

# EU-Ukraine Free Trade Agreement Negotiations Stakeholder Briefing Note 7

## Competition Policy

*Negotiations on competition policy involve ensuring fair competition in the markets of both parties including anti trust laws, state aid and state enterprises. Anti trust legislation seeks to ensure that firms do not undertake actions that will distort the market or restrict competition (anti-monopoly, mergers etc). State aid examines whether aid to a segment of business produces unfair market distortions and limits competition. State Enterprises examines whether or not the existence of state owned enterprises restricts competition, including sectors where there is a natural monopoly. In the context of a free trade agreement (FTA), this would be concerned with the impact of any unfair trade practises on import competition but would also affect domestic competition.*

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## CURRENT SITUATION FOR UKRAINE

### National

Ukraine has an anti-trust framework based on the 1996 Constitution, as well as in Law No. 2210-III "On the Protection of Economic Competition" of 11 December 2001, and in Law No. 236/96 "On the Protection from Unfair Competition" of 7 June 1996.<sup>1</sup> According to several sources<sup>2</sup>, Ukraine's anti-trust legislation is comprehensively based on the EU anti-trust legislation.

To implement these laws, Ukraine has established a competition authority, the Anti-Monopoly Committee of Ukraine which is mandated to regulate mergers, abuse of dominant position, unfair competition and anticompetitive actions of state authorities (including state aid, government procurement and price controls).

There is no law on state aid.

There is also a law "On Natural Monopolies" which defines, in a Ukrainian context, natural monopoly activities. These monopolies then operate under sector specific laws (e.g. transport, electricity etc) but regulatory bodies have only been established to oversee two of these industries and ensure that there is no abuse of monopoly position.

### EU-Ukraine Agreements

Both the EU Ukraine Action Plan and the Partnership and Cooperation Agreement (PCA) contain provisions to ensure there are no "restrictions on competition by enterprises or caused by State intervention insofar as they may affect trade between the EU and the Ukraine"<sup>3</sup> and more specifically "continue progress in the establishment of a fully functioning market economy, including price-formation, control of state aid, and a legal environment that ensures fair competition between economic operators".<sup>4</sup>

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<sup>1</sup> WTO Working Party Report

<sup>2</sup> CEPS, IFW & ICPS (2006) The Prospects of deep free trade between the European Union and Ukraine. 6.3.2 p. 100

<sup>3</sup> PCA Article 49 paragraph 1

<sup>4</sup> EU Ukraine Action Plan Paragraph 16

Provisions of Article 49 of the PCA is given below followed by elaborations in the EU Ukraine Action plan:

Anti-trust	State Aid	Natural Monopolies/State Trading
2.1 [...] have and enforce laws addressing restrictions on competition [...].	2.2 [...] refrain from granting State aids favouring certain undertakings or the production of goods other than primary products [...] or the provision of services, which distort competition insofar as they affect trade between the EU and Ukraine.	2.5 In the case of public undertakings or undertakings to which Member States or the Ukraine grant exclusive rights, [...] from the fourth year from the date of entry into force of this Agreement, to ensure that there is neither enacted nor maintained any measure distorting trade between the EU and the Ukraine to an extent contrary to the
<p>[...] ensure adequacy and compatibility with the EU, of the domestic anti-trust legislation and control regime.</p> <ul style="list-style-type: none"> <li>– Assess adequacy, and compatibility with EU, of current legislative framework, in practice, in particular its respect of the principles of non-discrimination, transparency and procedural fairness;</li> <li>– Continue to reinforce independence of the Anti-monopoly Committee, ensure adequate legal powers and resources; and reinforce staff training.</li> </ul>	<p>[...] and develop legislation and control regime compatible with that of the EU</p> <ul style="list-style-type: none"> <li>– Draft and adopt state aid legislation, including in particular:               <ul style="list-style-type: none"> <li>– a definition of state aid compatible with that of the EU;</li> <li>– a principle of prohibition of state aids which distort trade between Ukraine and the EU.</li> </ul> </li> </ul>	

## WTO Commitments

As part of its World Trade Organization (WTO) commitments, Ukraine agreed that from the date of accession, Ukraine would eliminate all export and import-substitution subsidies. However this does not cover state aid or regulating state aid to ensure that there are no distortions to competition. Ukraine currently provides state aid to special economic zones and priority territories, technological parks, as well as sector-specific support for fisheries, shipbuilding, the automotive sector, aircraft, construction, the space industry, coal mining, and publishing (of books). No other commitments relating to state aid were made.

The WTO Doha Ministerial Agreement began negotiations on competition policy, which Ukraine would have to adopt. However, the General Council of the WTO adopted the following Decision on 1<sup>st</sup> August 2004: "*competition policy [...] will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round*".

## Other Agreements

Ukraine has no other bi-lateral agreements relating to competition policy.

## ECONOMIC IMPACT (COST-BENEFIT)

The main economic impact of greater competition in the Ukrainian market will be to lower costs. Monopolistic and other structural distortions “crowd out” other, more efficient producers and prices are “controlled” at higher rates. In addition, more competition will increase consumer choice as the few dominant companies provide single, often sub-standard varieties. Finally, uncompetitive environments stifle innovation as dominant companies have no incentive or need to develop products or production processes so greater competitive will increase economic efficiency.

As a result of this greater competition and lower costs, Ukraine’s producers will increase their international competitiveness and therefore, Ukraine’s exports will increase.

Whilst recent studies on the impact of a EU-Ukraine FTA all address competition policy, none have been able to quantify the benefit to Ukraine of increased competition. Most studies focus on detailing deficiencies in Ukraine’s current system:

Although Ukraine has substantive anti-trust legislation, the implementation is very poor and furthermore, the independence of the Anti-monopoly Committee, the main authority responsible for enforcing all competition policy, has seen its independence reduced.<sup>5</sup>

31 per cent<sup>6</sup> of total sales in Ukraine are from sales of monopolistic enterprises and a further 14 per cent from oligopolistic enterprises – this means only 55 per cent of total sales in Ukraine come from competitive markets.

The most restrictive (non-competitive) markets are transport and telecommunications (only 15 per cent of sales are competitive), energy and coal (23 per cent), machine building (50 per cent) and agriculture/food (53 per cent).<sup>7</sup>

The main oligopolistic markets<sup>8</sup> in Ukraine that would also benefit from greater competition are cement, beer, tobacco, mobile telephone markets and petrol.

Between 2003 and 2004,<sup>9</sup> the number of cases of abuse of monopoly position increased but the Anti Monopoly Committee has been ineffective as the concentration of monopolistic industry in production increased over the same period. This is attributed to the fact that the Anti-Monopoly Committee reverted to price controls, which actually reduced competition.

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<sup>5</sup> Studies by Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations and; CEPS, IFW & ICPS (2006) The Prospects of deep free trade between the European Union and Ukraine.

<sup>6</sup> ECORYS (2008) Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations

## EU APPROACH IN OTHER AGREEMENTS

The EU has used a range of approaches for competition policy and state aid in FTA negotiations:

In agreements such as the EU Chile Association Agreement<sup>10</sup>, competition policy provisions are limited to applying “[...] their respective competition laws [...] so as to avoid the benefits of the liberalisation process in goods and services being diminished or cancelled out by anti-competitive business conduct. To this end, the Parties agree to cooperate and coordinate among their competition authorities”; with regards to state monopolies “Nothing [...] prevents [...] maintaining public or private monopolies according to their respective laws” and; state aid is restricted to the provision of “information on state aid on an annual basis, including the overall amount of aid and, if possible, the segregation by sector.”

Other FTA agreements such as those of Albania (also Croatia and some Mediterranean Countries) go further in outlawing any uncompetitive practises, including state aid “which distorts or threatens to distort competition by favouring certain undertakings or certain products.” The only method for assessing this will be that set out in EU legislation. Moreover, Albania will be required to adopt EU legislation and ensure all state aid, state monopolies and exclusive rights given to entities are compatible with EU competition legislation. Transitional periods of up to 4 years were granted for implementation in respect of these laws and effective enforcement.

## ISSUES FOR UKRAINE

What does this mean for stakeholders and negotiators in Ukraine: –

*Implications: It appears likely that the EU will request that Ukraine further approximates its competition legislation with that of the EU, including introduction of laws relating to state aid. It is also likely that the EU will insist on better enforcement along EU standards:*

*What timeframe should be allowed for Ukraine to comply?*

*Are any sectors to be excluded? On what basis?*

*What level of capacity development will be required to comply?*

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<sup>10</sup> Similar provisions are present in the Mexico FTA

*Next Steps: Stakeholders need to engage with government negotiators in a positive way to agree the best timeframe and scope for adopting EU competition legislation and enforcement:*

*Representatives of producers who believe rapid introduction of competition in their sectors would be beneficial should articulate their case whereas those producers/sectors which feel the status quo should continue (e.g. natural monopolies which are necessary in a Ukrainian context but would not be allowed under EU equivalent legislation) should also articulate their case for exemption or longer transition;*

*Ukrainian competition authorities/line Ministries (if no regulator exists in a sector) should determine whether or not any sectors should be excluded (if so they need to fully justify) and the capacity requirements and costs to implement EU approximation;*

*Stakeholders can then prepare a joint position with the government on the timeframe for fully adopting EU competition legislation and enforcement and any exceptions to be negotiated.*