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Adjustments to Article 10 of the Law of Ukraine “On protection of economic competition” to comply with the provisions of Article 81(3) of the EC Treaty.

According to the Review of the State Department for Legislative Approximation under the Ministry of Justice of Ukraine (2006)⁷⁰ provisions of Article 10 of the of Ukraine “On protection of economic competition” (hereinafter – the Law) dealing with the application of the exception rules for restrictive agreements and practices should be brought in compliance with Article 81(3) of the EC Treaty. The Antimonopoly Committee of Ukraine (AMCU) is well aware of the existing legal inconsistencies and is currently considering necessary draft amendments to the Law.

This paper is aimed at the provision of the AMCU, SDLA and other institutions involved in adaptation of the competition legislation of Ukraine to the EU standards with some references and comments that may be useful for the discussion of amendments to the Law and to the relevant implementing regulations.

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

The most evident need for adjustment of Article 10 of the Law stems from the incompliance of its provisions with *the four cumulative conditions* established in Article 81(3) of the EC Treaty for the application of the exception rule to the concerted agreements and practices. The scope and the meaning of each legal condition of Article 81 (3) are interpreted in details by the European Commission in the relevant regulations⁷¹, notices⁷² and in the case law⁷³.

The underlying principle of Article 81 of the Treaty is that the competition policy should be viewed as a means of enhancing consumer welfare⁷⁴. Therefore, the concept of “a fair share of benefit for consumers” is an important indicator to assess particular *impact of an agreement on existing or potential competition* as a value for consumers.

The competition law of Ukraine has no explicit references to the consumer welfare as an objective for the state competition policy. Consequently consumer interest is not an

⁷⁰ Ref. to the Review of the progress of legislative adaptation in Ukraine to the *acquis communautaire* in 2006

⁷¹ Commission Regulations (EC) No 19/65/EEC, No.1215/1999

⁷² Communication from the Commission: Notice on Guidelines on the application of Article 81(3) of the Treaty (2004/C101/08)

⁷³ *Metropole télévision SA and Reti Televisive Italiane SpA v Commission*, Case T-528/93

⁷⁴ Ref. to Sections 13 and 34 of the Commission’s Notice: Guidelines on the Application of Article 81(3) of the Treaty C101/97.

obligatory component for assessment of the applicability of the exception rule for anticompetitive concerted actions. In legal terms a restrictive agreement can be permitted by the AMCU if undertakings concerned have proven that their agreement or a concerted practice is likely to produce one of the six economic efficiencies⁷⁵ listed in Section 1 of Article 10 and provided that existing or potential competition in the relevant market will not be significantly restricted. It is also worth noting that the term “consumers” in the relevant AMCU Regulation 26-p⁷⁶ is viewed as a category of persons related to final consumption of products, whereas in the EU rules, for the purposes of Article 81(3), consumers are particularly interpreted as a wider category, including wholesalers and retailers⁷⁷.

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

Competition analysis and exemptions on public interest considerations

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

⁷⁵ The Law contains specific additional conditions non-existent in the EU, namely: optimization of export or import operations and facilitation of SME development. In fact, the latter is a duplication of objective covered by Article 7 of the Law, which is addressed by *de minimis* concept in the EU competition rules.

⁷⁶ Section 8.9 of the AMCU Regulation 26-p

⁷⁷ Section 84 of the Commission Guidelines (2004/C101/08)

It is worth emphasizing therefore that:

- a) “A fair share for consumers” is a condition *pertinent to the competition analysis* (and not to assessment of impact on any other state policies such as employment, social, environmental that could be legitimate in exceptional public interest cases. It is therefore only logical that this cumulative condition must be assessed by *the public authority specifically dealing with competition analysis* and not by any other public authorities dealing with industrial or any other legitimate public policies;
- b) *The right balance* between the negative impact and positive effects of restrictive agreements for the economy can be achieved if weighing of all elements is done *within a single procedure* against clear, quantifiable indicators and all elements are tested *cumulatively* (i.e. is only one of the compulsory conditions is not fulfilled the agreement cannot be exempt under no circumstances).

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

Thus certain benefits are believed to be possible for employment⁷⁸, environmental⁷⁹ policies. There have been certain cases when benefits for such policies were assessed by the European Commission within the scope of Article 81(3) in several instances and the ECJ supported those arguments as valid additional considerations for the application of exception rules to restrictive agreements (especially with regards to the employment policy⁸⁰). At the same time those public interest arguments were considered to be exceptional and the EU Commission used them in the early years of the application of the exception rule for the restrictive agreements. Finally in *Ford/Volkswagen (Para.36)* case the Commission underscored that such arguments related to the industrial or employment policy in itself *would not be enough to make an exemption possible unless all other conditions of Article 81 (3) were fulfilled*⁸¹.

Therefore, if such additional arguments are to be used within assessment procedure for the applicability of the exception rule they should not become an argument that outweighs the competition considerations and only as an additional benefit that can be attained from the restrictive agreement or a concerted practice.

The public interest considerations in the sphere of concerted actions and in the sphere of mergers have different motivation. The legal mechanism of the Law is practically identical for the application of exception rule to restrictive agreements and to concentrations. At the same time, the Law provides that the exception rule for concerted actions is applied with a certain procedure for balancing economic efficiencies and competition considerations. In the sphere of mergers it is only competition considerations (i.e. monopolization and substantial restriction to competition) that are relevant for the application of the exception rules to mergers within the procedure

⁷⁸ Commission decision from December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/33.814 - *Ford/Volkswagen*)

⁷⁹ Case IV.F.1/36.718. *CECED*, OJ L 187, 26/07/2000, p. 47-54, paras. 55-57

⁸⁰ *Metro vs Commission* Case 26/76 (1977) European Court Reports 1977, Page 01875

⁸¹ See Ref. 9 above.

applied by the AMCU. No other policies or economic efficiencies are to be taken into consideration as arguments of merging parties for the applicability of the exception rule to a merger case. It is therefore assumed that neither technical, nor economic progress that might result from an anticompetitive concentration can compensate for the elimination of competition in the relevant market. But quite naturally, structural changes in the structure of important markets may raise concerns of the government and protection of competition is not the only consideration that is of importance when long term structural changes may take place in the economy. Therefore, it is not unusual that special procedures for investigation of particular public interests that can be affected by mergers are established in several EU Member - States (examples: UK, France, Netherlands). These legal mechanisms are aimed at empowering the highest governmental body to consider legitimate public interests as argumentation not to find the right balance but to *outweigh* competition concerns and support formation of the market structure that seems to be required for relevant governmental policy.

As regards public interest argumentation for the application of exception rules to concerted actions, the competition authority should be able to legitimately consider them within a single assessment procedure as additional indicators of the economic efficiencies. For that purpose the narrow (technical) approach to the application of Article 81(3) has proven to be quite adequate and effective.

The Law provides for a possibility to consider such arguments as higher employment, environmental benefits, energy saving etc. within a rather broadly expressed condition of “economic development” (Paragraph 3 of Section 1). Provided that the analysis of such arguments is performed against other competition related conditions by the competition authority within a single testing procedure, on the basis of quantifiable indicators, the legal certainty of decision-making process in the sphere of application of the exception rules to the concerted practices will be improved.

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

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

“A fair share for consumers” is not the only compulsory condition that seems to be missing in the legal mechanism for the application Article 10 of the Law as compared to the concept for the exception rule for concerted actions under Article 81(3) of the Treaty. Another cumulative condition to be added into the legal test is “*indispensability of a restriction to competition for attainment of particular economic efficiencies*”. Therefore Article 10 of the Law seems to be also incompliant with the EU approach to the test for the applicability of the exception rule. In fact, the said condition for indispensability is included in Section 4 of Article 10 but unlike the mechanism applied by the competition authorities in the EU this condition must be analyzed according to the law within a separate procedure aimed at assessment of public interest by the Cabinet of Ministers: AMCU analyzes economic efficiencies and the impact on the competition in the relevant market, whereas indispensability and relevance of public interest (even if consumer

benefits are included) are analyzed within another procedure used by the temporary Commission under the Ministry of Economy of Ukraine⁸².

Further approximation of the Law with the EU rules would therefore require also *certain restructuring of the legal provisions in Article 10*, so that the four conditions could be *exhaustively and cumulatively* tested by the AMCU to apply the exception rules.

Conclusive comments

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

Section 1: To consider

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

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

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

Sections 3 and 4: Could be excluded

- Most of the arguments related to the employment, environmental or regional policies could be legitimately considered as elements of the concept “economic development” provided that the parties to the agreement can submit quantifiable evidence of benefits for particular public interests;
- Paragraph 2 of Section 4 could become part Paragraph 3 of Section 4 and fully encompassed by Sections 1 and 2 (a “threat to the whole system of market economy” is beyond the scope of any public interest).

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

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

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

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