangements on the original debate that led to the drafting of the relevant provisions of the Treaty of Rome. The case of Italy is appealing for the new Members of the EU, since, although Italy was a founding Member of the Community, universal competition legislation and the corresponding national authority were established only in 1990. Furthermore, both the Competition Act and the authority were conceived with the principle of subsidiarity in mind, as complementary to EU policy and institutions. Finally, Spain was included as a late Member of the Union, and because of its recent history as a former dictatorship.

1. The Origins of EU Competition Policy

The first example of public action in the domain of competition is to be found in the United States. With the notable exception of Germany, the European continent did not devote attention to competition related matters until after the Second World War.

Competition law is normally divided into two traditional branches: antitrust legislation and regulation of unfair competition. Antitrust law was first introduced in the USA in the form of the Sherman Act of 1890. This was an early attempt at systematic and modern regulation of competition. The general clause of the Act prohibited monopolistic agreements and the abuse of the monopolistic position. This statute was followed by a number of other laws[1] setting out in detail individual areas of intervention. It can be noted that the USA devotes considerably more attention to banning restriction of competition than to the restraints relating to unfair competition.

As mentioned, the public policies of most continental European countries were not concerned with the area of competition until after the Second World War. In the exceptional German case, as early as 1897, the Reichsgericht (the highest court of the Empire) ruled on the subject of competition. The ruling established that cartels did not violate the right of other parties to do business, thus interpreting the right to economic activity in a classical liberal sense, as freedom of interference by the State. In 1923 the German government passed legislation intended to combat the abuse of economic power, but this attempt was largely ineffective, since the number of cartels continued to rise in the interwar period (Kühn, 1997, 116). Germany was, nonetheless, the first continental European country to attempt to legally regulate the area of unfair competition in a universal and systematic manner. Today's regulation in Germany is based on a law adopted in 1957[2] and specific areas are governed by special regulations, the so-called sectoral rules.

On a continental scale, the foundations for today's competition provisions were laid with the Treaty of Rome[3], which was the first step in the process that led to the establishment of today's European Union. Both political and economic objectives inspired the establishment of a European Common Market in 1957. An important political objective was the desire to increase the political and economic weight of European countries on the world stage. This has been a red thread which has guided many decisions over the past decades, even contrary, in some instances, to a strict economic rationale. Economic objectives revolved around the increased scale and scope, and the increased opportunity for export, offered by integration. In this respect, a key factor that distinguished the European Community from other customs unions was the adoption of the proposition that private agreements should not impede the free movement of goods and services across national borders inside the market. This goal is embodied in the provisions directed at controlling cartels and dominant enterprises (Rosenthal 1990, 293-343). The Treaty of Rome also sought to limit the measures by which national governments provided financial assistance to enterprises in their jurisdiction. But, given the sensitivity of the matter, the specific procedures for the actual implementation of these provisions were left for future development.

In general, the provisions contained in the Treaty of Rome formed the basis for co-ordinating the national legislations of EU Member States. Accordingly, it has been a standard requirement for the countries aspiring to membership of the European Union to assume the obligation of harmonizing their national legislation with the provisions of the Treaty of Rome.

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[1] Examples are the Clayton Antitrust Act (1914), the Robinson-Patman Act (1936), the Hart-Scoss-Rodino Antitrust Improvement Act (1976).

[2] The "Act against Restraints of Competition," which came into force on 1st January 1958.

[3] In what follows, the term "Treaty" refers to the "Consolidated Version of the Treaty Establishing the European Community," which incorporates amendments, additions and updates to the original 1957 Treaty of Rome.

Protection of competition represents no exception, and competition provisions modelled on the corresponding Articles of the Treaty are regularly included in association and other relevant agreements which new Members stipulate with the European Union.

2. The Objectives of EU Competition Policy

Competition policy determines the institutional mix of competition and cooperation that gives rise to the market system (Graham and Richardson, 1997, 5). A market system is based on social interaction, and conditioned by both policy design and cultural inertia. This interaction of market players is governed by the formal rules of competition policy, which are one of the cornerstones for an effective functioning of the market. The formal rules and norms of behaviour enshrined in antitrust policies and practices regulate the intensity of competition and the scope of cooperation, and define the legal boundaries for both. Like all aspects of the institutional framework of a society (North, 1990), competition policy reflects history and culture. Therefore, it is constantly changing and it always differs among countries.

2.1 The Pursuit of Efficiency and Fairness

With respect to the determination of objectives of competition policy, following Ehlermann and Laudati (1998, introduction) distinction should be drawn between ultimate goals and intermediate (operational or direct) objectives. Casual observation of worldwide experience indicates that the ultimate economic goal of competition policy can be condensed in the general development of the economy of a country or group of countries. Following Graham and Richardson (1997), intermediate objectives can be grouped in the two categories of efficiency and fairness. Actual legislation typically seeks a combination of the two. To meet these broad intermediate objectives every country has developed conventions or rules of conduct for firms acting alone and in concert, over short intervals of time, and over their entire corporate lifetime.

One crucial difference between the two goals should be noted. While efficiency has a relatively well defined economic meaning, the significance of fairness is culturally distinctive, and can therefore give rise to conflicts of interpretation. At any rate, under most circumstances, the simultaneous pursuit of efficiency and fairness implies some trade-off between the two goals.

Examples of inefficiencies range from underproduction and overpricing of a monopolist with market power to distortions in relative prices and costs that mislead investors and buyers, excessive product standardization or wasteful product differentiation, unjustifiably slow innovation or unnecessary duplication of research effort, and inadequate realization of scale economies. An important trade-off can be identified with respect to the pursuit of static, short term, as opposed to dynamic, long term, efficiency. Indeed, practices that are statically efficient may not be dynamically efficient, and vice versa. Thus the simultaneous quest for static and dynamic efficiency involves trade-offs. For instance, some policies may seek static efficiency by encouraging stricter regulation of cooperative activities in innovation intensive sectors, while others may pursue dynamic efficiency by subsidizing innovation but, at the same time, forcing innovating companies to license imitators under certain conditions. Crucial questions arising from the trade-off between static and dynamic efficiency concern the effect of market structure on the rate of technological innovation, and the appropriate mix of competition policy and intellectual property protection. These dilemmas are not easily addressed with the tools of competition policy. This constitutes an argument that justifies focussing public control and intervention on narrower objectives.

In general, with respect to the goal of fairness, a competition authority "*must assist in the enfranchisement in the economic process of many of the interests that are naturally underrepresented in the alliance of managers and politicians that makes up the modern corporatist state. Shareholders, consumers, and potential employees ... an effective competition authority is the ally of all these excluded groups...*" [Neven, Nuttall and Seabright, 1993, 11; cited in Graham and Richardson, 1997, 8]. The most obvious example of the pursuit of fairness is the enactment of policies that oppose abuse of market power and coercion. Other expressions of fairness include the prohibition of fraud, theft of intellectual property and industrial secrets, predation and price discrimination. To emphasize the controversial nature of the notion of fairness, in some competition statutes, notably in the US, fairness is generally interpreted as equality of opportunity, in the form of free entry into a business endeavour. On the other hand, in other jurisdictions, like the European Union, fairness sometimes has a much broader scope. As far as legislation is concerned, while some competition statutes deemphasize fairness as an explicit goal of policy, others give it more prominence. Virtually all countries, however, include fairness considerations implicitly in implementing their competition policies.

Ehlermann and Laudati (1998) argue that objectives other than economic efficiency and consumer benefit should be pursued by other means which normally produce better outcomes. Among these spurious aims, the authors include industrial policy and the protection of small and medium sized enterprises, which, on the contrary, have been explicit goals of EU competition policy. Objectives are rarely defined expressly in competition statues. Typically, they are inferred from legislative provisions that are broadly worded. This allows a degree of flexibility and the adaptation of the law to changing circumstances. In this respect, competition authorities might be able to act more freely than courts, which are more strictly bound to the wording of legislation and to the rulings which were produced in case law.

2.2 The growing Pre-eminence of Economic-based Analysis

During recent years a distinct narrowing of objectives has been observed. The European Union is no exception to this general trend. The emphasis has moved in the direction of economic-based analysis, with the result that greater importance has been attributed to considerations of economic efficiency and consumer benefit in the course of the examination of competition related cases. The first landmark of this shift towards considerations of economic efficiency is the Merger Regulation of 1990, which promotes in-depth economic analysis as the main criterion for judging competition related cases. The latest developments are consolidating the move in this direction, namely in the form of a Commission proposal to nominate a chief competition economist to be based with the Commission itself. The declared intent is to ensure the independent application of the tools economic analysis to the cases examined by DG Competition. The benefit of these advancements is that the application of the tools of economic theory enhances transparency and facilitates critical appraisal. In order to clarify the advantages of a method based on economic fundamentals, two alternative approaches to competition policy may be observed. The first focuses on a general notion of "public interest." The second is more strictly centred on objectives of economic efficiency. An example of the former (Hay, 1997) is offered by the UK Fair Trade Act of 1973. It lists five criteria of public interest, which extend beyond the promotion of effective competition per se. They are [1] maintaining and promoting effective competition; [2] promoting the interest of consumers, purchasers and other users with respect to quality and variety; [3] promoting, through competition, the reduction of costs, as well as the development and use of new techniques and products; and facilitating entry of new competitors into existing markets;

[4] maintaining and promoting balanced distribution of industry and employment; [5] maintaining and promoting competitive activity in foreign markets on the part of domestic producers and suppliers. An obvious criticism of this approach is that the definition of public interest is so broad that policy frequently lacks focus and certainty. In contrast with a wide formal definition of the public interest, it has been remarked that EU policy has evolved in the direction of encouraging and maintaining effective competition among market players. For instance, in operational terms, the past decade has witnessed an increasing emphasis on the economic effects, rather than the legal forms, of agreements or market practices in the course of the examination of competition related cases. The implicit aim is to ensure that policy action is not diverted from the application of the tools of economic analysis.

2.3 Specificity of EU Competition Policy

The framework of competition policy in the European Union presents some particularities, which it is useful to examine. The ultimate objective that has been historically dominant in shaping EU policy in general is the integration of European markets for goods, services and capital. A related goal, more directly linked with competition policy, has been the vigorous and committed protection of the freedom of action of market players. This focus is probably a consequence of the strong influence of the neo-liberal *Freiburger Schule* on German competition theory and practice, which provided the first inspiration for the drafting of EU competition provisions (Ehlermann and Laudati, 1998; Peacock and Willgerodt, 1989, 10). The driving feature of the neo-liberal doctrine is the idea of *Ordnungspolitik*, which prescribes economic policies aimed at guaranteeing economic structures that are conducive to competition and voluntary exchange. The goal is the active promotion of a free-market economy with a role for the State in assuring the institutional framework (*Ordnung*) necessary for market exchange. In this context, the exclusive role of policy would be to guarantee such a framework. This is in stark contrast with the XIX century liberal idea of preventing State interference, since an explicit aim of policy is to preclude anyone with economic power from limiting others to act. As an example of the enshrining of this approach in legislation, the central concept of a competition policy inspired by such a doctrine is that of "dominant position" (Kühn, 1997, 117-118). This provides a glaring distinction with the less normative approach adopted in other jurisdictions, as the United States. The latter would tend to be re-active rather than pro-active, in the sense that public intervention is warranted only when a restrictive business practice or an abuse of dominant position effectively produces consequences on the market. In sharp contrasts with the European Union, this normally excludes public intervention in instances where the threat to competition may only be a potential one.

The reflection of these general principles can be detected in the competition provisions of the EU. Indeed, the proclaimed purpose of EU competition policy is to ensure that firms do not frustrate the overall aim of a unified common market by means of anticompetitive practices that hinder trade in goods and services between Member States. For instance, Article 3(g) of the Treaty explicitly promotes the institution of "*a system ensuring that competition in the internal market is not distorted*." This emphasizes the most prominent specificity of Community competition policy: the fact that integration of European markets is a patent operational objective of public action. Indeed, the delay in the adoption of economic theory as an explicit tool of analysis can be interpreted as a direct consequence of the proactive role entrusted to competition policy since the formation of the Community, and the consequent dominant focus on the overarching objectives of market integration and protection of the freedom of action of market players. As previously noted, the vastness of such an approach to

competition policy has, in some circumstances, induced conflicts with more specific goals dictated by a strict application of criteria of economic efficiency.
An institutional particularity of EU competition policy lies in the fact that individual decisions are taken by the EU Commission and not by an independent agency or courts. This underlines the detail that there is an evident relationship between the objectives of competition policy and the institutional arrangements for its implementation. Indeed, the broader the objectives, the greater is the need for a centralized political body to pursue them (Ehlermann and Laudati, 1998, introduction). Narrower objectives facilitate the transfer of responsibilities to decentralized bodies, which is in fact the trend that can be detected in the latest institutional developments embodied in Council Regulation No. 1/2003 of 16 December 2002.
On the issue of EU expansion, the following observations are reported in Ehlermann and Laudati (1998). In advanced market economies the immediate aim of competition policy is to foster efficient allocation of resources in the traditional economic sense, and therefore such policies stress market behaviour of firms and control of mergers. However, in developing countries or countries in transition – defined as countries in which the preconditions for a market economy are not fully established - the immediate goal of competition policy is bound to be somewhat broader, because there may be less consensus about the desirability of competition policy; economic, legal, social or political institutions are less appropriate for the development of a free market economy; and the public may attribute greater importance to the short term disruptions a market economy can provoke than to its long term benefit, with the result that the immediate objective of competition policy appears to be the emergence of economic opportunities and entrepreneurship in a context in which more attention must be paid to establishing the political acceptance of a market economy. Competition policy therefore appears to have a more regulatory character, thereby allowing it to play an active role in the transformation of economic structures and behaviours. Moreover, the advocacy function of the competition authorities vis-à-vis the rest of the government, and the propaganda function vis-à-vis the public are seen as crucial.

3. The Institutional Setting of EU Competition Policy

The uniqueness of the European Union in contrast to other free trade areas rests with the sophistication of the administrative apparatus which has been established for the implementation and enforcement of the provisions contained in the Treaty of Rome. Competition policy is no exception to this rule. Quite the opposite. The institutional system governing this domain of Community intervention is probably the most far reaching of all.
The institution which is of paramount importance in matters of competition policy is the Commission, whose duty is to act in the interest of the Union as a whole. The Commission is authorized to initiate proposals for regulations, directives and recommendations, although these cannot be enforced without enactment by the Council of Ministers, composed of the representatives of national governments. Regarding the application of the rules on competitive practices (Articles 81 and 82 of the Treaty), Article 85 of the Treaty requires the Commission (Directorate General Competition) to ensure the application of the principles laid down in the Treaty. In the domain of state aid (Article 87), Article 88(1) of the Treaty states that the Commission shall keep under constant review all systems of aid in cooperation with Member States.
The actions of the Commission are subject to appeal to the European Court of Justice, which is the guardian of EU law, and has ultimate jurisdiction to interpret the Treaty and its enactments. The Court has often played a crucial role, giving impulse to the process of European integration at key stages (Burley and Mattli, 1993). The central feature of the Court's decisive function is the formulation of various doctrines, which have become a key

component for the effectiveness of EU policy (Weiler, 1991 and Hartley, 1981). First is the doctrine of direct effect, which implies that, in several domains, the validation of Community legislation requires no additional action by Member States, and establishes the enforceability of obligations arising from this legislation in national courts, as well as in the judicial system of the Union itself. The second important doctrine is the principle of supremacy of EU law over national legislation. As a consequence of these rulings, the Union has the ability, through its directives, of commanding Member States to modify national laws or adopt new legislation that conforms to EU provisions. This power is joined with the right of citizens to appeal to the European Court of Justice against their national governments.

By virtue of this legal apparatus, DG Competition may act on its own initiative or in response to complaints received from affected parties, be they individual citizens or other undertakings affected by alleged anticompetitive practices. Those affected by a ruling of the Commission may recur to the Court of First Instance, and appeal to the European Court of Justice, in order to obtain reviews of Commission decisions.

Radical institutional changes were introduced with Regulation No. 1/2003 on the implementation of rules on restrictive business practices and abuse of dominant position. The new regulation replaces the arrangements which have been in existence since 1962 (Regulation No. 17/62). The main advance is the decentralization of the institutional architecture for the implementation of antitrust provisions. The purpose is to remedy the disadvantages of the obligation on undertakings to notify the Commission of any agreements in order to obtain negative clearance or exemption. The previous rules imposed a heavy burden on undertakings and entailed that the Commission had to deal with an often unmanageable workload of cases. The solution proposed in 1962 consisted of block exemptions and the introduction of "administrative letters," which closed the case on the basis of a presumption of non-infringement of the rules but did not have legal effect.

Decentralization of the system revolves around the replacement of the principle of "prior authorisation" of restrictive agreements with that of "legal exemption", which renders agreements legal, and therefore enforceable, as soon as they are concluded, provided that they are compatible with Article 81 or 82 of the Treaty. This solution gives direct effect to the provisions of Article 81(3), in the sense that Member States' courts and competition authorities are empowered to employ them. A related benefit should be a more uniform application of competition rules, since only those practices which may affect trade between Member States are subject to Community law, while those that do not are entrusted to national authorities and courts. In order to ensure consistency of policy, the Commission retains the power of decision on important matters, such as block exemptions, individual decisions concerning rulings on infringement or inapplicability, the formulation of guidelines, and the evocation of cases from national authorities. Regulation No. 1/2003 also contemplates provisions for systematic cooperation between national authorities and between them and the Commission, with the declared intent of promoting the harmonized enforcement of competition provisions across the EU[4].

4. The Domains of EU Competition Policy

Title VI of the Treaty includes a Chapter entitled "Rules on Competition." The Articles of this chapter constitute the legal foundations for Community involvement in matters of competition. The domains of EU competition policy may be classified in the broad areas of

[4] A detailed description of the innovations introduced by Regulation No. 1/2003 is provided in a subsequent section entitled "Recent Developments."

antitrust, and the derived attention to the regulation of mergers; liberalisation of monopolistic sectors; and State aid.

4.1 Antitrust

Antitrust provisions are contained in Articles 81, 82, 83, 84 and 85 of the Treaty, and prohibit restrictive business practices and the abuse of a dominant position.
The origins of EU policy on restrictive business practices can be traced to the 1947 Havana Charter for the establishment of an International Trade Organization, which was negotiated but failed to be adopted[5]. This Charter contained provisions for dealing with such practices[6], and eventually influenced the content of the Treaty of Rome. In 1951 the Treaty establishing the European Coal and Steel Community was signed. This was the immediate forerunner of the Treaty of Rome, and contained similar provisions[7]. In both, emphasis was placed on the political resolve that national barriers, eliminated by agreement among governments, would not be reimposed by private restrictions. This was a reaction to the pre-war cartels, which had been dividing markets along national lines in the interwar period. 1957 was the year of the signing of the Treaty of Rome. Its Article 81 prohibits and declares void agreements between firms and concerted practices that have the object or the effect of preventing, restricting or distorting trade in the common market, and that affect trade between Member States. Among these, reference is made to price or non-price, and horizontal or vertical restrictions, in the form of price fixing; control of production, procurement, marketing, investment, and innovation; and discriminatory treatment of sellers. Prohibited agreements and decisions are automatically void. Regulation 17/62 prescribes that all restrictive agreements must be notified to the Commission. The Commission has the power to prohibit restrictive agreements and impose fines on the offending firms of up to 10 percent of their global turnover in the year preceding the decision. The actual penalties are, however, calculated according to a method adopted in 1998, which determines fines on the basis of the gravity and duration of the infringement, and attenuating and aggravating circumstances. The Commission has the ability to carry out investigations on its own initiative into the behaviour of certain companies or into specific market sectors when it suspects possible restrictions of competition. Complaints from competitors, customers or consumer groups may be taken into consideration by the Commission.
These provisions present some similarities with US antitrust statutes. European distinctiveness lies in empowering the Commission to exempt, under Art. 81(3), agreements, decisions or practices, singly or by category, on the grounds that restrictions contribute to improving production or distribution of goods or promoting technical and economic progress. Other criteria are that a fair share of the resulting benefits is reserved for consumers; that superfluous restrictions are not imposed; and that the agreements do not afford the possibility of eliminating competition "*in respect of a substantial part of the product in question*".
Article 82 of the Treaty treats Abuse of market dominance. It condemns "*…any abuse by one or more undertakings of a dominant position within the Common Market or a substantial part of it…in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchasing or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the*

[5] The Charter was adopted by the United Nations Conference on Trade and Employment, and was intended to establish a multilateral trade organization.
[6] See Chapter V of the Charter "Restrictive Business Practices."
[7] See Chapter VI, "Agreements and Concentrations," and Chapter VII, "Interference with Conditions of Competition."

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."
The language of Article 82 indicates that potential dominance of enterprises, excluding the ones supported by the State, is dealt with by prohibiting them from taking improper advantage of a dominant position in the common market, but only to the extent that actions affect trade between Member States. Instances of "improper advantage" are explicitly identified in charging "inequitable" purchase and sale prices; imposing limits on production, markets or technical development to the detriment of consumers; discriminating among trading partners with the intention of placing them in a position of competitive disadvantage; and imposing supplementary tie-in conditions to contracts.

4.1.1 Enforcement of EU Antitrust Provisions

Controversy has arisen in the past regarding the exact interpretation of these antitrust provisions in the phase of implementation. A sensitive issue is the definition of the outer limits of the prohibitions, in consideration of the special position of various sectors, such as agriculture, transport, defence and public monopolies. Other problems are the integration of EU and national action under respective antitrust statutes, and the formulation of exemptions from Art. 81(1). Regulation 17 of the Council of 6 February 1962 for the implementation of Articles 81 and 82 of the Treaty, recently replaced by Regulation 1/2003, was devised to address some of these questions. It prescribed mandatory notification of prohibited agreements to the Commission with the purpose of requesting an exemption, and it established the procedure to obtain negative clearance, that is an acknowledgement that the agreement remained outside the scope of Articles 81(1) and 82.
The guiding principle in the enforcement of EU antitrust policy is the goal of a single market[8]. As a consequence, agreements or behaviours that might have the effect of dividing or segmenting the markets of Member States along national lines are attacked with particular vigour. For instance, the practice of charging different prices in different Member States, where such pricing is unrelated to the costs of supplying the different markets, is seen as particularly detrimental to market integration, and has, therefore, often been condemned by the Commission. So have been practices that might have the effect of closing the market of a Member State to interstate trade.
The Commission places special emphasis on assisting small and medium sized enterprises, which can benefit from a number of block exemptions from Art. 81. Examples of such exemptions concern research & development and specialization agreements, as well as the domain of joint ventures. The particularly tough line taken on price discrimination may also be partly ascribed to a desire to protect SMEs.
Article 81 of the Treaty deals with horizontal agreements, by commanding energetic action against arrangements that could carve up markets along national lines, fix prices, limit production, or restrict technological change. Even when such agreements were ostensibly contained within a single Member State, the Commission condemned them if they demonstrably affected trade between that country and other Members (See *Vereniging Cementhandelaren v. EC Commission*, Case 8/72 [1972]; *Groupement des Fabricants de Papiers Peints de Belgique & Ors v. EC Commission*, Case 73/74 [1975]; cited in Nicolaïdis

[8] The following considerations are based on Nicolaïdis and Vernon (1997).

and Vernon, 1997, 287). Eventually, the Court also asserted its jurisdiction over agreements entered into outside the Union that had effects on the Union's markets. Exemption criteria in Article 81 were used to allow some forms of restrictive agreements, for instance those intended to reduce excessive capacity in a given industry, and no-future-competition commitments in connection with takeovers. Eventually, the Commission granted several exemptions and was seen as bending to special interests.

As far as vertical agreements are concerned, a majority has consisted of bilateral supplier-distributor arrangements, designed to give distributors a monopoly in a national market, and suppliers the assurance that distributors do not handle rival products. Ultimately, the Commission and the European Court recognized the possibility of "group economic units" to account for intra-group trade (Goyder 1988, 79-83).

By virtue of the instruments of negative clearance and the exemptive provisions contemplated in Articles 81 and 82, certain propositions began to emerge as characteristic features of Commission decisions (Nicolaïdis and Vernon, 1997, 289). For instance, exclusive producer-distributor relations were deemed desirable if both parties could be assured of advantages, and were more easily tolerated for products with complex marketing requirements and other producers in the market, as in the case of the automobile industry. Numerous block exemptions were also granted. Further examples concern the areas of vertical agreements, licensing agreements for the transfer of technology, horizontal cooperation agreements, franchising agreements, and special provisions aimed at the insurance sector. Block exemptions of vertical agreements are treated in Commission Regulation No. 2790/1999 of 22 December 1999, which numbers various categories of agreements and concerted practices which are exempt from Article 81(1), and includes rules for supply and distribution agreements. Specific regulations concern particular kinds of vertical agreements, such as those mentioned regarding the motor vehicle sector[9]. Certain categories of licensing agreements for the transfer of technology are exempted under Commission Regulation No. 240/96 of 31 January 1996. Horizontal cooperation agreements are treated in Council Regulation No. 2821/71 of 20 December 1971 amended by Commission Regulation No. 2658/2000 of 29 November 2000. Commission Regulation No. 2659/2000 on the application of the Treaty Article 81(3) to R&D agreements represents a potentially controversial case of a type of horizontal agreement which is granted a block exemption. An evident problem is the determination of the right balance between encouraging R&D and preventing collusion and monopoly. This issue calls into question the appropriateness of competition policy as the instrument to deal with the dilemma of static versus dynamic efficiency.

In relation to the implementation of the provisions contained in Article 82 on abuse of dominant position, the Commission enjoys considerable room for interpretation in determining when an enterprise is dominant and when it abuses that position. A series of decisions of the Court confirmed that various enterprises in fact held dominant positions, including partnerships in the same line of business. A key characteristic of a dominant enterprise was identified as the ability to prevent effective competition, deduced from the capacity to operate independently of competitors and customers. A rule of thumb that was established is a 35% market share held by the undertakings concerned. Forms of abuse were seen in activities of dumping, fidelity rebates, withholding supplies from a customer in order to hamper competition, charging different prices to different customers, charging excessive prices, that is prices with no relationship to the economic value of the product. None of these was seen as a violation per se of Article 82, but was judged as such for its effects in a specific context.

[9] Commission Regulation No. 1400/2002 of 31 July 2002.

Table 1 provides summary statistics on cartel cases sanctioned by the European Commission in recent years.

Table 1
The Fight against Cartels – Statistics
Total (rounded) Amounts of Fines per Case/Year

1998

Case	Total amount (Euro million)
TACA[2]	273
Preinsulated pipes	92
British Sugar[1]	49
Total amount for 1998	414

1999

Case	Total amount (Euro million)
Seamless steel tubes	99

2000

Case	Total amount (Euro million)
Amino acids (Lysine)	110

2001

Case	Total amount (Euro million)
Vitamins	855
Carbonless Paper	314
Graphite Electrodes	219
Citric Acid	135
German Bank Charges	101
Belgian Breweries	91
Luxembourg Breweries	0.45
Sodium Gluconate	58
SAS/Maersk Air	53
Zinc Phosphate	12
Total amount for 2001	1.839 billion Euro

2002

Case	Total amount (Euro million)
Plasterboard	478
Methionine	127
Austrian Banks "Lombard"	124
Rond à Beton	85
Specialty Graphite	61
Industrial & Medical Gases	26
Food Flavour Enhancers	21
Fine Art Auction Houses	20
Methylglucamine	3
Total amount for 2002	950

[1]Fines reduced by Court judgements
[2] Fines including other aspects of antitrust infringements than cartel behaviour

Source: European Commission

4.2 Mergers

Concern for the abuse of dominant position eventually led to the control of mergers among large enterprises. The seminal 1972 Continental Can case was seen by the Commission as illegal under Article 82, and was judged to create a dominant position. In principle, this rule could only apply where a merger is instigated by a firm that is already dominant. The Court overrode the Commission's decision in the individual case, but approved the use of Article 82 for dealing with cases of mergers with a potential to suffocate competition (Nicolaïdis and Vernon, 1997). With this practice recognized, the Commission sought the right to regularly examine mergers ex ante. This was granted with Council Regulation EEC No. 4064/89 on the control of concentrations between undertakings, which is applicable to very large firms with

substantial business in the common market. This regulation was amended by Council Regulation No. 1310/97. The European Commission is granted the exclusive right to investigate mergers with a "Community dimension." As a result of an investigation, the Commission may prohibit mergers which create or strengthen a dominant position in the common market. "Community dimension" of a merger is defined on the basis of the turnover involved. The thresholds considered are a worldwide turnover of 5,000 million Euros and a Community-wide turnover of 250 million Euros. Below these thresholds, merger control is performed by the authorities in the Member States under national legislation. The criterion employed involves testing whether the merger could create or strengthen a dominant position in the common market. This exposes another dilemma, which is typical of EU competition policy, that of striving for a balance between encouraging the establishment of firms that are sufficiently large to compete in the world market, and assuring competition within the frontiers of the Union.

A prior enquiry to determine the relevant market and the presence or absence of dominance is required, before the question of abuse can be tackled. The Commission and the Court have not always followed this logic in practice. In fact, there frequently is a tendency to identify an abuse first, and then to infer that the firm must be dominant (Fairburn et al., 1984). The degree of competition has emerged as the criterion by which mergers should be judged. Neven, Nutall and Seabright (1993) lament that not enough weight has been assigned to consumer welfare effects in the rulings concerning merger cases. Indeed between 21 September 1990 and 30 April 2003 only 18 mergers have resulted in an outright prohibition of the part of the Commission, although often partners altered conditions of proposed merger after Commission review. (Table 2).

In January 2003, the Commission adopted a proposal for package of reforms[10], which aim at improving the solidity of merger decisions, notably with respect to the underlying economic analysis. Checks and balances will also be improved, while the right of merging parties to be heard during the proceedings will be enhanced.

[10] Commission Proposal 2003/C 20/06.

Table 2
European Merger Control – Council Regulation 4064/89 – Statistics
21 September 1990 to 30 April 2003

I.) NOTIFICATIONS

	90	**91**	**92**	**93**	**94**	**95**	**96**	**97**	**98**	**99**	**00**	**01**	**02**	**30/04 03**	**Total**
Number of notified cases	12	63	60	58	95	110	131	172	235	292	345	335	277	67	**2252**
Cases withdrawn - Phase 1			3	1	6	4	5	9	5	7	8	8	3	0	**59**
Cases withdrawn - Phase 2				1			1		4	5	6	4	1	0	**22**

II.) FINAL DECISIONS

Article, kind of decision...	**90**	**91**	**92**	**93**	**94**	**95**	**96**	**97**	**98**	**99**	**00**	**01**	**02**	**30/04 03**	**Total**
6.1 (a) out of scope Merger Reg.	2	5	9	4	5	9	6	4	6	1	1	1	1	0	**54**
6.1 (b) compatible	5	47	43	49	78	90	109	118	207	236	293	299	242	63	**1879**
6.1 (b) comp.w.commitments(6.2)		3	4		2	3		2	12	19	28	13	10	2	**98**
Total 6.1 (b) + 6.2	5	50	47	49	80	93	109	120	219	255	321	312	252	65	**1977**
9.3 partial referral to M.S. (ph.I)			1		1			6	3	1	4	6	9	0	**31**
9.3 full referral to Member States				1			3	1	1	3	2	1	4	6	**22**
Total 9.3 (ph.I)			1	1	1		3	7	4	4	6	7	13	6	**53**
Phase I	7	55	57	54	86	102	118	131	229	260	328	320	**266**	**71**	**2084**
9.3 partial referral to M.S.(ph.II)										1		0	0	0	**1**
8.2 compatible		1	1	1	2	2	1	1	3	0	3	5	2	0	**22**
8.2 compatible with commitments		3	3	2	2	3	3	7	4	8	12	10	5	3	**62**
8.3 prohibition		**1**			**1**	**2**	**3**	**1**	**2**	**1**	**2**	**5**	**0**	**0**	**18**
8.4 restore effective competition								2				0	2	0	**4**
Total 8		5	4	3	5	7	7	11	9	9	17	20	9	3	**109**
Phase II		5	4	3	5	7	7	11	9	10	17	20	9	3	**110**
Total final decisions	**7**	**60**	**61**	**57**	**91**	**109**	**125**	**142**	**238**	**270**	**345**	**340**	**275**	**74**	**2194**

III.) PHASE II PROCEEDINGS INITIATED

Article, kind of decision...	**90**	**91**	**92**	**93**	**94**	**95**	**96**	**97**	**98**	**99**	**00**	**01**	**02**	**30/04 03**	**Total**
6.1 (c)		6	4	4	6	7	6	11	12	20	19	22	7	4	**128**

IV.) OTHER DECISIONS

Article, kind of decision...	**90**	**91**	**92**	**93**	**94**	**95**	**96**	**97**	**98**	**99**	**00**	**01**	**02**	**30/04 03**	**Total**
6.3 (a) decision revoked										1		0	0	0	**1**
8.5 (a) decision revoked												0	0	0	**0**
14 decision imposing fines									1	4	1	0	1	0	**7**
22. 3				1		1	1	1				0	2	0	**6**
9 request rejected by decision		1								1		0	0	0	**2**
7.4 derogation from suspension	1	1	2	3	3	2	4	5	13	7	4	7	14	5	**71**

Source: European Commission

4.3 Liberalisation

Monopolies are the subject of Article 86 of the Treaty. Legal monopolies are declared subject to the anticompetitive prohibitions contemplated in the Treaty. Nonetheless, the application of such rules is not to obstruct the de iure or de facto fulfilment of the specific tasks entrusted to such enterprises. In consequence of the wording of Article 86, the Commission was not able to deal effectively with State monopolies until the Single European Act of 1986, which expanded the scope of competition policy to include services typically provided by the State, such as telecommunications, transport, gas and electricity. Indeed, frequently, monopolies have been in such network industries. In these sectors, the Commission follows the principle of distinguishing between the infrastructure and the service provided. The rationale for this

approach is that, while it is often difficult to establish alternative, competing infrastructures, for reasons connected with the relevance of the investment required, it is desirable to create competitive conditions with respect to the services provided.
The role of the Commission is to make sure that, when Member States grant special of exclusive rights, compliance with EU competition provisions occurs. The Commission also ensures that competition rules are properly complied with by enterprises that have been granted special or exclusive rights. In doing so, the language of Article 86 requires the Commission to verify that the application of competition rules does not obstruct the performance of the task entrusted to the enterprise. The legislative tool which has been used is that of liberalisation directives, which must be incorporated into national legislation, and enforced by Member States. Liberalisation directives have been introduced in the areas of telecommunications[11], transport, postal services, gas and electricity[12].

4.4 State Aids

A particularly sensitive matter is that of State aids. The Treaty is equivocal on this theme for reasons connected with the historic involvement of national governments in subsidizing certain "strategic" industries. Article 87 condemns State aids but only when they distort competition and adversely affect trade within the common market. Indeed, types of assistance compatible with the common market are expressly defined. Among these are aids of a social character that do not discriminate on the basis of origin of products; aids for natural disasters. Specific programs which the Commission may find compatible with the common market are also identified. Among these are forms of aid directed at the elevation of depressed regions; the financing of important projects with a European scope – as in the case of Airbus; assistance intended to remedy "serious economic disturbances".
Ehlermann and Everson (2001) point out that, unlike other regional economic groupings or federal states, State aid monitoring is a unique feature of competition policy in the European Union. However, State aids have been subject to worldwide rules, agreed in the context of GATT, since 1995. From an economic efficiency perspective, State aids should be granted only in cases of market failures. Yet, in reality, the decision by the State to assist individual industries or firms is often based on considerations of fairness, as opposed to a narrower concern for economic efficiency. In fact, the exceptions contained in the text of the Treaty, as

[11] For a detailed treatment of regulation in the telecommunications sector, see Ehlermann and Gosling (2000).
[12] Examples are Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity; Directive 97/67/EC of the European Parliament and the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service. The sector which was the object of the greatest deal of attention is the telecommunications sector: Regulation No. 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop; Commission Directive 1999/64/EC of 23 June 1999 amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities; Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets; Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications; Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of restrictions on the use of cable television networks for the provision of already liberalized telecommunication services; Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications; and the seminal Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment and Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services.

well as the block exemptions granted by the Commission, owe more to considerations of fairness than to a willingness to address market failures. The implied trade-off between efficiency and fairness is all the more evident in a multinational context, such as that of the European Union. Apart from the inefficiency arising from superseding the role of market forces in solving the problem represented by unviable industries or firms, negative externalities may be generated in consequence of the subsidies granted in one Member State, since these are likely to affect competition in other Members.

Table 3 provides summary statistics on State aid in the European Union. Note that the share of aid as a percentage of GDP has been steadily declining between 1997 and 2001, both in the Union as a whole and in most individual countries. By way of explanation for this tendency, while the provisions of the Treaty on State aid have not been modified since 1957, political, economic and legal conditions have radically changed over the past decades, both inside and outside the Community. Among these, special importance should be assigned to the impulse given to the common market since the Single European Act of 1986, and to the inception of the Euro, which has imposed strict budgetary discipline on Member State governments. Among factors external to the Union, membership of the WTO has played a crucial role in restraining governments from the practice of subsidizing domestic industries and firms[13].

[13] The WTO agreements, also called the Final Act of the 1986-1994 Uruguay Round, contain the "Agreement on Subsidies and Countervailing Measures," which includes a definition of subsidies and introduces the concept of "specific" subsidy, defined as an aid available only to an enterprise or industry within the jurisdiction of the authority granting the subsidy. Only specific subsidies are subject to the disciplines and countervailing measures set out in the agreement.

Table 3: State Aid as a percentage of GDP

		1997	1998	1999	2000	2001
EU	Total aid	1,30	1,18	1,04	1,00	0,99
	Total* aid	0,66	0,60	0,47	0,45	0,38
B	Total aid	1,42	1,41	1,39	1,34	1,34
	Total* aid	0,34	0,38	0,37	0,32	0,31
DK	Total aid	1,07	1,21	1,26	1,51	1,36
	Total* aid	0,60	0,64	0,63	0,82	0,68
D	Total aid	1,54	1,43	1,33	1,23	1,14
	Total* aid	0,91	0,82	0,74	0,69	0,58
EL	Total aid	1,78	1,19	1,05	1,06	1,02
	Total* aid	0,77	0,47	0,37	0,50	0,36
E	Total aid	1,08	1,10	0,90	0,85	0,74
	Total* aid	0,70	0,69	0,54	0,51	0,42
F	Total aid	1,59	1,37	1,23	1,18	1,10
	Total* aid	0,85	0,74	0,54	0,49	0,42
IRL	Total aid	0,82	1,31	1,35	1,31	1,20
	Total* aid	0,47	1,01	0,86	0,70	0,65
I	Total aid	1,61	1,35	0,97	1,04	1,01
	Total* aid	0,80	0,66	0,37	0,39	0,35
L	Total aid	0,61	1,44	1,37	1,38	1,30
	Total* aid	0,31	0,31	0,22	0,20	0,16
NL	Total aid	0,67	0,85	0,99	0,95	0,98
	Total* aid	0,17	0,16	0,20	0,17	0,15
A	Total aid	1,26	1,14	1,06	0,96	0,99
	Total* aid	0,31	0,27	0,26	0,22	0,26
P	Total aid	2,21	1,38	1,24	1,13	1,04
	Total* aid	1,64	1,06	0,95	0,85	0,77
FIN	Total aid	2,24	2,09	1,89	1,73	1,58
	Total* aid	0,46	0,42	0,38	0,36	0,29
S	Total aid	0,81	0,86	0,75	0,71	0,71
	Total* aid	0,22	0,23	0,23	0,20	0,19
UK	Total aid	0,67	0,60	0,45	0,40	0,66
	Total* aid	0,29	0,32	0,20	0,19	0,17
Total* :	Total state aid less agriculture, fisheries and transport					

Source: European Commission

Table 4 offers a snapshot of the distribution of State aid among various sectors between 1997 and 2001.

Table 4: State Aid by Sector; EU Totals

Million Euro					
	1997	**1998**	**1999**	**2000**	**2001**
Manufacturing	33.580,2	28.773,4	24.649,2	24.444,8	21.287,3
Tourism	318,9	347,7	393,4	323,9	306,7
Financial services	4.395,0	5.445,3	2.111,9	1.876,2	1.639,8
Media, culture and services	2.182,6	1.703,8	1.397,8	1.196,3	1.150,1
Employment and training	2.978,8	3.427,6	3.671,5	3.414,3	2.878,3
Transport	34.202,8	33.808,8	33.234,8	33.648,8	39.328,9
Agriculture and fisheries	15.826,2	13.595,3	13.452,8	13.386,1	13.322,0
Coal	8.199,2	8.619,4	6.789,3	6.976,6	6.201,0
Total	101.683,8	95.721,3	85.700,6	85.267,1	86.114,1

Source: European Commission

Concerning the institutional arrangements governing State aid, the Commission has the exclusive authority to scrutinise the schemes implemented by EU governments. The Commission's role is to monitor proposed and existing State aid measures to ensure that they are compatible with EU State aid legislation and do not distort competition within the common market. To clarify its State aid policy in a number of areas, ranging from aid to underdeveloped regions to research and development, employment, protection of the environment, rescue and restructuring of firms in difficulty, the Commission has adopted a number of "guidelines" or "frameworks". It has also promulgated a number of block exemption regulations for State aid concerning small and medium-sized enterprises, training and employment.

A screening procedure by the Commission of existing and future State aid programmes is contemplated. The Commission determines the forms of State aids and bases on which they may be assigned. The forms are grants, interest relief, tax exemptions, state guarantee or holding, and provision by the State of goods and services on preferential terms. Table 5 offers an overview of the share of each of these instruments in the manufacturing sector.

Table 5: Share of Each Aid Instrument in Total Aid to Manufacturing; 1999-2001

In %

	Grants	**Tax exemptions**	**Equity participations**	**Soft loans**	**Tax deferrals**	**Guarantees**
EU	63,3	26,1	0,3	6,6	0,5	3,1
B	78,7	14,9	0,2	5,5	0,3	0,4
DK	86,7	10,0	-	2,5	-	0,9
D	49,9	35,8	0,2	7,2	0,9	6,1
EL	81,2	18,7	-	0,0	-	0,1
E	88,1	-	0,7	11,1	-	0,1
F	47,1	38,7	-	10,4	0,3	3,5
IRL	18,9	76,8	4,3	-	-	0,0
I	77,9	17,5	0,3	4,1	-	0,3
L	94,3	-	-	5,7	-	-
NL	78,1	8,7	-	5,8	4,9	2,5
A	82,2	-	0,1	12,3	-	5,4
P	78,3	11,0	0,9	8,5	-	1,4
FIN	93,8	1,5	-	4,6	-	0,1
S	73,8	14,2	1,0	10,8	-	0,2
UK	96,2	2,6	1,1	0,1	-	-

Source: European Commission

The criteria to be used for evaluating the aid programmes implemented by national governments are *selectivity* (the programme must be specific about the geographical region and the industries it intends to support); *transparency*; *temporariness* (the program must be intended to address a difficulty of a transitory nature); *appropriateness* (given the problem). It is appropriate to point out that the standards on the basis of which state aids are appraised were significantly tightened after the Single European Act of 1986.

5. The EU and Member States

The competition provisions contained in the Treaty apply to all Members of the European Union. They are mainly intended to sanction restrictive business practices, abuses of dominant position, and merger decisions that have a transnational effect. EU legislation also provides for the supranational monitoring of national State aid programmes and for liberalisation of network industries. National competence is determined in a residual manner, in the sense that jurisdiction over cases which affect a single Member State is conferred upon the national competition authorities of that country on the basis of the corresponding national legislation. Given the nature of this two-tier system, both harmonization of national legislation with EU provisions, and institutional coordination among Member States and between these and the Commission, are essential ingredients for the effective implementation of competition policy.

Regarding the harmonization of legislation, Members of the EU and accession countries are achieving convergence as a direct consequence of the fact that they seek national laws and policies that do not conflict with EU practices. Competition provisions in the association agreements virtually duplicate Articles 81, 82, 86 and 87 of the Treaty, including the corresponding consultation procedures with respect to the Commission. A key problem is posed by the interdependence of policies across the Community. For instance, regulatory action, or lack thereof, on the part of a Member often has impacts in other Members. Additionally, State aids or lax application of competition rules may be used strategically by a Member to protect domestic markets or promote domestic producers in export markets. This can be seen as a form of intertemporal prisoner's dilemma (Hay, 1997, 209). The question is whether this is best resolved by agreements between Member States or by centralizing policy. In the former case, a problem that may arise is asymmetric information, in that each State is better informed about its own industries and firms. Furthermore, a range of possible solutions may be contemplated, with each having a different distribution of benefits among States. Another issue is that of credibility, since incentives to cheat are a defining feature of asymmetric information. If the solution to the dilemma is centralization of policy, the Commission would be in a better position than any single Member to broker an agreement, thus addressing the questions raised above. A complementary effect produced by centralization would occur in the phase of implementation, in that credibility would be enhanced. An intermediate situation arises where the Commission issues directives, which Members are required to implement, with sanctions for non-compliance. Obvious problems in this case would be detection, when, for instance, State aids may be concealed within public sector accounts; or the willingness of a State government to accept the risk of sanctions for non-compliance. The current institutional setting of EU competition policy is based upon a blend of the above solutions. Indeed, centralization of policy is contemplated for the cases which imply a transnational effect; indirect action, in the form of Directives, is the method of choice in the liberalisation domain; while decentralization to national authorities is the solution devised for the enforcement of antitrust provisions. This last method has been reinforced by the new rules set out in Regulation No. 1/2003 for the implementation of antitrust policy.

Concerning the status of EU legislation, Community norms have developed as an upper tier of policy, with precedence over domestic law, specifically in the areas of abuse of market power, anticompetitive agreements, and mergers with a European dimension. Consequently, if an agreement is granted exemption under Art. 81(3) or falls within a block exemption the view of the Commission is that exemption is a positive action, and therefore has to be permitted nationally. Alternatively, if Articles 81 and 82 do not apply, because interstate trade is not affected, national competition policy applies and firms cannot appeal to the Commission.

Difficulties may arise if Member State policies are weak. Then EU authorities cannot depend on national institutions to be effective, and a greater burden falls on DG Competition. The ideal solution is convergence between EU and member policies so that the load of cases can be shared, and jurisdiction is less of an issue. As stated above, this is indeed the tendency that may be observed both in the current Member States and in the accession countries. The allocation of the case load to different jurisdictions is made possible by the principle of subsidiarity, which allows the devolution of competition policy responsibilities to Member States, since they are likely to have better information about their own industries and firms, and are therefore better able to identify anticompetitive market structures and behaviour. But this solution will fail if EU and Member state policies are divergent. Ehlermann and Laudati (1998, introduction) suggest that some of the procedural and institutional problems with which the EU has been struggling might be linked to implicit divergences about the objectives of the EU's competition policy. Objectives are rarely discussed, as discussion might reveal major differences of opinion and prove to be divisive. However, a better understanding of these objectives is indispensable for the effective implementation of the substantive and procedural reforms contained in Regulation No. 1/2003, in particular concerning the attribution of responsibilities to national competition authorities.

6. Recent Developments

The most important recent developments concern the reform of the rules and institutional setting for the enforcement of the antitrust provisions contained in Articles 81 and 82 of the Treaty[14]. The reform is based upon a review conducted by the Commission of the system for applying the rules on competition, which have been in existence since 1962 (Regulation 17/62). This review has led to Council Regulation 1/2003 of 16 December 2002 implementing the rules on competition laid down in Articles 81 and 82 of the Treaty. This latest regulation, effective from 1 May 2004, seeks to address some of the problems which have arisen in connection with the implementation provisions previously in force. In particular, shortcomings were seen in the obligation on undertakings to notify the Commission of certain agreements in order to obtain negative clearance or exemption. This has imposed a heavy burden on firms and the Commission, which has had to examine a great number of cases that frequently did not raise problems with regard to the applicable rules but nevertheless involved a great amount of effort. As a result, the Commission, in some instances, has not had sufficient time to reach well-founded decisions. In the past, the Commission resorted to administrative letters, which closed the case on the basis of a presumption of non-infringement of the rules but did not have legal effect. Moreover, the Commission has frequently been unable to devote sufficient resources to investigating the most serious infringements of which, it may be supposed, it may not receive notification.
The new regulation represents a radical change with respect to Regulation 17/62. This implied that, while national competition authorities and courts were allowed to directly apply Articles 81(1) and 82, the power of exemption contained in Article 81(3) was reserved to the Commission, under the proviso that the Commission had been appropriately notified of the agreements. Because of the Commission's sole right to exempt, Article 81(3) did not have direct effect. Centralization of the power of exemption under Article 81(3), and the corresponding notification requirement, have also been seen to cause various difficulties in the phase of enforcement. For instance, in the early 1960s the Commission received such a

[14] For a comprehensive analysis of the debate on modernization of EU antitrust policy, various perspectives are presented in Ehlermann and Atanasiu (2002).

great number of notifications that it was unable to effectively deal with all of them. This was the main incentive for introducing block exemptions and comfort letters. However, these solutions were criticised on many fronts. Block exemptions were considered to be counter to economic efficiency, and to induce too great an amount of bureaucratic involvement. Comfort letters were deemed a poor substitute for a formal Commission decision since they lacked legal effect (Ehlermann and Atanasiu, 2002).With Regulation 1/2003, Article 81(3) becomes directly effective, so that it can also be applied by national competition authorities or national courts.

6.1 Decentralization of the System

The main innovation is an attempt to decentralize the system of enforcement by conferring more powers upon national authorities. On the basis of the analysis conducted, the Commission has proposed radical changes. In particular, Council Regulation No. 1/2003 explicitly acknowledges the need to reconsider the arrangements for applying the exception from the prohibition of agreements, laid down in Article 81(3). According to Article 83(2)b, account must be taken of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other. Consequently, the most important innovation is the decentralisation of the system. To this effect the principle of "prior authorisation" of restrictive agreements is replaced with that of "legal exemption", which renders agreements legal and therefore enforceable as soon as they are concluded if they are compatible with the Treaty (Article 81). In fact, the centralized system established by Regulation 17/62 no longer ensured a balance between those objectives. Its main shortcomings were that it hampered the application of Community competition rules by the national authorities and courts, and the aforementioned fact that the system of notification it had introduced prevented the Commission from concentrating its resources on the most serious infringements, while imposing a considerable burden on undertakings. The object of the new Regulation is the introduction of a directly applicable exception system, which entrusts the courts and competition authorities of the Member States with the power to apply not only Articles 81(1) and 82 of the Treaty, which contain the prohibitions and which are directly applicable, but also Article 81(3), which contains the exceptions to those prohibitions. The facts that national competition authorities are empowered to directly apply Community law, as stated in Article 3 of the Regulation, and that national courts are granted the power to award damages to the victim of infringements, also play an essential role in the direct application of Articles 81 and 82. This represents, indeed, the main feature of the institutional restructuring which is under way, the explicit intent of which is to facilitate the effective application of Community competition rules.
In order for decentralization to be effective, attention must be devoted to improving both horizontal and vertical coordination of competition authorities. To promote horizontal cooperation between Member States, and vertical cooperation between a Member State and the Commission, national authorities and courts are required to apply Community rules in conjunction with national legislation, taking into consideration whether agreements and practices affect trade between Member States. An essential precondition for this is the determination of the relationship between national and Community competition law, pursuant to Article 83(2)e of the Treaty. In this regard, the doctrine of supremacy of EU law implies that the application of national competition legislation to agreements that fall under Article 81(1) does not lead to prohibition if these agreements are not also prohibited under

Community law[15]. Nonetheless, Member States' authorities are not prevented from applying stricter competition provisions to agreements or practices which only have effect in their jurisdiction. In line with the general spirit of EU provisions, the Regulation does not preclude Member States from applying on their territory national legislation which protects legitimate interests, other than protection of competition, provided that such legislation is compatible with general principles and other provisions of Community law.

From the point of view of the institutional architecture, the coordination of antitrust action is guaranteed by the fact that the Commission and national bodies will form a network of public authorities (Chapter IV of the Regulation). To this end arrangements for information and consultation are indispensable (Article 12 of the Regulation). The exchange of information and the use of such information as evidence must be allowed between the members of the network, even when such information is confidential. This information may be used for the application of Articles 81 and 82, as well as for the parallel application of national competition law, provided that it relates to the same case and it does not lead to a different outcome. For this procedure to be effective the rights of defence enjoyed by undertakings in the various systems must be sufficiently equivalent. However, where undertakings are subject to different types of sanctions across the various systems, then the shared information may only be used if it has been collected in a manner which guarantees the same level of protection of the rights of defence as the one that is normally applied in the jurisdiction of the receiving authority.

As additional assurance of consistent application of competition rules, national competition authorities are automatically relieved of their jurisdiction if the Commission initiates its own proceedings, the so-called "right of evocation" (Article 13 of the Regulation). To warrant that cases are dealt with by the most appropriate bodies within the network, a competition authority is allowed to suspend or close a case on the ground that another authority is dealing or has dealt with it. The purpose is to guarantee that each case is processed by a single authority. The Commission has the option to reject a complaint on the grounds that the case lacks Community interest, even though no other competition authority has indicated its intention to proceed with the case.

The new institutional architecture builds upon some of the provisions contained in Regulation 17/62, which established a Committee on Restrictive Business Practices and Dominant Positions. This is maintained in the new system of decentralized enforcement, with a few operational modifications aimed at improving the effectiveness of its organizational arrangements (Article 14 of the Regulation). To this end, the Advisory Committee is allowed to act as a forum for debating cases that are being managed by the competition authorities of the Member States, the purpose being the consistent application of Community competition provisions. The Advisory Committee is composed of representatives of the national competition authorities.

Uniformity in the application of competition rules also necessitates arrangements for cooperation between the Commission and the national courts in the countries where, in alternative or in conjunction with competition authorities, these are entrusted with the application of Article 81 and 82 (Article 15 of the Regulation). National courts have the option to solicit from the Commission information or opinions concerning the application of Community competition law. The Commission and national competition authorities have the right to submit written or oral observations to courts in the course of the proceedings, according to the procedural rules and practices enshrined in national legislation. In order for this to happen, national competition authorities and the Commission must be kept up to date of the proceedings being examined in national courts. Since the occurrence of conflicting

[15] See section 3. "The Institutional Setting of EU Competition Policy."

decisions in a system of parallel jurisdictions would undermine the principles of legal certainty and uniform application of Community law, national courts may not make decisions which run counter to the decision adopted by the Commission (Article 16 of the Regulation).
The regulations determining block exemptions to Article 81(1) already in force[16], as well as new ones decided by the Commission, will still apply. Nonetheless, the Commission and national competition authorities have the power to withdraw in a particular case the benefit of the block exemption Regulation, if the effects in the particular case are incompatible with Article 81(3).
Article 2 of the Regulation imposes the burden of proof upon the party or the authority alleging an infringement of Article 81(1) or 82. In the case of the exemptions contemplated in Article 81(3), the burden of proving that the conditions are met rests with the party that claims the benefit. The Commission has the power to address decisions to the parties concerned in order to terminate infringements of Article 81 and 82 (Articles 7 and 8 of the Regulation). The Commission, following an acknowledgement by the Court of Justice, also has the power to adopt decisions ordering interim measures. Decisions may prescribe any remedy, whether behavioural or structural, which is necessary to effectively terminate the infringement, having due regard for the principle of proportionality. Structural remedies may be imposed either where there is no equally effective behavioural remedy or any equally effective behavioural remedy would be more burdensome for the undertaking.
Article 10 of the Regulation states that, in some exceptional cases, the Commission has the power to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or 82 does not apply. The objective is to clarify the law and ensure its consistent application throughout the Community. A similar power would be useful in new types of cases that have not yet been settled in the existing case law and administrative practice.
The Commission has wide ranging powers throughout the Community to collect the information necessary to detect anticompetitive practices (Chapter V of the Regulation). Undertakings are obliged to answer factual questions and provide the documents required. The Commission also has powers of inspection, and to request the active cooperation of national authorities. In this regard, the Commission has the right to interview any persons who may be in possession of useful information and to record the statements made. Commission officials are also permitted to affix seals to the premises concerned for the period required for the inspection. Case law of the European Court of Justice establishes the jurisdiction of national courts when the application of coercive measures is involved. National authorities have the option of cooperating by carrying out inspections on behalf of one another.
The fulfilment of obligations imposed in connection with infringements includes fines and periodic penalty payments. The procedures for their determination are laid out in Chapters VI and VII of the Regulation.
Concerning the rights of defence, Regulation No. 1/2003 establishes that the undertakings concerned have the right to be heard by the Commission (Chapter VIII of the Regulation). Third parties, whose interests may be affected by a decision, are given the opportunity to submit their observations beforehand. The right of access to the case file is also ensured. At the same time, the confidentiality of the information exchanged within the network of authorities is safeguarded. As an ultimate guarantee of the rights of defence, Article 31 of the Regulation confirms upon the Court of Justice unlimited jurisdiction to review Commission decisions.
An essential step to ensure that proper enforcement of Community competition law is achieved is that Member States designate and empower authorities to apply Articles 81 and 82

[16] For a discussion of block exemptions, and corresponding examples, see Section 4.1.1 "Enforcement of EU Antitrust Provisions."

as public enforcers. They should designate administrative as well as judiciary authorities to perform the various functions conferred upon national competition authorities.

7. Country Case Studies

This section is dedicated to country case studies. Among the current members of the European Union, attention is devoted to Germany, Italy and Spain. The interest for examining German competition policy arises from the overarching influence which was exerted by German law makers and academics in the original design of Community competition policy[17]. The interest for the Italian case stems from the fact that Italy, although a founding Member of the EU, instituted a national competition authority only in 1990. The analysis will shed light on how a Member of the EU went about designing from scratch legislation and institutions which, not only did not conflict with supranational competition policy, but were expressly intended to complement it on a national scale. Analysis of the Spanish situation is interesting because Spain was a late member of the Community, since it joined only in 1986, after its own transition from the regime of Franco. In this light, lessons may be drawn for the new Member countries of Central and Eastern Europe which are due to join before the end of the decade.
Comparison of the three case studies of current Members illustrates how, although all Member States conform to the basic provisions of Community law, institutional arrangements may vastly differ among countries. This variation in institutional arrangements and procedures may pose difficulties for the implementation of antitrust policy, when decentralization of enforcement of competition provisions, in consequence of Regulation No. 1/2003, will have taken effect. As was expressed in the previous section, successful vertical and horizontal coordination among competition authorities will be essential to the outcome of the reform provisions which will be in force beginning in May 2004.

7.1 Germany

The section on Germany is intended to have a closer look at the legislation and approach which represented the dominant model for the initial conception of EU competition policies, although the institutional solutions of the European Union were not designed to replicate the German model. In the course of the recent debate that led to Regulation No. 1/2003, German lawmakers and academics supported the establishment of an EU Cartel Office, based on the German model. This would have had the status of an independent EU agency, distinct from the Commission[18]. As discussed in the previous section, the reform process led to a different institutional outcome.

7.1.1 Legislative and Institutional Framework

The German Act against Restraints of Competition came into force on 1st January 1958, and has been subject to several amendments. An amendment enacted in 1999 was designed to eliminate a number of exempted areas and introduced public procurement law into the Competition Act, thus bringing German law in line with EU legislation.

[17] See section 2.3 "Specificity of EU Competition Policy"
[18] See Ehlermann and Atanasiu (2002).

The Act empowers the Bundeskartellamt (Federal Cartel Office) to proceed against all restraints of competition which have an effect within the Federal Republic of Germany. Its tasks include enforcement of the ban on cartels, screening of mergers and control of abuses of dominant position. Due to the federal structure of Germany, control of restrictive business practices and abuse of market dominance are the province of Land competition authorities. The Bundeskartellamt is only responsible if the effects on competition of these practices extend beyond the territory of an individual Land. Merger control, however, is the exclusive responsibility of the Bundeskartellamt.
The Bundeskartellamt is an independent Federal agency which is responsible to the Federal Ministry of Economics. It is allowed to use three different types of proceedings: administrative proceedings, which present similarities to judicial proceedings; objective prohibition proceedings, which may lead to a ban on prohibited forms of conduct; and administrative fine proceedings, in which fines may be imposed in response to infringements. The Bundeskartellamt is assigned vast powers of investigation. It is allowed to request information from companies, have access to company documents and, following a court order, search premises and seize evidence.
Decisions are taken by the Decision Divisions of the Bundeskartellamt, which are organized to reflect sectors of the economy. Individual cases are decided upon by a collegiate body which rules by majority voting, and is independent from the Ministry of Economics. The Ministry can, however, grant ex post exceptional approval to individual cases on the grounds that they serve an overriding public interest.
The Bundeskartellamt may impose administrative fines of up to 511,300 Euros for violations of the prohibition contained in the competition Act, as well as fines of up to three times the additional proceeds obtained as a result of an infringement. Firms may appeal to the Court of Appeals against decisions of the Bundeskartellamt, and to the Federal Supreme Court against decisions of the Court of Appeals.

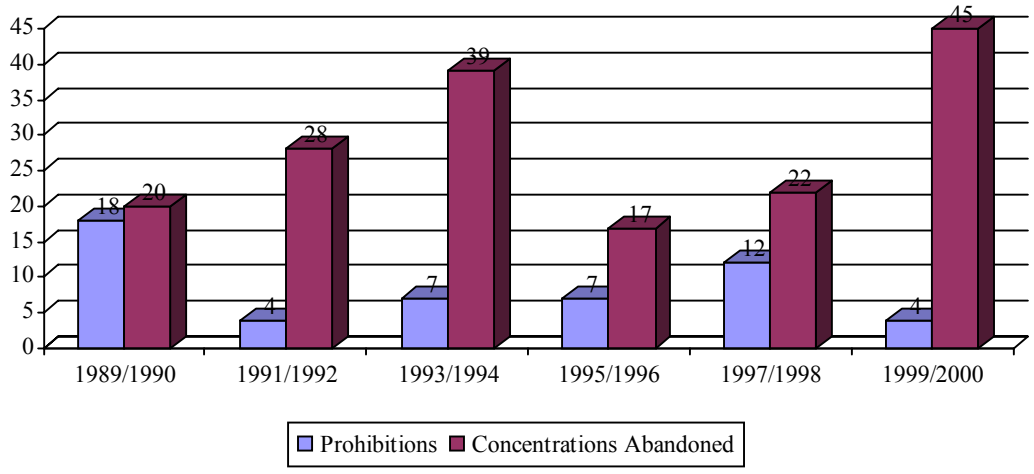
7.1.2 Competition Provisions and Enforcement

Regarding restrictive business practices, the Act does not contain any provisions applying uniformly but differentiates between horizontal cartel agreements and vertical agreements. While cartel agreements are prohibited per se, vertical restraints are nevertheless permissible in principle, though subject to screening by the Bundeskartellamt. The only exception is resale price maintenance, which is subject to an outright prohibition.
The Act provides for the legalisation of certain types of cartels, in the domains, for instance, of specialization agreements, small and medium-sized enterprises, rationalisation agreements, structural crisis, and agreements approved by ministerial authorisation. These exceptions are, however, subject to a control procedure by Bundeskartellamt, and the authorities have the power to revoke an exemption or order the undertakings involved to cease an abuse.
Abuse of a dominant position is prohibited outright. It is defined as any practices that unduly impair the ability of competitors, buyers or suppliers to compete, or adversely affect consumers. Dominant enterprises are banned from directly or indirectly hindering in an unfair manner other undertakings in their business activities, nor may they discriminate among other firms without an objective justification. This pro-active stance is specifically intended to protect the freedom of action of market players, and is a clear reflection of the influence of the Neo-liberal school on the design of German antitrust provisions[19].

[19] See section 2.3 “Specificity of EU Competition Policy.”

Merger policy has become the most important area of activity of the Bundeskartellamt since it was enshrined in legislation in 1973. As in the European Union as a whole, the main motivation that led to a systematic treatment of mergers is the central role played by the concept of abuse of a dominant position in German competition theory and policy[20]. Mergers are subject to scrutiny by the Bundeskartellamt if the undertakings concerned recorded a combined global turnover in excess of 511,3 million Euros, and if at least one of the firms recorded a domestic turnover of more than 25,5 million Euros. Mergers involving firms with combined annual turnovers of less than 511,3 million Euros are in principle not subject to screening. As in EU practice, the undertakings involved in a merger have the obligation to notify the operation before it is put into effect. In cases subject to scrutiny, the Bundeskartellamt has a maximum of four months to examine the project following submission of the complete notification. This four-month period is effective only if the authority sends a so-called "one-month letter" within one month of receiving the complete notification to inform the parties involved that a screening procedure has been initiated. Following this preliminary stage, main examination proceedings may be initiated, leading to a formal decision either clearing or prohibiting the concentration. Following a rationale analogous to that of the European merger regulation, the merger will be prohibited if it is expected to create or strengthen a dominant position. The parties concerned are charged with the burden of proof that the concentration will also lead to improvements in the conditions of competition and that these improvements will outweigh the disadvantages of dominance.
Although the number of prohibited mergers is extremely low[21], the Bundeskartellamt interprets the high incidence of mergers which are abandoned by the parties concerned, before it can reach a formal decision, as indicative of the success of its merger policy (Figure 1)[22].

Figure 1
Merger Cases in Germany
Source: Bundeskartellamt



[20] See section 4.2 "Mergers."
[21] For instance, in 2000, out of 1429 proposed mergers, only 4 were prohibited, while 45 were abandoned by the merging parties before Bundeskartellamt could reach a formal decision.
[22] See the Bundeskartellamt Activity Report (2001/2002).

7.2 Italy

Comprehensive competition legislation was enacted in Italy only in 1990. Prior to that, competition was regulated by the general norms contained in the Civil Code of 1942. Analysis of the Italian case is intended to offer an example of competition legislation and institutional set up which was specifically designed to coordinate with EU legislation and institutions. The fact that competition law and the corresponding enforcing Authority were designed with an explicit reference to the principle of subsidiarity offers an appropriate comparison with the Countries that are due to join the Union in the near future.

7.2.1 Legislative and Institutional Framework

The Italian "Competition and Fair Trading Act" was enacted on 10 October 1990. The same law established the Autorità Garante della Concorrenza e del Mercato (AGCM), the Competition Authority, which also has jurisdiction over misleading and comparative advertising, in application of relevant Community Directives[23]. In 1996 the Competition Authority was granted the power to apply Articles 81(1) and 82 of the Treaty on the basis of the national procedural provisions laid down in the Competition Act.

As a consequence of the late attention devoted to competition policy, the substantial provisions of the Italian law were devised to closely match the content of Articles 81 and 82, and of the EU Merger Regulation No. 4064/89. In addition, Article 1.4 of the Competition Act explicitly requires that these provisions be interpreted in accordance with the principles and general guidelines of EU competition law. The Competition Act includes rules prohibiting restrictive agreements, abuse of dominant position and anticompetitive concentrations.

The Autorità Garante della Concorrenza e del Mercato is an independent authority with the status of a public agency. Its decisions are taken on the basis of the Law alone, without any interference by the government. The Authority is a collegiate body, composed of five members, who decide by majority vote. The Chairman and the four members are appointed jointly by the speakers of the Senate and the Chamber of Deputies, and remain in office for a seven year, non renewable term. The Secretary General of the Authority has a function of administrative supervision, and is appointed by the Ministry of Industry, upon a proposal by the Chairman. In addition to direct enforcement powers, the AGCM has been entrusted with competition advocacy responsibilities vis-à-vis the Parliament and the Government.

In cases of non-compliance with a Competition Authority's order or in the most serious cases of infringement, concerning abuse of a dominant position or restrictive business practices, the AGCM may impose fines on the offenders. The amount of the fine depends on the gravity and duration of the infringement, and it may reach ten per cent of the companies' turnover realised during the previous financial year. No criminal penalties may be imposed by the Authority. However, in the event of repeated non-compliance, the Authority may order the cessation of the company's operations for a period of up to thirty days. The Authority may also sanction the parties if, without justification, they fail to provide information or documents requested in the course of an investigation. Fines may also be imposed on undertakings that fail to forward a notification.

Decisions taken by the AGCM may be appealed to the Tribunale Amministrativo del Lazio, the administrative tribunal of the Lazio region. Further appeals may be brought before the Consiglio di Stato, the supreme administrative court.

[23] Legislative Decree No. 74 of 25 January 1992, amended by Legislative Decree No. 67 of 25 February 2000.

7.2.2. Competition Provisions and Enforcement

The activities of the AGCM are in the areas of restrictive business agreements, abuses of a dominant position, scrutiny of mergers, as well as direct application of the Articles 81(1) and 82 of the Treaty. Table 6 provides summary statistics for the cases sanctioned by the Authority in each of these domains, as well as for more specific areas of intervention entrusted to the Authority.

Table 6
AGCM Activities
(number of cases)

	1991-95	1996	1997	1998	1999	2000	2001	2002	2003 (QI)
Concentrations	**2034**	**357**	**292**	**344**	**423**	**525**	**616**	**651**	**149**
Investigations	19	3	7	2	6	5	6	11	1
- prohibited	*4*	*-*	*1*	*-*	*-*	*-*	*2*	3	*-*
- authorised subject to conditions	*4*	*3*	*5*	*2*	*2*	*4*	*2*	*3*	*-*
- withdrawn	*1*	*-*	*-*	*-*	*2*	*1*	*2*	*1*	*1*
Agreements	**130**	**64**	**64**	**54**	**30**	**52**	**43**	**46**	**17**
Investigations	50	23	12	14	12	12	8	7	3
- judged to be infringements	*30*	*15*	*8*	*11*	*12*	*9*	*3*	*5*	*2*
- withdrawn	*4*	*1*	*1*	*2*	*-*	*-*	*2*	*-*	*-*
Abuse of dominant position	**89**	**52**	**46**	**21**	**15**	**22**	**28**	**19**	**4**
Investigations	31	10	5	3	4	7	3	4	**-**
- judged to be infringements	*24*	*7*	*4*	*2*	*3*	*6*	*2*	*4*	*-*
Non compliance with premerger notification requirement	**23**	**13**	**-**	**2**	**6**	**5**	**9**	**13**	**3**
Non compliance with orders	**3**	**-**	**3**	**1**	**-**	**2**	**2**	**3**	**-**
Fact-Finding inquiries	**7**	**3**	**6**	**-**	**1**	**-**	**1**	**-**	**-**
Advocacy reports and opinions to Parliament and the Government	**58**	**18**	**38**	**42**	**30**	**19**	**17**	**20**	**6**
Opinions submitted to the Bank of Italy	**162**	**48**	**50**	**46**	**43**	**50**	**29**	**28**	**13**
Football broadcasting rights	**-**	**-**	**-**	**-**	**1**	**1**	**-**	**1**	**-**
Misleading and comparative advertising	**594**	**389**	**506**	**468**	**358**	**333**	**289**	**308**	**81**
- judged to be infringements	*341*	*284*	*361*	*300*	*275*	*266*	*240*	*265*	*72*

Source: Autorità Garante della Concorrenza e del Mercato

Restrictive agreements are prohibited in so far as their object or effect is to significantly reduce competition within the national market or in a substantial part of it. In response to the fact that coordination of firms behaviour aimed at distorting competition can take various forms, the Law comprehensively defines restrictive agreements as all practices whereby undertakings may act jointly to coordinate their conduct on the market. Mirroring EU legislation, prohibited agreements are automatically null and void. However, under certain conditions, the Competition Authority is empowered to authorise restrictive agreements for a limited period of time. Conditions for exemptions, which must be demonstrated by the companies concerned, are that the agreements improve supply conditions on the market, thus

leading to substantial benefits for consumers, and that restrictions are strictly necessary in order to achieve these positive effects. Examples are reduction of prices or supply of products or services which would otherwise not be available.
The Law prohibits abuse of a dominant position on the national market or a substantial part of it. Reflecting EU provisions, examples of abusive behaviour are identified as charging prices or imposing other contractual terms and conditions which are unjustifiably burdensome. Other instances of abuse are acting in such a way as to prevent market access by other competitors and induce current competitors to leave the market.
With regard to mergers, the Law requires prior notifications of mergers and acquisitions when the gross aggregate domestic turnover of the undertaking to be acquired is in excess of 40 million Euros or if the gross turnover in Italy of all the companies involved exceeds 398 million Euros[24]. All notified operations are examined by the Competition Authority. As in EU provisions, the main criterion according to which mergers are examined is the effects they may have in creating or strengthening a dominant position on the domestic market. The abuse is judged by the impact it may have in either eliminating or substantially and durably restricting competition. The Competition Authority can prohibit the concentration or authorise it, after imposing measures necessary to prevent the anticompetitive outcome.
The Competition provisions apply to all sectors of the Italian economy, both public and private. Exemptions are, however, assigned to firms that, by law, provide services of general economic interest or operate in a monopoly situation. Such an exemption must be indispensable for these undertakings to perform the specific tasks assigned to them.

7.3 Spain

Spain is not a founding Member of the Community. Its case provides an interesting parallel with the accession Countries, also in consideration of the fact that Spain emerged from a dictatorship only in 1975. However, Spain's transition was much less abrupt than the one experienced by the Countries of the former Soviet block. Indeed, the Spanish economic model was largely based upon the type of corporatist State pioneered by Fascist Italy in the 1920's and 1930's. In this paradigm, although the role of the State, and State-owned enterprises in particular, was an important one, private initiative was never prohibited.
The most remarkable feature of the current framework of Spain's competition policy is the large degree of direct involvement by the government. For instance, from the point of view of the institutional arrangements of competition policy, the Servicio de Defensa de la Competencia is an integral unit of the Ministry of the Economy, while the members of the Tribunal de Defensa de la Competencia are directly appointed by the government. Regarding procedural issues, in the domain of concentrations the government itself is empowered to approve mergers and impose conditions.

7.3.1 Legislative and Institutional Framework

The first Competition Act dates from 1963. After Spain joined the EEC in 1986, it was replaced by the Competition Act 16/1989, which was planned to conform to EU competition legislation. Evolving theory and practice of Community competition policy has generated several amendments to the latter Act in order to maintain its conformity to EU legislation. With the declared purpose of ensuring the existence of sufficient competition and protect it

[24] Thresholds are annually adjusted to take account of inflation. These figures refer to May 2003

from any action contrary to public interest, the Competition Act establishes a double control mechanism: a punitive one on restrictive business practices and abuse of a dominant position, and a preventive one on mergers. It also establishes a system for monitoring state aids and assessing their impact on competition.
The Competition Act defines a two-tier administrative system for the enforcement of competition provisions: the Tribunal de Defensa de la Competencia with functions of resolution and proposal, and the Servicio de Defensa de la Competencia, charged with powers of instruction, investigation and decision. The Servicio is a unit of the General Secretariat for Economic Policy and Defense of Competition within the Ministry of Economy. It is entrusted with market monitoring, files instruction and accusation before the Tribunal. The Tribunal is a functionally independent administrative body, composed of a President and 8 "Vocales," appointed by the government for a five-year, once renewable term. The Tribunal decides on the existence of prohibited anticompetitive conducts; determines and imposes the corresponding sanctions; and issues reports, especially on merger transactions. The Tribunal may be consulted by ministerial departments, Chambers of Parliament, and the Comunidades Autonomas.
Procedurally, there are two phases. First, the Servicio de Defensa de la Competencia instructs and investigates cases. Then, the Tribunal de Defensa de la Competencia issues a resolution. The Servicio may initiate proceedings ex officio or upon request of parties or on the part of the Tribunal. If the Servicio considers that there is no evidence of infringement, it may decide to dismiss proceedings. Upon completion of the instruction phase, if the procedure has been initiated, the Servicio transmits the file, containing its analysis of the effects of the infringement, and assessment of facts and responsibilities, to the Tribunal. This has the power to order termination of the prohibited practices and the removal of its effects; impose fines and adopt any other measures it considers suitable. Tribunal decisions may be appealed to the Chamber of Administrative Litigation of the Audencia National, and, in final instance, to the Supreme Court.

7.3.2 Competition Provisions and Enforcement

In line with the provisions of the Treaty, the Act prohibits business practices, the aim or effect of which is or may be prevention, restriction or distortion of competition. Abuse of a dominant position is also prohibited. Mirroring EU legislation, the Act expressly provides for individual and block exemptions from these prohibitions. The generically worded exceptions are agreements that contribute to the improvement of production or commercialization of goods and services and promotion of economic and technical progress, as well as agreements that are justified by the general economic situation or by public interest. The Tribunal de Defensa de la Competencia is competent to authorise individual practices, while the government is entrusted with granting block exemptions.
For merger operations below the Community threshold[25], a mandatory notification is required when the market share of the combined entity is equal or in excess of 25% or the total turnover exceeds 240,4 million Euros and at least two of the participants have annual sales of more than 60,1 million Euros. After the notification, the Servicio has one month to produce a confidential report for the Minister of Economy, who then decides whether to forward the case to the Tribunal. If the Minister has not sent the file within the period of one month after the notification, the operation is tacitly authorised. If the Tribunal becomes involved, it must issue a non-binding report within two months, after consulting the parties. Then the Council

[25] See section 4.2 "Mergers."

of Minister has one month to decide whether the merger is authorised and under what conditions. Decisions are subject to judicial review by the Supreme Court. This procedure represents an exceptional case of direct political involvement, which is not present in most competition statutes of EU countries.

Given the administrative nature of the Spanish system, sanctions take the form of administrative fines, the amounts of which are commensurate to the gravity of the infringements.

Table 7 provides a summary of the cases treated by the Tribunal, classified according to various categories.

Table 7
Activity of the Tribunal de Defensa de la Comptencia
(Number of Cases)

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
From Servicio	10	7	24	30	36	35	55	87	68	57	57
Sanctioned	1	13	14	17	16	13	35	35	29	34	27
Individual Exemptions	20	12	11	20	52	56	43	52	39	42	34
Mergers	2	2	5	3	2	5	4	3	5	13	16
Fines(Ptas million)	-	20.9	369.5	274.4	36.7	224.3	323.0	1774.6	826.6	3436.0	2794.2

Source : Tribunal de Defensa de la Comptencia

P A R T I I

EU Competition Policy and its Institutional Framework: A Survey of Transition Countries

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Contents

Introduction

The establishment of competition legislation and of the authorities for its implementation in the countries of Central and Eastern Europe (CEE) is part of the process of their institutional transition to a market economy. It complements other reforms, such as the privatization process and the establishment of commercial legislation, which were enacted since the early 1990s. Reforms received further impulse with the signing of the so-called Europe agreements between the European Union and individual accession countries. These agreements represented the beginning of formal negotiations for the admission of Central and Eastern European countries into the European Union. The entry date for most CEE countries is 2004, while Bulgaria and Romania are expected to join in 2007.

A necessary precondition for accession has been incorporation of the *acquis communautaire*, the common body of EU legislation, into national law. The reason is that harmonization of national practices with EU standards is considered an essential element for the effectiveness of integration into the Union.

The provisions relating to competition policy are a fundamental part of this corpus of common legislation. In order to achieve harmonization, the rules on competition adopted by new Members have been conceived to closely replicate the basic principles of EU law. Indeed, in all countries, the national competition provisions on restrictive business practices, abuse of dominant position, liberalisation of monopolies and state aids virtually duplicate the content of Articles 81, 82, 86 and 87 of the Treaty[26]. This is intended to favour the harmonized application of competition law both across countries and, vertically, between individual Member States and the Union.

Regarding the institutional architecture of competition policy, the new Members of the EU have opted to grant their respective authorities a high degree of independence from political power. Indeed, while the heads of the authorities are generally nominated by government or parliament, the authorities themselves are declared subject only to the law itself. Nominal independence is reinforced by the extensive power of initiative and investigation vested upon competition authorities in the course of competition related cases. This is in adherence to the spirit of the innovations introduced by Regulation 1/2003 implementing the rules on competition laid down in Articles 81 and 82 of the Treaty. National authorities also participate in the system of institutional coordination that ensures that

[26] Here and henceforth the term "Treaty" refers to the "Consolidated Version of the Treaty Establishing the European Community," which incorporates amendments, additions and updates to the original 1957 Treaty of Rome.

competition legislation is applied uniformly across the European Union. Such coordination is necessary both horizontally, across Member States, and vertically between each Member State and the EU Commission.

Institutional independence and operational autonomy also ensure that national authorities are able to perform an advocacy role for the promotion of competition in their respective countries. As it is emphasized in the Hungarian case study, such a role is particularly valuable in the context of transition countries, where the acceptance of a competitive culture cannot always be taken for granted.

The rest of this paper contains surveys of competition policy in Bulgaria, Hungary, Romania and Slovenia. Focus is both on legislation and on the institutional framework for its implementation.

The Bulgarian survey contains an overview of the evolution of competition legislation and regulations. Bulgaria enacted a fist law on the protection of competition in 1991, which had a very limited scope. The signing of the Europe agreement in 1995 led to the enactment of a new competition law in 1998, which has a much broader scope than its predecessor, and fully incorporates the principles of EU competition policy. Eight case studies are included to illustrate in some detail the actions of the Commission for the Protection of Competition.

The chapter on Hungary contains a discussion of the legislative framework of competition policy, as well as a description of the structure and functions of GVH, the competition authority. In parallel with the typical functions directly connected with competition policy, one of the roles which is explicitly recognized for GVH is that of competition advocacy for the promotion of a competitive culture. The Hungarian chapter is concluded with a case study that illustrates the actions of GVH.

The section on Romania contains an overview of the legal and institutional background of competition policy. In particular, it includes a discussion of the dual role of the Competition Council and the Competition office in the implementation of competition policy. The section ends with a series of industry case studies organized according to different issues connected with the privatization process and competition policy.

In the Slovenian case a description of the formulation and implementation of competition policy is complemented with an overview of other elements of the institutional and policy environment. Namely, attention is devoted to such policy issues that can have an impact on competition, as industrial policy and the protection of intellectual property rights, as well as to a brief discussion of foreign direct investment.

Competition Policy in Bulgaria[27]

1. Introduction

During the decade and a half since the start of economic and political transformation in late 1989, Bulgaria has made considerable progress towards the adoption of the basic principles and norms of the market economy. Trade liberalization and enhancing market competition have played important role in this process. A number of important legislative measures (first adopted in 1991-1992 and amended several times in the period thereafter) laid the foundations for the institutional transformation necessary for the establishment of a market economy. Some of the most important among them were (Dobrinsky et al, 1995):

- Commercial code, which sects the rules for establishing of commercial entities;
- Law on foreign investment, regulating the economic activity of foreign-owned entities;
- Restitution laws allowing the restitution of real estate and industrial property to previous owners;
- Privatization law, regulating the process of transformation of state-owned enterprises into private companies;
- Law on the Bulgarian National Bank which established a two-tier banking system and established the independence of the central bank;
- Law on banks and credit activity, regulating the activity of commercial banks;
- A new Labour code;
- Law on the Protection of Competition.

Competition policy was given a new impetus with the establishment of closer relations with the EU and the increasing activity for participation in other international bodies. The two major events during the 1990s were signing of the Europe agreement in March 1995 (the association agreement formally entered into force on 1 February 1995 but an Interim Trade Agreement was in effect already on 31 December 1993) and the membership into the WTO in December 1999. Subsequently Bulgaria became a member of CEFTA as of January 1999. Following the decisions of the Helsinki summit of December 1999, accession negotiations with the EU started in March 2000 and are expected to be finalized in 2004. Bulgaria (together with Romania) has adopted the target to become a full EU member in 2007.

All these moves had profound impact on competition policy in Bulgaria leading to further liberalization and approximation to EU norms.

2. Evolution of legislation and regulations

The first Law on the Protection of Competition was adopted in 1991 and had a relatively limited scope: there was no protection of competition with regard to state aids and state monopolies, as well as with regard to cartels and monopolies. The law did not envisage the adoption of secondary legislation for its enforcement and was only limited to proclaiming the basic principles of the protection of competition. This led to difficulties in practical enforcement because of the too general character of the provisions. The Commission for the Protection of Competition was practically assigned with a dual and eclectic task, combining enforcement with regulatory functions as it was forced to complement the legislative norms with ad hoc provisions in order to fill the gaps.

[27] By Boyko Nikolov, Silviya Nikolova and Rumen Dobrinsky.

In the sphere of cartels and concerted practices the Bulgarian law included three main provisions: 1) regulation governing the decisions that may lead to the establishing of a monopoly position and prohibiting restrictive contractual terms; 2) regulations concerning commercial practices that may lead to restriction of competition or to a monopoly position; 3) regulations concerning derogatory commercial practices after receiving permission of the Commission for the Protection of Competition.
In the sphere of monopoly regulation, the Bulgarian law actually prohibited the establishment of a monopoly position which was defined as the control of 35 percent or more of the national market. In this sense it was different and even more restrictive than the EU legislation which only prohibits the abuse of a dominant position and not the establishment of such a position. In practice, however, the implementation has been questionable due to the numerous regulatory loopholes which left the Commission for the Protection of Competition with unclear powers as regards enforcement. The Law prohibited mergers and acquisitions among economic agents that may lead to a monopoly position and the establishment of public monopolies.
With the signing of the Europe Agreement, the principles of EU competition policy in principle have become part of the Bulgarian national legislation. According to the Europe Agreement during the initial stage Bulgaria was to be considered as a region identical with the regions of the Community. This opened certain possibilities for conducting a policy of state aids during the transitional period. To the contrary, with regard to granting of aids to undertakings in the so-called "underdeveloped regions" the Commission demanded the same informing procedure by the member states as with all remaining regions.
As noted, the first competition law was quite vague on the issue of state aid and actually there was no legal definition of the term "state aid". However, in terms of the provision of the Europe Agreement, state aid was to be regarded as an aid in any form granted by the State or through State resources which distorts or threatens to distort competition. The forms of aid could be: direct subsidy; reduction of tax rates; reduction of interest rates for export to other Member States; loan guarantees; writing off debt to the state; acquisition of land at preferential prices; subscribing of capital by the state in an enterprise under conditions under which a private investor would not subscribe. State resources could be granted either directly by the government (state budget), or by central or local authorities or by a public enterprise. All these in fact were applied in various forms in Bulgaria, leading to significant market distortions.
The new Law on the Protection of Competition (LPC), was adopted in May 1998, and repealed as a whole the previous law. The purpose of the new legislative norm was to ensure protection and conditions for extending the competition and free initiative of economic activities and to bring Bulgaria's legislation in this sphere closer to EU norms (Zartova, 1998).
The Law on the Protection of Competition applies to all enterprises carrying out their activities on the territory of Bulgaria, the bodies of the Executive and the local self-government, enterprises to which the State has assigned the execution of services of public interest, and natural persons who contribute to the establishment of a dominant position or unfair competition.

Protection against agreements, resolutions or concerted practice

The Law prohibits any agreements between enterprises, resolutions of joint or associated enterprises, as well as concerted practice of two or more enterprises whose goal or result is prevention, restriction or violation of the competition in the respective market, such as: direct

or indirect fixing of prices or any other commercial terms and conditions; distribution of markets or sources of supply; restriction or control of production, trade, technical development, or investments; application of various conditions for one and the same type of contracts referring to specific partners when they are not enjoying equal rights as competitors; making the execution of contracts dependent on undertaking additional obligations or on concluding additional contracts which, according to their nature or trade customs, are not connected with the subject of the main contract or with its fulfilment.
The enterprises should notify the Commission for the Protection of Competition of the existence of the above-mentioned agreements, resolutions and concerted practice within 30 days as of the day of their execution, adoption or application. Within two months as of receipt of notification, the Commission has to state a ruling either announcing that there are no grounds for applying the prohibition or imposing a prohibition of the agreement, resolution or concerted practice. Under specified conditions, the Commission may exempt agreements, resolutions or concerted practice from prohibition. These permits are to be issued within two months of submitting the notification by the respective enterprise.

Monopoly and dominant position

A monopoly is defined as the position of an enterprise which has the exclusive right to carry out specific business activities. Apart from those monopolies explicitly specified in the Constitution, the Law on the Protection of Competition proclaims invalid any other monopoly submitted by the State. A dominant position is defined as the position of an enterprise which, in view of its market share, financial resources, possibilities for market access, technological level and economic relations with other enterprises, can be an obstacle to the competition at the respective market because it is independent of its competitors, suppliers or buyers. Besides, an enterprise has a dominant position if it possesses a share of the respective market higher than 35%.
The Law on the Protection of Competition prohibits four specific forms of unfair competition: misrepresentation with respect to goods or services; misrepresentation with respect to the origin, manufacturer and other features of goods or services; and the use or disclosure of someone else's trade secrets in violation of good faith commercial practices. The law also prohibits "unfair solicitation of customers" (promotion through gifts and lotteries) and some specific forms of unfair marketing practices. In case of violation of these prohibitions by an enterprise of a monopoly position, the Council of Ministers, at a motion of the Commission for the Protection of competition may establish either minimum, fixed or limited prices for a certain period of time which shall be obligatory for the violating enterprise.

Concentration of business activity

Concentration of business activity is defined as: a merger/acquisition of two or more independent enterprises; establishment of a joint venture permanently carrying out all the functions of an economically independent agent; acquiring of direct or indirect control over one or more enterprises or parts of them. Enterprises are obliged to notify in advance the Commission for the Protection of Competition of their intention to carry out concentration in one of the above-mentioned ways where: total market share of goods or services with reference to the concentration, is more than 20%; total turnover of participants in the concentration process for preceding years exceeds a pre-set ceiling. Within a month as of receipt of notification the Commission for the Protection of Competition is to issue a decision

with which it announces whether or not that concentration is not included in the range set by the Commission. Under some pre-specified conditions the Commission may issue a permission for concentration.

Unfair competition

Unfair competition is defined as any activity or inactivity upon carrying out business operations, which is in contradiction with the bona fide trade practice and harms or may harm the interest of the competitors in their own relations or in their relations with the consumers. The Law specifies in detail the practices that are considered as unfair competition.

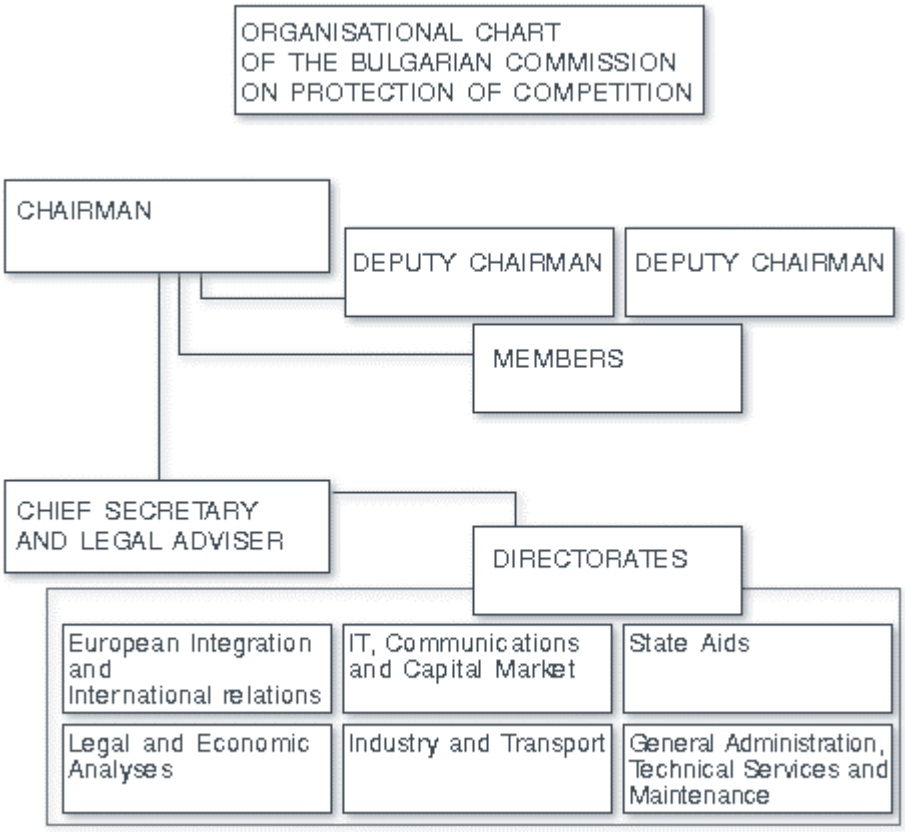
3. Institutions: The Commission for the Protection of Competition

The execution of the Law on the Protection of Competition (LPC) is assigned to the ***Commission for the Protection of Competition*** (CPC) which is a specialized, legally independent state body. The CPC the also the authority enforcing the State Aid Act (SAA). It is entrusted with the investigation of all competition infringements under the LPC and the issuing of decisions. The CPC is an independent specialized state authority financed by the state budget. It consists of a chairman, two deputy chairmen and members, distinguished lawyers and economists, elected and dismissed by Parliament for a five years' term of office. Upon the expiration of the period for which they have been elected, their mandates may be renewed.

Organizational structure

The Commission performs its functions from a central office in Sofia. It does not have regional offices in the country. In its duties, the CPC is backed up by an administration of 77 people, staffed with general administrative personnel and by lawyers and Commission on Protection of Competition economists with specialised knowledge in competition legislation. The latter form the pool from which experts are drawn for the working groups investigating violations of the LPC and SAA.
The organizational structure of the CPC is presented in the chart below. The administration is organized into six directorates dealing with the following activities of the CPC:

- Legal and Economic Analyses
- IT, Communications and Capital Market Sectors
- Industry and Transport Sectors
- European Integration and International Relations
- State Aids
- General Administration, Technical Services and Maintenance



The Secretary General of the authority reports to Chairman and is responsible for the general administrative support with regard to coordination of the work of various departments or work groups, liaison with the chairman, deputy chairmen and commissioners as well as with external bodies or parties to a case.

The main functions of the CPC: to ascertain violations and impose sanctions as provided for in the law; to issue permissions as provided for in the law; to suggest to the competent bodies of the executive and the local government to repeal regulative acts, issued in violation of this Law, and files claims with the judiciary for the revocation of individual administrative acts which are contrary to the law. In the course of its operation the Commission conducts survey and ascertains the position of enterprises on the relevant market, pursuant to methods adopted by the Commission. It also offers opinions on projects for the transformation and privatization of enterprises or parts thereof, where requested by the relevant Government and local bodies, in the event of circumstances which may eventually violate the Law. The Commission may permit preliminary equalization of the general terms for enterprises which offer contract's conclusion by applying general terms as provided for in the law, concentration of economic activity as provided for in the Law, exemption of the prohibited acts as set forth in the Law and state aids designated to:

- accelerate the economic development in regions with low living standard or unemployment above the average for the country;
- promote the economic growth in particular economic activities or regions as provided for in the law;
- support the implementation of projects that are of significant importance for the country or to surmount considerable difficulties in Bulgaria's economy;

- state aids monitoring of the countries, with which Bulgaria has established monitoring for state aids.

The CPC may also issue norms clarifying its interpretation of the LPC. For example the CPC may exempt agreements, decisions and concerted practices of small and medium-size enterprises, when they lead to enhancing their competitiveness. In order to make the procedure for exemption more efficient and pursuant to its powers entrusted by the LPC (Art. 14), the CPC adopted a decision for block exemption of some categories of vertical agreements (CPC Decision No. 44/10.04.2001). This decision generally follows the principles and the logic of the EC Block Exemption Regulation No. 2790/1999 and applies the same methods and tests.

Technical assistance is another important tool for cooperation in the field of competition. The CPC has obtained assistance from EC, OECD, ABA, USAID, JICA. The officials of the CPC have been on visits and internships to the European Commission – Directorate General for Competition, Anti trust Division and the FTC, many of them have participated in conferences, workshops and seminars, organized by the European Commission, OECD, UNCTAD, as well by the competition authorities of different countries. The Commission on Protection of Competition is well aware that cooperation between competition authorities can be very useful and rewarding for the sound law enforcement.

Operations

The CPC operates on cases after being invoked or alerted. The persons authorised to initiate proceedings at the Commission are:

- persons whose interests are affected or threatened by a violation of the Law on the Protection of Competition;
- State institutions with request to issue authorisations or allow harmonized general conditions or State aids;
- CPC itself;
- the public prosecutor.

Agreements, decisions or concerted acts which are in existence are notified to the Commission within thirty days following the day of their conclusion, adoption or application. The applications and requests are registered at the Registry of the Commission and are immediately reported to the Head of the Directorate of Legal and Economic Analyses in order for him to check compliance. The notification contains information about: the participating undertakings; the legal form of the agreement or decision, or the type of concerted practice; the overall share of the participating undertakings on the relevant market. The notification may also contain a request for exemption from the prohibition.

Within three days from the receipt of the application or request the Director General of Legal and Economic Analyses checks the adequacy of the application or request lodged. Where the application (request) fails to meet the requirements, the applicant (the requesting party) is served with notice to rectify the deficiencies within 7 days. If the applicant fails to rectify the deficiencies within this time limit, the Head of the Directorate of Legal and Economic Analyses returns the documents to the Registry for filing.

The hearings and sessions of the Commission are chaired by its chairman or, where the he is absent, by a vice-chairman designated by the chairman. The Chairman checks whether the persons constituted as parties to the proceedings or as persons concerned have been duly summoned and verifies their respective powers of representation. The parties to the proceedings have the right to challenge members of the Commission at the first hearing. Any such challenge must be reasoned. A member of the Commission is obliged to challenge

himself on one of the following grounds: in case that he/she has been a representative of one of the parties; in case that he has had an employment or civil law relationship with one of the parties; in case that, due to other circumstances, that member might be considered biased or directly or indirectly interested in the outcome of the proceedings.
The sittings of the Commission are open or held in camera. The parties avail themselves of counsel defence. The sittings are regular where at least seven members of the Commission are present and the Commission takes its decisions by open vote and a majority of six votes. Written evidence and explanations by the parties are admitted at the sittings of the Commission. Where he deems that the circumstances of the case are clarified, the President gives the parties an opportunity to express their opinions on the evidence gathered. Where the case is not fully and comprehensively clarified, the Commission remits it, by way of a ruling, for further investigation. In case of a threat for a proof to be lost or for its collection to be rendered difficult, the chairman of the Commission orders its collection prior to the initiation of the proceedings. The officials are obliged to assist the Commission in the fulfilment of the duties assigned thereto by the law, by providing access to premises, oral and written explanations, along with provision of documents and other information supports. In case of refusal to access or failure to provide information the Commission seeks the assistance of the bodies of public prosecution and of the Ministry of the Interior. If the Commission conducts an investigation or studies, the officials are allowed not to rely on official, industrial or trade secrets. The National Statistics Institute collects, processes and provides upon request information to the Commission on issues within the scope of its competence. Any documentation and information, received by the Commission in the course of the investigation is used solely for the purposes of that investigation.
Within two months after the receipt of the notification, the Commission issues a decision whereby it declares that no ground exists for the application of the prohibition or declares a prohibition of the agreement, decision or concerted practice. The decision of the Commission is signed by all members having participated in the voting. A member of the Commission who does not consent to the decision, signs it with a reasoned dissenting opinion. The dissenting opinion is reasoned within three days and is attached to the decision.
The prohibition may be declared inapplicable in the case of agreements, decisions or concerted practices, which contribute to increasing or improving the production of goods and the provision of services, to promoting technical or economic progress or to increasing the competitiveness on external markets, while allowing consumers a fair share of the resulting benefits.
The Commission exempts from the prohibition agreements, decisions and concerted practices of small and medium-size enterprises, when they lead to enhancing their competitiveness.
When the decision is appealed against, the President submits, within three days as from receipt of the appeal, to the Supreme Administrative Court the whole file, including the decision appealed against, and notify the appellant thereof. When the file also contains material constituting a protected trade or official secret of the parties, this material is forwarded in a separate folder and bears a special mark to that effect. After the Commission's decision comes into effect in accordance, the President entrusts its enforcement to the Head of the Directorate of Legal and Economic Analyses.
The decisions of the Commission enter into force, when: they are not subject to appeal, they have not been appealed against within the time limit, the appeal lodged has not been granted. The pecuniary sanctions and fines imposed by decisions of the Commission which have come into force are subject to collection in accordance with the Law on the Collection of State Claims. Proceedings are not initiated or the proceedings initiated are not discontinued after the expiry of five years after the offence has been committed.

The authorizations are issued in two months following the submission of the request. They contain certain conditions with which the undertakings complies. The Commission exercises control over the observance of the conditions. It revokes or amends its authorization, as well as prohibit the agreement, decision or concerted practice, if:

- there has been a change in any of the facts which were basic to the giving of the authorization;
- the parties commit a breach of any obligation attached to the authorization;
- the authorization is based on incorrect information and facts supplied by the undertaking.

In case that in the process of investigation information indicating that the agreement, decision or concerted practice for which exemption is requested, seriously affects or might affect the interests of the trading parties or consumers, was found, the Commission orders by means of a decision an immediate termination or modification of the agreement, decision or concerted practice. That decision is a subject to appeal.

Table 1 presents a summary of the cases and rulings of the CPC in the period 1999-2002.

Table 1. Summary statistics on the cases and rulings of the Bulgarian Commission for the Protection of Competition, 1999-2002.

		1999			2000			2001			2002		
Type of case	**Of which:**	No. of cases	Cases by type of ruling by		No. of cases	Cases by type of ruling by		No. of cases	Cases by type of ruling by		No. of cases	Cases by type of ruling by	
			Violation	No violation		Violation	No violation		Violation	No violation		Violation	No violation
Agreements and Concerted Practices	Initiated by CPC				5	4	1	3		3	1		1
	Initiated by other parties	1	1		2	1	1	2		2	1		1
	Total	1	1		7	5	2	5		5	2		2
Abuse of monopoly and dominant position	Initiated by CPC										1		1
	Initiated by other parties	4	4		8	4	4	10	3	7	4	2	2
	Total	4	4		8	4	4	10	3	7	5	2	3
Concentrations	Initiated by CPC				1	1		1		1	1		1
	Initiated by other parties	3		3	8		8	21		21	3		3
	Total	3		3	9	1	8	22		22	4		4
Unfair Competition	Initiated by CPC										2	1	1
	Initiated by other parties	10	7	3	35	15	20	53	15	38	7	3	4
	Total	10	7	3	35	15	20	53	15	38	9	4	5
State Aids	Initiated by CPC				1	1		1	1				
	Initiated by other parties							5		5	17		17
	Total				1	1		6	1	5	17		17
Consultative Acts	Initiated by CPC												
	Initiated by other parties							1	1				
	Total							1	1				
Total	Initiated by CPC				7	6	1	5	1	4	5	1	4
	Initiated by other parties	18	12	6	53	20	33	92	19	73	32	5	27
	Total	18	12	6	60	26	34	97	20	77	37	6	31

Source: Bulgarian Commission for the Protection of Competition

4. Selected Case Studies

Case 1. MAT Service versus ZEBRA: Case No. 25/1998, Decision No. 49 of 23 June 1998 of the Commission on Protection of Competition

By application lodged at the Commission on Protection of Competition on 23 February 1998 V. J., manager of MAT Service Ltd. and sole proprietor of SOMAT J.- S. Co. brought an appeal No. 25. The complainant explained that the undertaking he represented had as its main object of activity a "cold regenerate for heavy car tyres" and that the basic material for its production was a protector supplied by ZEBRA, a state-owned company with shares, Novi Iskar which was the sole producer in the country. It was pointed out that direct commercial links have been established between MAT Service Ltd. and ZEBRA, the state-owned company, for the supply of the product which had been sustained for more than 10 years. The complainant claimed that the Director General of ZEBRA had informed him orally of the termination of their mutual activities vis-à-vis all customers due to a contract signed with KRAIBURG, Austrian company, for goods produced with materials supplied by the customer. It was claimed that this was equivalent to a close-down of the Bulgarian market and was claimed to be a direct infringement of Article 7, point 1 from the Law on the Protection of Competition of 1991, which prohibited abuse of monopolistic position.
In the response to ZEBRA signed by the Executive Director, S. S., it was made clear that the cooperation agreement signed with KRAIBURG had as its final objective an increase in sales and entering the European market, as well as an entire renovation of technology and the whole set of machines and instruments of production that would enable the undertaking to manufacture goods with new design. The cooperation agreement with KRAIBURG was allegedly not going to terminate the supplies for the up-to-now ZEBRA customers, but the higher quantity of the goods would require a higher selling price which was accepted by other undertakings, such as MEDINA-copper, Stara Zagora and Omiphac, Sofia. It was pointed out that there was no contract signed between MAT Service and ZEBRA, but sporadic orders had been taken only.
As a result of the analysis undertaken and the facts established the following legislative conclusions were drawn by the Commission:

1. By virtue of Article 17 (2) of LPC: ZEBRA, a state-owned company with shares, is an undertaking with a dominant position on the relevant market following the meaning of Article 17 (2) of LPC.

2. By virtue of Article 18 of LPC: The inclusion in the cooperation agreement between ZEBRA and KRAIBURG of a condition for granting KRAIBURG the exclusive right to sell protectors and prohibition to sell them to other consumers without the exclusive consent of KRAIBURG cannot be considered as an abuse of a dominant position on the part of ZEBRA following the meaning of Article 18 from the LPC which the claim of the complainant actually is. In this particular case there is not enough evidence available for the explicit refusal by ZEBRA (or KRAIBURG) to sell the required protectors to MAT Service at reasonable prices. MAT Service's claim of incapability to get supplies of the same article at a competitive price through import from other undertakings remains unjustified.

3. By virtue of Article 9 of LPC: Assessing the restrictive effect on competition of contract provisions granting the exclusive right to sell, it is necessary to consider the circumstance that within the framework of the unified legislation on the protection of competition of the European Union there is Regulation No. 1983/83 of the Commission of European Community for block exemption of prohibition under Article 85 (1) of the Treaty of Rome (Prohibition of Agreements Limiting Competition) of exclusive purchasing

agreements. In conformity with Article 1 of the Regulation: Article 85 (1) of the Treaty of Rome is inapplicable to "agreements to which only two undertakings are party and whereby one party agrees with the other to supply certain goods for resale within the whole or a defined area of the common market only to that other". The block exemption from the prohibition does not apply (Article 3 of the Regulation) in cases when the distributor is granted the exclusive right to sell the goods - subject of the agreement directly to consumers who have no other source of supply on this or another territory, as in the cases where the one or the other of the parties to an agreement create difficulties for intermediaries or consumers to get supplies of the goods - subject of the agreement from other retailers within or without the territory established by the agreement. The Commission of the EC may refuse the application of block exemption (Article 6 of the Regulation), if it discovers that a) there is no competition of similar goods from different brands on the territory under question; b) it is not possible for the intermediaries or consumers to get supplies of the respective goods from suppliers from outside the territory established by the agreement; c) the exclusive right distributor refuses to sell goods to the consumers in the respective territory at equal and adequate terms.

4. The requirements of Article 5 and 6 of the Regulation No. 1983/83 where the exemption from prohibition is not applied at all or is refused to be given are not covered in the case ZEBRA and KRAIBURG, where ZEBRA has granted KRAIBURG an exclusive purchasing right.

5. The cooperation agreement concluded between ZEBRA and KRAIBURG can be viewed as infringement of the prohibition under Article 9 (1) (3) from LPC (Prohibition of Agreements Limiting or Controlling Production, Trade, Technical Progress or Investments). On the contrary, the agreement contributes to the renovation and widening of production, to the increase of investments and technological development.

On those grounds, the Commission on Protection of Competition took the following decision:

1. Dismisses the complaint due to lack of infringement of the Law on the Protection of Competition (Article 18 and Article 9(1));

2. The decision is subject to appeal to the Supreme Administrative Court within 14 days of its announcement.

Case 2. Dionisii LTD. versus Port of Varna: Case No. 115/1997, Decision No. 44 of 30 June 1998 of the Commission on Protection of Competition

An appeal was lodged in 1997 lodged by Dionisii Ltd., Varna, with a sole proprietor N. N. against the Port of Varna Plc. The applicant explained that the activity of his company was "to collect waste and waste disposal" in the port of the city of Varna. For that purpose he had been given licenses by all state authorities with supervisory functions, such as: Varna State Inspection of Navigation (hereinafter "VSIN"), Border Check-point Authorities (BCA) and Varna Customs office. The company claimed to have duly concluded contracts with agencies for catering of their ships. In order to be able to perform his activities, the applicant asked for a license to ensure access for his truck to the region of the port where the incinerator was based in order to transport the waste disposal. License was denied by the port authorities. Waste collected from other port regions couldn't be transported to the incinerator. The applicant was also deprived of the possibility to collect waste disposal from the ships in the region of the port. The company suffered losses and remained inactive. The applicant requested the competent intervention of the Commission.

With an additional statement of 10 July 1998 /after the entry into force of the LPC, 1998/ the applicant maintained his previous statement for infringement of Article 9(1) 2 and 3, Article 18(2), Article 30(1) and Article 34 of the Law on the Protection of competition.
In its statement the Port of Varna plc. announced that the waste collection in the port of Varna-East, which makes a part of the Port of Varna, was carried out by a specialized department of the port itself. An additional statement said that waste collection from the ships was an obligation of the Varna Port plc.
After an analysis of the above-mentioned circumstances the Commission came to the following conclusions:

1. No explicit act exists, nor regulations, nor even administrative acts for the assignment and realization of the activity hard waste collection from the ships. The activity is performed in conformity with the International agreement of MARPOL 73/78 - Annex V where, with the purpose of avoiding the pollution of sea territories, the rules for waste collection and handing over of waste disposal from the ships should be strictly observed. It is governments' obligation to provide the equipment needed for the optimal short-time reception of the waste disposal, delays of the ships avoided. From 15 January 1998 onwards Obligatory regional rules under the jurisdiction of the Varna State Inspection of Navigation have been issued by virtue of ch. XVII, Article 362 of the Commercial Navigation Code, Article 4, 10 and 18 of the Guidelines for the Activities of the State Inspection of Navigation to the Ministry of Transport and Article 1(2) of the Guidelines for Sea Areas Law Application of the Republic of Bulgaria. Ch. XIII postulates the obligations of the ships and coast authorities for covering MARPOL 73/78 requirements and preserving the environment. In conformity with Article 254 of the Guidelines "waste disposal, liquid and hard, is handed over to the recipient - the coast equipment active in the region of the ports. Every act of handing over is certified with a document duly filled out and issued by the receptor". In conformity with Article 257 of the Guidelines, waste disposal is obligatorily burnt down in coast incinerators of the type. In the region of the Port of Varna-West an incinerator has been built for obligatory incineration of hard waste collected from the ships. It belongs to the Port of Varna plc. and is the only equipment of the kind in the region of Varna. The state authority of administrative power which is to supervise the execution of the activity is the Varna State Inspection of Navigation.

2. The product market is the service of collecting hard waste from the ships. The service is composed of activities connected with collection, transportation and burning of domestic, alimentary, oily substances and other waste disposal.

3. The geographic market comprises the ports in the region of Varna. It is determined by the service consumers, the mooring ships in the ports. These are under the obligation of handing over the waste and waste disposal collected in the course of the trip for them to be burnt in the coast equipment. The service could be done in the region of the port only.

4. The circumstance that basic port equipment such as the incinerator belongs to the Port of Varna plc. turns it into an undertaking with a dominant position by virtue of Article 17(1), because it can act independently of its competitors on the market of hard waste collection. In order a company - competitor of the Port of Varna plc. to be able to perform the activity of waste collection from the ships, it should have an access to the ships on raid stead or on the quay of the port and the incinerator as well. On the grounds of ownership of the incinerator by the Port of Varna and its denial of access to it means restriction of competition in the relevant market. Basic requirement for a competitive market to be free is ensuring free access for the undertakings to a given market and compete with the other operators unrestricted. The denial on the part of the company to issue a pass for the truck of Dionisii Ltd. in order it to move freely in the region of the port with the purpose of selling a particular service is equivalent to denying access to the market of this service resulting in restriction of

competition. The service of waste collection from the ships should be performed in conditions of fair competition where other companies can also participate while observing the requirements set out in the legislative instruments regulating the specificity of environmental protection and border and passport control regime. Free market and effective competition should be the main criterion on the basis of which the consumer (ships and their agents) could choose by himself the company to perform the service. The denial of access to the market of hard waste collection from the ships the Port of Varna plc. abuses its dominant position which it has due to its ownership of the incinerator thus restricting the competition on the relevant market following the meaning of Article 18 of the Law on the Protection of Competition.

The Commission concluded that there was no information that the Port of Varna plc. had performed activities contravening Article 9(1)(1) and (2) of the Law on the Protection of Competition. The Company's activities did not correspond to unfair competition following the meaning Article 30(1) and Article 34 of the Law on the Protection of Competition. The complainant had not participated in the relevant market as a competitor with equal rights. He had not been granted access to it at all.

On the grounds of the above-mentioned and by virtue of Article 55(1)(1) of the LPC the Commission on Protection of Competition took the following decision:

1. Imposes a property sanction to the Port of Varna plc. amounting to 5 000 000 lv. for infringement of Article 18 of the Law on the Protection of Competition.

2. Dismisses the appeal of Dionisii Ltd., Varna against the Port of Varna plc. following Article 9(1)(1) and (2) of the Law on the Protection of Competition, Article 3(1) and Article 34 of the Law on the Protection of Competition due to lack of infringement.

Case 3. Radio-Telecommunications Company (RTK) acquisition of Betcom: Case No. 78/1998, Decision No. 65 of 28 July 1998 of the Commission on Protection of Competition

The case was brought by the Executive Manager of RTK J. M. as a request to the Commission for the Protection of the Competition to check the legality of RTK's intention to acquire 100% of the shares of Betcom. The applicant requested the Commission to estimate the market share that would result from the acquisition and to give an opinion of the eventual infringement of the provisions of the LPC.

As a result of the of the evidence presented and additionally collected, the following facts were established by the Commission:

1. RTC Ltd. was registered after a decision of the Sofia district court of 10 December 1992 with an object of activity: wireless telecommunication services on the territory of Bulgaria. In accordance with the laws, the company has acquired a license from the Bulgarian Committee for Posts and Telecommunications. The company claimed that after acquiring Betcom, it would continue to develop the network of public phonecard devices and that this service would be provided in accordance with LPC.

2. Betcom Ltd. was registered after a decision of the Sofia district court of 16 July 1992 with an object of activity: development and maintenance of a network of public phonecard devices and supply of telecommunication services. In accordance with the laws, the company has acquired a license from the Bulgarian Committee for Posts and Telecommunications.

3. Determining the market. The market under consideration is that of local public telephone services. At present there are three companies operation on the market: The Bulgaria Telecommunications Company (BTC), Bulphone Plc and Betcom Ltd. BTC has the

status of a national telecommunications provider. Within its spectrum of activities BTC maintains 8 845 public telephone devices and has not major expansion plans. Bulphone Plc supplies phone services through publicly located devices operation with phonecards. Both Bulphone and Betcom operate through the fixed telephone network of BTC on the basis of contractual agreements. The market shares of the three companies were established on the basis of: 1) the number of public telephone devices; 2) the revenue from operating them. The available information suggests that the market share of Betcom in 1998 would be around 15% of all devices and around 28% of the revenue. On the basis of these estimations it es evident that Betcom does not have a dominant position on the market in the sense of Art. 17 of LPC. At present RTC does not participate in the above market and in this sense it is not to be considered as a direct competitor to the market participants, including to Betcom. Hence the acquisition of 100% of the shares of Betcom by RTC would not change the existing market structure and would not endanger competition on this market.

4. From the available evidence is has become clear that at present RTC has no control in the sense of Art. 21 of LPC over Betcom or over any other company operation on the market.

On the grounds of the above-mentioned and by virtue of Article 27(2)(1) of the LPC the Commission on Protection of Competition took the following decision:

1. The eventual acquisition of 100% of the shares of Betcom Ltd by RTK Ltd does not fall into the domain of Article 24 of the LPC.

Case 4. Sole Proprietor "Paralel-Ivan Kodinov" contents about violations of Article 19, para 3 and Article 9, para of the LPC committed by the National Health Insurance Bank (NHIB): Case No. 95/200, Decision No. 64 of 30 April 2002 of the Commission on Protection of Competition

Sole Proprietor "Paralel-Ivan Kodinov" claims that in July 2001, the National Health Insurance Fund (NHIB) introduced a new requirement for the method of delivery of the monthly reports of the general practitioners: the data to be delivered on a floppy-disk after being classified according to a method adopted by NHIB. The problem is that the standard of encoding is a secret, wherefore many of the physicians, using various software for preparation and delivery of the general practitioners' monthly reports, are not in a position to draw them up automatically, unless they use the software of "AremisSoft" (producer of the software and of the encryption programme). The non-provision of the data in the introduced standard hampers the other developers of software for general practitioners to make adequate corrections to their own products. The applicant alarms that under the given circumstances all developers of software for general practitioners, apart from "AremisSoft", experience great difficulties and that, in case no urgent measures are taken, this will lead to their disappearance from the market. Thus "AremisSoft" will be able to take possession of the emerging large market of software for general practitioners through their product ACSIOM-F, since it is the only corporation having at its disposal the standard of encoding.

On the grounds of the collected data, two independent of one another directions, containing hypotheses for possible violations on behalf of the National Health Insurance Fund, are being considered by the Commission:

I. Violations on behalf of NHIF ensuing from the untimely publication of the National Health Care Surveys standard for encryption, which puts in unequal position the competitors of "AremisSoft' on the market for software products for general practitioners.

II. The appearance of the software product Microsoft Access as an element of the tender terms under a procedure for selection of supplier of work stations and software for

the information system of the National Health Insurance Fund, hidden in a general package named MS Office 2000 Professional Open Licence, which might eventually favour those companies, who use that platform, and especially "AremisSoft".
In view of the evidence, the Commission deemed that the application of SPC "Paralel- Ivan Kodinov", town of Plovdiv, against the National Health Insurance Fund was partially well-grounded. The Commission decided:
1. Imposes a fine on NHIF, city of Sofia, 1, Kritchim Street, amounting to BGN 5 000 for perpetrated violation of Article 18 in connection with Article 16, para 1 LPC.
2. Disregards the application of SPC "Paralel - Ivan Kodnov", Plovdiv against NHIF in its part for finding violation of Article 9 of LPC.

Case 5. Commission on Protection of Competition bounds to clarify whether Art. 60 of the Corporate Income Taxation Act ("CITA") constitutes a general measure or state aid: Case No. KZK 1 -49/2002, Decision No. 100 of 7 July 2002 of the Commission on Protection of Competition

The Commission on Protection of Competition opened proceedings, in the course of which it was bound to clarify whether Art. 60 of the Corporate Income Taxation Act ("CITA") constitutes a general measure or state aid within the meaning of Article 20 of the Law for Protection of Competition as at that time being in force. The reason prompting this own initiative of the Commission is the finding of the European Commission set forth in its annual report on Bulgaria's progress towards accidence to the European Union as regards the absence of control on or monitoring of state aids.
The Ministry of Finance states that in their opinion the scheme is related to undertakings, which operate in regions, where unemployment is 50% higher above the country average, and are aimed to promote the economic development of these regions.
The Commission requested further opinions on the economic effect of the tax measure in question from the Bulgarian Chamber of Commerce and Industry, the Bulgarian Business Chamber and the Union of Employers in Bulgaria. A reply came solely from the Union of Employers (UE). In their opinion the Union of Employers deems that in the conditions of a not yet fully-fledged liberalised market economy a similar mechanism will be helpful to Bulgarian entrepreneurs until the country's accidence to the EU. They also add that "tax exemptions" can not be considered to fall within the definition of the term "State aid".
As a result of the investigation that was carried out the Commission considered the following facts as relevant:
1. Body responsible for the implementation of the measure: The Ministry of Finance
2. Name of measure: State aid scheme - tax exemptions.
3. Legal grounds for granting this aid: The aim of the tax exemptions provided for in Art. 60 of the Corporate Income Taxation Act is to encourage undertakings to invest in regions stricken by high unemployment and thus to create new jobs. The higher investments in fixed tangible assets in these regions are a prerequisite for increasing the level of employment and for improving the standards of living. The scheme is not applied to a particular sector. There are not any priority industries or activities, which are the only beneficiaries of this tax measure. The measure applies notwithstanding the nature of the undertaking's business.
4. Description of scheme: Art. 60, CITA contains two hypotheses, in which the undertaking's financial result before reconciliation for tax purposes is reduced. The first hypothesis foresees reduction of the profit tax that would otherwise be due, provided that each of the following two conditions is met:

- the undertaking's investment is made in a region, where unemployment is 50% above the country average in each of the two years preceding the year in question;
- the investment is made from the undertaking's originally paid or subsequently increased capital. The reduction in profit tax amounts to 10% of the subscribers' original contributions to the capital (respectively, their subsequent contributions to the increased capital), committed to the investments as aforesaid.

According to the second hypothesis, the taxes are also reduced by the effectively paid mandatory social insurance, proportionately to the new jobs created through the year relative to the average number of full time payroll staff, provided that the undertaking is free from outstanding public obligations at the time of benefiting from this reduction. The reductions apply to a list of municipalities shown in an Annex to the said Art. 60, which list is updated after the end of each calendar year on the basis of a proposal made to this effect by the Ministry of Labour and Social Policy.

5. Beneficiaries: The tax exemptions in Art. 60 of the Corporate Income Taxation Act are available to all undertakings from the listed regions, which meet the objective criteria established in the law - small, medium and large firms, irrespective of the sector, in which they operate. In the year 2000, 22 firms benefited from the exemption, the total amount of tax reductions was 8 134 644 Bulgarian Leva (BGN). In 2001, the number of firms dropped to 17, and the tax reductions - downed to 338 258 Bulgarian Leva.

6. Eligible expenses: The reduction of profit tax due by the undertakings takes place in the manner provided for in Art. 60(1) of the Corporate Income Taxation Act, provided that the investments are committed to acquisition or improvement, upgrading and reconstruction of monolith buildings, infrastructures, transmission devices, carriers of electric energy, communication lines, machines, production equipment, motor vehicles, apparatuses, computers and software. Art. 60(2) requires the creation of new jobs vs. the average annual full-time personnel employed by the undertaking during the previous year. Thus additional costs arise for the enterprise in terms of salaries and wages, including social insurance charges. And it is these effectively paid social insurance charges that are deducted from the undertaking's financial result before tax reconciliation.

7. Budget spending: The so-granted tax exemption amounts to lesser budget inflow from profit taxes compared to the taxes that would normally have been due. The tax exemption affects budget inflows by reducing revenue from tax on profits. Even though there is not any direct budget spending, the tax exemption, in its substance, constitutes indirect budget spending.

On the grounds of the mentioned above and on the grounds of Art. 15(2)(1) of the Law on State Aids, the Commission for the Protection of Competition decided to declare that the state aid scheme in the form of tax exemptions provided for in Art. 60 of the Corporate Income Taxation Act is caught by Art. 4(1) of the Law on State Aids.

Case 6. Granting state aids to: the Municipality of Pestera and BIOVET AD, town of Pestera; Sofia Municipality and "Axenadrovska Hospital", Sofia; and Precise Inter Holding AD, v. of Ivanovo, Russe District: Case No. KZK-84/25, Decision No. 22 of 19 February 2002 of the Commission on Protection of Competition

The Commission on Protection of Competition started proceedings under Case No. KZK-84/25.09.2001 in relation with a notification filed under the Ministry of Environment and Waters projects to grant state aids to the following beneficiaries: Municipality of Pestera and BIOVET AD, town of Pestera; Sofia Municipality and "Axenadrovska Hospital", Sofia; and Precise Inter Holding AD, v. of Ivanovo, Russe District.

The Commission, in pursuance of its legal powers, requested additional information from the beneficiaries and the National Environmental Protection Fund (NEPF), which were constituted as parties to the Case. With regard to the fact that the NEPF has, under one cover, notified three aid projects, which do not fall within the single aid scheme, the three projects are reviewed separately:

Project One: Reconstruction of the water treatment plant of Biovet AD, town of Pestera
Seen from the notification received, in order to supplement missing equipment and finish the construction of Biovet's water treatment plant, the National Environmental Protection Fund plans to disburse dedicated financing on account of resources, which the Fund has lawfully acquired, that is to say: a non-refundable aid (subsidy) to be disbursed to the Municipality of Pestera in the amount of 1 200 000 Bulgarian Leva (BGN) in the year 2001, and interest-free loan to Biovet AD, Pestera, in the amount of 654 141 BGN. According to information additionally received from the Municipality of Pestera, Biovet AD and NEPF don't have a contract signed for disbursement of moneys to the project as aforesaid, because some legal circumstances related with the ownership of the water treatment equipment remain unclear.
In the National Environmental Protection Fund's opinion, submitted after the notification, the conclusion is made that no legal grounds are there to justify the grant of non-refundable aid to the Municipality of Pestera for the reconstruction of an establishment, which is not municipal property pursuant to the Law on Municipal Property.

Project 2: Construction of an incinerator for incineration of contagious and pathological waste for use by medical establishments in Sofia
2.1 Body granting the aid: Ministry of Environment and Waters (MoEW)
2.2 Beneficiary: Sofia Municipality and Alexandrovska Hospital AD, Sofia
Seen from the notification, the project foresees grant of non-refundable aid from the National Environmental Protection Fund's funds for constructing the building and the relevant infrastructure of the municipal incinerator.
2.3. The aid has as objective horizontal impact and preservation of the environment. Social infrastructure means a system of establishments of national or regional importance for ensuring the public services, guaranteed by the state, in the following sectors: education, culture, health and social services.
2.4. The aid takes the form of a grant for construction of the contiguous infrastructure and building for the incinerator of contagious and pathological waste and is provided by NEPF.
2.5. Eligible expenses according to the notification, the project foresees the granting of non-refundable aid in the amount of 2 500 000 Bulgarian Leva (BGN) for construction of the municipal incinerator building and infrastructure. The very incinerator, in the amount of DKK 12 000 000, will be delivered gratuitously by the Danish Environmental Agency pursuant to its agreement with the Ministry of Environment and Waters.

Project 3: Completing the installation of a water treatment plant to the factory for pre-fabricated metal elements - Precise Inter Holding, v. of Ivanovo, Russe District
3.1. Body granting the aid The Ministry of Environment and Waters (MoEW).
3.2. Beneficiary: Precise Inter Holding AD is a company specialised in the production of precise electrically welded steel pipes and profiles, the quality of its products is ISO 9002 certified. Precise Inter Holding AD has a contract with the Austrian company SCHRAMM Tech Trade GmbH for supply of a finished product - "STAPA" pipes - for the German concern PIPE LIFE until 2003. In relation with the national environmental policy, which is directed towards preservation, protection and improvement of the environment's quality, safeguarding of human health and rational utilisation of natural resources, there are certain

binding environmental standards, which have been established by law or other regulatory acts.
3.3. Objective of the state aid for the project, provided on account of the National Environmental Protection Fund's budget for environmental projects, has a horizontal effect and seeks to protect the environment in the relevant region. The aid will be committed for construction of air and water treatment facilities for environmentally unfriendly production processes. The project in question covers the funds required to complete the construction and equipment of the treatment plant of the factory for production of prefabricated metal elements and the objective is to obtain a comprehensive environmental effect on the air and water components by reducing the hazardous emissions. The aid is granted to the company in the form an interest-free loan and, by its legal nature, is environmental aid with regional impact.
3.4. The aid takes the form of an interest-free loan for an environmental project. The aid covers the additional investment required to be made in environmental equipment.
3.5. Eligible expenses: Investment environmental aid may only be allowed if it covers certain costs of an environmental project, rather than production costs.
On the grounds of Art. 55(8) of the Law on the Protection of Competition and the above mentioned facts, the Commission decided:
1. to allow a state aid project for "Construction of an incinerator for incineration of contagious and pathological waste for use by medical establishments in Sofia" in the form gratuitous aid in the amount of 2 500 000 Bulgarian Leva to be granted to the Municipality of Sofia and Alexandrovska Hospital AD.
2. to allow a state aid project for "Completing the installation of a water treatment plant to the factory for pre-fabricated metal elements" in the form of an interest-free loan in the amount of 367 398 BGN to be granted to Precise Inter Holding, v. of Ivanovo, Russe District.
3. to terminate the proceedings as regards the Municipality of Pestera and Biovet AD, Pestera.

Case 7.: Ministry of Transport for state aid granted to Bulgarian Posts EAD: Case No. KZK-124, Decision No. 18 of 14 February 2002 of the Commission on Protection of Competition

The Commission on Protection of Competition has started proceedings under Case No. KZK-124/2001 in relation with a notification, filed by the Ministry of Transport and Communications, for state aid granted to Bulgarian Posts EAD. The Ministry of Finance also notified the Commission on the project for disbursement of state aid from the Republican Budget to the postal services.
Relevant facts:
1. Ministry responsible for implementing the aid: The Ministry of Transport and Communications (MTC)
2. Name of scheme: Gratuitous financial aid designed to cover the deficit arising from the provision of the universal postal service.
3. The postal services comprise: the universal postal service and non-universal postal services. The universal postal service is provided at affordable prices and is available to every user on the territory of the country, regardless of his/her geographic location, and includes: collection, transport and distribution of domestic and cross-border postal items (small items up to 2 kg; secogrammes up to 7 kg; parcels up to 10 kg); money transfers; additional services: registered and insured items. The non-universal postal services are all services related with collection, transport and distribution of postal items falling outside the universal

postal service, they include: postal parcels between 10 and 20 kg, courier services and transmission of messages using telecommunication media.
4. This is not a new aid scheme. In the year 2002 Bulgarian Posts AD receives compensation from the State Budget for the deficit, proven by the company, deriving from the provision of the universal postal service.
5. Terms and conditions of granting the aid: Even though the scheme has been existing until now, no notification therefore has been made to the Commission on Protection of Competition.
6. Level of scheme management: Central Government Commercial Company.
7. Objective of the aid: Operative aid to compensate the loss of income deriving from the provision of the universal postal service.
8. Instrument (form) of the aid: Direct subsidy in the amount of 1 500 000 Bulgarian Leva (BGN) for the year 2002. The deficit anticipated in the year 2002 and attributable to the universal postal service, as seen from the estimates of Bulgarian Posts EAD, will be 3 844 458 BGN. 47% of the company's total operative costs for the next year will be on account of the universal postal service. The analysis of the estimates demonstrates a deficit from the reserved sector in the amount of 3 539 082 BGN, which represents 92% of the total deficit deriving from the universal postal service.
9. Eligible expenses: The amount of deficit deriving from the provision of the universal postal service is determined on the basis of indisputably proven and inherent expenses for: materials, third-party services, salaries and wages, social insurance and allowances, depreciation charges and other costs. The deficit has been determined using a modern econometric model, which is being applied in the developed countries.
10. Budget spending: The subsidy to Bulgarian Posts EAD should be discontinued by the end of 2004. Until then the direct subsidy afforded to the company will be determined in the State Budget of the Republic of Bulgaria for the year in question.
11. Beneficiaries: The aid recipient is the major postal operator - Bulgarian Posts AD - who on the premises of the Law on Postal Services holds an individual license, which compels it to provide, via its postal network, the universal postal service on the whole territory of the country, even though at economically disadvantaged conditions. Users of this aid are all Bulgarian citizens, included in the universal postal service. Bulgarian Posts EAD has 28 territorial branches and 3 specialised branches. The subsidy is allocated among the users proportionately to their income/cost ratios as regards the universal postal service.
With a view to the above and on the premises of Art. 55(1)(8), the Commission decided:
On the grounds of Art. 20(4)(2) of the Law on the Protection of Competition the Commission deems admissible the state aid to Bulgarian Posts EAD in the amount of 1 500 000 BGN, designed to cover the deficit deriving from the provision of the universal postal service.

Case 8. Notification filed by the State Owned Undertakings and Competition Directorate of the Ministry of Finance on the legal grounds of Art. 20(2) of the Low on Protection of Competition, on state aids granted in the form of subsidies to district heating and coal mining companies: Case No. KZK-5/24, Decision No. 10 of 29 January 2002 of the Commission on Protection of Competition

The Commission on Protection of Competition has started proceedings under Case No. KZK-5/24.10.2001 in relation with a notification filed by the State Owned Undertakings and Competition Directorate of the Ministry of Finance for state aids granted in the form of subsidies to district heating and coal mining companies.

As a result of the investigation that was carried out, the Commission considered the following facts as relevant:
1. Ministry or another state body, which by law or other legislative act is responsible of the state aid scheme in question and of its implementation: The State Agency of Energy and Energy Regulation
2. Type of the aid: Subsidy for the production activities of district heating and coal mining companies in the year 2002.
3. The draft budget for the year 2001 foresees that the subsidising from the Republican Budget will be discontinued for the production activities of the following three state-owned joint-stock companies: "Toplofikacia Yambol" EAD; "Toplofikacia Pravetz" EAD and "Toplofikacia Lovech" EAD.
4. New or existing aid scheme: No notification has been made until present.
5. Level of scheme management: Central government.
6. Objective of aid: The objective is to grant an operative aid to the district heating companies designed to cover their losses and ensure their production and to achieve social and environmental effects. In the case of the coal mining companies the aim is to grant an operative aid designed to cover their losses, to preserve jobs and to guarantee the country's energy balance
7. Form of the aid: Direct subsidy planned for the year 2002 in amount of 40 million Bulgarian Leva (BGN). The State Agency of Energy and Energy Regulation grants direct monthly subsidies to the district heating and coal mining companies taking into account their financial position and the economic criteria as determined by the State Agency of Energy and Energy Regulation. In its opinion the State Agency of Energy and Energy Regulation states that the criterion, on the basis of which the subsidies are allocated among the district heating companies, is the estimated loss from sales of heat energy to households in the year 2002. The aim of the subsidy is to cover a part of the loss of the district heating companies deriving from the application of fixed prices of heat energy for household users. In the case of coal mining companies the criterion for allocation of the subsidy is the estimated loss deriving from sales of coal in the year 2002.
8. Eligible expenses: Resolution of the Council of Ministers states that the district heating companies will sell their heat energy to all households at uniform prices countrywide as determined by the Council of Ministers, which prices are lower than the cost of the heat energy sold, while the heat energy to all other users will be sold at prices, determined on the basis of the total production cost plus a certain profitability rate. The difference between the production costs and the fixed prices charged to household users is partially covered by the state subsidy.
9. According to the mechanism of allocation of subsidies among district heating and coal mining companies, the money will be distributed monthly only among the loss-making companies proportionately to their respective negative financial results, subject to implementation of the cost reducing measures as planned for the year in question.
10. Expected amount of subsidies**:** Subsidies for the district heating companies - 37 million BGN, subsidies for the coal mining companies - 3 million BGN. The subsidy afforded to the district heating companies will cover as little as 41,7% of the anticipated loss, and 20,5% of the loss anticipated by the coal mining companies.
11. Aid effectiveness: Seen from the above-cites pieces of legislation, the subsidies for the district heating companies should be discontinued in 2004.
12. Results expected from the state aids to be granted: Reduction of the loss generated by the subsidised companies.
13. The beneficiaries of the planned subsidies are 14 district heating companies.
14. Other forms of state aid:

- "Toplofikacia Sofia" EAD - state guarantee for a long-term loan in the amount of 56 MEUR (fifty-six million Euros) granted by the World Bank and the European Bank for Reconstruction and Development for financing the Project for Rehabilitation of the Heat Transmission System and Substations;
- "Toplofikacia Pernik" EAD - state guarantee for a long-term loan in the amount of $ US 7 million (seven million US Dollars) granted by the World Bank for financing the Project for Rehabilitation of Electric Precipitator No. 5 and Heat Transmission System.

The subsidy for the coal mining undertakings seeks to improve the economic performance of the recipients, helping them to cover the cost of their economic activities. The undertakings do not bear the risk of doing business at a loss and are given the opportunity to generate profit in the mid-term. At the same time, the need to rationalise the business of coal mining undertakings inevitably entails redundancy and reorganisation of the production capacities.

With view to the above and on the premises of Art. 20(4)(2) in conjunction with Art. 55(1)(8), the Commission decided to deem admissible the state aid in the form of direct subsidies in the amount of BGN 40 mn to be granted in the year 2002 to the following district heating companies: Sofia EAD, Pernik EAD, Vratsa EAD, Russe EAD, Pleven EAD, Gabrovo EAD, V. Tarnovo EAD, Razgrad EAD, Shumen EAD, Varna EAD, Sliven EAD, Burgas EAD, Kazanlak EAD, Plovdiv South EAD and to the following coal mining companies: Bobov Dol EAD, Balkan 2000 EAD and Pirin EAD.

Competition Policy in Hungary[28]

1. Introduction

This paper deals with competition law in Hungary. It overviews the most important legal sources of Hungarian competition law, and examines the types cases the Hungarian competition law enforcers have to deal with. Alongside with the substantial regulation, the procedural rules of the administrative enforcement system and the organization of the *Hungarian Competition Authority* (GVH) are also presented, embedded in a system focusing on the major activities of the Hungarian competition authority, namely competition supervision proceedings, competition advocacy and competition culture. The paper is concluded with a short case study taken from the practice of last year's law enforcement.

2. Hungarian Competition Law

2.1 Major fields of activity and legal sources

Competition law covers three separate, although somewhat interrelated fields of law: first *restraints on competition* (also called as antitrust law), secondly *unfair market practices* of undertakings, and thirdly *state aids*.

According to the current **legislation**, the *Act LVII of 1996 on the 'Prohibition of Unfair and Restrictive Market Practices'* (Competition Act) covers both restraints on competition and unfair market practices of undertakings. The law regarding these two topics is enforced by the *Hungarian Competition Authority*, the *Gazdasági Versenyhivatal* (GVH) and the courts, whereas the regulation concerning state aids is governed by the *Government Decree No. 163/2001 (IX.14.) on the Exemptions from the Prohibition to Grant State Aid to Undertakings*, and is first of all dealt with within the Ministry of Finance.

The following paper focuses on the *activity of the GVH*. Cases concerning unfair market practices belong to the competence of the courts, while the GVH is charged with the duty of supervising restraints on competition. The major tasks of the GVH are the antitrust cases and the prohibition of unfair manipulation of consumer choice. The most important **legal sources** governing the functioning of the GVH *in addition to the Competition Act* are the following:

Act X of 2002 on the promulgation of Decision No 1/2002 of the Association Council replacing Decision No 2/96 of the Association Council on *the implementation of the competition rules adopted under Article 62(3) of the Europe Agreement establishing an association between the Republic of Hungary*, and *the European Communities* and their Member States, of the other part

Block exemption regulations of the Government for certain groups of agreements (see Anticompetitive agreements):

Government Decree No. 55/2002: vertical agreements,
No. 54/2002: research and development,
No. 53/2002: specialisation,
No. 86/1999: technology transfer,
No. 247/1997: motor vehicle distribution and servicing,
No. 50/1997: insurance.

[28] By Surd Kováts.

Act No. LXXXVII of 1990 on Price Setting
Act. No. LVII of 1997 on Advertising as amended by Act No. I of 2001

2.2 Development of the Hungarian Competition Law regulation

Competition law has quite a **history** in Hungary, as the *first signs* of regulating this issue appeared in the first half of the 20th century.[29] The communist regime also tried to enact a regulation on competition at the end of its era, but this law remained without practical consequences.[30] The first modern Competition Act the Act LXXXVI/1990 was accepted by the new Parliament in 1990, and it provided a sound basis for competition law in Hungary.
The *first Competition Act* covered the prohibition of unfair market practices and the restraints on competition in one legal source, representing a quite unique solution. The Act also established the necessary procedural rules with the result of an administrative enforcement system extended by some characteristics from civil proceedings.
Upon the experiments in law enforcement and the obligation of legal harmonization with the EU a new competition act was needed in 1996. The new 'Act LVII/1996 on the Prohibition of Unfair and Restrictive Market Practices" entered into force on 1 January 1997 replacing the previous Competition Act.
The most important **new elements of the 1996 Act** are as follows[31]:

- The *scope of the new act* covered market practices carried out on the territory of Hungary by natural and legal persons and companies without legal personality. The new wording cut out the definition of 'economic activity' of the previous act, in this way *extending* its scope for example to investor activities i.e. a field which was not covered by the old legislation. The extension of the scope to market activities of foreign undertakings in respect of anticompetitive practices was another new feature.
- The new act extended the prohibition on agreements to all kinds of *vertical agreements*, that later gained a block exemption regulation. (The previous Act covered horizontal agreements and of vertical restrictions it was only resale price maintenance that was prohibited.) Another extension is that the new act also covered „*decisions by social organisations of undertakings*, public corporations and other similar organisations ... ". The scope of the prohibition has been extended also from an additional point of view, the new prohibition covered „prevention, restriction and distortion of competition". The provision about the automatic voidness of agreements infringing the prohibition was also a new element of the regulation.
- In the field of abusive control the new act has an entirely *new concept for defining dominant positions*. Replacing an unlucky definition in the first Competition Act the new definition did not contain market share thresholds, but was built on the ability of the undertakings to act independently to a great extent from other market participants. Costs and risks of market entry and exit, financial strength of the undertakings, the structure of the relevant market and market shares are among the factors to be taken into account assessing the existence of dominance in a particular case.
- Continuing with *dominance*, the new act has kept the spirit of the old one and contains a general prohibition of abuse. However there were some new elements put into the illustrative list of particular state of affairs of abuses, such as tying, withholding of goods, discrimination and predatory pricing.

[29] Act V/1923 on the Prohibition of Unfair Market Practices and Act No. XX/1931 on 'cartels'
[30] Act IV/1984 on Economic Competition
[31] Competition act amendment 2001:Key changes arising from the amendment of the Hungarian competition act effective from 2001 Competition Office Bulletin No. 5 Gazdasági Versenyhivatal Hungary December, 2001

- In respect of *merger control* the new act *modified the notification thresholds*. The turnover thresholds of the old act has been amended - HUF 10 billion joint net turnover, in the case of financial institutions, ten per cent of their total assets is considered in place of net turnover. Market share ceased to exist as a notification criterion. There were some new elements in the definition of concentrations, e.g. /1/ acquisition of parts of undertakings, /2/ creation of concentrative-type JVs, /3/ acquisition of majority voting rights and /4/ acquisition of the right to appoint the majority of executive officials. In difference to the previous competition act the new legislation explicitly defines that temporary acquisitions by financial institutions do not fall under the scope of merger control.
- The possibility for *divestiture* has been introduced to the Hungarian competition authority should the parties failed to apply for authorisation and the authority may not have been authorised the transaction.

The 1996 Act was **significantly amended in December 2000**. The amendments, which entered into force in February 2001, were motivated mainly by the four-year experiences collected with the enforcement of the 1996 Competition Act, indicating the necessity for fine-tuning certain provisions of these rules. The incorporation of some principles established by the law enforcement practice into the Competition Act, the wording and rewording of some definitions proved to be rational, moreover, the investigative powers of the GVH were also increased.

The **most important elements of the December 2000 amendments** were as follows:

- Certain *hardcore* (price fixing, market sharing) *agreements* cannot be regarded as agreements falling under the de minimis escape of anticompetitive agreements.
- *Supply-side substitutability* is explicitly mentioned as one of the factors to be contemplated in defining the relevant product market.
- *Individual exemptions* for anticompetitive agreements can *not* be given *for* an *unlimited period* any more.
- The competition authority can *deprive agreements of the benefits of block exemption regulations* if certain circumstances exist, and similarly, the benefits attached to the application of de minimis rules can be withdrawn if network effects of similar agreements can be observed on the market.
- *Conditions and obligations* can be set for anticompetitive agreements to be exempted and also for concentrations to be authorised.
- The *members of the Competition Council* (i.e. the decision-making body within the Office of Economic Competition) are *nominated for a definite period* of time,
- The possibility for the competition authority to *inquire sectors* of the economy was created,
- *Investigation powers* of the competition authority have been enhanced, by introducing the possibility to search private homes and cars (nevertheless the use of this possibility requires a preliminary court judge authorisation),
- Defining the *top fines* up to 10% of the previous year's turnover, an express hint for the undertakings has been worded into the Act,
- The basis of a possible *leniency policy* has been established by incorporating "the effective co-operation by the undertaking" among the factors to be contemplated when the Competition Council defines the amount of the fine in the given case.[32]

In 2002, the most important change in the field of competition was the settlement of the constitutional concerns relating to the *implementation* of the competition rules of the *Hungary/EC Europe Agreement*. In 1998 the Constitutional Court declared the unconstitutionality of some of the provisions of the Government Decree establishing the

[32] Annual Report on Competition Law and Policy Developments in Hungary (January – December 2001) p. 2.

implementing rules for the competition-related provisions of the Europe Agreement. As a resolution, new implementing rules serving as a special legal basis in respect of antitrust cases affecting trade between Hungary and the EC were accepted in January 2002.[33]
Recently, the reform of the EC competition law, highlighted by the EC Decree 1/2003, made an amendment of the Hungarian competition law necessary. The new regulation, *Act XXXI/2003* aims the harmonization in the field of application EC and the Hungarian rules. The new legislation contains some procedural amendments and some further rules about the enforcement of competition decisions by the Hungarian courts.[34]

3. Major activities of the GVH

The major activities of the GVH are the competition supervision proceedings and the competition advocacy together with competition culture. The **competition supervision proceedings** comprise the law enforcement activity of the GVH in the field of the *antitrust cases* and the *consumer fraud cases*, which are all examined in details below, whereas the **competition advocacy** comprises the activity of the GVH influencing government decision makers to act competition-friendly. **Competition culture** is a part of competition advocacy that enjoys significant independence – it is the communication of the benefits of the competition towards the public, and today it is accepted as the third major field of activity of the GVH.

3. 1 Competition supervision proceedings: Antitrust rules and prohibition of consumer fraud in the Hungarian competition law

There are three major groups of antitrust cases: *anticompetitive agreements*, the *abuse of dominant position*, and *merger control*. We will overview the major rules governing these three types in the following, and then *consumer fraud cases* are presented in a separate chapter.

Anticompetitive agreements

The Act prohibits all kinds of *anticompetitive agreements* (agreements or concerted practices between undertakings and decisions by social organisations and associations of undertakings, which have as their object or potential or actual effect the prevention, restriction or distortion of competition) including vertical agreements. Anticompetitive agreements are declared by the Act automatically **void**. Agreements concluded between **non-independent undertakings** are not covered by this Article, and there is also a provision about the *de minimis* principle in the Act [Article 12]. Article 13 defines the notion of **de minimis agreements**, it makes an exception from the prohibition for all restrictive but non hard-core agreements[35] between parties, whose joint market share does not exceed 10 per cent on the market. If the cumulative effect of such agreements is significantly distorting competition, the GVH may revoke the exception granted by the Act.

[33] Annual Report on Competition Law and Policy Developments in Hungary (January – December 2002) p. 2.
[34] For details see: Act XXXI/2003 on the amendment of the Competition Act 7. §.
[35] Section 2 of Article 13 names price-fixing and market sharing as agreements that shall not be deemed of minor importance.

The Act empowers the Government to issue **block exemption regulations**. Although the GVH has no general authorisation to revoke in individual cases the exemption given by such a regulation, but in the case of the above mentioned cumulative effect it may decide that in the future the agreements in question are caught by the prohibition.
The GVH may, upon notification of the parties, grant **individual exemption** if the agreement fulfils the four conditions laid down in Article 17 of the Act. These *conditions* are similar to those of Article 81(3) of the Treaty of Rome and read as follows:
(1) Agreements or planned agreements shall be exempted from the prohibition declared by Article 11 on individual application by the decision of the GVH, 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.
The GVH may impose *conditions and obligations* on the parties in its exemption decision.
The parties can apply for a **negative clearance** of the GVH as well, in which the GVH establishes that the parties' agreement does not fall under Article 11, because it is subject of an exception under Article 13 or falls under one of the block exemption regulations of the Government. The GVH is not bound by its negative clearance.
Exempting decisions are made by the GVH within 120 days, while in hard-core cartel cases the deadline for making the ultimate decision is 180 days, which can be extended twice by the same period.

Abuse of dominant position

In the field of controlling the abuse of dominant positions the Act contains a **general prohibition** for this practices. There can not be an exhaustive list of this practices, but the Article lists a wide range of these: excessive pricing, limiting production, discrimination, tying, predatory pricing, refusal to deal, etc. [Article 21]. Any other kind of abuse can be captured under the general prohibition.
The *definition of dominance* builds on the ability of the undertakings to act independently to a great extent from other market participants [Article 22]. Costs and risks of market entry and exit, financial strength of the undertakings, the structure of the relevant market and market shares are among the factors to be taken into account at assessing the existence of dominance in a particular case. Article 22 also contains a hint for joint dominance by applying the rules of the dominant undertaking for more undertakings, stating that a dominant position may be held by individual undertakings or jointly by more than one undertaking. In abusive practice cases the time limit is 180 days for the investigations, which can be extended twice by the same period.

Merger control

Concentrations must be notified in advance if they reach certain *turnover thresholds*. Concentrations among non-independent undertakings are not subject to authorisation. *Temporary acquisitions* by financial institutions do not fall under the scope of M&A control.

Dominance test forms the basic assessment criterion: the authorisation of a concentration may not be refused if it does not create or strengthen a dominant position, does not impede the formation, development or continuation of effective competition on the relevant market or on a considerable part of it, or if the concomitant advantages outweigh the concomitant disadvantages [Article 30]. The GVH may impose **obligations or conditions** on the parties or may decide about the divestiture of certain assets. The GVH may apply the same provisions if the parties failed to apply for authorisation and the authority may not have authorised the transaction [Article 31]. The investigation has two stages in concentration cases. In **complex cases** the decision is reached by the GVH within **120 days** while in the **simple** ones this deadline is only **45 days**.

Prohibition of Unfair Manipulation of Consumer Choice (Consumer fraud)

Besides the antitrust cases another important law enforcement activity of the GVH is the protection of consumers by the so-called consumer fraud cases. The GVH shares the task of consumer protection with different state agencies with the GVH dealing only with this type of cases.
The Competition Act prohibits the unfair manipulation of consumer choice and as such the deception of consumers and the application of business methods, which *restrict* without justification *the freedom of choice by consumers*. Deception is presumed in particular, if false declarations are made about the essential features or the price of the goods, the information given about factors related to the sale of goods is or may be deceptive or a product does not meet the legal or usual requirements for such goods. The aim of the GVH is to ensure that consumers are sufficiently informed on the product or service offered, which not only protects the consumers' interests but also serves indirectly the protection of competition. It should be noted, however, that the GVH is competent only in the event that a larger group of consumers is concerned and not in cases affecting only individual (personal) interests.
Although the *importance* of such cases *decreased* substantially over years, these cases still form a significant part of the proceedings of the GVH. In 2002, they represented almost one-third of the case-related workload, and 52 final decisions concerning this topic were made by the Competition Council. In 36 cases of the 52 an intervention of the GVH was necessary because of the infringement of law and in 17 of these interventions the Competition Council imposed fines in a total of HUF 35 million (Euro 142000).[36]
The following tables summarize the number of the competition supervision proceedings by the GVH, and the number of GVH interventions, i.e. how many times was it necessary for the competition authority to undertake some kind of legal measures to ensure the protection of the competition.

[36] Annual Report on Competition Law and Policy Developments in Hungary (January – December 2002) p. 13.

***Number* of the GVH's decisions reached**

state of affairs	1991 to 1996	1997	1998	1999	2000	2001	2002
consumer fraud	218	74	72	65	86	57	52
restrictive agreements	33	5	15	15	18	10	18
abuse of dominant position	212	45	44	35	56	31	36
concentration	80	34	49	46	70	81	65
other	177	16	-	-	-	-	-
total	720	174	180	161	230	179	171

Number of decisions establishing an intervention of the GVH

state of affairs	1991 to 1996	1997	1998	1999	2000	2001	2002
consumer fraud	118	26	30	44	47	29	36
restrictive agreements	14	0	2	7	11	1	10
abuse of dominant position	52	8	5	7	19	3	15
concentration	1	0	1	-	3	1	3
other	66	5	-	-	-	-	-
total	250	39	38	58	80	34	64

3.2 Competition advocacy

In a recent ICN study competition advocacy is defined as 'those activities conducted by the competition authority related to the promotion of competition environment for economic activities by means of *non-enforcement mechanisms*, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.'[37]

The reason for competition advocacy is that competition advocacy may not only be hindered by private anticompetitive conduct, such as collusion among competitors, anticompetitive mergers, vertical agreements in restraint if competition and unilateral abuse of dominant position, but also in certain circumstances, by public regulatory intervention and rulemaking. Such *regulatory intervention* may be warranted in sectors featuring extensive economies of scales or other market failures. In particular, without intervention, some markets may fail to provide minimal level of services considered of public interest. However, regulatory intervention may go beyond the strictly necessary and may impede competition in those sectors.

Moreover, economic regulation may give rise to the emergence of *interest groups* lobbying with the relevant authorities for the imposition of regulatory measures to their own benefit, but eventually to the detriment of the society as a whole. Regulators doing their job properly

[37] Advocacy and competition policy Report prepared by Advocacy Working Group ICN's conference, Naples, Italy, 2002 p.8.

must resist those pressures, and the GVH must support these regulators by providing expert advice.
The regulating activity whether or not influenced by interest groups, is perfectly legal and so cannot be influenced by the law enforcement activity of the competition authority. What the authority can do is **advocating** with the relevant government agencies for the rejection of unnecessarily anticompetitive regulatory measures, or at least for the adoption of measures as competition friendly as possible.
As far as the Hungarian competition authority is concerned, in 2002 in the framework of its competition advocacy **the GVH** has given its opinion to more than 200 submissions and draft bills/regulations. Similarly as in the earlier years also in 2002 the main endeavours of the GVH were to avoid excessive barriers restricting the competitive markets by state interventions and to find the appropriate solutions proportional to the planned regulatory aims (e.g. the regulation of insurance services, and the regulation of law-exhaustion or IPRs, etc.). In respect of sectors which can be characterised by a limited level competition or market failures, the GVH's comments aimed at increasing the success of the justified regulatory interventions and the advocacy of the GVH was directed towards the initiation of or calls for the elaboration of well-prepared professional solutions which could result in efficiency pressure (e.g. agricultural regime, legislation aiming at the liberalisation of the sectors of electric energy, gas, health care services, etc.). The problems of impartial competitive behaviour of the state and municipalities raise concerns repeatedly. There are also returning debates concerning the setting of service/management fees for organisations having special and exclusive rights (to some extent these debates are about the VAT obligation of these services – sometimes the situations lack the conceptual solution).

3.3 Competition culture

Competition advocacy comprises all activities by competition agencies promoting competition, which do not fall in the enforcement category. On the one hand, as we have seen, it implies convincing other public authorities to abstain from adopting unnecessarily anticompetitive measures and to help them in building a competition-friendly environment – that is competition advocacy in a stricter sense. On the other hand competition advocacy comprises all efforts by competition authorities intended to make other government entities, the judicial system, economic agents and the public at large more familiar with the benefits of competition and with the role competition law and policy can play in promoting and protecting welfare enhancing competition wherever possible. This second part of the broader competition advocacy is called competition culture.[38]
Competition culture implies a variety of activities among which seminars for business representatives, lawyers, judges, academics etc. on specific competition issues, press releases about current enforcement cases the publication of annual reports and guidelines setting out the criteria followed to resolve competition cases, are just a few examples. It is generally recognized, that such activities enhance the transparency of competition policy along with the credibility of and the convincing power of the enforcement agencies.
Establishing *a forum for experts* professionally cultivating competition law, i.e. research fellows, academic people where they can exchange thoughts is of fundamental value for competition culture. This forum may offer a significant contribute in the communication, further development and control of competition law.[39]

[38] Advocacy and competition policy Report prepared by Advocacy Working Group ICN's conference, Naples, Italy, 2002 p.9.
[39] Backround paper on antitrust policy GVH, draft version 2003.

In 2002 the **GVH** looked for the possibilities of further developing competition culture, by widening knowledge of the society about competition law. The Office attaches special importance to its activity devoted to the education of and discussions about competition law and policy in universities and on scientific fora. Some of the GVH's staff members held regular competition law courses in universities. Lectures for interested professional groups are organised regularly. Communications and publications by staff members of the GVH on issues of competition policy are quite frequent.

The *institutionalised co-operation* of the GVH has been extended and made more intensive mainly with the regulatory authorities (Hungarian Energy Office, Communications Authority, Communication Arbitration Committee, Hungarian Financial Supervisory Authority), furthermore the GVH keeps regular connection with interest groups of undertakings as well.

The preparation for the EU membership continued during the year of 2002. The basic aim of this process is to make the GVH suitable to meet all the conditions and criteria, which are set by the Community institutions to the competition authorities of the Member States. In addition to the preparation for membership the GVH's international relations had two main directions in 2002, namely the co-operation with the US competition authorities and with the competition authorities of the South-Eastern European countries became more intensive. In this latter framework the GVH had the possibility to share its experience gained during the 12 years of its competition law enforcement. The GVH contributed to the work of the OECD Competition Committee and of its working parties. One colleague from the GVH joined the OECD Secretariat for a one-year period on a co-financed basis. From January 2002 on the GVH has participated in the work of the ICN.

International cooperation may also play a significant role in strengthening competition culture. The preparation of the GVH for Hungary's EU accession was regarded as a priority in 2002. In this framework several steps have been taken:

In the framework of a twinning light project a cooperation with the Bundeskartellamt aiming at mapping the practice of the BKartA vis-à-vis oligopolies, on the one hand and its international cooperation practice in EC cases.

The GVH began to prepare the amendment of the Hungarian competition law taking into consideration the accession and the new EC regime introduced by the new implementing regulation of the Council. In 2002 the first steps have been taken, the majority of the work is scheduled for 2003.

From October 2002 the GVH has been participating in the work of the "European Competition Network" organised by the EU Commission in order to shape the framework for the implementation of the new EC competition regime.

In addition to the preparation process there were two main directions of the GVH's international relations. Financed by the USAID and in close cooperation with the GVH the US Department of Justice and the FTC organised a series of seminars in Budapest for the competition authorities of the South-Eastern European countries. These professional events offered an excellent possibility for the competition authorities of this region to meet regularly and for the GVH to share the Hungarian experiences gained during the 12 years of competition law enforcement. There was another channel to cooperate with the competition authorities of the SEE region, a more direct, bilateral-type cooperation. From this point of view meetings with the Croatian and Yugoslavian authorities should be mentioned. Officials of the GVH participated regularly in professional events of the Macedonian competition authority, and there were several meetings between of the Romanian and Hungarian authorities as well both on top and expert level.

In 2002 the GVH continued to fulfil one of its most important tasks – to provide information to the public about its activity, the development of competition law in Hungary and about theoretical and pragmatic questions of competition policy.

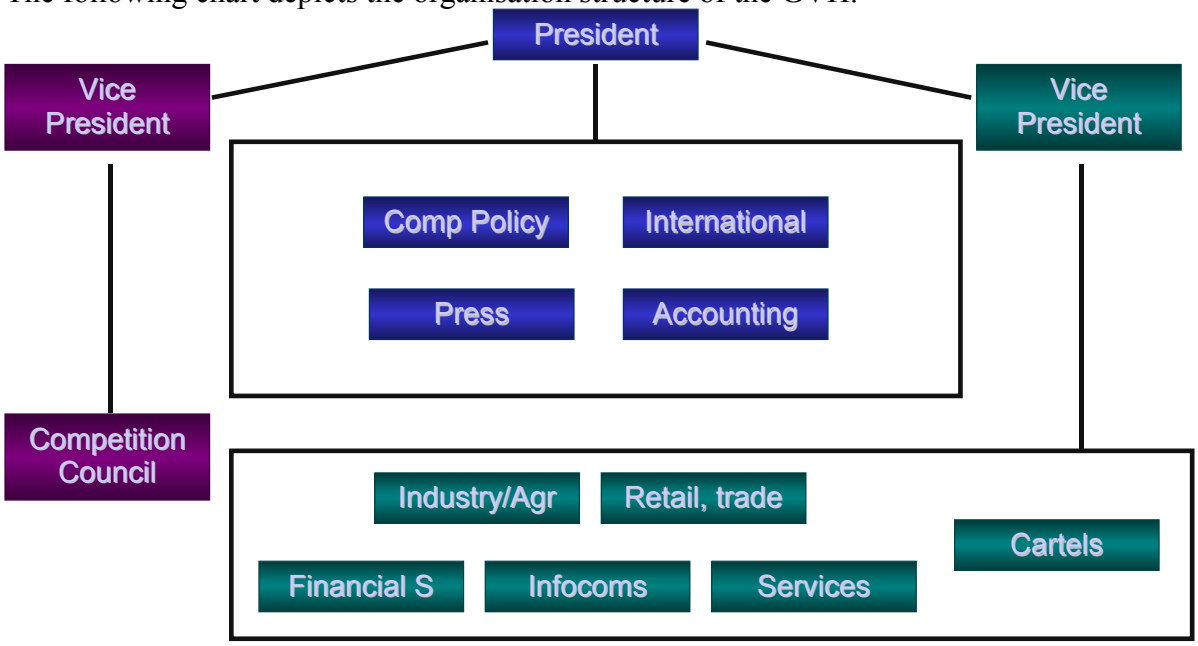
The GVH's role in the development of competition culture		
	Number of GVH officials who regularly give lectures in higher education	6
	Number of interviews given to different means of media	13
	Number of professional publications	12
	Lectures for university students	9
	Lectures for professionals	32
	Number of theses by students in competition matters	7
Articles in newspapers about the GVH in 2002		
	Articles, news in nation-wide newspapers	64
	Articles, news in professional/economic newspapers	56
	Articles about the previous year's annual report	4
	Articles about the amendment of the competition law	-

The GVH puts a great emphasis on communicating its activity to the public. To this end the decisions of the Competition Council are made public on the website of the GVH: www.gvh.hu. This homepage was substantially renewed and restructured in 2001. The new site contains more information and a substantial part of the Hungarian version can also be found in English.

4. The organisation of the GVH

The GVH is a public, budgetary institution supervising competition. The GVH is *independent* from the government: all the duties of the GVH must be prescribed by law, and its activities are controlled solely by the parliament.
The GVH is headed by the **President**, and his *independence* is also underlined by the way of nomination and term of appointment. The President of the GVH is nominated by the Prime Minister, elected by the parliament and appointed by the President of the Republic for a term of six years.
The President can only be *relieved* of his position, on specific grounds that are listed in the act on competition. These grounds are unworthiness, incapability, incompatibility for the reasons listed in Article 40, and failing intentionally to fulfil his obligation to make a property declaration or intentionally supplying false information in respect of any important fact or data in his property declaration.
The *tasks* of the president include directing the activities and representing the GVH; establishing the organisational and operational rules of the GVH and approve the same kind of rules of the Competition Council; and exercising the rights of employer, except for the appointment and dismissal of the members of the Competition Council.
Most of the activities of the GVH are regulated as tasks of the president in the Act on Competition, including the report to the Parliament, competition advocacy, the issue notices, and the conduct of sectoral investigation, however because of their large number and complexity, they will be discussed in separate chapters.
There are two **Vice Presidents** in the GVH, are nominated by the President of the GVH to the Prime Minister and appointed also by the President of the Republic. The President of the Republic, charges one of the two Vice Presidents with the responsibilities of the President of the Competition Council. The term of appointment is also six years in the case of the vice-presidents, with the possibility of reappointment.

As appointed, one of the Vice Presidents is President of the **Competition Council**. The Competition Council is the *decision making body* of the GVH, its tasks include reaching decisions of the GVH on the merits of the case closing the enforcement proceedings and the decisions ordering the implementation of those decisions. It also serves as an *appeal forum* where decisions made by the investigator during the proceedings and decisions rejecting to proceed upon a complaint can be challenged.
The members of the Competition Council are appointed and dismissed by the President of the Republic of Hungary. The members of the Competition Council are subject only to the law in the course of the competition supervision proceedings, and they can only be relieved for the same grounds as the President of the GVH and for disciplinary punishment of dismissal.
The President of the Competition Council organizes the activities of the Council, supervises compliance with procedural deadlines, prepares and submits for approval the organisational and operational rules of the Competition Council and ensures publication of the decisions of the Competition Council He may also act as a member of the decision making competition council in an actual case at hand.
The other Vice president directs the work of the investigating sections. There are six investigating sections currently in the GVH: they are either responsible for a branch (Industry and agriculture, financial services, infocommunications, retail and trade, other services) or a certain type of antitrust cases is delegated to their competence (cartel unit).
The following chart depicts the organisation structure of the GVH.[40]



5. Proceedings of the GVH

The GVH has jurisdiction in all cases relating to competition supervision which do not belong to the competence of the courts. The courts have jurisdiction in cases which affect unfair market practices. In antitrust cases, the GVH is the primary judicative body.

[40] *'Introduction to the activity of the host authority'* presentation by *Csaba Kovács*, Head of the Competition Policy Section at CG 7530 Workshop on competition CG 7530 organized at the GVH 27 June 2003

The competition supervision proceedings consists of four phases: 1) the procedure of the investigation 2) the procedure of the competition council 3) post-investigation and 4) enforcement.
There are several methods for a competition supervision **proceeding** to be launched: they can be **commenced** on application or may be started ex officio.
The proceedings that are commenced *on application* are the following:

- Negative clearance, that is it is not a restrictive agreement, or it is not subject of the prohibition (agreements of minor importance), or it is exempted from the prohibition by way of block exemption regulations.
- Request for an individual exemption, that is to receive an exemption from the prohibition of an agreement restricting competition.
- Request for authorisation of a merger if the enterprises concerned reach the thresholds set out in the Competition Act
- Request for the extension of the one year period of the temporary acquisitions of control or ownership by financial institutions, during which, under certain conditions, these acquisitions do not qualify as mergers.
- Prior notification of a price increase.

The competition supervision proceeding may also be *ex officio* where it is established that, in the above listed cases a competition supervision proceeding should have, but have not been, applied for. In addition to this, the competition investigator shall open an investigation upon observation of an activity, conduct or situation which may violate the provisions of the Act on Competition, provided that the proceedings are within the competence of the GVH and the proceedings are necessary to safeguard the public interest. The latest experience shows that in 2002 out of the proceedings that ended with a decision of the Competition Council 65 were initiated upon application and 104 ex-officio.[41]
During the **procedure of the investigation** the investigator prepares a report, which is to be submitted to the competition council. This report contains the subject matter of the investigation, the findings of the investigator and the supporting evidence and finally, the proposal of the investigator relating to the further course of the proceedings and for interim measures where necessary. In justified cases, the investigator may, in a separate report, propose interim measures prior to the conclusion of the investigation.
In order to ensure the perfect functioning of the GVH, he investigators are entitled with *significant investigative powers*. They may inter alia access to documents relating to the economic activities, even if such documents contain business secrets, they may also perform an inspection at the party, enter any of the premises, oblige the party or its representative or former representative, employee or former employee to provide information and explanation, or collect information on the spot in any other manner; and they may also make copies of or abstracts from documents and furthermore, for this purpose, take possession of them for a period of maximum eight days.
In cases where the prohibition of anti-competitive agreements or abuse of dominant position is infringed, the investigators have even more significant powers. They may perform some of the above mentioned functions on their own, and they may enter on their own and search with a particular purpose the premises used for private purposes or privately used, of any executive official of the party or of any other person who exercises control as a matter of fact. These investigation acts require prior judicial authorization.
During the **procedure of the Competition Council** the decision on the merits of a case is to be reached. In its decision the Competition Council may decide in the cases which are listed among the cases commenced on application, furthermore it may decide in the case of

[41] Annual Report on Competition Law and Policy Developments in Hungary (January – December 2002) p. 5.

proceedings started ex officio, i.e. it may exempt the agreement restricting economic competition from the prohibition, or may authorize the concentration of undertakings, and it may also establish that the benefit of the group exemption does not apply to the agreement.
When an infringement of the Act is found the Competition Council may inter alia establish that the conduct is unlawful and it may order a situation violating the Act to be eliminated, and it may prohibit continuation of the conduct which violates the provisions of the Act. The most important sanction used by the Competition Council is the fine. It can be imposed on persons violating the provisions of the Act on Competition. The maximum fine is ten per cent of the undertaking's net turnover in the preceding business year. The following table illustrates the amount of the fines imposed by the GVH since the new Competition Act entered into force (1997). In 2002 we experienced a very significant increase in this field, and some further increase is to be expected.

Fines imposed by the GVH (in million HUF)

state of affairs	1997	1998	1999	2000	2001	2002
consumer fraud	52,1	35,7	21,4	46,6	45,2	35,0
restrictive agreements	-	5,0	7,0	96,0	-	182,5
abuse of dominant position	17,8	29,0	13,5	11,8	10,0	218,5
concentration	0	-	2,2	2,7	-	-
blanket clause of the old Competition Act	34,2	-	-	-	-	-
total	104,1	69,7	44,1	157,1	55,2	436,0

The competition council makes its decision on the merits of the case on trial, or without a trial if the parties have jointly requested its omission, or where all parties consented to such a request, which trials are held in public.
When the competition council orders the suspension of the proceeding, or the decision on the merits of the case of the competition council contains pre- or post-conditions or obligations, whose fulfilment is to be checked, a **post-investigation** is necessary.
The competition council may order the suspension of proceedings started ex officio where the conduct under review jeopardises the freedom or fairness of competition only to a minor degree and the defending party undertakes that it refrains from continuing its conduct violating the Competition Act, and take the necessary measures to prevent any damage or to remedy infringements already committed.
The investigator may also hold a post-investigation in other cases concluded by a decision on the merits of the case of the competition council. The post-investigation is governed by the same procedural rules as the normal investigation except for the fact the report shall be submitted to the competition council within thirty days.
The final stage of the competition supervision proceedings is the **enforcement**. Decisions made in the course of competition supervision proceedings are final and enforceable if no claim for a legal remedy has been filed against them within the time limit or a legal remedy has been waived or is precluded by the Competition Act. Any decisions, for which the claim for a remedy has no suspending effect pursuant to this Act, are also enforceable. To make enforcement more effective the competition council may impose an enforcement fine if the enforcement is aimed at the performance of an act or display of conduct specified in the decision. Should the competition council have imposed a fine, the party fined shall pay an

interest corresponding to twice the central bank's prime rate for the period in question following the expiry of the time limit determined for voluntary compliance.[42]

5.1 Legal remedies against the decisions in the Competition Supervision Proceedings

There are several possibilities for legal remedies in the competition supervision proceedings, in case of irregularities in the investigation procedure an objection can be filed, while against the decisions of both the investigators and the competition council a devolutive legal remedy can be sought.

In case of any **irregularities in the investigation procedures**, a party may file an objection, in writing, to within three days of the irregular measure alleged. If an objection is ignored the investigator or the competition council bringing proceedings in the case shall give reasons for its decision to ignore the objection in the report or the decision concluding the proceedings respectively.

In the course of the proceedings legal remedies may be sought against the **decisions** made *by the investigator* or the *competition council* bringing proceedings in the case during the proceedings in the cases defined in the Competition Act. In general, this does not have a suspending effect on the implementation of the provisions of the contested decisions Legal remedy will be provided by the competition council (in case of a decision by the investigator) or the Metropolitan Court of Budapest (in case of a decision by the competition council).

The courts play a supervisory role not only in procedural aspects, but also when the merit of the case is concerned. Within thirty days of the serving of the decision on the merit of the case a revision of the decision may be requested from the court. This claim has no suspensive effect on the implementation of the decision.

The proceeding takes place in front of the Metropolitan Court of Budapest, with the Supreme Court as the appellative body. The courts may overrule the decision of the competition council, and if the decision made by the competition council violated a legal norm as a result of which the party has a claim for the reimbursement of the fine, the refunded amount is subject to interest corresponding to twice the central bank's prime rate in the period in question.

During the first ten years of competition law enforcement 457 proceeding were initiated seeking remedy against the decisions of the competition council. and 372 of them have been concluded by the end of 2001. The court reduced the fines imposed in 41 cases and amended in whole or in part the merit of the decision of the GVH in 31 cases. In further 15 cases the court obliged the GVH to repeat the proceedings.[43]

In 2002, the proportion of cases appealed before courts increased compared to the figure of 2001. As in the preceding year, around half of the condemning decisions were brought to courts, while only every fourth or fifth decision terminating the proceedings was appealed by the complaint. In 2002 only one of the Competition Council's decisions was overruled by the first instance court and two further by the second instance court. Besides, the fines were reduced on one occasion by the first instance court and on four by the second instance court. Courts are also entitled to annul the Competition Council's decision and order new competition supervision proceedings. During the last year the first instance court passed an annulling judgement ordering new competition supervision proceedings on five occasions. Besides the courts' intervention, the fact that the legal basis applied by the Competition

[42] For a more detailed description of the proceedings see in Hungarian language see Miskolczi (2002): *A versenytörvény magyarázata* (Commentary on the competition Act) p. 419-472.

[43] Annual Report on Competition Law and Policy Developments in Hungary (January – December 2001) p. 10.

Council is rarely modified by the court shows that there is a harmony between the courts and the GVH.[44]

6. A Case Study

A merger in an oligopolistic market was one of the complicated cases last year (in 2002) in Hungarian Competition law enforcement. In the **Südzucker** case, as a result of the acquisition of Financiere Franklin Roosevelt S.A.S. by Raffinerie Tirlemontoise S.A., *Südzucker* – having controlling rights over the latter – would have acquired a 50 per cent *ownership* also over *Eastern Sugar* BV. (99,7 per cent owner of the Hungarian sugar factory Kabai Cukorgyár Rt). However, Südzucker had already *had indirect control over another Hungarian sugar firm*, Magyar Cukor Rt. (Béghin Say, the third market participant on the Hungarian sugar market controlling three sugar plants, was not concerned by the planned transaction.) In its decision the Competition Council found, that the Hungarian sugar industry was in a *tight oligopolistic situation* already before the planned transaction would have been carried out. It was stated, that the transaction *would have created an even tighter structural relationship* between Magyar Cukor Rt. and Kabai Cukor Rt, i.e. *between two of the three Hungarian market participants*. Consequently, the strengthening of the joint dominance of the two remaining market participants might be expected to strengthen the ability of the firms of the duopoly to use their market position by harming the consumers' interest, e.g. by increasing or by maintaining the high level of their prices. So, the *Competition Council attached a* ***condition*** *to its authorisation*: it was ordered that Südzucker had to sell Eastern Sugar BV to Tate & Layle Plc, its other 50 per cent owner.

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[44] Annual Report on Competition Law and Policy Developments in Hungary (January – December 2002) p. 15.

Competition Policy in Romania[45]

1. Introduction

Since the beginning of the historical process of transition to a market economy, the creation and development of a normal competitive environment in Romania - compatible with the European Single Market - became a primary objective of government action in Romania. One of the compulsory conditions for accession into the European Union for Romania was the achievement of a functional market economy, a status that has not yet been achieved due to delays in various reforms. The twin conditions for reaching the target were the enforcement of a viable competition policy and of a large-scale privatisation process within the industry and market services/public utilities sectors. One may assume that following privatisation the companies obtain material support, and management that is qualified and interested in the achievement of the optimal profits, ensuring thus the existence of competition on their markets in the interest of the end-users.

The enforcement of a normal competitive environment in Romania was achieved by establishing the legal framework in this field and by effectively training the market competitors in the area of competition. An important step in reaching such aim was undoubtedly the liberalisation of the prices of primary goods and manufactured products, which were centrally controlled until 1990, not being determined by the equilibrium between demand and supply.

The main measures taken for promoting competition, were:

- Forbidding the anti-competitive practices (express and tacit agreements, decisions of partnership or concerted practices, abuse of dominant position);
- Supervising and controlling mergers and acquisitions;
- Pursuing, limiting and supervising the anti-competitive impact of the state intervention in the economy through granting of state aids.

The Competition Policy in Romania was set to aim at regulating the goods and services markets through the control of the restrictive practices, abuse of dominant position, economic concentrations and mergers, as well as the control of non-loyal competition between market competitors and between competitors and consumers.

Competition Policy in Romania is composed of primary and secondary legislation. Primary legislation includes the Competition Law (no.21/1996), the State Aid Law (no.143-1999) and the Consumer Protection Law (193/2000) regarding the provisions of the standard contracts between the natural or legal monopolies of services providers and consumers. The secondary legislation consists of regulations, decisions and guidelines.

2. Evolution of legislation

The first *law statement* governing competition in Romania was Chapter V of Law 15, adopted in 1990, referring to the reorganization of state owned companies as autonomous-management units ("regies autonomes") and commercial companies. However, the Law 15/1990 did not establish an administrative body in charge of its implementation. In 1991, the Parliament passed the Law on Unfair Competition and its validity lasted until 1997.

[45] By Virginia Campeanu and Constantin Ciupagea.

The Romanian Parliament adopted the new ***Competition Law*** (21/1996) on 10.04.1996 which entered into force on 01.02.1997. The law has its foundations in the principles of E.C. (European Commission) competition policy.
The purpose of the new Competition Law is to protect, maintain and stimulate competition to the benefit of consumers, as well as to create the conditions to assess the behaviour of economic agents based on standard principles. The adoption of the new Competition Law expressed Romania's willingness to give competition the special place it has in the functioning of the markets. Through this Law, Romania enforced its own legislation in the field of competition policy and also fulfilled the obligations of the Association Agreement between Romania and the European Union that required the setting up of competition rules and tailoring legislation according to the European Union's models.
The Romanian Competition Law applies to undertakings (companies, enterprises, holdings), or groups of undertakings, of Romanian and foreign nationality carrying out activities on the territory of Romania, as well as to central and local public administration authorities in a case where, by decisions issued or regulations adopted, they get involved in market operations.
The new Competition Law is divided into seven chapters. Chapter one contains the general provisions of the law. Chapter two regulates anti-competitive practices. Chapter three deals with economic concentration. The institutions entrusted with the application of the law are covered by chapter four. Chapter five contains the investigation and the decision-making procedures. Sanctions are covered in chapter six and, finally, chapter seven includes the common and final provisions.

Rules for Restrictive Agreements

The Law prohibits any agreements between undertakings, and any concerted practices having as object or as possible effect the restriction, prevention or distortion of competition on the Romanian market or on any part of it.
Article 5 provides a list of specific examples (not exhaustive) of such agreements and concerted practices: direct and indirect fixing prices, tariffs, rebates, supplements, as well as other inequitable terms of trading; limiting production, distribution, technological progress or investments; sharing out distribution markets or supplying sources according to territorial criteria; participation, in a concerted manner, with collusive tendering to bids; limitation or obstruction the access to the market, the free exercise of competition between other parties, without reasonable justification.
The Law also sets up a procedure by which parties may seek *exemption* from these prohibitions based on criteria balancing the anti-competitive and positive effects on consumers and on national economy, concerning both agreements and economic concentrations. There are five major *exceptions* to the general prohibition of restrictive agreements, namely when:

a. the positive effects are able to compensate the negative ones;
b. the agreement will benefit the consumers;
c. the agreements are of minor importance, having a market share less than 5 per cent[46];
d. there is case for an individual exemption[47].
e. certain kinds of co-operation which are judged to be positive are permitted by means of block exemption regulations (adopted in 1998):

[46] Article 8 of the Competition Law and Regulation for the application of the provisions of art.5 and 6 of the Competition Law 21/1996 regarding anti-competition practice. The Official Monitor of Romania, June 9, 1997
[47] Application for the preliminary certification of non-intervention of the Competition Council, for the exemption of individual exception from the provision of Article 5(1) of the law respectively.

- agreements for exclusive distribution;
- R&D agreements;
- agreements for the transfer of technology and know-how;
- agreements on franchising, insurance agreements, and others.[48]

Abuse of a Dominant Position

A dominant position held on a product market in Romania is not a prohibited one. Undertakings in this position are subject of the Competition Law provisions to the extent they abuse their dominant position through anti-competitive practices, which have as object the harm on commerce or the damage to consumers, as well as the case in which consumers are negatively affected.
The Competition Law (art.6) prohibits the misuse of the dominant position held by one or several undertakings. The following seven cases may be considered as examples for such abusive practices: a) imposing, directly or indirectly, the sale or purchase prices, the tariffs or other unfair contractual clauses; b) limiting production, distribution or technological development; c) imposing unequal terms for equivalent services to trade partners, thus causing a disadvantage to their market position; d) conditioning the conclusion of contracts by imposing additional services which do not relate to the object of the contract; e) importing products and services that determine the overall price and tariff level in the economy, without the usual bids; f) imposing excessive or low prices to eliminate competitors, or exporting below production costs and covering the difference through higher domestic prices; g) exploiting the economic dependence on one or several undertakings when a client or supplier.
The Law also provides guidelines for defining the relevant market - i.e. geographic and product market - as well as the relevant market for economic concentration. It is intended to provide help for the economic actors in drawing up their application for individual exemption and for drawing up notification of economic concentration.

Economic Concentration

The Romanian Competition Law provides in a distinct chapter the rules and regulations concerning the control of economic concentrations, following the model of the European Council Regulation (EEC) No. 4064/1989, which has as object the prohibition of any economic concentration that may create or strengthen a dominant position that would significantly impede on effective competition.
Economic concentration is defined as a merger between two or more previously independent undertakings or, an acquisition made by one or several persons, already controlling at least one undertaking, or one or several undertakings gaining control over another undertaking; gaining control can be achieved through larger share of capital, through purchase of assets, by contract or by other means. The economic concentrations are prohibited to the extent that they create or consolidate a dominant position and lead to or are likely to lead to a significant restriction, prevention or distortion of competition on the Romanian market or on a part of it.
The economic concentrations may be authorized if, analysing them in accordance to the criteria provided for in the Competition Law, they are compatible with a normal competition environment, and if the involved undertakings prove that they fulfil cumulatively certain

[48] Competition Regulation Exemption/ No.319, Competition Annex 1-7/no.326

conditions such as: increase of the economic efficiency and of the competitiveness of exports, benefits for consumer through reduced real prices.
Special regulation attached to the Law provides instructions on notification of economic concentrations.

State Aid - Evolution of national legal framework

On 1st February 1995, the European Agreement between Romania and European Communities and member states came into force. Provisions on State Aids are mentioned for the first time in Romanian legislation in Article 64 of the European Agreement that asks the Romanian part to regulate this area during the pre-accession period.
Within this Agreement, State Aid issues are treated under competition chapters.
As a result, Competition Law no. 21/1996 provides attributions in the State Aids area for the two Romanian Competition authorities: Competition Council and Competition Office.
The overall legislative framework that provides the concepts, the assessment methods, surveying techniques of the State Aids, including provisions on adopting secondary legislation in this field, is included in the **Law no. 143/1996 on State Aids**.
Consequently, the Law gives a definition of the state aids, establishes the modality for granting, controlling, authorizing, recovering, inventorying, monitoring and reporting them in a transparent manner, as well as the institutional responsibilities concerning the application of such provisions.
The term "state aid" covers any aid granted through state resources and providing specific advantages in favour of certain beneficiaries. The state aid may be granted by the central public administration or by local public authorities, directly or through other bodies administering funds on behalf of the state.
The state aid concept includes measures resulting in a net transfer of public funds to the recipients or in revenues (whether actual or foregone) that are renounced. The state aids also include those investments of which only certain products, services or regions may benefit.
The state aid may be granted to a single beneficiary and in this case represents an individual state aid, or through an aid scheme defining a system based on which specific aid allocations may be granted to undertakings that are defined generally and in an abstract manner as potential state aid beneficiaries.
Any state aid, irrespective of form or beneficiary, has to be authorised, from the competition point of view, through decisions issued by the *Competition Council*. When state aids are granted without an authorization by the Competition Council (illegal aids), or are forbidden by the law, the amounts are to be recovered by the suppliers or reimbursed by the beneficiaries.
The Law also provides for procedural aspects as the notification of an existent or of a new state aid, the examination of the notification as well as the investigation procedure.
The expected development of the overall legislative framework comprises both the regulations issued by the Competition Council (autonomous authority that decides if the new or the existing State Aid schemes/individual aids significantly distort the competitive market or the international treaties at which Romania takes part) and the legal acts of the central administration (Government Decrees, Minister orders) regulating the concrete ways of inventorying, monitoring and reporting the State Aids.
As a consequence, in March 2000, the President of the Competition Council issued the Order no. 27/2000 for implementing:

- The Regulation on form, content and other details of a State Aid notification[49]
- The Regulation on the *de minimis* threshold of the State Aid that does not fall under the obligation of notification.

In July 2000, the Government Decree no. 599 for the approval of procedures of reporting, monitoring and informing was adopted, in order to assist the implementation of the Law no. 143/1999 on State Aid. The Government Decree constitutes the methodological frame for inventorying and monitoring the State Aids, and for monitoring the financial flows between authorities and undertakings entrusted with provision of some public services of general interest. By its provisions, the Government Decree entrusted *Competition Office* with surveying and controlling the process of granting the State Aids, both from the competition point of view and from the perspective on the use of public funds (in accordance to the carrying on of the Government Programmes).

The legislation process in the State Aids area is considered to be in an incipient stage and needs to be improved both by harmonizing it with the new European regulations, and by enriching it as a result of the experience gathered in the specific implementation process. An example is the adoption of the Government Decree no. 277/2001 regarding the organization and functioning of the Competition Office under the Public Finance Ministry. Following the introduction of the above mentioned regulation, the Competition Office activity in the State Aids field enhanced within all its attributions, fact implying at institutional level the necessity to implement the provisions of the Law no.143/1999 on State Aids and of the Government Decree no. 599/2000.

The Law provides for the possibility of exemption for those state aids that are not exceeding the *de minimis* threshold value of 3 billion ROL (approx. EURO 100 000)[50], establishing at the same time the exemption criteria.

3. Institutions

3.1. The Governmental-Public Institutions, with an officially recognized role in managing Competition Policy in Romania

The Competition Council (Consiliul Concurentei)

The Competition Council is the autonomous administrative authority in the field of competition. The Competition Council represents Romania in its relations with specialized international institutions.

The Competition Council observes the enforcement of the legal provisions on anti-competitive practices (anti-competitive agreements and abuse of dominant position) and controls the economic concentration (mergers and acquisitions) in order to protect, maintain and stimulate competition and a normal, competitive market-oriented environment, with a view towards promoting consumers' interests. The Competition Council gives advisory opinion on the Government decision drafts that may have anti-competitive impact, and proposes amendments to the normative acts having such effects.

The role of the Competition Council as an autonomous administrative authority is twofold: one aspect is corrective relating to its interventions to restore and maintain normal,

[49] Official Journal no. 125/24 March 2000

[50] Order of the President of the Competition Council no. 251/23.12.2002.

competitive environment on markets, and the second one is preventive, related to its interventions that significantly impede and prevent unfair competition on the market.
Competition Law no. 21/1996 provides attributions in the State Aids area for the two Romanian Competition authorities: Competition Council and Competition Office.
The Competition Council gives advisory opinion on State aid policy and state aid schemes from the point of view of the possible effects on competition and monitors these rules. Any State aid in any forms whatsoever and regardless of its recipient, must be authorised by the Competition Council considering its potential effects on competition. One may not put into effect a new State aid measure or changes to existing State aid until the Competition Council has made a decision to authorize the State aid. A State aid, other than an existent aid or aid that is exempted from the notification obligation, is considered to be illegal if allowed without the Competition Council's authorisation or granted after being notified, but before the Competition Council took a decision within the legal term limits.

The stage of the negotiations that took place within the process of Romania's accession to the European Union for Chapter 6 – "Competition policy", for which the Competition Council is integrator

Because the commitments that were assumed in the Complementary Position Paper and the National Accession Program could not be respected, the new Plenary of the Competition Council discussed this matter in its first meeting on February 2002. The new Board of the Competition Council established the measures required for setting up working groups in order to elaborate the secondary legislation in the domains of competition and state aids.
In order to accomplish this goal the Competition Council has analysed the community legislation on competition and worked out a timetable for incorporating the *acquis communautaire* during the period before the closing of negotiations on Chapter 6. In order to adjust and enrich the **legislative framework in the area of competition**, the Competition Council has adopted new regulations and guidelines and intensified its advocacy activity by informing the undertakings, as well as central and local public administration, on the importance of observing and enforcing the competition and state aid rules. The completion of the legislative framework has continued and will continue up to the end of 2004 in order to get harmonised with the provisions of the *acquis communautaire* by taking into account the characteristics of the Romanian economic environment.
The Competition Council oriented its activity in the direction of the preparation for accession into the European Union, by achieving the objectives settled in the Accession Partnership, the Position Paper and the Complementary Position Paper. This was in accordance with the recommendations formulated by the European Commission in the annual reports regarding the progress registered in the accession preparation process for the years 2000 and 2002, aiming at:

- Recovering the delays registered in year 2001 in the domain of legislative harmonisation;
- Strengthening the institutional capacity;
- Implementing efficiently the policy in the competition and state aid domain.

Following the analysis of the new EC policies in the domain of vertical agreements and horizontal agreements, and taking into account the need for their transposition into Romanian legislation in order to consolidate the competitive environment and increase the capacity of the Romanian economy to face the competitive pressures from the European Union, the Competition Council adopted new specific regulations and instructions. The activity of the Council in 2002 was positively appreciated by the General Director of the Competition -

Directorate General of the European Commission who also expressed his satisfaction with regard to recovering of delays in fulfilling the commitments for year 2001.
The Complementary Position Paper II "Competition Policy" and the grounding dossier were approved by Governmental Memoranda on October 31, 2002**.** Through Complementary Position Paper II, Romania reasserted its commitments on the transposition and enforcement of the *acquis communautaire* in the field of competition and state aid and on strengthening the administrative capacity in view of accession into the European Union. Additional information required by the experts of the European Commission and of the Member States was transmitted for the following sensitive issues: regulation on industrial parks functioning, facilities granted to deprived areas, fiscal facilities granted in free zones, tax profit low rate for the profit related to exports, restructuring of Romanian metallurgy, state aids granted on shipbuilding industry. The progresses on this chapter of negotiations were also on the agenda of the Association Committee Romania - European Union held in Brussels on December 3, 2002.

Legislative process - the secondary legislation adopted by Competition Council

Romania has been particularly active in implementing secondary legislation in the field of competition. These regulations and guidelines have been set up following the model of the corresponding regulations in European Commission's law.
In the competition area, the Competition Council acted for completing the legislative framework for the full harmonization with the *acquis communautaire*. Following the assessment of the new EU policies in the field of ***vertical restraints and horizontal agreements*** and taking into account the necessity of transposing them into Romanian legislation in order to strengthen the competitive environment and to increase the capacity of the Romanian economy to cope with the single market's competitive pressures, the Competition Council adopted the following Guidelines and Regulations[51]. They entered into force on the date of their publication:

- Regulation on the application of Art. 5 of the Competition Law to *vertical agreements;*
- Guidelines on the application of Art. 5 to vertical agreements;
- Regulation on granting exemption from the application of the interdiction stipulated in Art. 5 (1) to *specialization agreements*;
- Regulation on granting exemption from the application of the interdiction stipulated in Art. 5 (1) of the to *research and development agreements*;
- Guidelines on the application of Art 5 to *horizontal co-operation agreements.*

The Competition Council altered and completed the Regulation on authorising ***economic concentrations***, by transposing the provisions concerning the time limits for notifications[52].
In the second half of 2002, taking into account the envisaged liberalisation of the *telecommunication market* starting January 1, 2003, the Competition Council adopted the Guidelines for application of the competition rules to access agreements within the telecommunications sector - general framework, relevant markets and principles[53].
The Competition Council elaborated together with the Ministry of Transport, Public Work and Housing, in compliance with the *acquis communautaire*, the following Regulations and Guidelines, which transpose the *sectoral competition rules*:

[51] Official Journal of Romania no. 591 bis/09.08.2002
[52] Ibidem
[53] Official Journal no. 920/ 17.12.2002

- Regulation on the application Art. 5 and Art. 6 of the Competition Law to transport by rail, road and inland waterway ;
- Regulation on the application of Art. 5 and Art. 6 to maritime transports;
- Regulation on the application of Art. 5 and Art. 6 of the to air transports;
- Regulation on granting exemptions from the interdiction stipulated in Art. 5 (1) to maritime transport;
- Regulation on granting exemptions from the prohibition provided on art. 5(1) to categories of agreements, association decisions and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports.
- Regulation concerning the form and content of the applications required within the *transportation sector*.

These regulations and guidelines are fully in line with the provisions of the EU *acquis* but one may still observe some incompatibilities with the Competition Law. Thus, the secondary legislation on transportation sector will be effective only after the modification of the Competition Law, according to the agreement between the experts of European Commission and Romania during the technical discussions held in Bucharest and Brussels.

Having in mind that Romania has to promote a ***State aid*** policy similar to the European Union policy in this area, the Competition Council acted for issuing its own proposal for a legislative framework in this field and for ensuring a very strict control of the State aids granted in Romania. The legislative framework has been enriched through the adoption of Regulations and Guidelines establishing clear criteria for the assessment of State aids.

Following a thorough assessment of the EU legislation in the state aid field, especially of the new EC approach on setting up clear criteria for granting state aid in different sectors or types of activities, the Competition Council has elaborated and adopted the following Regulations[54]:

- Regulation on regional state aid and state aid to SMEs;
- Regulation on state aid for rescuing and restructuring firms in difficulty;
- Regulation on state aid for research and development;
- Regulation on state aid for training;
- Regulation on state aid for environment protection.

The Competition Council elaborated and adopted in the second half of 2002, the following Regulations:

- The Multisectoral Regulation on transitory rules applicable to the regional state aid for large investment projects in the non-specific industrial sectors;
- The Multisectoral Regulation on regional state aid for large investment projects;
- Guidelines on state aid in the form of guarantees,
- Guidelines on state aid and risk capital.

Consultations between the Romanian and EU Commission experts took place in 2002, in order to deliver a regional mapping of maximum admissible intensity of state aid in Romania for approval through Decision of Association Committee Romania - European Union. The Decision will entry into force on the date of its adoption and will expire on 31st December 2006 or on the date of Romania's accession to EU, if the latest would come first.

In accordance with the recommendations of the EU's experts, the Competition Council will continue to take over the *acquis communautaire* through the adoption of the State aid rules for specific sectors. In order to strengthen the capacity of the Competition Council to act

[54] Official Journal no. 470/02. 07.2002 and entered into force on January 2nd, 2003.

against State aid schemes contained by normative acts, the Law on State Aid no.143/1999 will be amended during the next two years period.

Enforcement of the competition and state aid policy

Statistical data on number of analysed decisions, number of decisions that were issued, number of imposed sanctions, and number of analysed markets may illustrate the enforcement of the Competition policy. Taking into account that the economic agents are already accustomed with the provisions of and the monitoring procedures within the Competition Law, the data highlight the increased degree of exigency when assessing the infringement of the competition rules.
The Competition Council initiated the setting up of an inter-institutional working group on State aid area. This Working Group meets quarterly and aims at assessing the existing State aid schemes and at establishing their compatibility with the *acquis communautaire*. The latter action tries to eliminate the incompatible aids or to convert them into compatible, looking at their legal and commercial direct and collateral effects. This approach has three steps: the cancellation of the schemes that are incompatible with the *acquis*; alteration of the schemes in order to assure the compatibility with the *acquis*; identification of the viable and legal solutions for the firms benefiting of aid under the current schemes.
In February 2002 the European Commission received a preliminary list of the state aids that Romania intends to grant after the date of accession into the EU. Romania may continue to operate any aid which is included in the list and against which the European Commission has not objected during the period for which the aid has been approved given its compatibility with the EU relevant rules. The list is updated periodically.
The Competition Council is also a member of the inter-institutional working group set up within Prime-Minister Decision no. 182/24.10.2002 having the mission of analysing state aid schemes inside free (trade) zones. The activity of this working group aims at:
- evaluating the existent state aid schemes within the free zones and the specific allocations to each beneficiary;
- establishing the compatibility with the *acquis* in view of eliminating the incompatible facilities or of transforming them into compatible ones;
- making a complete list of incompatible state aid measures and analysing every case in order to establish all the necessary measures, including the amendment of the legislation concerning the free zones.

Organizational structure of the Competition Council

The Competition Council consists of ten members: one President with the rank of Minister, three vice-presidents with the rank of Secretary of State and six competition counsellors with the rank of Undersecretary of state. The President has three counsellors. The eight specialised departments managed by eight directors of the Competition Council are: consumer goods department, industrial goods department, services department, state aid department, research directorate, legal directorate, directorate of international aspects, budget directorate.
The President of Romania appoints the Council members, pursuant the joint proposal of the Economic Commission of the Senate and the Commission for Economic Policy, Reform and Privatization of the Chamber of Deputies, which submit the list indicating the positions they are nominated for. The term of mandate for the Competition Council members is 5 years, and each member may be re-invested not more than twice.

The status of the Competition Council's members is incompatible with any other public position, except for didactic activity in the high-level education institutions. They do not represent the authority that appointed them, and are independent in decision-making. The Council members and the competition inspectors cannot be members of political parties or other political organizations.
The competition inspectors working within the Competition Council have *de facto* investigative and research powers. They have the ability to investigate, search, take over documents or their copies, seal and take other measures as provided by the Criminal Procedure Code of Romania.
The Competition Council functions and deliberates in plenary sessions and in commissions. Each commission consists of two competition counsellors, as designated by the Chairman of the Council for every particular case, and is headed by a vice-president of the Council. The President of the Council decides on the opening of an investigation and nominates a responsible reporteur for each case.
The Competition Council examines in plenary sessions:

- the investigation reports and possible objections to them, and decides upon necessary measures to be taken;
- the authorization of economic concentrations;
- the intimation of courts in enforcing the law;
- the viewpoints, recommendations and opinions to be made in enforcing the competition law;
- the categories of agreements, decisions and concerted practices proposed to be exempted;
- the draft regulations proposed to be adopted;
- the annual report on the state of competition.

Every single member has one vote in any deliberative session; when votes tie, the President's vote prevails.
In order to carry out its prerogatives, the Competition Council sets up its own apparatus, consisting of specialised departments and functional departments. The specialised departments of the Competition Council are four investigation departments, Research Directorate, Juridical Directorate, Foreign Affairs Directorate and Territorial Directorate. One vice-president and two competition counsellors manage each department of the Competition Council. The investigation departments of the Competition Council correspond to the following areas: consumer goods, industrial goods, services and State aid.
The functional departments form the General Secretariat, managed by a General Secretary.
The Competition Council draws up its own budget, which is a distinct chapter of the state

Attributions of the Competition Council

The attributions (set by law) the Competition Council has are:

- to take decisions, according to the law;
- to certify, following investigations requested by undertaking, and on account of the gathered evidence that there is no ground to intervene according to the law;
- to take decisions concerning the individual exemptions for agreements, decisions for partnership or concerted practices, decisions concerning the admission of economic concentrations according to the provisions of the law, following the investigations in the cases notified by the interested undertakings;
- to carry out the effective enforcement of its decisions;
- to carry out, at its own initiative, investigations aimed at a better understanding of the market;

- to inform the Government about monopoly situations or other cases according to the law and to propose the measures deemed necessary for price control;
- to intimate the courts on cases in which these are competent;
- to supervise the enforcement of legal provisions and other norms related to the object of the present law;
- to inform the Government about the interference of central and local public administration bodies in enforcing the law;
- to endorse the Government decision drafts that may have anti-competitive impact, and to propose amendments to the normative acts having such effects;
- to endorse state policy and the schemes of granting of state aids from the point of view of the possible effects on competition and to control that these rules are observed;
- to recommend to the Government and the local public administration new measures facilitating the market and competition development;
- to propose to the Government and local public administration bodies, disciplinary measures against their staff for violating the mandatory decisions of the Council;
- to draw up studies and reports on its field of activity, and to inform the Government, the public and the specialized international organizations about this activity;
- to represent Romania and promote information and experience exchanges in the relationships with specialized international organizations and institutions, and to co-operate with foreign and community competition authorities.

The Council shall state its viewpoint on every aspect of competition policy, at the request of: the Presidency of Romania; the Parliament commissions, senators and deputies; the central or local public administration bodies; the professional, employers' and trade union organizations, including the Chamber of Commerce and Industry of Romania; the consumers' protection organizations; the courts and prosecutors' offices.

Competition Office

The **Competition Office** was set up in September 1996 by Government Decree no. 775 issued based on the provisions of Competition Law no. 21/1996, and subject to subsequent changes. The Competition Office is the governmental specialised body in the area of competition, with prerogatives in applying the specific field strategy and implementing competitive policies.

Competition Council and Competition Office collaborate in correcting and updating the existing legislation. Whenever a State aid measure significantly distorts competition on the internal market, or affects the fulfilment of international treaties in which Romania is part, they propose measures in order to grant that the state aids will not have a negative impact on the business environment or on trade with other states.

The law invested the Competition Office with important responsibilities in monitoring the market rules and, implicitly in promoting the principles that must govern a normal business environment.

The priorities in the activity of the Competition Office moved from supervision of the regulated prices to carrying on investigations on anti-competitive practices, to monitoring of the (still existing) price-regulators and also to the inventorying, monitoring and reporting of the State aids, in a transparent manner.

Working out of analyses and market studies in order to identify the market shares in those cases in which restrictions on competition exist or may appear and of forecast on market and

inflation evolution, constitute another aspect of the Competition Office activity, conferred to it by the law.
The law no. 143/1999 on State aid - in force from 1st January 2000, is strengthening the Competition Office role and attribution in this field. The Office makes an inventory of the state aid already granted and reports annually for these aids, monitors the existing aids and the financial flows between the authorities and companies entrusted with the provision of some public services. As a result, following the market analyses on the economic effects of the State Aids and following the assessment of the impact on the market, in accordance with the objectives of the carrying on Government Programs, the Competition Office proposes measures to obtain the expected outputs when granting State Aids. The proposed measures are transmitted to the Competition Council, to the initiators and to the grantors of State Aids, in order to act according to their legal competences.
The Annual Reports concerning the State aids are submitted for Government approval, published in the Official Journal and further submitted to the European Union Commission. At the same time, the Competition Office supervise and verify the legality of granting State aids in the economy, monitors the way the State aid schemes are applying, and within these, monitors the specific awards and the individual State aids.
Competition Office has, at present, a very well defined role in the process of supervising the market mechanisms, mostly in relation to the effect of spending the public money under the form of State aids, as compared to the anticipated effect at the moment of their granting.

Organizational structure of the Competition Office

Competition Office Headquarter has its siege in Bucharest and controls all the 41 regional offices.
The organisational structure of the Competition Office shows the following three departments: General Division for Synthesis, Methodology, Inventorying and Monitoring State Aids; Judicial and Administrative Division; General Division of Investigation and Control.

3.2. Other components of the institutional environment in the field of competition

3.2.1. The National Authority for the Consumer Protection (NACP)

The National Authority for Consumer Protection is a specialised body belonging to the central public administration and subordinated to the Government, having legal personality and founded in year 2001. NACP performs its activity in accordance with the Government Ordinance no. 21/1992 regarding the consumer protection, with its subsequent amendments and completions.
A Secretary of State, President, appointed through decision of the Prime Minister, provides the leadership of the National Authority for Consumer Protection. A managing college is operating as a consultative body beside the president. The secretary general ensures the smooth functioning of the relationship between structures of the National Authority for Consumer Protection, appointed by the President, according to the legal provisions.
At central level, the structure of the institution has three directorates, namely:
· The Directorate for Market Control and Surveillance;
· The Direction for Strategies, Partnership, European Legislative Harmonisation and Relations with Mass Media;

· The Directorate for Economic and Human Resources.
The maximum number of job positions at central level is 65 (excluding the dignitary and the job positions assigned to his cabinet).
The National Authority for Consumer Protection has in its subordination 42 offices for consumer protection, in every county and the Bucharest municipality, the maximum number of job positions being 550. It co-ordinates as well the activity of the National Centre for Products Test and Appraisal LAREX Bucharest, a non-budgetary unit with 9 territorial subsidiaries, functioning in accordance with the provisions of the Government Decision no. 625/1999.
Besides the National Centre for Products Test and Appraisement LAREX, with its 9 territorial subsidiaries in Bucharest, Arad, Baia Mare, Constanta, Galati, Oradea, Satu-Mare, Sibiu and Iasi, the network of laboratories comprises test and appraisement laboratories organised in the counties of Bacau, Vrancea, Neamt, Braila and Suceava, as well as the Laboratory for Wine and Alcoholic Drinks Quality Analyses, functioning in the structure of the Office for Consumers Protection Bucharest.
The National Authority for Consumer Protection develops and co-ordinates the Government's strategy and policy with regard to consumer protection, preventing and combating practices detrimental to the health, security or economic interests of the consumers, and evaluates the effects of the product and service surveillance systems.
Through G.D. 681 / 19.07.2001, the Inter-Ministerial Committee for Market, Products and Services Surveillance and Consumer Protection was established to function beside the National Authority for Consumer Protection. Its main attribution is to ensure the collaboration between the central public administration authorities, as well as the collaboration between these ones and the civil structures, in order to improve the national system for products and services market surveillance, to improve the legislative framework, to accelerate the harmonisation process of the national legislation with the legislation of the European Union.
According to the Government Decision no. 166/2001, the main attributions of the National Authority for Consumer Protection are:

- To participate to the elaboration of strategies and programmes in the field of consumer protection, to initiate or authorise specific projects and regulations protecting the legitimate rights and economic interests of the consumers;
- To control the conformation to legal disposals regarding the consumer protection, the products and services quality and safety, as well as the protection of the consumers legitimate rights and economic interests, by carrying out market controls at the producers/service providers, importers, distributors and custom units;
- To inform, advise and educate the consumers, to support the activity of consumer associations, including foundation and operation of information and consultancy centres;
- To co-ordinate a fast information exchange with national and international institutions, regarding the products implying risks for the consumers' health and safety;
- To receive and solve the consumers intimations and claims regarding infringements of fundamental rights of the citizens as consumers;
- To perform analyses and tests in legally accredited laboratories or in own or agreed laboratories;
- To notify the decision-making bodies and the operators involved in the products and services quality certification system about non-compliance cases;
- To ascertain contravention and to apply legal penalties, to notify the penal investigation bodies whenever violations of the penal law are detected.

In order to restrain the production, import or trade of products or services that do not meet the legal stipulations concerning consumer protection, the National Authority for Consumer Protection may command the following actions:

- temporary closure of the unit, for a period of maximum 6 months;
- temporary closure of the unit, for a period from 6 months to 12 months;
- definitive closure of the unit;
- to stop temporary or definitive the product's trade or production;
- to stop temporary the service
- to destroy the products if this is the only way to cease the danger;
- to withdraw the dangerous products from the market or from consumers;
- to seal the products that do not meet conditions of the legal stipulations concerning consumer protection;
- to seal the closed units;

Taking into account the complexity of issues, the National Authority for Consumer Protection collaborates with other specialised bodies of the public administration, having attributions in the field of consumer protection, based on procedures approved by the Government.

In order to apply the legislation efficiently and unitarily, the National Authority for Consumer Protection issued over 90 specific control procedures, by groups of products and services.

In order to create the legal tools necessary for the protection of consumer's rights and interests, the National Authority for Consumer Protection considered the development of the legislative framework in the field of consumer protection, based on European directives.

To complete the institutional framework we mention the existence of the consultative councils, which bring together representatives of state authorities, industrial sector and consumer groups, at local and national level as well, organised according to the provisions of Government Decision no. 251/1994.

The National Authority for Consumer Protection supports the foundation and development of consumer protection associations and, together with these, informs and educates the consumers.

Associations and other non-governmental organisations in the field of consumer protection were established in each of the 42 counties, 127 associations being currently registered, structured at county level in 16 federations a one confederation.

The legislative framework for the establishment of the Consumers Consultancy and Information Centre makes the subject of the Government Ordinance no. 88/2000; currently, the Consultancy and Information Centre is performing its activity beside the Romanian Association for Consumer Protection – Bucharest.

In order to strengthen the market surveillance system, the National Authority for Consumer Protection participates to the Transitional Rapid Exchange of Information System – TRAPEX between Central and East-European countries, regarding dangerous products. In April 1999, the National Authority for Consumer Protection was designated as National Contact Point for TRAPEX System.

Within the TRAPEX system, the specialists of the National Authority for Consumer Protection aim at the detection of dangerous products with high degree of risk for the consumers' life, health and safety; for this purpose, collaboration agreements were concluded with the Ministry of Health and Family and the Ministry of Agriculture, Food and Forests.

4. Case studies

4.1. Privatisation and competitive pressure on selected markets

4.1.1. Privatisation and established prices and tariffs on competitive markets

The industry of building materials

The sector for exploiting, processing and commercialisation of river and quarry aggregate ores is almost entirely privatised, with the exception of some up-stream extraction units, and so is the concrete and mortar industry. Generally, a few corporations that are present on the cement market have acquired the companies acting in these industries. These companies entered the downstream market in order to ensure their vertical integration on the market. At this moment, there are in Romania about 500 producers of aggregate ores out of which more than 100 producers have state owned majority capital. On each regional market of these products are acting minimum 10 producers and the demand is much lower than the supply.
Both river and quarry aggregate ores markets and concrete and mortar markets are competitive markets. The Government Emergency Ordinance no. 36/2001 has introduced the requirement for the Competition Office to offer advice regarding the selling price of ores aggregate. The Government deemed that it is necessary to avoid possible tendencies of abusive manifestation of anticompetitive practices, by the producers and/or traders of these products, by introducing "sands and gravels" within the list enclosed to the Government Emergency Ordinance no. 36/26.05.2001. This list enumerates products and services for which prices and tariffs have been established and have been adjusted following the advice of the Competition Office.
As a response to the above mentioned measure proposed by the Competition Office and submitted to the **Chamber of Deputies, the Committee for Economic, Policy Reform and Privatization,** the COMPETITION COUNCIL has proposed the elimination of the products (gravels and sands) mentioned in the enclosed list of the GEO no 36/2000, considering such elimination as **a correct competitive measure that should answer to the policy of price liberalisation of the products and services**.

4.1.2 Privatisation and economic concentration

Cement sector

The cement sector has been entirely privatised during 1997-1999, process that allowed the penetration of the Romanian market by large companies such as: LAFARGE, HOLDERBANK FINANCIERE GLARIS (became HOLDCIM in the year 2001) and HEIDELBERGER ZEMENT AG. The established economic concentration has been analysed by the board of the COMPETITION COUNCIL.
Furthermore, during 2000-2002, the incumbent companies on this market made transactions among them that made the territorial positioning of the companies to be different than at the moment privatisation ended.
At present, on the Romanian cement market companies of worldwide reputation are acting: LAFARGE, HOLCIM and Heidelberg Cement AG (with the new name since the year 2002 HEIDELBERGER ZEMENT AG). The location of the factories in territory makes the market homogenous at national level (without regional fragmentation), with the market shares for

each company to be around 30%. A look at the whole sector highlights that the privatisation was profitable, most of the cement factories having been gone through a process of restructuring, modernisation of their activity and improvement of efficiency. The financial resources needed for restructuring would not have been available if the cement factories should have remained under the state control.
The over-investments in large-scale factories during the years of centralised planning led to an overcapacity of 75% in the Romanian cement sector, as measured by the end of year 2002 (taking into account the fact that the construction sector is now viable in Romania, showing small, but increasingly positive growth rates). The market proved to be until now a very dynamic and competitive one, regardless the regional positioning of beneficiaries/clients. There were some allegations concerning potential cartelisation of the market, but nothing has been proved so far. The prices on the domestic market were found to be in line with the general evolution of producers' prices in Romania, and any kind of bilateral or trilateral agreement for potential price-setting between the main competitors remains in the domain of uncertainty and anecdotal stance.
In the year 2002, the Competition Council authorized an economic concentration consisting in the acquiring by Heidelberg Cement SA of the control over the SC TAGRIMPEX ROMCIF SA Fieni.

Oil industry (extraction, refining and distribution)

The year 2002 made its debut by the authorisation of economic concentration achieved through the acquisition CANYON SERVICOS Lda (Portugal) made over RAFO Onesti refinery. The privatisation led in time to revitalizing of RAFO Onesti activity, which has been kept in conservation for a long time due to shortage of raw material.
After RAFO Onesti privatisation, the only refineries that are still state owned are ARPECHIM Pitesti and PETROBRAZI Ploiesti, both forming part of SNP Petrom SA structure (counting for about 30% of the total oil refining capacity at the national level).
In October 2002, another operation with impact on the Romanian market was an agreement signed between OMV and ROMPETROL Groups (as parent companies). The signing of this agreement led to changing the form of control exerted over the companies previously forming the Rompetrol Group, from a unique control exerted by Rompetrol (S.A.), into a joint control, exerted by OMV AG and Rompetrol S.A. This operation of economic concentration, authorised by the COMPETITION COUNCIL at the end of November 2002 will lead to the strengthening of the position held by the two groups in Romania, especially in the distribution sector of fuel and other oil derivatives.
During the year 2002, the attention of the Romanian Competition Council was drawn up by one of the most important acquisition made at European level; DEUTSCHE BP AG, German subsidiary of the multinational BP Group acquired the control over VEBA OEL AG, a subsidiary of the German power Group E.On. The analyses made focused on the market of finished lubricants for cars destination, taking into consideration that both parts involved in the acquisition process were present on the oil products Romanian market, by merchandising car lubricants trademarks BP and Castrol (BP Group), and trademark Aral (E.On. Group), respectively.

4.1.3. Privatisation and State aids

The bearing industry

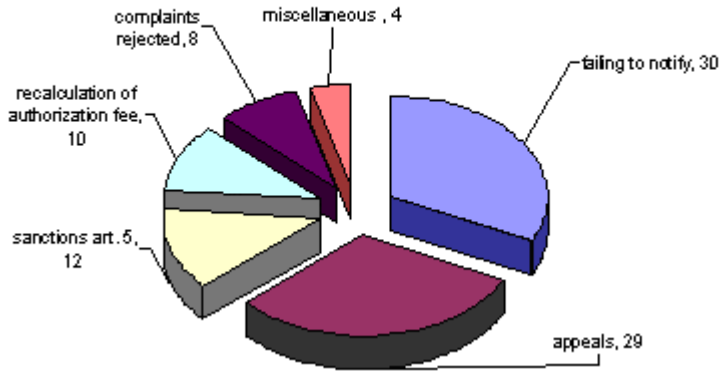
Romania's production of bearing is quite important. Almost 50% of this sector is privatised, three of the manufacturing companies (SC KOYO SA Alexandria, SC Rulmentul SA Barlad and SC Timken SA Ploiesti) being recently transferred from the state sector to private ownership. For the other three companies, SC Rulmentul SA Brasov, SC Rulmenti SA Slatina and SC Rulmenti Suceava, which are now in the process of privatisation, the investors show a special interest due to the potential and the quality of the products promoted on the market.
The whole sector of bearing producers in Romania had been designed and built during socialism on the principle of complementarity, in order to ensure a complete offer for the internal centralized market as well as for the external markets in former COMECON trade area. After 1990, a *Strategy of bearing production sector in Romania* was enforced for this sector of industry, establishing the principles and the main criteria that are necessary to ensure the continuity of the activity, including some facilities for producers materialized in state aids (rescheduling payments and exemptions from payments of debts and penalties accumulated in time).
The main investors in this sector are international companies acting in this field, with a great financial and managerial potential, ensuring their products' marketing on the international markets (essential to resist within the competitive environment in this field).
In the year 2002, the Government authorised a state aid in this sector of activity.

4.2. Decisions of the Competition Council

During 2002 the Competition Council issued 423 decisions based on the Competition Law no.21/1996 and 64 decisions based on the Law on state aid no. 143/1999.
The following table presents a comparison on decisions number falling under articles 5, 6 and 11 of the Competition Law in the period 01.01.2001-31.12.2002:

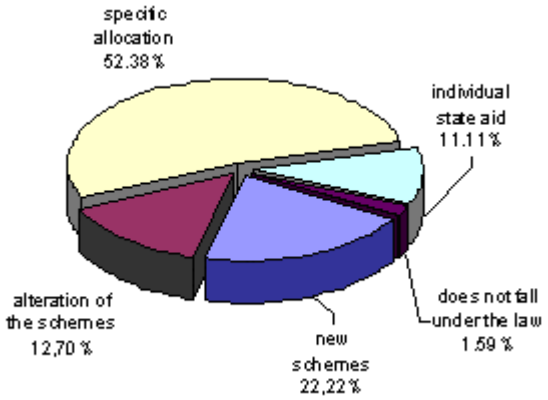
Decisions	**2001**	**2002**
A. Agreements, association decisions and concerted practices (art. 5), out of which:	177	154
- complaints	8	29
- requests for negative clearance	5	6
- request for individual exemptions	1	-
- notifications for block exemptions	163	119
B. Abuse of dominant position (art. 6)	15	19
C. Economic concentrations (art.11)	169	157
TOTAL	**361**	**330**

The table indicates that, in comparison to the previous year, the number of complaints concerning the possible infringement of articles 5 and 6 increased, decisions on anticompetitive practices represent 52% and the decisions on economic concentrations 48%.
According to the provisions of article 33 of the Competition Law, authorization fee levied for economic concentration operations reached the amount of 46.752.558.659 lei.
The Competition Council issued also 93 decisions, as follows:

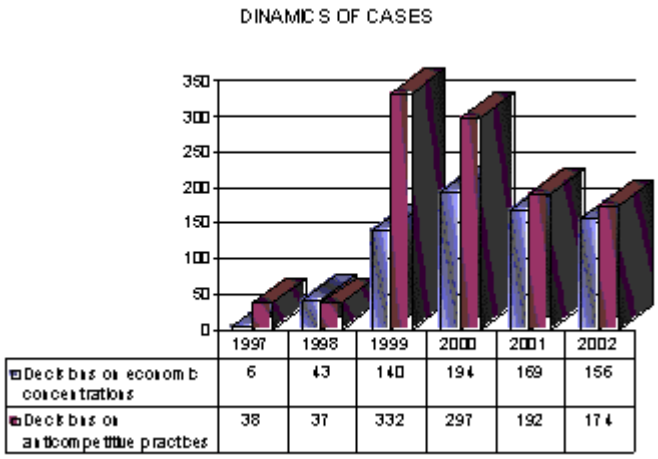


By applying the sanctioning decision issued for infringement of article 5 and 6 of the Competition Law no.21/1996, the amount of the fines imposed to economic agents reached 425.285.450.475 lei (13,6 million EUR).

According to the Law on state aid no. 143/1999, the Competition Council issued 64 decisions concerning the notified state aids out of which 63 are authorizing decisions and one decision states that notified measure does not represent state aid. From the total number of authorizing decisions 14 decisions concern new state aid schemes, 8 concern the alteration of existing schemes, 7 concern individual state aids, 33 concern the specific allocation of the state aid granted on the basis of new or existing state aid schemes and one decision according to the State Aid Law does not fall under the Law on state aid.



The following graphic presents the evolution of decisions on anticompetitive practices and economic concentrations issued by the Competition Council on the period 1997-2002:



Out of the total decisions of Competition Council issued during 2002, 24 decisions were appealed, as follows:

- 13 at Bucharest Court of Appeal, out of which:
  - 5 files solved;
  - 1 suspended;
  - 7 pending.
- 1 at Constanta Court of Appeal - solved;
- 10 at Supreme Court of Justice - pending

In that 6 solved files, the Court of Appeal rejected as being ungrounded the actions taken by undertakings that challenged the decisions of the Competition Council.

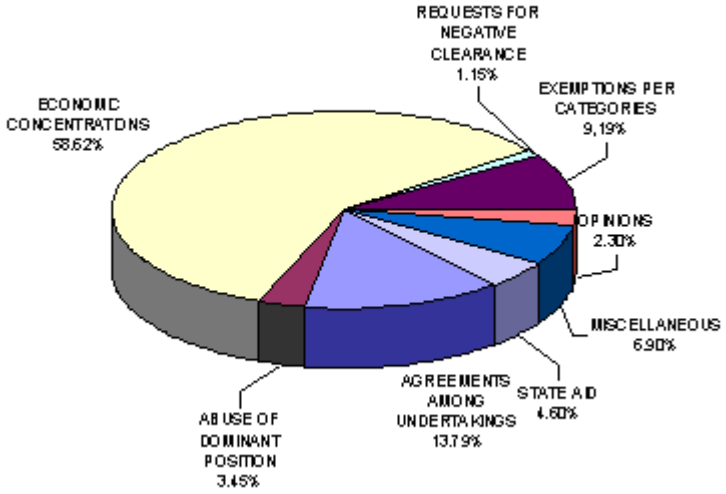
During 2002, the Courts have analyzed 75 files having as subject the solving of the actions taken against to the decisions and other administrative acts issued by the Competition Council exerting its attributions as autonomous administrative authority:

- 24 decisions issued during 2002 made the subject of 27 files solved or pending;
- 29 decisions issued during 2001 made the subject of 30 files solved or pending;
- 14 decisions issued during 2000 made the subject of 15 files solved or pending;
- 1 decision issued in 1999 was appealed and made the subject of 1 file that is pending at Supreme Court of Justice;
- 1 decision issued in 1998 was appealed and made the subject of 1 file that is pending at Supreme Court of Justice;
- 1 minute issued by competition inspectors of the Competition Council and which made the subject of 1 file that is pending at Court of Pitesti.

Out of the total files, 15 were solved at Bucharest Court of Appeal and 1 at Constanta Court of Appeal, 24 files at Supreme Court of Justice, 27 files are pending at Supreme Court of Justice, 4 are pending at Bucharest Court of Appeal, 1 file is pending at Court of Pitesti, 2 files are suspended at Supreme Court of Justice and 1 ruling is repealed and sent back to the Bucharest Court of Appeal by the Supreme Court of Justice.

At the end of the year 2002, **87** cases were pending:

COMPETITION	**83**
Agreements and concerted practices	12
Abuse of dominant position	3
Economic concentrations	51
Requests for negative clearance	1
Notifications for block exemptions	8
Opinions and requests for clarification	2
Miscellaneous	6
STATE AID	**4**



4.4. Investigations

During 2002, five ex-officio investigations were opened out of which: three according to articles 5 and 6 of the Competition Law no.21/1006, one investigation on failing to notify the economic concentration and 1 investigation according to article 27, let. e of the Competition Law - having as subject the analysis of the marketing's effects on competition environment on the beer, coffee, soft drinks and hygiene and cleaning products markets.
The cases that are pending at the end of the year, are presented as follows:
Intimations:
1. Investigation on abuse of dominant position of SNP PETROM according to article 6 of the Competition Law;
2. Investigation on the infringement of the provisions of art. 6 by SC Chimpex SA Constanta;
3. Investigation on the conduct of Rigips, Knauff, Obobetterman and Men at Work firms - infringement of the provisions of art. 6 of the Competition Law;
4. Investigation on possible agreement among insurance firms on the price of mandatory insurance for cars;
5. Investigations on possible infringement of Competition law no. 21/1996 by SC Mobifon, SA SC Mobilrom SA si SC Cosmorom SA - the mobile phone companies - with the occasion of concluding the interconnection contract;
6. Investigation on possible agreement between SC Sodexho Pass, TS Ticket Service si Hungastro SA concerning the tariffs charged and abusive clauses included in the affiliation contract to the network dealing with free meals tickets according to article 5 of the Law;
7. Investigation on acquiring the control over SC USG SA by SC Begacom SA that already has the control over SC Upson SA;
8. Investigation on the wine market concerning the possible infringement of article 5 and 6 by the SC Euroavipo Sa and SC Vie Vin Murfatlar SA;
9. Investigation concerning the possible association between Bulf's Firms and SNP Petrom according to article 5(1) of the Competition Law.
Ex-officio investigations:
10. Investigation on the infringement of the provisions of article 16(4) by the members of New Century Investment Fund;
11. Investigation on cement market concerning the possible infringement of art. 5(1) of the Law no. 21/1996 and article 16(1) by the cement producers;

12. Investigation on practices of the Railroad National Company, Railroad Romanian Association, National Company of Railway Merchandise Transport and SC SEFER SA - article 5 and 6;
13. Investigation on possible anticompetitive practices on cable television market in the context of relations between Cable Television Companies and their associations on the one hand and among suppliers or distributors of foreign channels on the other hand;
14. Investigation on the failing to notify an economic concentration by Mr. Bulf- article 16(1);
15. Investigation on possible infringement of the following articles:
a. article 6 of the Competition Law by SNP Petrom SA Bucuresti by establishing measures that have been included in the tender regulation and approved by the Administration Council of SNP Petrom on 07.12.1999, measures that have as effect the distortion of competition on the market;
b. article 5 of the Competition Law by SNP Petrom SA Bucuresti and the Romanian Association of Drilling Contractors by concluding an agreement at the level of operation tariff for drilling equipment;
16. Investigation on possible infringement of article 5(1) by the Banks Group: Romanian Commercial Bank, BancPost, BRD-GSG, Raiffeisen - Agricol Bank and Commercial Bank "Ion Tiriac" by establishing an agreement on the level of commission for card holders that use the currency automate boxes of the other bank than that which issued the card.
17. Investigation on possible infringement of article 5(1) and article 6 of the Competition Law by commercial companies selling the car fuel and consumption products within gas station.
18. Investigation having as subject the analysis of the marketing's effects on competition environment on beer, café, soft drinks and hygiene and cleaning products markets.
Following the notification:
Investigation on the economic concentration's impact that has been concluded between SC Iamsat Prodconstruct SA and SC Gerom SA Buzau - article 13 of the Competition Law.

Trade and Competition Policy in Slovenia[55]

1. Introduction

Slovenia became independent in June 1991, and established a parliamentary democracy, by adopting a new Constitution on 23 December 1991. Within a decade, Slovenia has established a democratic political system with the introduction of stable institutions and a multi-party system. At the same time, Slovenia has made substantial progress in its transition into a market-oriented economy. A majority of economic sectors are now characterized by market structures. Liberalization of prices, trade and investment flows has been a major feature in this process, contributing to fast reorientation of trade towards EU between 1992 and 1999. Both exports and imports with the EU grew by 9 and 13% p.a., respectively, and increased from 60% to more than 66% of total trade.[56]

After becoming independent in 1991, Slovenia has to completely transform the old inadequate institutional setup. The basis for institutional transformation provides the new Constitution from December 1991 by introducing democratic political system with stable institutions and a multi-party system. The Constitution provides also a basis for transition into a market-oriented economy. Firs steps in transformation of the economic institutional setup and legal framework were done in 1991 by reorganization of the government and amendments of the inherited trade regime. In 1992, tax reform as well as privatization were major issues. In 1993, new Commercial Company Law and Foreign Trade Act were introduced in order to provide a legal basis for internal and external corporate economic activities.

Table 1 provides an overview of Slovenia's main trade -related laws.

Table 1: Main legislation related to trade and competition in Slovenia, 1992-2002

Area	Main legislation
Privatization	1992 Law on Ownership Transformation; 1998 Law on Completion of Ownership Transformation and Privatization of Entities Owned by Slovene Development Corporation (1998)
Tax system	1992 Income tax law (04/92, last amended 06/2003), 1999 Value Added Tax Act (06/99); 1999 Excise Duties Act (06/99)
Basic corporate legislation	1993 Commercial Company Law (05/93, last amended 05/2001); 1993 Foreign Trade Act (03/93); Law on Financial Operations of Companies (06/99, amended 12/99)
Competition	1993 Protection of Competition Act; 1999 Prevention of Restrictions of Competition Act (07/1999); Decree defining the contents and elements required for the notification form for the concentration of undertakings (01/2000); Decree on Block Exemptions (06/2000); Instructions on the Method and Conditions for defining the Relevant Market (09/2000)
Main legislation on exports and imports	1995 Tariff Schedule Act; Law on Customs Tariff and Customs Act; Decree on the Autonomous Measures of Reduction or Abolition of Duty Rates for Specific Goods (12/2001); 1993 Foreign Trade Act; Decree on the Manner, Time Periods and Conditions for the Allocation of Import Quotas (03/93); Decree Determining the Import and Export Regime for Specified Goods (12/2001); Decrees on Determining Tariff Quotas for individuals years (2000, 2001); Decree on the implementation of the Customs Act (05/99)
State aid	2000 State Aid Control Act (01/2000); Decree on the content and procedure of supplying data for preliminary and subsequent state aid control; Decree on the purposes and conditions for the granting of state aid and on the appointment of the ministries responsible for the management of state aid schemes
Intellectual Property Rights (IPR)	1995 Copyright and Related Right Act (04/95) and amendments (01/2001); 1995 Law on the Protection of Topographies of Integrated Circuits (04/95); Law on Industrial Property (05/2001); 1994 Law on Courts (definition of jurisdiction over IPR disputes); Law on Customs Measures Relating to Infrigments of IPR (04/2001)

[55] By Jože P. Damijan.

[56] On the other side, after 1999 one can observe a trend of reorientation of Slovenian exports back towards former Yugoslav markets and other developing countries (mainly Russia). Trade with the EU after 1999 is stagnating, while exports to developing countries and to former Yugoslav markets increase at 11 and 9 per cent annually, respectively.

Area	Main legislation
Standards	1999 Act on General Safety of Products (03/99); 1999 Standardization Act (07/99); 1999 Act on Technical Requirements for Products and Conformity Assessment (07/99); 1999 Act on Accreditation (07/99); Law on Consumer Protection (03/98)
Government procurement	2000 Public Procurement Act (04/2000); Review of Public Procurement Procedures Act (09/99)
Agriculture	2000 Agriculture Act (06/2000)
Services	1999 Banking Act (07/99); 1999 Securities Market Act (06/99); 2000 Insurance Act (01/2000); 2001 Telecommunications Act (04/2001); 1999 Energy Act (09/99); Maritime Code of the Republic of Slovenia (03/2001); 2001 Aviation Act (02/2001); 2001 Road Transport Act (07/2001)
Foreign investment	Commercial Company Law (05/93, last amended 05/2001); Law on Financial Operations of Companies (06/99, amended 12/99); Foreign Exchange Act (03/99)
Anti-dumping and countervailing	Part V of the 1995 Law on the Protection of Competition, on "Dumping and Subsidized Imports", complemented by the 1994 Decree on Dumped and Subsidized Imports.
Safeguard	2000 Decree on Safeguard Measures (09/2000)
Export controls	2000 Exports of Dual-Use Goods Act (05/2000)

Source: *Trade Policy Review of Slovenia 2002* (WTO, 2002).

Over the past decade, accession to the EU has been a major goal of Slovenia's policies. Slovenia presented its formal application for membership on 10 June 1996 and was accepted as a candidate for full membership of the Union in July 1997. The process of economic integration with the EU has been an integral part of the domestic transition towards a market economy. Slovenia's preparations for membership have accelerated recently, with the implementation of the Europe Agreement, completion of the screening of the *acquis communautaire*, i.e. the corpus of laws and regulations on which the Community is based, and rapid progress on accession negotiations. Free trade was achieved for most products at the beginning of the implementation period of the Europe Agreement.

Numerous laws were amended or replaced in this context. In the past few years, changes included new or revised laws on standardization, conformity of industrial products, food safety, dangerous substances, and environmental protection. Great importance was attached to the introduction of "horizontal" laws on customs, government procurement and anti-competitive practices, which are aimed at meeting EU and international standards.

Slovenia's efforts towards membership have been stepped up since the European Commission's favourable Opinion on Slovenia's request for EU membership in 1997.[57] The Opinion concluded that Slovenia fulfilled the necessary conditions, and recommended the initiation of negotiations for accession. The Commission considered that Slovenia should be regarded as "a functioning market economy", which should "be able to cope with the competitive pressure and market forces within the Union in the medium term".

2. Competition Policy: formulation and implementation

2.1 Competition policy formulation

While a first law regulating competition was enacted in 1993 (the Law on the Protection of Competition), competition rules were recently amended, in the context of the adoption of the *acquis*. The new Prevention of the Restriction of Competition Act (PRCA) entered into force in 1999. It transposes into domestic legislation EU anti-trust rules regarding restrictive agreements (Part II of the Act), abuse of dominant position (Part III), and rules on concentration (Part IV). The Act is supported by secondary legislation, such as the Decree on the Contents and Elements required for the Notification Form for the Concentration of

[57] European Commission (1997).

Undertakings and the Decree on Block Exemptions, and Instructions on the Methods and Conditions for Defining the Relevant Market.[58]

The main features of this legislation, which covers both goods and services, are described in Table 2. All legal and natural persons are treated equally under the law, irrespective of their legal status (private and public companies) or ownership affiliation (domestically and foreign-owned companies) (Article 2 of the Act). The Act prohibits in principle all forms of restrictive agreements (Article 5(1)), both horizontal and vertical, with some exceptions, which are authorized under individual or block exemptions (Article 5(3) and 9).[59] It also prohibits the abuse of a dominant position (Article 10). A dominant position is held by a legal or natural person (an undertaking) when it has no competition or significant competition for a specific product or service in the Slovenian market. A 40% market-share threshold is used as a reference to assess market dominance, but other criteria are also taken into account.[60] The Act also takes into account the case in which two or more companies enjoy joint dominance of the market (duopoly or oligopoly). The Act prohibits concentrations, in particular through mergers, when they may result in the elimination of effective competition in the relevant market. Concentrations must be notified by the companies concerned. Merger control is exercised on companies with turnover exceeding SIT 8 billion. An alternative threshold of 40% of the relevant market can be used. The Competition Protection Office publishes guidelines on how market shares are calculated and how relevant markets have been defined. Restrictive practices covered by the law can be subject to investigation, prohibition, and fines. Fines for breaking competition rules are imposed by the courts, and range from SIT 10 to 30 million for concluding an agreement to restrict competition and abusing dominant position in the market (Article 52 of the Act).

[58] The Decree on notification forms defines the content of the notification form that companies are required to submit to the Competition Protection Office. The Decree on Block Exemptions defines groups of restrictive agreements that are allowed under the law.

[59] Article 5(3) of the Act explicitly permits certain restrictive agreements if they "contribute to improving production or distribution of goods or promoting technical progress, while allowing consumers a fair share of the resulting benefits". However, such agreements, decisions or concerted practices cannot eliminate competition in the market concerned or impose conditions that are not indispensable for the attainment of these objectives. This provision is applied through individual or block exemptions. The Competition Protection Office can provide exemptions on an individual basis, while fixing the limits and obligations imposed on the company concerned. Article 9 of the Act allows the Government to define more broadly the categories of agreements that meet the conditions of Article 5(3), i.e., the agreements that will be exempted from competition rules. The Decree on Block Exemptions covers essentially vertical agreements such as franchising, exclusive distribution, and purchasing, and stipulates the conditions and limits of those block exemptions.

[60] In determining whether there is a dominant position, the Competition Protection Office goes well beyond the market share criteria to determine market control, in particular whether companies benefit from particular advantages with regard to access to finance or investment.

Table 2: Main provisions of Slovenia's competition law

Prohibition	Examples of prohibition
Agreements distorting competition (Article 5 = Article 81/1 of EEC Treaty)	Article 5(1) provides that: "agreements between undertakings regarding business conditions in the market which have as their object or effect the prevention, restriction or distortion of competition in the Republic of Slovenia shall be prohibited and shall be null and void". The prohibition applies in particular to agreements that: directly or indirectly fix prices or set business terms; limit or control production, investment, technical development or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage; and make the conclusion of contracts subject to acceptance of obligations that by nature have no connection with the subject of the contract.
Dominant market position (Article 10=Article 82 of EEC Treaty)	A competitor/undertaking is deemed to have a dominant position if its share of purchasing or selling goods or services in Slovenia amounts to at least 40% of the total. Two or more undertakings are deemed to have a dominant position if no significant competition exist between them, and if the aggregate share of purchasing or selling goods and services exceed 60% of the total. The market share represents an important, but not exclusive, criterion for determining the dominant position in the market. According to Article 10(2), other factors should be taken into consideration, such as the degree of competition in the market, the financial situation of competitors, and barriers to entry in the market. Competition rules prohibit the abuse of a dominant position and confer on a dominant undertaking an obligation to refrain from any practices that restrict or prevent competition in the market without justifiable reason. The Act does not define the notion of abuse but enumerates certain abusive practices. Examples of prohibitions include: - imposition of unfair terms and conditions (including prices) in contracts - "unjustifiably increasing or reducing prices" in contracts - applying dissimilar conditions to equivalent transactions - making the conclusion of contracts subject to acceptance by the other parties of obligations that have no connection with the object of the contract
Concentration (Article 11=EEC Reg. No. 4064/89)	Article 11 prohibits "concentrations which strengthen the power of one or more undertakings, individually or jointly, as a result of which effective competition on the relevant market would be significantly impeded or excluded". Operations that would be assumed as concentrations are: - mergers of two or more independent undertakings - acquisitions by one or more persons or undertakings already controlling at least one undertaking - concentrative joint ventures Exceptions include businesses (in particular banks, saving banks, financial institutions or insurance undertakings) whose activities include dealing in securities holding, or holding on a temporary basis shares that they have acquired in another undertaking with a view to reselling them, provided they do not exercise the voting rights in order to determine or influence the competitive behaviour of such undertaking (Article 11 (5)). In assessing whether the concentration might lead to a dominant position, the Competition Protection Office should examine the following criteria: the choice available to suppliers and users; market positions of the affected undertakings; access to sources of supply and to the market itself; the structure of market shares; the state of competition in the market; barriers to entry in the market; the financial capabilities of the affected companies or undertakings; the evolution of supply and demand for the good or service affected by the concentration; the international position of market participants (Article 13).

Source: *Trade Policy Review of Slovenia 2002* (WTO, 2002).

2.2 Competition policy implementation

The Competition Protection Office (CPO) was established by Article 4 of the Act to monitor the implementation of competition rules in all economic sectors. It was conferred fairly extensive powers to review the restrictive arrangements and concentrations described in the law, request information, open and conduct investigations, organize hearings, and impose penalties (Part V of the Act).[61]
Under the Article 15 of the PRCA following competencies of the CPO are defined:

[61] The CPO only imposes "process penalties", concerning infringements to competition procedures by non-cooperating undertakings (refusal to provide data or to comply with the CPO's recommendations).

- exercising supervision of the application of the provisions of this Act; the methods of exercising supervision are specified in Article 17 thereof, namely in exercising the supervision, the CPO may request from the subject under supervision reports and information on all issues relevant for the appraisal whether or not the subject of supervision is acting in accordance with provisions of this Act;
- monitoring and analysing the conditions on the market to the extent necessary for the development of fair and free competition;
- conducting the procedures and issuing the decisions in accordance with this Act;
- submitting its opinions to the National Assembly and the Government on general issues under its competencies.

The CPO was granted independence to exercise its tasks; it does not need to report to any executive or legislative body. However, important decisions of the CPO, such as decisions to commence an investigation and final decisions, must be published in the *Official Gazette*. Decisions of the CPO may be reviewed by the Administrative Court, and appeals can be made to the Supreme Court.[62]

According to the CPO's Annual Reports so far, the CPO has handled 20 antitrust cases: two concerned restrictive agreements, nine abuse of dominant position (six of which had been initiated before the year 2000), six were applications for individual exemptions and three were applications for negative clearance. In addition, the CPO issued 39 decisions on concentrations; no infringements were found, sometimes due to additional commitments by the parties. Three decisions were reached during 2001 (price cartel on investment funds; merger in the electronic industry; and individual exemptions on security services).

Case GIZ Suma

Decision in case of request for individual exemption (2000)

The subject matter of the procedure was the assessment of a contract establishing Economic Interest Group Suma 2000. Members of this association are trading companies dealing with daily consumer goods. One of the objects of the contract was to create uniform business conditions in the buying market and the introduction of joint purchasing, which resulted in restricting the competition inside as well as outside this association. The members of the Group were also planning to introduce joint development. In its request for obtaining an individual exemption Suma 2000 pointed out that the establishment of Economic Interest Group represents only a transitional phase toward the formation of a holding company. After close examination of the contract and the market situation in the daily consumer goods market, the CPO established that the conditions of Article 5(3) are fulfilled and that an individual exemption can be granted. In the view of the CPO, rationalisation of operations, and the concentration of purchased quantities will improve the distribution of goods. As a result, better operating conditions achieved by the members of the association at suppliers, will be passed indirectly on to the consumers, which will result in lower retail prices. At the same time, the individual members, in spite of their involvement in the association, will keep their own sales, development and investment policy. Taking into account the position of the members of the Economic Interest Group on the relevant product market, they are unable to eliminate competition in respect of a substantial part of the products in question. CPO has therefore exempted the contract for the period of 3 years.

Source: Competition Protection Office of the RS, Annual Report 2000 (2001)

[62] This procedure differs from the previous law, the Protection of Competition Act, under which the affected company could bring an action under civil procedures.

3. Other related policies

3.1 Industrial policy

While Slovenia has established a functioning market economy, the State continues to provide subsidies on economic or social grounds. Subsidies are granted in the form of aid to industrial restructuring (steel, coal mining, and textiles and clothing industries), direct support to output (agriculture), or regional aid and other horizontal programmes (employment and training, research and development aid, etc.). The direct cost of the state aid system has been declining slowly, from 2.5% of GDP in 1998 to 2.1% in 2000. Current figures show that the gradual reduction of subsidies to industry and horizontal programmes is partly offset by the strong increase in subsidies to agriculture. In addition to direct costs to the budget, there are indirect costs as a result of forgone revenues, associated with, for example, duty and tax exemptions (duty-free zones, the large number of autonomous MFN exemptions).

As part of the requirements for EU accession, Slovenia has established an independent system for monitoring state aid. The legislative framework, the State Aid Control Act, as well as secondary regulations, entered into force in 2000.[63] It provides extensive powers to the monitoring entity, the Commission for State Aid Control, to assess and approve state aid (ex-ante control), as well as to monitor its use (ex-post control). Based on notifications made by the institutions granting subsidies, the Commission prepares an annual review of state aid covering all sectors, including agriculture and fisheries. Progress in establishing a state aid inventory and widening the notification system to all levels of Government (local, national) are under way.[64] Major sectoral aid programmes, such as those for the restructuring of the leather, footwear, textiles, apparel, and steel industries have been examined by the Commission for State Aid Control, and approved under certain conditions. Up to September 2001, the Commission had examined 166 notifications of subsidies and approved two thirds (98, of which 57 conditionally).[65] Further work is under way to draw a detailed map of support to regional development, and ensure that it is consistent with EU legislation.

Recently, Slovenia is promoting a pro-active industrial policy, which is being implemented through two interrelated programmes. The "Programme for Entrepreneurship and Competitiveness Promotion 2001 – 2006" consists of horizontal measures to enhance productivity growth, competitiveness at the company level, internationalisation of Slovenian enterprises, investment promotion, inter-company co-operation and cluster development. The "Programme Supporting Structural Adjustment and Restructuring" of traditional industries is aiming at supporting selected industries in meeting single market criteria and requirements.

3.2 Protection of intellectual property rights

Overview

Slovenia has a comprehensive legal framework for the protection of intellectual property rights. This includes a revised Law on Industrial Property (adopted in May 2001 and entered into force on 7 December 2001), covering patents, industrial designs, trade marks and geographical indications; a law on copyright and related rights (April 1995, amended in February 2001); a law on the protection of topographies of integrated circuits (April 1995); and the Protection of New Varieties of Plants Act adopted in 1998. In addition to its

[63] Secondary regulations include the Decree on the Purposes and Conditions for the Granting of State Aid, and the Decree on the Content and Procedure of Supplying Data for State Aid Control.

[64] The Commission for State Aid Control receives technical and administrative assistance from the State Aid Control section in the Ministry of Economy.

[65] European Commission (2000).

acceptance of the obligations of the Agreement on Trade-Related Aspect of Intellectual Property Rights (the TRIPS Agreement), Slovenia has become a party to all major international conventions and multilateral agreements on intellectual property. Slovenia is an observer to the European Patent Organization, and has concluded an agreement with the European Union on patent extension.[66]

Changes to the legal framework have been implemented by Slovenia with a view to bringing its intellectual property rights regime in line with both the TRIPS and the EU *acquis*. According to the Slovenian authorities, as reflected by recent and regular revisions of the laws on industrial property and copyrights, Slovenia makes every effort to incorporate in its domestic legislation state of the art developments in international law. To this aim, consultations are being held on a regular basis with the WIPO, the European Union, and other bilateral partners. According to the European Commission, Slovenia's legislation is now "well developed",[67] and "broadly in line with the *acquis*".[68] In the WTO, Slovenia did not seek the special transitional provisions available under the TRIPS Agreement, so that the provisions of the Agreement have been applied from 1 January 1996. In some areas, Slovenia's legislation is more stringent than the minimum standards laid down by the TRIPS Agreement. In the case of duration of copyright protection, for example, whereas the TRIPS stipulates the life of the author plus 50 years, Slovenia's current copyright law provides protection for the author's life plus 70 years. Slovenia's IPR legislation has been subject to a comprehensive review by WTO Members in the TRIPS Council.

Slovenia, together with some other countries, is seeking to extend the coverage of additional protection for geographical indications to products other than wine and spirits. While the authorities have brought laws on the protection of intellectual property towards international standards, enforcement appears to have lagged. A newly enacted law provides for tough criminal sanctions for infringement, but the Slovenian courts have not yet imposed such sanctions in practice.

Enforcement

The Slovenian authorities have recently focused their efforts on improving the enforcement of IPR legislation. However, systematic collection of data on enforcement activities has started only recently. The data available since 1996 indicate that the number of cases initiated has increased every year.[69] The average length of proceedings at the first instance (from filing the suit to judgement) is between one and two years. As a result, provisional measures are often sought and are granted in the majority of copyright cases. The number of provisional measures is quite high in trade mark cases; it is lower in patent cases. Around 15 criminal cases were lodged between 1996 and 2000 (most concerning alleged infringement of copyrights). While the number of cases is relatively limited, courts recognize the TRIPS Agreement as directly applicable and self-executing in the Slovenian territory.

3.3 FDI policy

Most legal restrictions to foreign direct investment were dismantled after independence, resulting in a first wave of FDI in the mid 1990s. However, in contrast to other advanced

[66] This Agreement provides that once a patent is filed in the EU, it is automatically extended to Slovenia and vice versa.

[67] European Commission (1997).

[68] In its 2000 report, the Commission notes that "in certain areas, only slight technical and terminological improvements are necessary" and that " the major remaining legislative step is the adoption of an act on border enforcement, which should cover both fight against piracy and against counterfeiting, as well as a new act on industrial property". The latter has been followed by the adoption of a revised law (European Commission (2000), p.40).

[69] The number of court cases initiated was 11 in 1996, 23 in 1997, 47 in 1998, 34 in 1999 and 96 in 2000.

transition economies, FDI in Slovenia is relatively less important. Until 2000 the stock of FDI was very modest - under 15% of GDP. This is primarily due to the particular characteristics of the privatization process, pervasive capital account restrictions, and limitations to investment in the financial sector which may have limited the potential for foreign participation in the Slovenian economy in the second half of the decade. While most of these restrictions were abandoned in 1999-00, and a number of incentive programmes have been put in place, the ratio of FDI to GDP remains below the average in similar transition economies.

The positive reorientation towards FDIs is reflected in the renewed "Programme for the Promotion of FDI for the period 2001 – 2004". This Programme identifies three basic priorities: (i) lifting of administrative barriers to investment, (ii) improvement of the supply of industrial sites and (iii) creation of an internationally comparable system of non-refundable incentives.

Recently, in 2001 – 2002, there have been enormous FDI inflows in Slovenia, which increased the stock of FDI to 27% of GDP. These large inflows of FDI, however, occurred due to foreign takeover of two large domestic banks and the second largest pharmaceutical company and not due to the above programme..

3.4 Price controls and regulations

The Government is gradually liberalizing prices of all products and services considered to be competitively established in the market to a sufficient extent, and for which price disparities between Slovenia and comparable EU countries have already been removed. Over the last few years, prices of the following products have been liberalized: medical products (in 1998), heavy heating oils and gas oils (1998, in 2000 regulated prices were reintroduced), compulsory automobile insurance (1999), sugar (1999), postage (2000); the pricing of public utility services was transferred to local communities in 2000. Price controls still apply to some strategic products and services. In April 2000 a model for the pricing of petrol was introduced, on the basis of which prices are adjusted every 14 days according to fluctuations in the prices of oil derivatives in the world market and the exchange rate of the U.S. dollar. In 2002, 14.8% of prices of products and services monitored by the Office of Statistics were under direct or indirect Government control. According to the authorities, the share of controlled-price products in the statistical basket of goods (consumer price index) is falling every year, and reached 12.7% in 2001. The products and services under direct or indirect price control at the end of 2001 were: electric power; oil derivatives; postage for basic postal services up to 100 gr.; basic telecommunications services; railway passenger transport; distance communal heating; school textbooks; basic public utility services; and LPG (propane and butane).

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