

SCF

Sofia Competition Forum

GUIDELINES FOR ASSESSING THE COMPLIANCE OF REGULATORY AND GENERAL ADMINISTRATIVE ACTS WITH COMPETITION RULES

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BULGARIAN COMMISSION
ON PROTECTION OF COMPETITION



UNITED NATIONS CONFERENCE
ON TRADE AND DEVELOPMENT

**GUIDELINES
FOR ASSESSING THE COMPLIANCE
OF REGULATORY AND GENERAL
ADMINISTRATIVE ACTS WITH
COMPETITION RULES**

I. OBJECTIVE AND SCOPE

1. Scope

The present Guidelines have been developed to assist the public authorities, including the executive authorities and the local government, in the process of identifying potential anticompetitive impacts at the early stages of drafting regulatory acts. They are based on the approach in this field, adopted by international institutions such as the European Commission (EC), and the Organization for Economic Cooperation and Development (OECD), as well as by the competition authorities in other EU member-states⁴.

The document sets criteria on the basis of which, without possessing in-depth knowledge in the field of competition, one can assess whether the proposed regulations might lead to restriction of competition. The Guidelines provide advice on achieving the objectives in a way that complies with the principles of free competition.

2. Good regulation principles

The bodies responsible for drafting regulatory and general administrative acts use state regulation as a tool for achieving a number of social, economic, ecological and other objectives. On the other hand, the business in many cases perceives regulation as an unnecessary barrier that hampers the development of the market environment and affects the opportunities for competitive economic growth.

The intervention of the state in a free market is undoubtedly necessary when the so called market defects are manifested, and justified when it aims at protecting the public interests. At the same time, however, there is a risk for the

⁴ The Guidelines were adopted by the CPC decision No1777/20.12.2011

regulation to impose too strict or unnecessary restrictions on competition, thus leading to increased process of goods and services and limited product range. That's why it is extremely important for the state intervention to be carried out in accordance with the good regulation principles by taking into account its influence on the competitive environment.

The Program for Better Regulation for the period 2008-2010 adopted by the Council of Ministers emphasizes the need for introducing an approach which should „ensure equal conditions for carrying out economic activities and should encourage competition”. The Program defines good regulation as a key to ensuring fair and competitive market environment and improving the citizens' welfare.

3. Impact assessment

One of the operative measures for achieving this objective is the introduction of impact assessment of draft regulatory acts. Impact assessment is a process directed to improving state governance and ensuring that the validity of the discussed variants of public policies⁵. This activity is related to identifying, forecasting, analyzing and assessing the potential results, both positive and negative, of applying the respective act.

The complex impact assessment, in which the potential economic, financial social, ecological and other consequences of the planned act are being analyzed, is aimed at ensuring its compliance with the other policies, to reduce to the minimum the negative and optimize the positive consequences of its implementation. A key instrument to achieving this objective is the timely consulting of the draft acts with the stakeholders. That is why Article 32 of the Rules of Organization of the Council of

⁵ Handbook on impact assessment in Bulgaria developed in the frame of project PHARE BG-0103.01 „Strategic planning and coordination” of the Council of Ministers.

Ministers and its Administration (promulgated, SG No 78 of 2009) obliges the members of the Council of Ministers to coordinate not only with the other ministers, but also with the other public bodies, the draft acts that are related to or affect their activities.

4. Why is the assessment of compliance with competition rules necessary?

Adopting a new or amending an effective act could have negative consequences for the free functioning of the market if it restricts the conditions for effective competition among economic operators. The negative impact on the competitive environment could harm the interests of consumers as it may lead to a limited choice of goods or services, or to higher prices.

For the purpose of avoiding the negative effect of implementing provisions which unjustifiably restrict free initiative in economic activities and deprive consumers of the advantages of an effective and working market, the draft acts need to be also assessed from the point of view of competition rules. The assessment of impact on competition needs to be used in addition to the general impact assessment of the planned regulation.

5. What is the nature of the assessment of compliance with competition rules?

The assessment of compliance with competition rules includes, on the one hand, an analysis of draft acts or effective acts with a view to identifying provisions which could unjustifiably restrict competition, and suggestions of less restrictive alternative regulation methods which could achieve the set objectives, on the other.

6. Advantages of the assessment of compliance with competition rules

The incorporation of the assessment of compliance with competition rules as an element of the overall impact assessment of regulatory acts contributes to the introduction of a regulatory framework which gives companies the opportunity to compete effectively, encourages entrepreneurship, investments and innovations, contributes to economic growth and job creation, ensures free choice and optimum prices for consumers. The integration of the analysis of compliance with competition rules in the overall assessment contributes to the drafting of regulatory and general administrative acts of good quality which take into account the constitutional principle of protection of free economic initiative and reduce to the minimum the potential negative impact on the competitive environment.

7. Who is responsible for carrying out the assessment of compliance with competition rules?

The Commission on Protection of Competition is the body authorized under the Law on Protection of Competition to carry out an analysis of the compliance of draft or effective acts with competition rules. The aim of this analysis is to help the state authorities in the drafting of those acts and to ensure the development of an effective and free market.

It is of essential importance for the consultations with the CPC to be carried out at the early stage of drafting the respective acts so that the Commission has the required time to present to the stakeholders the results of its investigation.

It should be noted that the position statements of the CPC on the assessment of the compliance with competition rules are of non-binding nature for the competent authority. They aim at warning the competent authority of potential negative impact that the planned act may have on competition and to point out possible regulation alternatives and, in the end, help the competent authority in taking a justified decision.

8. What is the procedure for carrying out assessment of compliance with competition rules?

As a first step, each body working on a draft regulatory or general administrative act needs to, in the process of its planning and drafting, carry out a preliminary assessment as to how likely it is for the draft act to lead to restriction of competition.

To that purpose, the body may use the checklist for preliminary assessment included in the present guidelines (see Part II of the Guidelines).

If the state body is not certain whether the planned act complies with competition rules, it may request a position statement from the CPC on the grounds of Article 38, para 1.8 of the Law in Protection of Competition (LPC).

The CPC might initiate proceedings for compliance with competition rules of a regulatory act or a general administrative act either on its own initiative or upon the request of the stakeholders whose interests have been affected by acts issued in contradiction with the provisions of the LPC.

As a result of the analysis the CPC may establish potential restrictions of the competitive environment. In this case it may recommend regulation alternatives which achieve the same objectives but restrict competition to a lesser degree. The CPC may propose to the competent bodies or associations of undertakings to amend or repeal the respective effective act.

The decision of the CPC by which it adopts a position on the compliance of draft or effective acts with the provisions of the LPC is sent to the parties in the proceedings and is published in the public registry of the Commission. The decision is not subject to appeal.

II. THE IMPACT OF A REGULATORY ACT. EXAMPLES AND ALTERNATIVES.

Checklist for preliminary assessment

The first step in assessing the compliance with competition rules is to establish whether the draft regulatory or general administrative act contains provisions which could lead to prevention, restriction or distortion of competition on the relevant market. In order to support the bodies responsible for drafting the respective act in the preliminary assessment, the guidelines contain a checklist designed in accordance with the Guidelines for impact assessment in the field of competition of the OECD.

In the checklist for preliminary assessment the potential restrictions of competition are divided into 3 main groups, and are formulated as questions. Each group contains a number of specific restrictions, some of which may belong to more than one main group. In this way, the establishment of a regulatory or self-regulatory regime could lead to both limiting the number of participants in the market and to a decrease in the number of stimuli for them to compete among one another. The checklist for preliminary assessment is not exhaustive.

If the answer to the three questions in the checklist for preliminary assessment is “no”, it is unlikely for the act to lead to prevention, restriction or distortion of competition on the relevant market. If the answer to any of the questions is “yes”, it is possible for the provision of the regulatory or general administrative act to exert negative consequences on competition which requires a further in-depth analysis on the part of the CPC.

CHECKLIST FOR PRELIMINARY ASSESSMENT

1. Is the number or circle of participants in the market restricted?

This is likely to happen if the draft act:

- provides exclusive rights to one of the participants in the market;
- introduces a licensing, permission of registration regime as a requirement for carrying out a given activity;
- sets a fixed number of participants in the market;
- restricts the opportunity of some of the participants in the market to provide a given good or service;
- considerably increases the costs for entering or getting out of the market;
- creates geographic barriers to the free movement of goods and services.

2. Are the opportunities for the suppliers to compete among one another limited?

This is likely to happen if the draft act:

- regulates or exerts considerable impact on prices;
- restricts the opportunities for advertising;
- introduces quality requirements which give advantage to some participants in the market or go beyond the quality level that many well-informed consumers would choose;
- restricts the potential distribution channels or the geographic region in which the supplier could carry out its activities;
- restricts the freedom of suppliers to organize the production process themselves and to choose its form of organization;
- puts some participants in the market in a privileged position compared to other participants.

3. Is there a lower number of stimuli for the providers to compete actively?

This is likely to happen if the draft act:

- creates a regime for self- or joint regulation;
- exempts a given sector or a group of suppliers from the field of application of the general competition protection legislation;

- requires or encourages the exchange or publishing of information for production volume, prices, sales or producer's costs;
- creates legal insecurity for the undertakings which have just entered the market.

4. Is the choice and information provided to consumers restricted?

This is likely to happen if the draft act:

- restricts the freedom of consumers to decide who to buy from;
- increases the costs of consumers for change of suppliers, reducing the opportunities of the consumers for mobility.

The different types of restrictions have been discussed in detail below, and examples are given of regulations that may have an anticompetitive effect. To make the job of the authors of draft acts easier, examples of alternative regulations are given which are likely to achieve the objectives of the respective sector policy but with fewer restrictions.

1. Is the number or circle of participants in the market restricted?

The draft acts which restrict the number or circle of participants in the market are very likely to lead to restrictions of competition. Opportunities are created for prohibited agreements between undertakings, restrictions of innovations and the stimuli for effectively satisfying the needs of consumers. This is likely to happen if the draft act:

1.1. Provides exclusive rights to one of the participants in the market

The provision of exclusive rights for carrying out a certain activity can be justified from the point of view of public interest, for example for encouraging investments in infrastructure building or scientific research, which are less likely to be realized at the absence of this stimulus.

On the other hand, however, this can lead to elimination of competition as the undertaking to which the exclusive right has been provided will start exercising a dominant position on the market and the entry of new participants will be impossible. It is very likely for such a situation to lead to higher prices, lower quality of the services and lagging behind from a technological point of view. In such a case there's no competition "on the market" but possible competition "for the market" (i.e. undertakings can only compete for acquiring the right to enter the relevant market).

With a view to the above, in drafting an act which provides exclusive rights, the regulatory bodies need to assess whether the regulation is justified and whether the set objective could be accomplished with fewer restrictive measures.

Example: Public transport for passengers

Providing an exclusive right for carrying out the public transport of passengers along the main city bus lines to only one undertaking

Example: Water supply

Providing an exclusive right to one undertaking to provide the water supply and sewerage services for domestic purposes on a given territory

Alternative: In this particular case there is no competition "on the market". If the regulatory body finds out that the provision of exclusive rights is justified from the point of view of the public

interest, it can encourage competition “for the market”. That can be achieved through the provision of an exclusive right by means of a tender or a public procurement procedure. Such an approach is particularly suitable for the sectors of water supply, electricity supply, transport, telecommunications. Competition can be additionally encouraged by means of providing the exclusive right for a shorter period of time.

1.2. Introduces a licensing, permission of registration regime as a requirement for carrying out a given activity

The objective of the licensing, permission and registration regimes is to ensure a high quality of the provided services as only the participants on the market who manage to meet the required criteria, can carry out the respective activity. Those regimes have been introduced to protect public interest in specific areas in which consumers find it difficult to objectively judge the qualities of a given service, and in which the wrong choice could lead to serious and unfavorable consequences for them.

On the other hand, the licensing, permission or registration regimes could lead to restriction of competition. Requirements for minimum capital, size of the working premises, gained professional experience, geographical distribution and other, pose barriers to the entry of new participants in the market. The restriction of competition on the market leads to a limited choice on the part of consumers and increased prices. In this way the introduction of licensing, permission or registration regimes is likely to have as an end result the protection of the participants in the market, rather than the consumers.

An additional complication is the restriction of the maximum number of licenses and permissions for carrying out a certain activity. In this case the persons that satisfy the requirements won't be able enter the market.

The long procedures for providing licenses for carrying out an activity can also have a restrictive effect as they give advantage to the persons who are already on the market to those who are about to enter it.

Example: The activities of tour operators or tour agents

The introduction of a **licensing regime** for carrying out the activities of a tour operator or agent with a view to protecting the consumers of tourist services

Example: Sales of plant protection products

Introducing a requirement for obtaining a license for selling plant protection products

Example: Retail trade

A requirement introduced by the municipalities for registering trade facilities

Alternative: The less strict requirements for starting and developing economic activity would have a positive effect on the competitive environment. If preliminary control is needed, the requirements for economic operators shouldn't be higher than ensuring that the public interest has been satisfied. A registration regime needs to be introduced that envisages a simpler and clearer administrative procedure which does not include a subjective assessment of expedience and is related to less time and financial resources on the part of the undertakings. Improving the competence of the consumers to take informed decisions as well as the introduction of sanctions in case of infringements could serve as an alternative measure.

1.3. Sets a fixed number of participants in the market

It is possible for the number of persons carrying out certain economic activity to be fixed. The motives for such regulations are usually related to ensuring a sufficient level of profit for the suppliers as well as with preventing the concentration of suppliers in the big cities at the expense of the poorly populated regions where the respective service is not provided.

But the regulations that fix the number of participants in the market are in practice restricting their number. In this way, they reduce the number of stimuli for the suppliers to compete among one another by offering goods of higher quality and services at lower process to the extent to which each one of them would have a guaranteed level of profit. This applies to a greater extent to the less populated regions in which such a regulation would lead to the presence of undertakings enjoying dominant position on a given market.

Example: Pharmacies

A regulation defining a set number of pharmacies which can function in a given populated area limits the opportunities for entering the market and thus the number of participants in the market.

Alternativea: The lack of a regulation that fixes the number of those who carry out a certain activity in a given populated area would lead to an increase of the number of participants in the market and would result in a sufficient number of operators willing to carry out the respective activity in the poorly populated areas. Despite that, if necessary, the provision of certain goods or services in poorly populated regions could be achieved by alternative means such as stimuli for the suppliers who carry out activities in those.

1.4. Restricts the opportunity of some of the participants in the market to provide a given good or service

The opportunity for some participants in the market to provide a given good or service could be restricted by introducing conditions for participation in a public procurement procedure which either gives advantage to some participants, or unjustifiably limits the participation of others. Those conditions could be outlined in the tender announcement and tender documentation, or could be introduced at a later stage (e.g. proposal evaluation) by an act of the competent authority.

The objective is to stimulate small and medium business, the suppliers from specific regions, the undertakings implementing special employment policy (e.g. one of their priorities is to provide jobs to people in a disadvantaged position) or undertaking providing only the good or service in question.

This type of policy reduces the opportunity for some undertakings to compete among one another in a public procurement procedure. Undertakings which could offer more favorable financial and technical conditions from those offered by the participants in the public procurement may be deprived of the opportunity to participate in the tender. This may lead to the signing of contracts which are less favorable to the contractor (higher prices and lower quality).

Example: Public procurement

One of the discriminatory criteria, for example, is the requirement set by the contracting authority which forbids the participants in the tender to use sub-contractors in implementing the contract. In practice, this requirement deprives the tender applicants of their right to judge, in the process of preparing the offer, whether to use sub-contractors or not.

Example: Public procurement

Introducing requirements with regard to the contractors which are far too high and do not correspond to the scope and value of the public procurement. This limits the circle of potential participants in the procedure and makes the requirement discriminatory.

Alternative: The objective of encouraging certain undertakings could be achieved through less restrictive from the point of view of competition measures, among which are the provision of state aid in accordance with the legal requirements, tax concessions, etc.

1.5. Considerably increases the costs for entering or getting out of the market

The objectives of the legislation which envisages considerable investments for entering and getting out of the market could be related to consumer protection or environment protection.

The barriers to entering or getting out of the market can exert negative influence on the competitive environment and the consumers. They hold back the entry of new participants in the market because they are related to considerable investments. This could lead to high concentration on the market and the presence of undertakings with large market share which creates preconditions for abuse of dominant position.

The costs which could be regarded as barriers to entering the market are: requirements for minimum initial capital, experience in implementing contracts of the respective type, presence of a minimum number of personnel with the required professional qualification.

The costs for getting out of the market are related to the investment of funds for satisfying the higher than normal

requirements for environment protection and the health and security of citizens. The very high costs for getting out of the market could influence the initial decision of the economic operators to start economic activity.

Example: A requirement for a certain number of vehicles

A **barrier to entry** the market could be the requirement for each trainer at a training center to have a certain number of vehicles in order to be able to obtain a driver's license.

Example: Re-cultivation of post-mine terrains

The requirement for re-cultivation of post-mine terrains after completing the activity may be considered as a barrier to getting out of the market.

Example: Licensing fees

The introduction of high licensing fees for complementing a certain type of economic activity could be considered a barrier to entering the market for small and medium-sized enterprises.

Alternative: The authors of draft acts need to judge to what extent the undertakings which want to enter the market can satisfy the stricter requirements and whether the expenses they have made would have a significant impact on their profitability. In many cases, however, there are very few alternative ways for achieving the objectives that have been set – consumer protection and environment protection. With a view to reducing the anti-competitive impact of such provisions, the competent authorities may envisage to provide assistance to the economic subject so that they could meet the requirements. It is also possible for the requirements to be limited to the minimum requirements for achieving an adequate level of consumer protection.

1.6. Creates geographic barriers to the free movement of goods and services

The objective of the regulatory regimes which create geographic barriers to the free movement of goods and services could be to stimulate the industry in the less economically developed regions and the “new sectors”.

This legislation, however, could lead to negative consequences for competition. It is possible for the level of concentration on the market to be higher, thus contributing to the market strength of undertakings. In addition to that, the narrower market would lead to a reduced number of innovations limited product range. All that could have an unfavorable impact on the consumers who will have to choose among a limited number of goods and services, offered at higher prices.

The creation of geographic limitations should be considered a barrier to entering the market as the market grows geographically and economically smaller as a result of the regulation.

The free movement of goods, services, capitals and/ or workforce, the “four freedoms”, is considered to be the main pillar of the single internal market within the European Union. The mutual exchange of goods, services, capital and/or workforce ensures free competition on the European market and increases the effectiveness and efficiency of the used resources.

Example: Craftsmanship

Only the members of the regional crafts chamber have the right to exercise economic activity on the territory of the respective municipality

Example: Taxation

Tax exemption for undertakings registered in a region with high level of unemployment

Alternative: If the authors of draft act consider the introduction of restrictions to the free movement of goods and services to be justified from the point of view of public interest, they could fix a shorter period for the restriction.

2. Are the opportunities for the suppliers to compete among one another limited?

The presence of a large number of competitors is not a sufficient condition for the development of markets characterized by effective competition. Suppliers can compete among one another through different means: price, quality, distribution channels, service, and advertising. Regulations which restrict one of these opportunities could lead to restriction of competition among the participants in the market.

That is why in carrying out the initial assessment of compliance with competition rules, an answer needs to be found to the question of whether the offer **restricts the opportunities of suppliers to compete among one another**. This is likely to happen if the draft act:

2.1. Regulates or exerts considerable impact on prices

Price regulation is usually carried out through determining fixed, minimum or maximum prices for certain products or services. It can be implemented in a direct or indirect way. In the case of direct control, the borders of the prices are determined in the regulatory act whereas in the indirect control, price fixing has been assigned to a specific body or organization, or a way (methodology, guidelines, etc.) for prices formation has been regulated. Even of the policy for determining fixed, minimum or

maximum prices aims at protecting consumers, it may lead to significant unfavorable consequences for competition.

Price regulation is only rarely the most effective means for achieving the above-mentioned objective. Price control may lead to restricting the opportunities of the participants in the market to compete by strategies for price reduction or product differentiation. What is more, the acts that control or exert considerable impact on prices may pose problems to the effective functioning of the market. This is due to the fact that the opportunity for price changes to act as an indication for finding a balance between demand and supply has been eliminated, as it happens on a market with effective real competition.

It has been argued that **fixed prices** aim at ensuring low prices. According to economic theory, however, it is not likely for price regulation to lead to prices lower than the ones which would be formed in the conditions of free competition.

The purpose of the **minimum price** is to guarantee that the standards for quality and safety have been met. But the minimum price on its own cannot serve as a guarantee for quality. The minimum price cannot stop unfair suppliers to offer goods or services of low quality. They have the incentive to reduce their costs as they will have higher profit for the same price, that that will unavoidably affect negatively the quality.

In other cases the minimum prices are introduced as a result of an extremely strong price competition with a view to ensuring the protection of small undertakings or undertakings of regional importance.

The effect of minimum prices is that the existing participants in the market are being protected by competition and the opportunity for price competition is limited. The presence of a price threshold may prevent the suppliers from offering their goods at pieces lower than the minimum prices. In this way, their

stimulus for finding more effective and innovative ways to remain on the market has been eliminated, which, on its part, leads to lower prices in favor of consumers. At the same time the minimum price provides in with the opportunity to stay on the market.

Maximum prices are usually introduced with the aim of protecting consumers. But maximum prices could be used by the participants in the market as a coordinating mechanism for price increase which would lead to prices very close to the maximum prices. It is also possible the maximum price to include additional unannounced fees with a view to going round the maximum price. Another problem in the determining of maximum prices has to do with the fact that their existence reduces the stimuli for the suppliers to compete on the basis of innovation and quality, and not price. Such a situation may force some of the undertakings to leave the market.

Prices, which initially were meant to play the role of **recommended** or approximate prices, may well turn into fixed prices as their existence will help the competitors coordinate their price strategies.

Example: Prices for professional services

In many cases the regulation of prices in the field of free professions has been assigned by a regulatory act of professional organizations which can set minimum, maximum and recommended prices for the services provided by their members.

Alternative: The most effective guarantee for quality and safety of the products is the establishment of a control mechanism with regard to the requirements that the goods and services need to meet.

Consumers can also be protected by raising their awareness with regard to the level of the prices by the publishing of past prices and surveys on prices carried out by independent organizations.

2.2. Restricts the opportunities for advertising

The restrictions on the opportunities for advertising are usually introduced with the motive that consumers find it difficult to make a judgment on the basis of the quality of goods and that's why they need to be protected. Such restrictions are used as a means for limiting the consumption of goods and services that are likely to lead to negative consequence for the society (e.g. cigarettes advertisements).

As a rule advertising restrictions have an anticompetitive effect. They prevent the consumers from comparing the goods and services offered by different participants in the market.

Restrictions reduce the ability of undertakings to inform the potential consumers about their presence on the market and about the characteristics of the goods they offer. They are very unfavorable both for the undertakings which have just entered the relevant market and for the more effective participants in the market which do not have the opportunity to advertise the advantages of their goods.

There is a prohibition for advertisements that contain comparison of prices. Those advertisements have a clearly expressed restrictive effect on competition in the market and prevent the consumers from taking advantage of the competition among the suppliers.

At the same time, it has to be emphasized that some restrictions for advertisements are acceptable from the point of view of the rules of competition because they contribute to the functioning of effective markets and are precompetitive in their essence. Such is the hypothesis of the prohibition of misleading advertisements, regulated in the Law on Protection of Competition.

The introduction of advertising restrictions needs to be carefully analyzed on the basis of the advantages and disadvantages of such a measure.

Example: Advertising professional services

Many sectors successfully protect themselves from competition through advertising restrictions. This holds true to a great extent for the free profession for which in a number of cases there is a prohibition for advertising the offered services under the excuse that this is not ethical and is not in the interest of consumers.

Alternative: An alternative way for protecting the interest of consumers is the launching of information campaigns. And the imposing of excise duty on the offered goods and services offers a way for limiting overconsumption.

2.3. Introduces quality requirements which give advantage to some participants in the market or go beyond the quality level that many well-informed consumers would choose

The regulations on the quality requirements are often favorable to consumers. They contribute to the introduction of new products by ensuring the compatibility between the goods of different producers. At the same time, however, these acts may give unjustified advantage to some suppliers compared to others, for example by introducing requirements for the use of a specific technology, or through setting unjustifiably high criteria which cannot be met or can hardly be met by undertakings that possess limited resources.

The introduction of new regulations with regard to quality requirements which are considerably different from the existing ones could considerably restrict competition on the market. When those requirements are much higher than the ones that have been

established on the market, they can hardly be met by some of the participants in the market. Such is the effect when for meeting the minimum quality requirements, the undertaking has to use a special patented production technology.

The owner of the patent has interest in refusing a license to his/ her potential competitors. Even if the technologies are not protected by a patent, the small undertakings, such as the ones with limited resources, can hardly afford to make considerable investments in order to meet the too strict legislative requirements from a technological point of view. In this way, they will be forced to leave the market, which will have a negative effect on competition.

The extremely high quality requirements may restrict the freedom of suppliers to offer goods of different quality in order to satisfy different types of demands. They can be to the detriment of consumers who will not be able to buy the less expensive goods they prefer, despite the fact that they are of lower quality. That's why the quality requirements for goods and services shouldn't be established above the level sufficient to guarantee the safety of consumers.

For the purpose of ensuring a certain level of quality, some technical requirement may be introduced as well. The obligation for meeting these requirements, however, may restrict the opportunities of the producers to use innovative decisions and to impede the entry of new participants in the market.

Example: Offering of food and drinks at low cost flights

Many consumers prefer to use low cost air carriers despite the fact that they don't offer food and drinks during the flight. The introduction of a requirement for the air carriers to provide food and drinks during the flight disregards the interests of some of the consumers and restricts the freedom of the participants in the

market to offer different products aimed at different types of demand.

Example: Chemical industry

New technical requirements to the motor tires which require a change in their production technology. That could increase the production costs and to force a large part of the participants in the market to cease their activity and to move to another activity.

Alternative: In drafting regulations with regard to quality requirements it is recommended for the changes to be introduced gradually as considerable and abrupt changes are much more likely to have a negative impact on competition.

Once the quality requirements have been introduced with the purpose of protecting consumers, an alternative means for achieving the same purpose would be the provision of information to consumers about risks related to the product, or a requirement for announcing certain characteristics of the product. In the cases in which considerable changes to the standards have been envisaged out of ecological considerations (e.g. standards for harmful emissions), the competent authorities would be able to minimize the potential anticompetitive effects through providing financial, technical or other assistance, mainly to the small undertakings which could hardly meet the new requirements.

In a number of cases no quality requirements need to be introduced as the reputation of the seller can serve as a guarantee for quality, especially when the consumers can observe the quality and make further purchases. The requirements based on good market practices are preferred to the prescribed requirements as they provide the supplier the opportunity to adapt their products to the standard and increase the options among which consumers can choose.

2.4. Restricts the potential distribution channels or the geographic region in which the supplier could carry out its activities

The motives for introducing regulations that restrict the potential distribution channels are usually related to consumer protection. This approach, however, limits the number of places from which the products can be purchased, restricts competition and, respectively, the choice of consumers.

Geographic restrictions have a similar effect. They are usually introduced with the aim of ensuring the provision of certain goods and services in poorly populated regions.

Example: Drugs

Drugs are usually offered only in pharmacies. The aim is to ensure the safety of consumers by the presence of a pharmacist at the moment of purchase. At the same time there is a wide range of non-prescription drugs the purchase of which does not require consultations with a pharmacist. That is why the requirement for such drugs to be distributed only in pharmacies, and not for example in supermarkets, is not justified.

Example: Selling of cosmetic products in pharmacies

There are other products that are offered at pharmacies, such as cosmetic products. The introduction of restrictions for selling cosmetic products in pharmacies would restrict competition and would limit the choice of consumers.

Alternative: In introducing restrictions with regard to the potential distribution channels or the geographic region in which the supplier can carry out its activities, it needs to be assessed whether they are necessary for ensuring the safety of consumers and for their access to certain goods and services. An alternative measure to the provision of certain goods or services in poorly

populated regions may be the introduction of stimuli (e.g. financial alleviations) for suppliers. With regard to the restrictions for distribution channels, the introduction of a requirement for product storage may serve as an alternative.

2.5. Restricts the freedom of suppliers to organize the production process themselves and to choose its form of organization

Usually the motives for introducing such rules have to do with ensuring the responsibility of the suppliers to the clients, the avoiding of conflicts of interest and the independence of the participants in the market.

Regulations that restrict the freedom of the suppliers to organize the production process themselves and to choose its form of organization, restricts their creativeness and innovation, thus reducing their effectiveness. For example, partnerships with undertakings from another sphere of economic activity could be prohibited which would prevent the participants in the market from developing their goods and services in an innovative way and from introducing business models that allow for more effective use of resources. In this way, the opportunities for competition are being restricted.

Regulations which introduce characteristics for certain goods or services could restrict innovations. It should be noted that with time and as a result of the scientific progress and the development of technologies, the characteristics of products may be changed, as well as the way in which they are offered. Not taking into account the above mentioned circumstances would lead to the risk of preventing the appearance of innovative products, which would be to the detriment of technological development and of the interests of consumers at the expense of the interests of less effective participants in the market.

The introduction of production quotas also restricts the opportunities for competition as the undertakings won't be able to make an optimal use of their production capacity and to achieve the economies of scale that they would be able to achieve without such restrictions and if they determined the quantity of their production.

Example: Architects and builders

A requirement has been introduced according to which architects do not have the right to combine the activity of an architect with that of a builder, construction investor or consultant. The impose restrictions on multidisciplinary activities could limit the range of the existing services and to impede the development of new business models.

Alternative: There are alternative mechanisms which could guarantee independence and certain ethical standards, while at the same time being less restrictive to competition. Such mechanism, for example, is the introduction of sanctions for unconscientious carrying out of obligations on the part of the suppliers.

2.6. Puts some participants in the market in a privileged position compared to other participants

Every regulation which puts certain participants in the market in a privileged position compared to other participants, distorts competition. Such a situation can be observed, for example, when producers are obliged to use a strictly defined technology. Such a restriction would be in the interest of those participants in the market which are already using this technology while the other undertakings would have to make certain investments in order to start using it.

It is possible for the regulations to require the participants who have recently entered the market to adhere to stricter

standards while the undertakings which are already established on the market are still following, although for a limited period of time, the existing, less strict rules. Such regulations could significantly distort the equality between economic subjects as they will lead to an increase in the costs for some suppliers (the undertakings which have just entered the market or those which are introducing new production processes). Such a situation could have a discouraging effect on the economic operators and could reduce the number of stimuli for innovations and competitive pressure.

Example: Ecological requirements

A law introduces new, stricter ecological requirements for the production processes. These rules however, apply to the undertakings which have just entered the market whereas the existing undertakings are exempt from adhering to these rules.

Example: public procurement procedures

By means of the documentation for public procurement procedure for construction work, the contracting authority sets the requirement for the participants to have their own concrete centre. All undertakings which have such a center are in a privileged position compared to the undertakings which, despite the fact that they do not have a concrete center, are able to do the job by subcontracting other undertakings.

Alternative: The introduction of such regulations has to be carefully considered as often times it serves as an attempt to protect the established participants in the market from potential competition. The anticompetitive effect can be reduced by stating that the rules would be valid for a certain period of time. What is more, the period for which certain undertakings are exempt from observing the newer and stricter rules, needs to be proportionate to the motives for accepting exceptions.

3. Are the opportunities for the suppliers to actively compete among one another limited?

The nature of effective competition has to do with the opportunity of suppliers to compete by offering lower prices, better services, better quality of the good or the service, with the aim of winning more clients and acquiring a larger market share.. In some cases the undertakings can stop competing by coordinating their behavior so that they can share a given market and collectively increase their profit at the expense of consumers.

The legislation could also lead to a reduction in the stimuli suppliers have to compete actively by means of encouraging or facilitating the cooperation between them. There is a risk for the regulatory act to have a negative impact on the competitive environment when the suppliers have a significant role in its drafting. This is likely to happen if the draft act:

3.1. Creates a regime of self- or joint regulation

The state bodies with legislative initiative can decide to involve a professional or branch organization in the regulatory process. The approach through which the engaged organizations develop and monitor the adherence to the respective rules and the state ensures the required regulatory basis and support for their implementation, is known as a regime of joint regulation. In case that the role of the state has been reduced to a minimum and the whole responsibility for achieving the set objectives and the regulation of the profession and the branch is in the hands of the organizations, we have an example of self-regulation.

The main advantages of self-regulation and joint-regulation are the low administrative costs, the utilization of the specific expert experience and knowledge in the profession or the branch, the high level of commitment and implementation, the stronger trust in the regulation on the part of the organizations and their members.

Regardless of the fact that these regulatory regimes can bring significant benefits to the branch/ profession and the society as a whole, there is a danger for the rules developed by professional organizations to have a negative effect on competition and consumers.

Example: Self-regulation of free professions (lawyers, notaries, architects, engineers, etc.).

The respective professional organizations can introduce rules which could restrict competition in the exercising of a given profession such as for example obligatory or recommended prices, unjustifiably high barriers to entering the market of new participants in the profession, advertising prohibitions and restrictions with regard to the business structure.

Alternative: The regimes for self- or joint regulation need to be reviewed on a regular basis in order to find out to what extent the existing rules are necessary for protecting the public interest, whether they are proportional and justified, to what extent they are needed for successfully exercising the respective profession. In this case, both the benefits and the harms for the consumers need to be taken into account.

3.2. Exempts a given sector or a group of suppliers from the field of application of the general competition protection legislation

The sector legislation may envisage deviations from competition rules. In some cases, on the strength of a regulatory act, the undertakings are obliged to: jointly set prices and/or conditions for purchasing and selling of goods and services; allocate production quotas or markets; provide special or exclusive rights. The motive for such a regulation could be to support the successful operation of those undertakings on the market as well as to enhance their competitiveness on the external markets.

Regardless of the fact that this policy is directed to supporting a certain branch or sector of the economy, it can be to the detriment of competition and consumers as it contributes to the creation of cartels or abuse with dominant position. Such a policy would go counter to jurisprudence and more specifically to a decision of the Court of the EC which provides that the member-states shouldn't introduce or enforce measures which could lead to ineffectiveness of the rules of competition⁶. Exempting a given branch or a group of producers from the obligation for observing some of the competition rules should be reduced to the minimum or repealed, except for the presence of indisputable public interest which cannot be protected in any other way. In case it is urgent for exceptions to be allowed, their anticompetitive effect needs to be reduced to the minimum.

Example: Quotas for the production and sales of matches

A regulatory act provides the exclusive right for production and sale of matches to several undertakings. Along with the regulatory act, production quotas were set for each undertaking, which restricted the stimuli for effective competition among them.

Alternative: The introduction of these deviations from the rules of competition for a short period of time, carrying out an analysis of the result of applying the legislation and repealing the exemption right after there is no longer need for the deviations from the rules.

3.3. Requires or encourages the exchange or publishing of information for production volume, prices, sales or producer's costs

⁶ *Consorzio Industrie Fiammiferi (CIF)*, ECJ 9 September 2003.

Regulations that require or encourage the publishing of information with regard to the prices, production volumes or the sales of the different participants in the market aim at facilitating the access of consumers to information, especially on markets characterized by a large number of participants which offer a great variety of products. An example for that is the requirement for publishing detailed and clear information on prices and packages of services of mobile operators.

On the other hand, however, there is greater risk of concerted behavior of the participants on the market and participation in a cartel. This is more likely to happen on markets characterized by the presence of a limited number of competitors.

It has to be taken into account that regulations that do not envisage the publishing of information but require or facilitate the exchange of information between competitors could also lead to the anticompetitive effects described above.

Practice shows that the exchange or publishing of detailed individual company statistics, especially when carried out on a regular basis could reduce the stimuli for the participants in the market to compete effectively and could in the end lead to increased prices.

Example: transportation of passengers and cargos

The legislation creates an obligation for publishing prices and discounts for transportation of passengers and cargos

Alternative: In the cases in which the information is gathered mainly for the purposes of the respective policy, its publishing may be avoided. If the purpose is to provide assistance to consumers or to provide general statistical data for a given market, the following information should be required:

- summarized information as it is less likely to lead to participation in a cartel compared to individual company statistics;
- information about past periods as it is less likely to lead to concerted market behavior compared to up-to-date information.

3.4. Creates legal uncertainty for the undertakings which have just entered the market

The lack of clarity and the contradictory nature of the regulatory framework may have a restraining effect for the undertakings which have just entered the market. The creation of legal insecurity would have an especially unfavorable influence in economic sectors undergoing liberalization as it will be hard to achieve the objective of opening the market for new participants.

Example: Licenses for opening big trade centers

The lack of clear rules with regard to the criteria (conditions) for licensing the big trade centers may have a restraining influence on the undertakings which are entering the market. Probably this effect will be more significant if the undertakings have to pay a higher licensing fee.

Example: Energy

The lack of foreseeability of the price changes of energy dissipators prevents the undertakings from planning their investment intentions and to enter new market.

4. Is the choice of and information provided to consumers limited?

4.1.Has the ability of consumers to decide who to buy from been restricted?

Regulation that restrict the ability of consumers to decide who to buy from could be introduced with the aim of protecting the consumers from wrong decisions or with the aim of improving consumers' choice at the presence of options which are incomplete, confusing, misleading or hard to understand. Such a situation could also arise when, as a result of liberalizations, new markets appear which have not existed before, which fundamentally changes the scope of the information that consumers need to have in order to shop effectively. Due to the new character of the product or the service, and maybe their complexity, consumers may have difficulties in assessing and comparing different offers.

The restrictions of the choice of consumers may lead to restriction of competition with regard to price and quality as a result of the reduced stimuli for the suppliers who have remained on the market to satisfy the needs of consumers by offering goods and services of better quality and at lower prices.

Example: Contact lenses

A regulation that forbids the selling of contact lenses without a prescription from an oculist may prevent consumers from choosing that type of lenses which to a maximum extent correspond to the ratio between quality and price they are looking for.

Alternative: The regulatory aim could be achieved without restricting competition by raising the awareness of consumers. With regard to new markets, information and educational campaigns could be organized, e.g. through brochures and TV advertisements, which inform consumers about the choice they have to make after the regulation.

4.2. Increases the costs of consumers for change of suppliers, reducing the opportunities of the consumers for mobility

„Change costs” are the costs that the consumer needs to make when changing the supplier of a good or service.

Provisions that envisage change costs would be justifiable from the point of view of the fairness of the conditions under the contract, if they reflect the presence of significant actual costs for the supplier. For example, in the “package sale of products” sanctions could be envisaged for premature termination of a contract with the aim of reimbursing incurred costs for fixed assets (mobile phones).

Imposing change costs, however, could have unfavorable effects on competition as it creates barriers to entering the market by new participants and restricts competition among the undertakings operating on the relevant market.

This is also valid for the recently restructured branches in which there is a well-established operator that has a large market share. There is a risk for this operator to impose new or higher costs for change of operator in response to the competitive pressure.

Example: Mobile phone services

Provisions in the contracts with the consumers of mobile phone services which impose considerable penalties if the consumers decide to change the operator after a certain period of time.

Example: Lack of transferability of a mobile phone number

The lack of transferability of a phone number could make the change of operator considerably unattractive due to the inconvenience for the consumer and the imposed large administrative costs.

Alternative: The introduction of rules which guarantee the transferability of phone numbers and make possible the mobility of consumers. If there should be a fee for change of operator, it should be cost oriented.

III. MAIN ELEMENTS OF ASSESSING COMPLIANCE WITH COMPETITION RULES

In the process of assessing compliance with competition rules the CPC carries out an in-depth analysis of the draft acts. The table below presents the main elements included in this process.

Main elements of assessing compliance with competition rules

- Defining the subject of the assessment and the circle of affected economic subjects;
- Providing the persons affected by the draft act with the opportunity to give their comments on the proposed regulation;
- Defining the need and expedience of the proposed act;
- Setting alternative methods for regulation which restrict competition to a lesser degree;
- Defining the circle of economic subjects which will be affected by the proposed alternative methods;
- Defining the actual consequences of the proposed alternative methods and the potential side effects;
- Clear and detailed justification of the assessment of compliance, including the proposed alternative methods;
- Tracing the effect of the adopted regulatory act on competition.

IV. PRINCIPLES OF EFFECTIVE PRO COMPETITION REGULATION

Effective from the point of view of competition is the regulatory framework which takes into account the following principles:

- necessity and proportionality;
- minimum restriction of competition;
- effectiveness;
- transparency;
- predictability.

1. Necessity and proportionality

Each draft act should have a clearly defined objective. When the achievement of this objective is related to the direct or indirect restriction of competition, it has to be carefully assessed whether there is an actual need for those restrictions or whether the objective can be achieved without restricting competition. It also needs to be assessed whether the objective is proportionate to the restrictions by comparing the benefits of achieving the objective with the harms done as a result of the restrictions on economic activity.

2. Minimum restriction of competition

Even if the restrictions of competition are necessary and proportionate, this is not sufficient to justify the effectiveness of the proposed regulatory framework. Of all possible alternatives, the alternative should be chosen that would lead to minimum restriction of competition. This issue has to be assessed at the level of preparing the act in order to avoid unnecessary restrictions which would be much more difficult to eliminate at a later stage. If the objective can be achieved to a sufficient degree

with less mechanisms that restrict competition, those mechanisms should be preferred.

3. Effectiveness

For a regulation to be effective, first of all the objectives of the act have to be clearly defined. If that is not the case, the risk of introducing unnecessary restrictions is much higher.

What is more, the regulatory framework needs to be easy to apply. If the adherence to the rules and the control mechanisms are complicated and related to high costs, most probably they won't be observed. It has to be kept in mind that the numerous references to the provisions of the same or other acts may create problems for the persons to whom the act applies. That's why referencing needs to be done only as an exception, when there's no other ways for regulating the subject matter. Compliance needs to be ensured as well with the Law on regulatory acts and the Decree on its implementation, the acts on the implementation of other regulatory acts to regulate comprehensively the subject matter they refer to, and secondary legislation to be drafted along with the draft act.

The regulatory framework may be unnecessarily complicated if the regulation is dispersed in many regulatory acts, issued by different bodies and if the principle of coordination among the acts on the different levels has not been observed. The clarity with regard to the competencies of the bodies which are responsible for implementing the respective acts is of great importance for exercising effective control on observing the regulatory framework.

4. Transparency

In a number of cases the rules that apply to a specific sector of the economy change too often and contain a great number of acts. This situation could significantly reduce the

transparency of the regulatory framework thus making it difficult for new participants to enter the relevant market.

The principle of transparency needs to be applied in the process of drafting the regulatory framework. That is why it is extremely important for the requirements of the Law for regulatory acts, for publishing draft acts on the website for public discussions as well as for preliminary coordination of the draft acts with the bodies whose authorities are related to the subject of the regulation. In this procedure, the stakeholders are provided with the opportunity to present proposals and positions on the draft act.

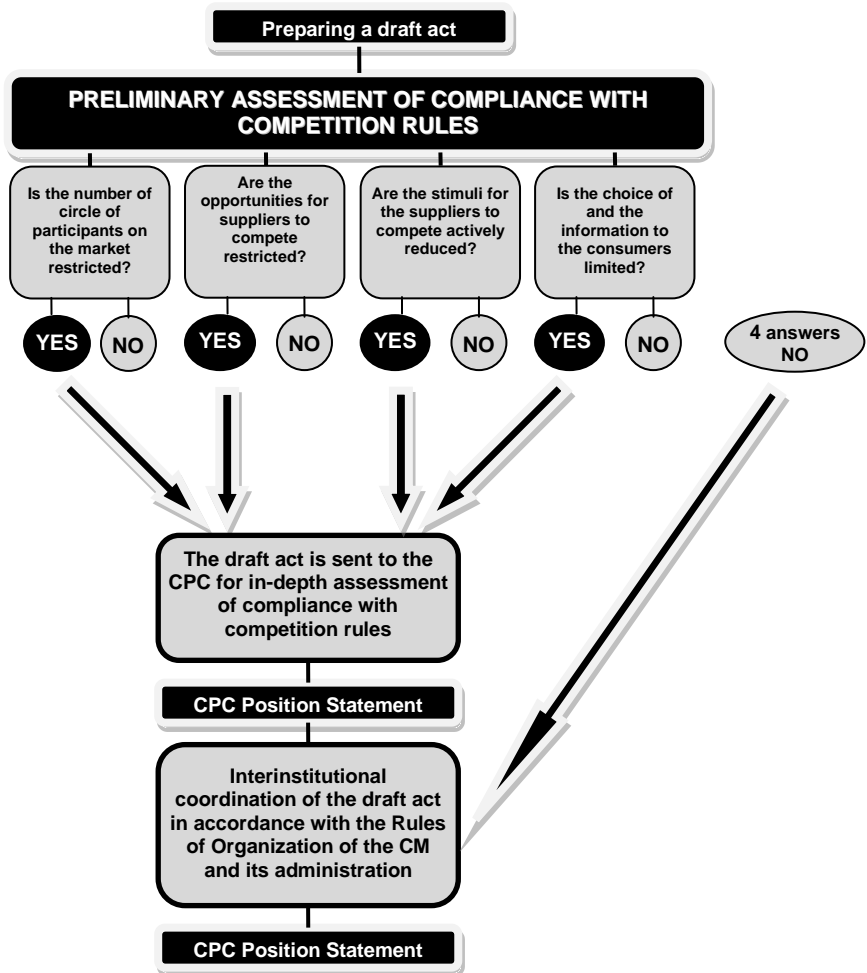
5. Predictability

The stability of the regulatory framework is of great significance for protecting the interests of economic subjects. The regular changes create uncertainty, which, on its part, is the reason for impeded market entry and reduced investments.

The regulations should contain deadlines for the measures they envisage which leads to foreseeability, creates trust in the system and puts emphasis on the commitment of the respective body.

The surprising changes to the regulatory framework should be avoided with the economic subjects being unprepared, or without giving them sufficient time to adapt to the changes.

V. A DIAGRAM OF THE PROCESS OF ASSESSING COMPLIANCE WITH COMPETITION RULES



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