

APPROVED

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Antimonopoly Committee of Ukraine
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**Methodological recommendations for assessing the impact of regulatory
and legal acts and draft acts on competition**

Abbreviations:

AMCU	Antimonopoly Committee of Ukraine
OECD	Organization for Economic Cooperation and Development

CHAPTER 1. GENERAL PROVISIONS

1. These Guidelines are intended for use:

bodies of the Antimonopoly Committee during market research, preparation of recommendations in accordance with paragraph 5 of part three of Article 7 of the Law "On the Antimonopoly Committee of Ukraine", consideration of applications and cases on anti-competitive actions of authorities, local self-government bodies, administrative and economic management and control bodies;

by authorities, local self-government bodies, administrative and economic management and control bodies, bodies of the Antimonopoly Committee of Ukraine during the approval of draft legal acts and decisions that may affect competition, in accordance with the requirements of the legislation on the protection of economic competition;

by executive authorities and local self-government bodies during the development of normative legal acts that would ensure the achievement of the goals of state policy, without creating, at the same time, significant restrictions on economic competition or, at least, reducing the negative impact on competition.

2. These methodical recommendations are informative and recommendatory in nature.

CHAPTER 2. ASSESSMENT OF THE IMPACT OF REGULATORY AND LEGAL ACTS ON COMPETITION

Principles of assessment

2.1.1 Bodies of state power, bodies of local self-government, bodies of administrative and economic management and control (hereinafter - authorized bodies and organizations) within their competence initiate, develop and adopt normative legal acts, administrative decisions with the aim of ensuring economic, social, regional, environmental and other areas of state policy. The vast majority of normative legal acts and administrative decisions do not create problems for the functioning of competition on product markets, however, in some cases they may excessively limit entrepreneurial initiative, set excessive requirements for economic activity in certain industries, give advantages to certain undertakings or industries, and, thereby, negatively affect the efficiency and competitiveness of the economy in the long term.

2.1.2 State regulation can negatively affect the conditions of competition directly or indirectly, in particular, as a result:

the creation of obstacles to the establishment or expansion of business, obstacles to the entry of new competitors into the market, or as a result of supporting the vital activities of inefficient enterprises;

limiting the freedom of entrepreneurs to form their own market strategy, determine prices, volumes and methods of production, channels of product sales, volumes of advertising, etc.;

establishment of economic conditions that reduce the interest of entrepreneurs in active competition for market share, for consumers thanks to their own innovations, achievements and, thus, can contribute to anti-competitive coordination of the behavior of undertakings;

increasing the costs of consumers who wish to change suppliers of goods or services, or limiting the information necessary for consumers about the goods, services or activities of other suppliers.

2.1.3 In view of the principles of freedom of entrepreneurial activity enshrined in the Constitution of Ukraine, the prevention of unlawful restrictions on competition and abuses of a monopoly position on the market, unfair competition, the requirements of the law regarding the restraint of state bodies and organizations from any unlawful actions that may harm free competition between undertakings¹, state intervention in the market mechanism can be considered justified only in cases when the market mechanism does not work properly, has certain "market failures" ² that do not allow to ensure public interests based on

¹ Part 2 of Article 4 of the Law of Ukraine "On the Protection of Economic Competition"

the usual interaction of demand and supply, free competition between market participants.

Assessment of the impact of drafts regulatory legal act (normative legal acts) on competition

2.1.4 It is expedient to assess the impact of draft regulatory legal act (normative legal acts) on competition in accordance with the Checklist of issues listed in Table 1 (hereinafter - the Checklist).

2.1.5 The initial assessment of the impact of draft regulatory legal act (normative legal acts) on competition is carried out by the executive power body, the local self-government body that is the developer of the document.

In the absence of any positive response to the Checklist questions, the draft regulatory legal act will not have a significant negative impact on competition.

2.1.6 If a positive answer is received to one or more questions of the Checklist, this indicates the possibility (presence) of preventing, eliminating, restricting, distorting competition as a result of the act, this should be taken into account during approval in accordance with part four of Article 20 The Law of Ukraine "On the Antimonopoly Committee of Ukraine" and the Regulation on the procedure for agreeing with the bodies of the Antimonopoly Committee of Ukraine the decisions of state authorities, administrative and economic management and control bodies, local self-government bodies regarding demonopolization of the economy, development of competition and antimonopoly regulation, approved by order of the AMCU dated 01.04. 1994 No. 4-r (with amendments), as well as during the consideration of statements (cases) about violations provided for in Article 15 of the Law of Ukraine "On the Protection of Economic Competition", market research.

CHAPTER 3. CATEGORIES OF IMPACT OF THE REGULATORY LEGAL ACT (DRAFT ACT) ON COMPETITION

3.1. IMPACT CATEGORY "A": LIMITATION OF THE NUMBER OR CIRCLE OF MARKET PARTICIPANTS

The emergence of new competitors is usually determined by the development of new products, more efficient production methods, the expansion of the assortment and geographical boundaries of sales and distribution channels of products by individual undertakings. The expansion of the range of goods and services ensures that prices are set at a competitive level.

On the other hand, the prospect of the appearance of new competitors, the expansion of activities by existing competitors, is perceived by other undertakings

as a certain threat to their market position, and therefore is a source of competitive pressure. Regulation of the number or circle of market participants reduces the level of competitive pressure on market participants and, as a result, negatively affects competitive pricing and, as a rule, the quality of goods and services. In addition, reducing or limiting the number or scope of market participants may contribute to coordination of market behavior among undertakings remaining in the market, induce them to market allocation, agree on prices, reduce production volumes and inhibit innovation.

Impact category A1: Granting exclusive rights

- 3.1.1 Granting exclusive rights to sell certain goods or provide services means a monopoly, eliminating or preventing competition. The granting of exclusive rights can sometimes be justified under the conditions of a "natural monopoly"², or if it is necessary to attract private investment in public infrastructure, or to carry out scientific developments necessary for society, which cannot be implemented without attracting private investment.
- 3.1.2 Substantial market power may arise from granting the right to purchase or distribute certain goods to only one enterprise or to a few enterprises in circumstances where there are many small, dispersed suppliers of such products. This situation is relevant for the markets of agricultural products.
- 3.1.3 State authorities, local self-government bodies that propose to grant an exclusive right to an undertaking must clearly justify the term of such exclusive right, the cost of its use, and possible alternative ways of achieving the goal. Since the undertaking holding the exclusive right is not subject to competitive pressure in the market, it is advisable to ensure competition at least at the stage of entering the market, i.e. tender procedures for obtaining the exclusive right.
- 3.1.4 Granting exclusive rights to one undertaking or a small group of undertakings is often carried out in the procedure of public procurement or the conclusion of concession agreements. State authorities, local self-government bodies, authorized institutions and organizations forming the relevant legal framework and conditions for public procurement or concession must ensure that exclusive rights are granted for a relatively short period of time. This will make it possible to periodically conduct competitive procedures for the selection of suppliers or concessionaires and to stimulate competition between them at least for the relevant market, if competition in the relevant market is absent or significantly limited.

² The legislative definition of a natural monopoly is contained in Clause 1 of Article 1 of the Law of Ukraine "On Natural Monopolies" (No. 1682-III dated April 20, 2000).

Example 1 (Ukraine):

The draft Law of Ukraine "On Amendments to the Law of Ukraine "On Postal Communications" provides that the designated postal operator has the exclusive right to forward simple letters weighing up to 50 grams and simple postal cards.

In addition, the draft law provides that a conclusion on the compliance of an undertaking, which intends to provide services related to the implementation of postal transfers, to the established requirements is provided by the central executive body, which ensures the formation and implementation of state policy in the field of providing postal services, based on the results of consideration of the documents submitted by the undertaking, in particular those that confirm the impeccable business reputation of the ultimate (controlling) owners and persons who manage or will manage these undertakings. At the same time, the draft law does not specify specific criteria for the integrity of the business reputation, which creates legal uncertainty and a potential restriction for access to this market for individual undertakings.

An alternative solution:

Eliminate unjustified preferential conditions for the work of an authorized postal operator. If the regulatory body considers that there is no alternative to the exclusive right, for example, taking into account the state of natural monopoly or the need to reliably ensure public interests, it is advisable to stimulate competition for access to the market. For example, by holding an auction or a corresponding competitive procedure with acquisition of an exclusive right. It is also necessary to control that the criteria for the selection of an exclusive service provider do not allow a company that already acts as an exclusive provider, based on past experience acquired during the execution of a previous contract based on an exclusive right, to gain an additional advantage over other interested bidders and thus gain a foothold as the only qualified supplier.

Limit the period of validity of the exclusive right on the market of postal services (in the conditions of the non-competitive structure of the relevant market);

In addition, consider the possibility of distributing the exclusive right between two or three undertakings at the same time, which will allow to preserve the dynamics of the competitive market to a certain extent and, at the same time, ensure the necessary results from the granting of the exclusive right.

Specify which documents confirm the impeccable business reputation of the ultimate (or controlling) owners of the undertaking and the persons who will or are managing these undertakings.

Source: Antimonopoly Committee of Ukraine

Impact category A2: Introduction of licenses, permits or requirements for approval of undertakings with authorities

- 3.1.5 Licensing, permits or approval of undertakings with authorities are usually introduced with the aim of ensuring the proper quality of services, the necessary level of competence of entrepreneurs, and the protection of public interests. In some industries, it is difficult for consumers to independently assess the quality of services and the qualifications of their providers, and the wrong choice (medical, legal services, architecture, etc.) can lead to serious negative consequences. In such fields, only persons with appropriate qualifications are usually allowed to work.
- 3.1.6 By limiting the number of licenses, the state creates an absolute barrier for new suppliers to enter the market and protects licensed undertakings from competition. For example, in many countries the number of taxis or pharmacies is limited depending on the population. In some markets, obtaining a license is conditioned by requirements for the qualifications of service providers, special conditions of customer service or the maximum number of persons that can be employed in this area. In some industries (for example, telecommunications services), licensing is a payment for market access. In such cases, the cost of the license may depend on the level of profitability that the licensed operator can expect in the relevant market.
- 3.1.7 When proposing a licensing regime, obtaining a permit or the need to agree undertakings with authorities, the developers of regulatory and legal acts should pay attention to the following aspects:

The effectiveness and cost of the system of monitoring compliance with license conditions by entrepreneurs and preventing unlicensed undertakings from entering the market, since the lack of control over licenses can undermine the quality of services, and actually, the very logic of licenses and permits;

Qualification requirements for licensees should not be excessive. In particular, requirements for the minimum amount of capital, availability of facilities, staff or professional experience, registration or presence in the region, etc., may create unjustified barriers to market entry for new entrants. Licensing conditions should primarily be aimed at protecting the interests of consumers, rather than at the interests of licensed undertakings in the market.

- 3.1.8 Developers of regulatory acts proposing the introduction of licenses and permits for certain types of economic activity should hold consultations with AMCU and market participants regarding the necessary balance between the protection of the interests of undertakings and the interests of consumers.

Example 2: (Greece)

The legislation of Greece in the field of petroleum products required obtaining a license for the sale of asphalt. To obtain a license, the following was required from the company:

- 1. The minimum amount of authorized capital - 500 000 euro.*
- 2. Availability of asphalt storage tanks with a capacity of at least 2,000 m3.*

The goal is to provide guarantees of the financial capacity and viability of companies engaged in the sale of petroleum products, given the high cost of such products.

These requirements increased the necessary costs of enterprises to enter the market, especially for small suppliers. Difficulties with obtaining the required size of the plot for the construction of the reservoir also arose due to the uncertainty of the intended use of land plots in a large part of the country. Licensing requirements limited the number of competitors and increased concentration in the relevant market, potentially driving up the price of asphalt. In addition, barriers to market access for new entrants strengthened the market power of existing suppliers and contributed to their anti-competitive behavior.

An alternative solution:

- Cancel the requirement for the minimum size of the authorized capital and the organizational form of the enterprises of the industry. Preservation of the value of products can be ensured through the insurance of the risks of the death of products, and not through the requirement for the minimum size of the authorized capital.*
- To allow companies to maintain tanks of any capacity that they can provide with their own financial resources and according to sales volume.*

Source: OECD (2014), OECD Competition Assessment Reviews: Greece, OECD Publishing.
<http://dx.doi.org/10.1787/9789264206090-en>

Example 3: (Romania)

According to Romanian legislation, a license for the exploitation of coal deposits is granted for a period of up to 20 years, which can be extended for the next 5 years. The maximum number of license extensions is not stipulated by law. Coal mining requires large investments, and is associated with significant risks and production costs. If the deposit is large, it may take a long time to exploit it until the resources are exhausted. However, in the absence of regulations regarding the maximum term of validity of the license, other enterprises will not be able to enter the market for an indefinite period of time.

An alternative solution:

Supplement the law with a provision on the maximum number of license extensions for the exploitation of coal deposits.

Source: OECD (2016), OECD Competition Assessment Reviews: Romania, OECD Publishing, Paris.
<http://dx.doi.org/10.1787/9789264257450-en>

Impact category A3: Restrictions on the ability of individual entrepreneurs to sell goods or services

- 3.1.9 Legal acts may limit the opportunities of entrepreneurs to sell products, in particular, by limiting distribution channels (for example, the sale of liquor and vodka products or certain medical drugs, vitamins) or the type of enterprises that

can carry out certain operations (for example, making payments through mobile

payment systems is allowed only to banking institutions).

- 3.1.10 In the field of public procurement, which covers numerous markets, government customers can set too high requirements for participants, qualification criteria, too short deadlines for preparing proposals, as a result of which some categories of entrepreneurs will not be able to participate in procurement procedures, although they are able to supply products of appropriate quality at competitive prices.
- 3.1.11 Large-scale public procurement contracts can also lead to a narrowing of the range of potential suppliers capable of fulfilling orders on their own. Customers may also limit the right of contractors to engage subcontractors. Sometimes customers can set such strict requirements that only one market participant will actually be able to fulfill the contract, and in a situation where the only buyer is the state, such conditions actually create a monopoly and have an effect similar to the granting of exclusive rights.
- 3.1.12 Government customers seek to reduce administrative costs for the execution of a procurement contract, and concluding a contract with one or two large enterprises can improve control over the fulfillment of contractual obligations, however, the benefits of such a contract must be weighed against the overall losses from reducing the level of competition and narrowing the choice for consumers.
- 3.1.13 Pursuing the goals of the development of small and medium-sized businesses, regional development and ensuring employment, state customers can set requirements for the mandatory involvement of a certain quota of local labor force, local enterprises on the basis of subcontracting, etc. This approach can also sometimes reduce the level of competition. An alternative to such requirements may be state support, subsidies or tax incentives for small and medium-sized enterprises in the volumes and subject to the conditions allowed by the legislation on state aid.
- 3.1.14 Sometimes state authorities or local self-government bodies or authorized industry associations may set excessive requirements for business, and only a small number of certified firms will be able to provide a set of services in accordance with the established norms. Establishing a mandatory minimum set of services may limit the ability of individual firms to implement services that they could provide, but not to the extent required by the regulator (this may apply to pharmacies, hairdressers, investment brokers, realtors, etc).

Example 4 (Ukraine):

The draft resolution of the Cabinet of Ministers of Ukraine proposed to designate JSC "Oschadbank" as the only bank authorized to pay pensions and cash assistance to internally displaced persons. In addition, criteria were established for the selection of authorized banks for the payment of pensions, cash assistance and wages to employees of budget institutions, namely: i) the bank's assets must be at least 1% of the assets of the banking system; or ii) the controlling stake must belong to international financial and banking institutions that have an international rating of investment class from internationally recognized rating agencies; and/or iii) in which the state owns a share of the authorized capital in the amount of more than 75%.

The establishment of such criteria may lead to the limitation of competition in the market of banking services in the segment of services for employees of budgetary institutions and citizens who receive state social assistance, as they create advantages for banks in which the state owns a share of more than 75% compared to privately owned banking institutions.

An alternative solution:

- Determine the banks that will receive the right to provide services for the payment of pensions and monetary assistance to internally displaced persons on the basis of competitive selection.
- Review the selection criteria of authorized banking institutions provide relevant services.

Source: Antimonopoly Committee of Ukraine

Example 5: (Romania)

The Romanian legislation on concessions gave the right to the state customer to set a requirement for subcontracting at the level of up to 30% of the value of the relevant concession contract. The purpose of such a rule is to expand opportunities for small and medium-sized enterprises to participate in infrastructure construction concessions. However, the legislation did not explain: a) whether such a requirement makes it possible to exclude participants who offered to perform the contract on their own; b) whether the definition of subcontractors had to be agreed with the customer, or whether it depended entirely on the main contractor

Unclear regulation could limit the participation of operators who were able to perform such work independently, and in addition, customers could impose subcontractors on the executor of the contract (however, the executors did not confirm during market research such actions on the part of government customers)

An alternative solution:

Edit the specified norm and bring it in line with the EU Directive, which does not provide for the possibility of customers to demand subcontracting.

Source: OECD (2016), *OECD Competition Assessment Reviews: Romania*, OECD Publishing, Paris.
<http://dx.doi.org/10.1787/9789264257450-en>

Impact category A4: A significant increase in the cost of entering or exiting the market

3.1.15 A regulatory act can affect the number of market participants indirectly -

through an increase in the costs of undertakings. If the costs of undertakings

increase to a small extent and all, without exception, undertakings working in the industry bear such costs, the conditions of competition will not change significantly. However, if regulations require entrepreneurs to make significant capital investments and costs to comply with the regulations, entrepreneurs may be tempted to leave such a market because the profitability they were counting on is significantly reduced.

- 3.1.16 Barriers to entering the market can be requirements regarding the minimum size of premises for the provision of services or a mandatory set of services. When concluding state contracts, requirements for authorized capital or a minimum number of qualified employees can become barriers to entering the market. A too short license term with high renewal costs can also create a barrier to market entry.
- 3.1.17 A significant increase in the cost of economic activity may apply to new market participants compared to existing enterprises. In particular, in those industries where access to resources is difficult (for example, the number of time "windows" ("slots") for landing airplanes at airports or free radio frequencies for telecommunication services is limited), undertakings already operating in the market can convince state authorities, local self-government bodies to establish a lower tariff for the use of the resource for them or to ensure preferential access to resources, compared to new market participants.
- 3.1.18 On the other hand, advantages may be given to new entrants compared to incumbents, or to individual incumbents compared to others. Regulations may establish as a standard technology that only one or two start-ups possess, and other market participants are forced to bear significant costs to retool production processes, to innovate, or even to acquire a license to use the patented technology in order to meet regulatory requirements..
- 3.1.19 Regulatory acts can also significantly increase the cost of exiting the market, in particular, by setting excessively strict requirements for cleaning up the area after the closure of production. Too high an exit cost may deter potential investors from entering the relevant market. Excessive exit costs can have a double negative effect: as a barrier to the entry of new competitors into the market, and also as a factor that increases incentives for active resistance to the appearance of new competitors on the part of incumbents and, thus, reduces the attractiveness of the market for new undertakings.

- 3.1.20 The analysis of barriers to entering or exiting the market, due to a significant increase in the costs of entrepreneurs, should be aimed at finding alternative means that will allow establishing only the minimum necessary costs to ensure adequate standards of product quality and consumer protection. Entrepreneurs' costs of complying with regulatory requirements must be compared with the projected profitability of the relevant industry, as well as with the projected increase in consumer prices, since an increase in the overall costs of suppliers is likely to lead to the transfer of these costs to the price of goods or services.

Example 6: (Mexico)

The Mexican regulator of telecommunications services, with the aim of reforming the industry, proposed to establish new requirements for technological equipment, network coverage and necessary investments for the concessionaire to deploy and operate audio-television cable networks. New technological conditions established a requirement for the minimum power of the network at the frequency level of 750 MHz. Such a requirement did not exist at the time when the existing operators started working on the market, and 90% of them at the time of the regulatory reform provided services in networks with a capacity of 450 to 500 MHz. The reform also required market participants to use "modern" technologies, which could be recognized as such at the discretion of the regulator. In terms of coverage area, operators were required to guarantee access to the network to 50% of connected homes in the district within the first three years, and to 80% of homes by the end of the five-year period. In addition, from the moment of concluding the concession agreement, 30% of the network must be deployed within 180 days.

The proposed regulatory reform in the cable television market required significant capital investments for most existing companies and created significant barriers for new operators to enter the market.

An alternative solution:

Set requirements for operators at the minimum necessary level to ensure adequate technical standards and real needs of consumers, and allow gradual technological renewal of cable networks.

Source: OECD (2005, DAF/COMP (2005) 42 "OECD Policy Round tables: Barriers to Entry", p. 175
<https://www.oecd.org/competition/abuse/36344429.pdf>

Impact category A5: Creating geographic barriers to the movement of goods, works, services or investments

- 3.1.21 Restrictions on the free movement of goods or services between regions create a geographic barrier for new entrepreneurs to enter the market. As a result, as a rule, the concentration and market power of undertakings present on the market increases, which results in higher prices and less choice for consumers. Control over the movement of goods, services or labor is a traditional tool of regional policy, which seeks to stimulate local industry and ensure employment of the population in economically backward regions.
- 3.1.22 Geographical restrictions should be evaluated primarily with regard to the

following questions:

- Is there a direct link between the restriction of competition, trade or capital movement and the achievement of specific political goals?
- are the proposed restrictions really the minimum necessary to achieve the regulatory objective?
- is the restriction a temporary measure, the deadline of which is defined in the normative legal act?

Example 7: (Ukraine)

1. *The order of the head of the regional administration "On filling the consumer market of the region with locally produced food products and increasing revenues to the budget" approved an assortment of food products (in particular, liquor and vodka products), in which retail enterprises were to offer at least 80% of products produced by the enterprises of this region, compared to the amount of similar imported products or delivered from other regions of Ukraine.*

2. *By order of one of the city mayors in Ukraine, the territory of the city was divided for taxi stands between four undertakings operating in the market of passenger road transport.*

An alternative solution:

The mentioned administrative decisions were canceled because they violate the requirements of Article 15 of the Law of Ukraine "On Protection of Economic Competition".

At the same time, when preparing regulatory decisions, the relevant administrative bodies should consider opportunities to apply stimulating measures, such as tax incentives or holding information companies to encourage the appropriate behavior of entrepreneurs.

If the restriction of the free movement of goods, services or capital is really considered justified in view of the interests of the community, the regulatory act should establish a short period of validity of the corresponding restriction..

Source: Antimonopoly Committee of Ukraine

3.2. IMPACT CATEGORY "B": LIMITATIONS ON SUPPLIERS' ABILITY TO COMPETE

Suppliers of goods or services can compete in the market using such means as price, quality, service volume or innovation.

State regulation of means of competition can limit the ability of market participants to compete with each other.

This category of negative impact on competition includes regulatory provisions that relate, in particular, to price control, establishment of higher quality standards, mandatory characteristics for goods or services, production of goods with new characteristics, restrictions on the choice of marketing and advertising measures, organizational - legal forms of doing business, alternative channels of distribution or production process, etc.

Impact Category B1: Restrictions on the ability of entrepreneurs to independently determine prices for goods and services

- 3.2.1. Price regulation may be justified in relation to markets with a monopoly structure, in particular, natural monopolies and the sphere of housing and communal services. However, in relation to markets in which a significant number of suppliers operate, price regulation can lead to undesirable consequences for both consumers and economic efficiency as a whole.
- 3.2.2. Regulation of prices for goods or services is carried out, as a rule, through the establishment of minimum or maximum prices (price thresholds). Price regulation can be direct or indirect. Direct price regulation refers to the determination of the price or tariff in the regulatory or administrative act itself. Indirect price regulation takes place when an authorized authority, local self- government body or other competent organization establishes a mandatory procedure for forming the price of goods or services.
- 3.2.3. Minimum prices are usually set to ensure a certain level of quality and safety of goods or services. However, minimum price thresholds actually protect the interests of existing enterprises, as they limit the ability of more efficient undertakings to offer goods or services at prices lower than the regulated minimum price, and therefore consumers cannot take advantage of the competitive market. In addition, the introduction of minimum prices does not guarantee that all suppliers comply with the standards of quality and safety of products, since the minimum price does not prevent unscrupulous suppliers from offering goods or services of lower quality, but only encourages inefficient manufacturers to reduce costs, since this allows to increase the profit from the sale of goods or services for a guaranteed minimum price.
- 3.2.4. In some cases, minimum prices may be set in response to extremely aggressive price competition to protect small producers, small businesses, or local industry. Such regulatory measures require careful evaluation, as their consequence, as a rule, is an increase in consumer prices and insufficient satisfaction of demand.
- 3.2.5. Maximum prices are also usually introduced as an argument to protect consumers from the market power of a dominant supplier or from rapid increases in consumer prices. At the same time, the maximum price thresholds can be used by undertakings as a reference point for coordinating behavior and "pulling up" the general level of prices to the established maximum threshold. At the same time, the intensity of price competition between

suppliers

decreases, and the motivation to innovate and improve product quality decreases. Sometimes, to circumvent the maximum allowable price regulation, suppliers may impose additional hidden charges on customers.

- 3.2.6. Setting a maximum price threshold causes some suppliers to leave the market because they have a reduced incentive to compete through innovation, better quality goods or services, and not just on the basis of price.
- 3.2.7. Setting a maximum price can be a side effect of the existence of a barrier to market entry. In such cases, an alternative to regulating the maximum price is to lower or eliminate the corresponding barrier. Sometimes price increases can be the result of collusion between market participants. In such cases, the most effective way to solve the problem is to conduct an investigation and apply antimonopoly legislation to the participants of the anti-competitive conspiracy.
- 3.2.8. In some cases, an effective alternative to price regulation is subsidizing consumers of relevant goods or services, additional stimulation from the demand side, rather than additional control from the supply side.

Example 8: (Greece)

In order to protect consumers from retailers who received extremely high margins from the sale of basic food products, maximum markup levels were established for almost all vegetables and fruits.

An alternative solution:

In 2011, maximum markups on food products were abolished, after which the average level of retail and wholesale prices actually decreased. This allows us to conclude that the maximum markup, as a rule, was used by sellers as a guideline for price negotiation. Even if the relevant norm could protect individual consumers from high markups in the retail trade, on average it contributed to the growth of food prices.

(See Christos Genakos, Pantelis Kautraumpis, and Mario Pagliero (2014) "The Impact of Trade Markup Regulation on the Price Level», DAF/COMP/WP24,

<http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf>

Example 9: (Canada)

Guided by the Code of Professional Services of the Province of Quebec (Professional Code), the General Council of the Bar Association, whose competence includes issues of the organization of the activities of lawyers, has the right by its decision [...] to approve and recommend tariffs for the payment of professional services of lawyers who are members of the association.

The existence of such a recommended tariff could facilitate the coordination of prices for legal services, which is contrary to the rules of competition. As a result of the proposed method of calculating prices for legal services, lawyers could set prices higher than would be possible in the absence of such information. As a result, the quality of legal services could decrease, since professionals whose services are fixed in price would not have the motivation to improve the quality of services, and therefore the quality of services would likely deteriorate.

An alternative solution:

The Competition Bureau of Canada has suggested that the Council consider repealing a provision in the Professional Code that authorized its members to propose a tariff for professional services that members may use

Source: Competition Bureau of Canada "Freelance Market Review: Balancing Competition and Regulation" (2007) "Self-regulated professions Balancing competition and regulation"
<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions-study-final-E.pdf>

Impact Category B2: Restrictions on the ability to advertise goods and services

3.2.9. Restrictions on advertising and marketing activities are usually introduced to protect the rights of consumers who find it difficult to independently assess the quality of individual goods or services. In particular, the restrictions are directed against false and misleading advertising. Restrictions on advertising can also be used as a means of reducing the consumption of goods with potentially negative consequences for human health and public welfare (for example, restrictions on advertising of cigarettes or alcohol). At the same time, advertising is an important means for consumers to obtain information about goods and services on the market. By advertising their goods and services, suppliers give consumers the opportunity to distinguish them from the products of other manufacturers, to make informed decisions about acquiring the goods and services they need.

3.2.10.

Advertising restrictions tend to have anti-competitive effects, and therefore proposals to limit advertising and marketing opportunities for individual manufacturers must be carefully analyzed with attention to the potential effects on competition. Advertising restrictions are especially harmful for new market participants, as they are deprived of the opportunity to inform potential

consumers about their presence on the market and about the nature and quality of the products, they are able to offer.

- 3.2.11. Deceptive advertising is prohibited by the legislation of Ukraine³, which guarantees undertakings the right to compete on equal terms and provides additional protection for consumers against the wrong choice of goods or services. The legislation also recognizes as unlawful comparative advertising aimed at gaining advantages in the market by providing consumers with negative or unreliable information about the products of other manufacturers⁴.

Example 10: (OECD)

Advertising and marketing of professional services are often subject to regulation. In the past, regulatory acts, in particular, decisions of self-regulatory organizations, introduced requirements for some aspects of service advertising or even established a complete ban on service advertising. An example can be Ireland, where there was a complete ban on the advertising of legal services.

Restrictions may apply to specific forms of advertising (such as television advertising), to the content of advertising (such as advertising for special experiences), or to the means by which consumers can seek services (such as submitting a request for legal assistance through a website, which distributes these requests among the attorneys who are members of the association).

An alternative solution:

A total ban on advertising is subject to increasing opposition from consumer protection organizations and antitrust authorities. The European Commission, for example, has made it clear that advertising should be permitted as a legitimate means of competition if it uses truthful and representative information.

At the same time, a study conducted by the Maastricht Center for Scientific Research in the Field of Accounting and Auditing shows that there is no evidence of a direct positive effect of auditor advertising restrictions on audit quality. The researchers concluded that existing data convincingly prove the negative effects of advertising restrictions on competition within the EU. The study recommends removing national regulatory restrictions on the active offer of professional services and advertising...

OECD (2009), Competitive Restrictions in Legal Professions. OECD (2011), Competition Assessment Toolkit, Version 2.0

³ Art. 15-1 of the Law of Ukraine "On Protection from Unfair Competition" (No. 236/96 - Government of Ukraine dated 07.06.1996 with amendments dated 18.12.2008)

⁴ Art. 7 of the Law of Ukraine (No. 236/96 - VR dated 06.07.1996)

Example 11: (OECD)

Advertising taxes can lead to increased costs of producing goods and job losses, and affect competition by increasing the entry costs of new products that require more advertising than existing products. There is evidence of a wide range of market effects of advertising taxes. Until 2000, each federal state in Austria had different advertising tax rates. As a result of the introduction of a single nationwide advertising tax rate of 5% in 2000, the price of advertising increased in some regions and decreased in others. A detailed study by Rauch (2013) offers an analysis of the dependence of the volume of companies' advertising expenditures and the level of consumer prices on changes in the marginal cost of advertising production based on the experience of the federal states of Austria. Three main findings emerge from this study. First, a 1% increase in the cost of advertising led to a 1.6% reduction in advertising spending, provided that companies do not leave the advertising market. Secondly, the increase in the cost of advertising increased the number of cases of exit of companies from the advertising market by 17.5%. Third, while prices for some products rose and some fell on average, Rauch estimates that if the 5% advertising tax were eliminated, the overall price level across the economy would fall by 0.25%. [See Rauch, F. (2013), "Advertising Expenditure and Consumer Prices", International Journal of Industrial Production Organization, Vol. 31 (4), pp. 331- 341.

OECD (Competition Assessment Toolkit, Vol.3, Version 3.0, 2015

Impact Category B3: Establishing quality standards that give undue advantage to individual suppliers or standards that are higher than those that reasonably informed consumers would choose

- 3.2.12. Providing consumers with high-quality and safe products and services is a fully justified goal of regulatory policy. Standardization makes it possible to ensure the compatibility of goods from different manufacturers and, thus, contributes to the expansion of the range of goods and services. However, high quality standards, if they are not directly related to consumer safety, can limit the ability of enterprises to compete in the market due to the differentiation of goods and services.
- 3.2.13. Unreasonably high requirements for product quality may even negatively affect the welfare of certain groups of consumers, who may actually be deprived of the opportunity to acquisition goods of lower quality, although they would prefer these products, fully aware of the risks associated with their consumption or use. In particular, the consequences of inflated quality standards may be particularly felt for low-income consumers, who are more willing to compromise quality for price.
- 3.2.14. The introduction of a minimum quality standard for goods or services, if the majority of market participants are unable to support it, can significantly limit competition and give advantages to individual market participants. For example, establishing a requirement to use a certain technology can limit competition because it is too expensive or even

unavailable to those market

participants who do not have sufficient own investment resources and access to the necessary financing. In addition, manufacturing technologies are often protected by patents. The requirement to use a patented technology strengthens the market power of the patent owner, who can refuse to grant a license to potential competitors. Regulatory requirements for the technological process can also deter manufacturers and service providers from searching for innovative technical solutions and more efficient production methods.

- 3.2.15. Unreasonably high quality standards, as a rule, require additional capital investments, which, in turn, are transferred to the price of products. In the long term, this leads only to an increase in consumer prices and a narrowing of the consumer assortment, as some undertakings will be forced to leave the market.
- 3.2.16. In view of the consequences for competition, a more appropriate means of ensuring adequate quality of goods and services is to establish functional efficiency criteria, rather than specific parameters of the product or service. Manufacturers need freedom in determining the characteristics of their own product, which is able to satisfy the needs of the consumer in view of its functionality. For example, a more effective way to reduce the level of air pollution from the use of internal combustion engines is to set limits on the level of carbon dioxin emissions than to set limits on the power of automobile engines. With this approach, engine manufacturers can offer innovative technologies that will ensure the limitation of harmful emissions into the air.
- 3.2.17. An alternative to regulation through the establishment of product quality and safety standards, requirements for production technology is the requirement to inform consumers in detail about product characteristics on labels, in product annotations, in the premises of service providers, etc..
- 3.2.18. After all, in market conditions, quality is guaranteed by the reputation of the seller, who is interested in the fact that customers, familiar with the quality of his products or services, will turn to him in the future.

Example 11:

The regulator can establish a requirement for airlines to provide passengers with meals on all flights (including medium and short routes). However, many passengers, especially on short routes, prefer the services of low-cost airlines, even though they do not offer food and drinks during the flight. Requiring passenger meals on all flights goes against the interests of a significant number of consumers, restricts the freedom of market participants to offer different packages and diversification of services to meet different market demand.

An alternative solution:

Offer airlines to inform passengers at the time of purchasing air tickets about the basic and additional conditions of transportation, in particular, regarding the transportation of luggage, food, services for passengers with special needs, etc..

Example 12 (Ukraine):

The draft Rules for the production of cognacs of Ukraine, developed by the Ministry of Agrarian Policy and Food, established that in the production of ordinary cognacs of Ukraine, it is permissible to use cognac spirits of non-domestic origin, aged for at least three years, provided that the share of cognac spirits of domestic origin is used at the same time in terms of 1 liter of one hundred percent alcohol of the produced product must be no less than: from June 1, 2017 -15%; in 2018 - 20%; in 2019 - 25%; in 2020 - 30%; in 2021 -35%; in 2022 - 45%; in 2023 -55%; in 2024 - 65%; in 2025 -75%; from 2026 -85%.

The consequences of the proposed regulation may be the elimination/restriction of other producers from the market of production of ordinary cognacs in Ukraine, except for those with their own vineyards.

An alternative solution:

Not to introduce strict regulation of the content of cognac alcohol produced from domestic raw materials and the proportional content of absolute alcohol produced from domestic raw materials for each blend of cognac alcohol.

Source: Antimonopoly Committee of Ukraine

Impact Category B4: A significant increase in the costs of some enterprises compared to others

Example 13: (Romania)

Romanian legislation requires persons involved in the production, processing, storage, transportation and sale of food products to have a certain qualification ("sufficient" knowledge in the field of health care, food hygiene, occupational hygiene, etc.), which must be confirmed by a certificate of completion of a special training course and passing the exam. The fee for such a training course and exam is about 20 euros, and the duration is up to 17 hours). Eligible persons must retrain every three years

The purpose of this provision is to ensure public safety, due to the obligation of special training of persons who come into contact with food products and may pose a risk of product contamination.

Special training and certification is required for all, including employees, which increases costs for employers and restricts the labor market. The regulatory act does not distinguish between personnel - the same requirements apply to personnel who are in direct contact with unpackaged or packaged products, or are involved in the processing of food products or are engaged in the transportation of products.

An alternative solution:

The Competition Council has proposed that these provisions be repealed in relation to staff who do not come into direct contact with non-packaged food. The obligation to comply with the requirements of food hygiene, occupational hygiene and completion of a training course should be left only to those persons who are in direct contact with unpackaged food products. To this end, clearly define the types of activities that are not related to contact with unpackaged food products (for example, transportation, storage and sales staff).

Source: OECD (2016), *OECD Competition Assessment Reviews: Romania*, OECD Publishing, Paris.
<http://dx.doi.org/10.1787/9789264257450-en>

- 3.2.19 Sometimes state regulation can give advantages to individual undertakings, in particular, lead to asymmetric costs of some enterprises compared to others. An example may be a requirement to use a certain technology. Such a requirement actually protects the interests of enterprises that already use the relevant technology, while other market participants are forced to invest additional funds for its introduction. Increased risks, particularly regulatory risk, are also a challenge for competition. Increased regulatory risk can cause not only asymmetry of costs, but can even become an obstacle to the start of economic activity, if it is characterized by regulatory risk in the conditions of a market economy.
- 3.2.20. Another example of regulation that leads to asymmetric costs can be understated requirements or exclusions from the scope of the rules introduced by the normative legal act 6 for enterprises that already operate in the relevant market. Such exclusions are established, in particular, in order to provide additional time for depreciation of irreversible investments of operating enterprises. At the same time, the requirements are fully applied to

new market

participants, increasing their costs for compliance with new standards and regulations. This approach reduces the attractiveness of the industry for investors, restrains innovation, the entry of new participants into the market and reduces the intensity of competitive pressure on the relevant market.

- 3.2.21. The negative impact of state regulation measures that provide incumbents with price advantages at the expense of asymmetric costs (or risks) compared to other market participants can be minimized by limiting the number of exemptions for incumbents over time. However, artificially bringing the production costs of enterprises in the industry to a single level cannot be considered a positive practice of state regulation either.
- 3.2.22. In principle, regulation that provides an advantage to certain market participants threatens to restrict competition. Market advantage may arise, in particular, from the provision of subsidies, preferential loans, tax exemptions, exclusive or special rights, land plots or other resources necessary for economic activity (e.g., water, radio frequencies, etc.) at below-market prices. The authorities traditionally seek to provide benefits, directly or indirectly, to state-owned or municipally owned enterprises. The Law of Ukraine “On State Assistance to Undertakings” (No. 1555 of July 1, 2014) establishes the principle of incompatibility of state aid that creates advantages for the production of certain types of goods or for certain types of economic activity. The Law also defines the grounds for exemptions for certain categories of undertakings and types of undertakings (e.g., medium and small enterprises, primary agricultural production, activities related to national security and defense) from the above principle of incompatibility of state aid, as well as a special procedure for preliminary approval of state aid measures by the Antimonopoly Committee of Ukraine, which allows to direct state support to the purposes of economic, technical and regional development without significantly harming competition.

⁶ Так звані “дідусеві права” (англ. “grandfather clauses”)

Example 14: (European Commission)

If one company faces financial difficulties and receives a substantial reorganization subsidy from the government, while competing profitable companies do not receive subsidies, the profitable companies may argue that the subsidy is anti-competitive and actually puts them at a cost disadvantage compared to the company that received the subsidy.

Under the EU state aid legislation, the European Commission applies very strict conditions for authorizing aid for enterprise rehabilitation and restructuring, as this type of aid has a high potential for distorting competition and risks slowing down structural adjustment and, ultimately, economic development, as the exit of inefficient firms from the market is one of the key factors of growth. In particular, the European Commission authorizes aid for the restructuring of firms only when: the restructuring plan can be considered to return the firm to a state of long-term viability without further state support; the firm will cover a sufficient share of its own restructuring costs and the plan provides for adequate measures to do so, such as asset sales or capacity curtailment, which will minimize the competition restrictions caused by the aid.

The decision taken in July 2013 to restructure the PSA Group is a good illustration of this approach. In order to return to a state of long-term viability, PSA refocused its operations by reducing production capacity in some segments and increasing the specialization of production sites. An asset sale program ensured that the company was able to cover a sufficient share of the restructuring costs. Finally, mechanisms were established to prevent the use of state aid to the detriment of competition.

Source: "OECD, Competition Impact Assessment Toolkit. T-3, p. 41 (2015).

Example 14: (European Commission)

The current system of “slot allocation ” ¹, that controls the right to land aircraft at most European airports requires carriers to have a slot to land an aircraft at a certain time of day in order to operate a flight at that time. Slots are allocated based on past rights: i.e., carriers that used certain slots last year are entitled to continue using the same slots in the current year.

Such an allocation system allows inefficient, high-cost incumbent airlines to have access to airport infrastructure, even though a new, more efficient, low-cost carrier could use those slots more productively.

In 2000, the European Commission noted in its decision that British Airways' dominant position in the UK air transport market is enhanced by its significant share of slots at the relevant airports, as well as by the succession system that exists for slot allocation. The control of slots and access to passenger gates has also been a major concern of the Federal Aviation Administration and antitrust authorities in the United States. In 2015, the Antitrust Division of the U.S. Department of Justice filed a lawsuit to block United Airlines' acquisition of 24 takeoff and landing slots at Liberty Newark International Airport from Delta Air Lines. In the end, United Airlines abandoned the deal, which would have increased the company's share in the total number of slots at Newark from 73% to 75%.

Alternative solutions:

1. The succession system can be applied subject to strict adherence to the “use it or lose it” rule, which will reduce the accumulation of slots by one carrier and ensure maximum use of the slots received (i.e., the carrier must use a certain proportion of the total time of all slots to retain the right to use these slots in the next period).
2. A secondary market for slots could be introduced. This will allow to reallocate slots and reduce the inefficiency of the primary allocation (although it may lead to speculative gains for those carriers that already have slots).
3. One can create a reserve fund (pool) to accumulate newly created slots, as well as those that are returned voluntarily or as a result of the use-it-or-lose-it rule, or those that remain unused in the succession system for various reasons.
4. Airports can introduce a payment system to encourage air carriers to return slots to the pool without delay.
5. The initial allocation processes for any newly created slots should be market-based and create competition among airlines for slots. For example, rules may be introduced that require a certain proportionate share of slots transferred to the reserve fund to be allocated only to new entrants to the relevant air transportation market.
6. Increase the transparency of the slot allocation process and the independence of slot coordinators.

Sources: Based on the OECD Competition Impact Assessment Toolkit T.2 (2011) and 2000/74/EC: Decision of the European Commission of July 14, 1999 on infringement of Article 82 of the EU Treaty (IV/D-2/34.780 - Virgin/British Airways) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000D0074&from=EN>

Case U.S. v. United Continental Holdings № 2:15-cv-07992
<https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-block-uniteds-monopolization-takeoff-and-landing>

3.3 CATEGORY OF IMPACT “B”

DECREASE OF MOTIVATION OF UNDERTAKINGS TO ACTIVE COMPETITION

The essence of competition is the active competition between undertakings for consumers, for market share by offering a lower price, better service or a better product or innovative solution. However, sometimes entrepreneurs may decide, either explicitly or implicitly, not to compete with each other but rather to coordinate market behavior to increase their overall profits by limiting supply and choice for consumers. Undertakings may agree on prices (or a range of prices), agree to allocate customers among themselves or not to compete for certain products, or create certain market conditions that make it difficult for customers to switch from one supplier to another. Such concerted actions constitute a serious violation of the legislation on protection of economic competition.

State regulation measures may reduce the motivation of undertakings to actively compete in the market if they provide for:

- exclusion of certain categories of enterprises from the scope of general competition law;

- encouragement or obligation of market participants to publish or otherwise exchange information on prices, production costs, production or sales volumes (in particular, if it is an exchange of up-to-date information without delay);

- increase the necessary costs for customers to switch suppliers and thus limit the ability and willingness of customers to switch from one supplier to another.

Type of impact B1: Introduction of a self-regulatory or co-regulatory regime

3.3.1 “Self-regulation” is a regime in which industry or professional associations determine, without any regulatory support from the state, rules of conduct or standards, are fully responsible for their compliance by members, and monitor the achievement of the set goals. The role of the state in such a regulatory regime is minimal. The term “co-regulation” is used to describe a situation where the state delegates certain regulatory powers to industry or professional associations and supports the rules and standards developed by them with legal requirements. Self-regulation and co-regulation regimes have certain advantages, such as low administrative costs, wide access to and involvement of specialized knowledge in the relevant industry or profession, and a high level of trust of organizations and professionals in the decisions of the authorized association. The most effective self-regulation and co-regulation regimes are those that introduce industry standards, technical or qualification requirements, promote the

development of industry and

professional structures, and allow for rapid adaptation of industry standards and technical requirements to changes in modern technologies.

3.3.2. At the same time, industry and professional associations may establish rules and conditions that reduce the intensity of competition, the motivation of entrepreneurs to actively compete in the market, and create barriers to new market entrants. Examples include restrictions on advertising⁷, recommended or mandatory prices for association members⁸, unreasonably strict qualification requirements for licenses to provide professional services (e.g., for notaries, lawyers, architects), etc. In some cases, membership in a professional association is a prerequisite for entering the market. The greatest danger to competition in a self-regulatory regime is the possibility of collusion with the assistance of the association. Influential and long-term members of the association or the largest enterprises in the industry can use the self-regulatory regime as a cover for concerted anti-competitive actions or cartels.

3.3.3. In addition, the right to grant licenses, set qualification requirements, and quality standards may actually be used to create barriers to new market entrants, which guarantees high rents to existing members of associations. The prohibition to advertise professional services, which is often justified by the principles of professional ethics and consumer interests, may be aimed at reducing competitive pressure and ensuring high profitability for long-term members of the association, given the lack of information for consumers about possible alternatives in the market.

3.3.4 Assessment of the impact of a regulatory legal act on competition helps to identify conditions and requirements established by authorized associations that create barriers to entry, promote coordination of market behavior, reduce the intensity of competition and motivate undertakings to actively compete for the market. Proposals to introduce self-regulation or joint regulation should be considered in the context of their feasibility and proportionality to ensure the public interest (interests of consumers, potential competitors, society as a whole), as well as their advantages and disadvantages for the functioning of fair competition. The validity of the license conditions, qualification requirements, quality and safety standards established by them should be checked, as associations often make decisions “under the influence” and in the interests of their members, rather than in the interests of consumers and the development of fair competition.

⁷ See Example 9.

⁸ See Example 8 of these Methodological recommendations

Example 15: (USA)

The National Association of Realtors ("NAR") (a self-regulatory body) unites more than one million realtors, brokers, and their agents across the country who compete with each other in local markets for brokerage services for the acquisition and sale of real estate. Local boards of realtors representing NAR compile lists of clients and properties for sale in all 50 states and ensure the exchange of this information (approximately 80% of the total number of properties) between members of the association and their clients. A broker's participation in the system of access to data on clients and real estate is a crucial factor in offering adequate service, the broker's competitive position in the market and the distribution of commission fees among brokers.

With the development of the Internet, brokers started to use so-called "virtual offices", which allowed them to reduce costs and increase market share, but on the other hand, led to a decrease in the overall level of commissions in the industry.

In the interests of traditional brokerage firms, NRA approved a regulation that gave its members the option of not allowing access to their client lists and data via the Internet. Another rule approved by NRA limited the ability of brokers operating through virtual (Internet) offices to have the same access to information as traditional brokerage firms. In addition, the association prohibited virtual office operators from placing advertisements featuring real estate on their websites. This decision hindered innovation, reduced the motivation to actively compete in the brokerage market, set up additional barriers to entry, limited information about alternatives for clients, and ultimately contradicted the interests of consumers.

The U.S. Department of Justice's Antitrust Division investigated and filed a lawsuit against NAR alleging that the association's rules violated antitrust laws. The parties agreed to settle the case and the Illinois Court accepted the settlement, which, among other things, required NAR to repeal a regulation that prevented the dissemination of information through the virtual office service that traditional brokerage firms could disseminate by regular mail, e-mail or other means. The NRA was required to approve new non-discriminatory rules for brokers that innovatively use Internet resources to provide consumers with high-quality and low-cost services.

Sources: U.S. v. National Association of Realtors (2008) (U.S. v. National Association of Realtors, <https://www.justice.gov/atr/enforcing-antitrust-laws-real-estate-industry>

Additional information about this case is available here: [https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/McDonald,%20GCP%20Jul-08\(1\).pdf](https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/McDonald,%20GCP%20Jul-08(1).pdf)

Type of impact B2: Encouragement or requirement to publish information on production volumes, sales, costs or prices

3.3.5. If sellers offer products with different characteristics and functionality (differentiated products) or different scope of services, it is difficult for consumers to compare prices and make decisions about acquiring a product or service. The requirement to publish information about producers' prices can help consumers compare offers and make rational decisions without spending too much time and money searching for the right product or service.

3.3.6. Market participants, on the other hand, can use information about prices, costs, production and sales volumes to coordinate market behavior. The risk of behavioral coordination increases when there is a small number of market participants, their products are standardized, and there are high barriers to entry.

3.3.7. When requiring the publication of market data for the purposes of better consumer information, the benefits of data transparency should be weighed against possible anticompetitive effects, in particular, the risk of harmonization of market behavior, as the ability of cartel members to monitor the behavior of competitors (or associates) is key to the functioning of a cartel. The publication of current prices can help suppliers to set prices at the level of competitors and monitor competitors' prices to confirm their participation in a cartel agreement. Information on market share or capacity utilization by individual companies can help to understand the factors that deter players from actively competing for the market.

3.3.8. It is advisable to publish statistical data in the form of consolidated information for previous periods without identifying specific undertakings. If the information is intended primarily for decision-making by public authorities, there is no need to publish or disclose such data at all.

Example 16: (Mexico)

The public procurement legislation requires contracting authorities to hold meetings with bidders in each procurement to explain the terms of the tender. Such a requirement provided an opportunity for bidders to identify potential competitors, exchange important information or even collude. The law required that public procuring entities hold at least one meeting to provide clarifications in each procedure. In addition, the requirement to disclose tender proposals (public announcement of the names of participants and prices of submitted proposals) contributed to manipulation of the procedure results.

Alternative solutions:

- *To remove from the law the requirements for public disclosure of proposals, in particular, disclosure of financial proposals and disclosure of the names of participants, where possible.*
- *Prohibit the disclosure of the names of participants and group meetings of the procuring entity with bidders.*
- *If it is not possible to completely abandon meetings with tenderers, such events should be minimized and conducted under strict control. One of the options for holding meetings to explain the terms of the tender may be the use of remote communication technology, which eliminates the likelihood of a personal meeting of the procedure participants. Public procuring entities may use any alternative methods of receiving inquiries and responding to tenderers' requests in order not to identify the tenderers who have submitted the request for clarification.*

*Source: OECD review "Combating Collusion in Public Procurement in Mexico" (2015), page 64
<http://www.oecd.org/daf/competition/FightingBidRigging-Mexico-CFE-Report-2015.pdf>*

3.4. CATEGORY OF IMPACT "G"

RESTRICTION OF ACCESS TO INFORMATION

Regulations may limit consumer choice by restricting competition. In some areas, such as medical services or pharmaceuticals, state and local governments may establish lists of available medical facilities or medicines that are dispensed to certain categories of consumers, even though some consumers may be interested in similar facilities or other specialists, even if they have to travel a greater distance or pay a higher price. Restricting consumer choice can be harmful and reduce incentives for producers and service providers to meet consumer needs with better quality goods and services at a lower price or with more innovative solutions.

In the healthcare sector, information about alternative providers of medicines and healthcare services is needed not only by consumers-patients, but also by family doctors who advise patients on the choice of further treatment and refer patients to specific specialists. Limited awareness of alternative providers of goods and services can reduce the effectiveness of services for organizing and managing the treatment process, which is the responsibility of primary care physicians, which is introduced in most modern healthcare systems.

Type of impact G1: Restricting the ability of consumers to decide from whom to buy a product or service

Examples of restrictions on consumer choice include rules on insurance coverage or reimbursement for healthcare services, medicines, or specialized goods (e.g., prosthetics, wheelchairs, etc.). Restrictions on competition may stipulate that certain goods can only be purchased from authorized suppliers, often domestic producers or state-owned enterprises, or prohibit the sale of certain products in pharmacies or the sale of medicines over the Internet, etc. The grounds for such restrictions are often presented as safety and consumer protection measures, but it is likely that such restrictions are imposed only to protect certain producers from competition.

Example 17: (European Union)

In October 2013, the European Parliament considered and rejected a legislative proposal that would have required e-cigarettes to be sold only in pharmacies. Such a regulation would have effectively made e-cigarettes (generally considered a safer form of smoking) much less accessible than regular cigarettes that can be purchased at common retail outlets. Requiring the sale of e-cigarettes in pharmacies would affect the competition between cigarettes and e-cigarettes. Sales of cigarettes have been declining significantly while the market for e-cigarettes has been growing.

Alternative solution:

The European Parliament decided not to restrict the sale of e-cigarettes to pharmacies, in particular because such a restriction of competition could have negative consequences for public health by reducing access to a presumably safer form of smoking.

Source: OECD Competition Impact Assessment Toolkit (2015) Vol. 3 p. 46.

Example 18: (USA)

In the early 1980s, the laws of most US states prohibited pharmacists from selling generic medicines to patients if a doctor's prescription included a branded medicine. The Federal Trade Commission, based on the results of a comprehensive study, demonstrated that such a ban on substitution of branded products with similar bioequivalent drugs (generics) led to restrictions on price competition between manufacturers producing virtually the same medicine, as well as to significant losses for consumers. The Commission proposed that regulators should allow substitution and expand the choice between medicines with equivalent therapeutic effects, which would stimulate price competition while not compromising the quality of medical care.

Alternative solution:

New federal legislation (the Hatch-Waxman Act) changed the approach to substituting branded medicines with generic, low-cost medicines with equivalent therapeutic effects, where such analogues exist. In addition, all states have introduced legislation that allows brand-name medicines to be substituted for generic medicines unless the prescription contains an explicit physician's requirement for the sale of a specific brand-name drug. The Food and Drug Administration (FDA) publishes a list of branded drug analogs, and pharmacists do not need to contact a physician to confirm that a substitution with an appropriate equivalent generic is possible.

A study of the economic effect of this reform showed that the total number of branded medicines substituted for generics in doctor's prescriptions increased, and consumer spending on medicines decreased significantly. In 1984, generic medicines dispensed by pharmacies on the basis of doctor's prescriptions accounted for about 13%, and in 2012, 84% of the prescriptions dispensed were generic medicines. According to analysts, the legislation on substitution of branded pharmaceuticals with generics has allowed consumers to save more than \$1 trillion over the past 10 years.

Source: Publication of the Federal Trade Commission of the United States. "Generic Substitution and Prescription Drug Prices" (1985). Page 1.

<https://www.ftc.gov/sites/default/files/documents/reports/generic-substitution-prescription-drug-prices-economic-effects-state-drug-product-selection-laws/massonsteiner.pdf>

Type of impact G2: Reduced consumer mobility due to increased costs of supplier switching

- 3.4.1. One of the important factors of competitive pressure in the market is the ability of consumers to switch suppliers if they are not satisfied with the quality or price of a product or service. However, switching suppliers usually involves certain direct or indirect costs that may arise for various reasons. Additional costs of switching suppliers may be associated with early termination of the contract (e.g., increased interest rate for early repayment of a bank loan), or dependence of an asset used by the consumer on the supplier (e.g., change of mobile operator results in loss of phone number).

- 3.4.2. Suppliers seek to create and maintain conditions that increase the costs of switching suppliers for consumers and may use such conditions to set inflated prices, narrow consumer choice, reduce the quality of products or services, and hinder the production of innovative goods. Low consumer mobility due to high switching costs is a barrier to entry of new competitors into the relevant market and a factor that reduces the intensity of competition for consumers between businesses in the relevant market.
- 3.4.3. Regulations may increase the willingness of customers to switch suppliers or, conversely, impose unreasonable requirements on commercial relationships. For example, legislation may set a minimum term for certain types of contracts, or require customers to notify the supplier of their intention to terminate the contract early within a certain minimum period, which may limit the mobility of consumers to enter into a contract with another supplier.

Example 18: (Canada)

According to the findings of the Canadian Radio-television and Telecommunications Commission (CRTC) research in 2012-2013 one of the key constraints to competition in the mobile market was the excessive costs for consumers to change operators, in particular, for the following reasons: i) long-term contracts (up to 3 years) and significant payments in case of early termination of the contract (which were set by operators allegedly to fully compensate for the cost of the telephone device provided to the customer); ii) blocking of the phone with a specific network and the inability to use a SIM of another operator, iii) inefficient mechanism for transferring subscriber numbers between operators.

The high costs for consumers to switch operators reinforced the market power of the four large operators and created a barrier to new competition, as competitors would have to offer significant compensation to consumers for switching to their network, making the market unprofitable. In addition, the presence of market power discouraged innovation and ensured profitability for operators with a large market share through network effects and new customers, thereby also reducing the incentive for innovation and price competition.

Alternative solution:

In 2013, in order to reduce the cost of switching operators for consumers, the CRTC approved the Wireless Communications Code of Conduct (WCC), which, among other things, required mobile operators to: i) reduce the maximum contract term; ii) reduce the level of penalties for early termination of the contract; iii) unlock the phone to allow the use of other SIM cards within 90 days after the device is issued, or immediately after the consumer pays the so-called "subsidy" to the operator for the acquisition of the device.

Source: Canadian Competition Bureau publication *Telecom Notice of Consultation*
<http://www.competitionbureau.gc.ca/eic/site/cb-bc.Nsf/eng/03531.html>

Impact type G3: Restriction of information necessary to make a rational decision to buy or sell goods

- 3.4.4. Information about the price, quality and safety of goods or services allows consumers to take rational decisions about their acquisition. It is especially necessary to provide consumers with information about new goods or services that they have not yet purchased. An example of such a market with asymmetry of information is the electricity market, where deregulation is being implemented and direct contracts with consumers are being introduced. When exercising their right, consumers may face difficulties in choosing the best quality and most reliable service at a competitive price, and often may not know what criteria to use to evaluate the supplier's performance.
- 3.4.5. A state or local government body may establish requirements for market participants to provide certain information and thus prevent the dissemination of misleading or false information that may lead consumers to take wrong decisions. Deregulation and liberalization of the economy should be accompanied by information measures aimed at raising consumer awareness of the criteria for comparing offers of suppliers of goods and services.

3.4.6. Suppliers need legal certainty based on up-to-date information about the competitive environment and business rules in a particular industry. This is

especially true for industries that are in the process of liberalization and deregulation. Undertakings need reliable and complete information, for example, on licensing conditions, license fees, guarantees of access to resources, and parameters for calculating price fluctuations for energy or other resources. Lack of reliable information, its incompleteness, including gaps in legislation, inconsistency of regulatory measures, prevent business entities from making investment decisions on entering the market or expanding their presence in the market.

Example 18: (Ukraine)

In 2016, the Antimonopoly Committee of Ukraine conducted a study of the accuracy of information in the tariff plans of one of the largest mobile operators and compliance with the declared tariffing conditions, and decided to violate the law in the form of providing misleading information to consumers. In particular, it was noted that subscribers were deprived of the opportunity to have the current tariffing rules before entering into a contract, based on the information contained in starter packages, advertising leaflets and on the operator's website. In addition, the AMCU noted the inaccuracy of the regulatory definition of per-minute billing, which did not allow calculating payment for the period of service provision for less than a minute. Based on the operator's available information, consumers expected that their connections would be charged to the exact second.

The Antimonopoly Committee provided its recommendations to the operator and the regulator to introduce relevant amendments to the legislation, ensure greater transparency, clarity and completeness of information on service pricing with the possibility of accounting to the exact second and applying the same tariff unit to any part of the service session.

4. SELECTION OF ALTERNATIVES TAKING INTO ACCOUNT COMPETITION PROTECTION ISSUES

Consideration of alternative solutions

- 4.4.1. At the initial stage of the assessment of the draft act, the draftsman identifies potential restrictions on competition based on the questions of the Checklist. The main task of the draftsman is to ensure that the necessary policy objective is achieved, or that an existing market deficiency is corrected, with the least negative effects on competition in the relevant markets. To do this, it is advisable to consider all possible alternative ways to achieve the goal. Each of the alternatives is tested against the Checklist in the same way as the original proposal.
- 4.4.2. The first step is to clearly state the objective of the regulation. For example, a draft regulation is intended to correct a market failure. In such a case, the draftsman should clearly state what the market failure is and explain how it is proposed to correct it. It is also necessary to specify the indicators that will be used to measure the reduction of inefficiencies caused by this market failure. Sometimes, the objectives of the regulation are formulated in the regulation itself or in higher-level legislation. In this case, the purpose of the regulation is stated in accordance with the legislative act that requires the development of relevant provisions, amendments or bringing existing bylaws into compliance with the law.
- 4.4.3. The next step is to identify the elements of the regulatory act, regulatory provisions that pose a risk of restricting competition, in accordance with the types of negative effects specified in the Checklist. This step allows to determine whether the restrictions on competition, the scope of the act, and the possibility of changing the wording or other solution that will ensure the political goal without exacerbating the negative effects on market competition are adequate and necessary to achieve the declared goal.
- 4.4.4. In order to determine the best solution, it is advisable for the drafters of regulations to consult with industry experts, academics, specialists from the AMCU or other government agencies, market participants, and other stakeholders. To obtain comments and recommendations from experts on competition risks, the developer may initiate the formation of working groups, hold roundtables or presentations, and offer the results of a preliminary competition impact assessment to the participants. These consultations should be held simultaneously with public hearings or other forms of open discussions of the draft relevant act.
- 4.4.5. When choosing alternative solutions to achieve the goal of protecting and promoting competition, the following principles are suggested to be taken into account by the drafters of regulatory legal acts:

The most effective solution is one that offers minimal restrictions on competition

in the market.

- Economic incentives for market participants are a more effective way to ensure that public needs are met with goods and services of appropriate quality and at a fair price than direct government regulation or control. At the same time, subsidies or other types of state aid to industries in crisis or to individual employers can sometimes impede economic restructuring. Stimulation of inefficient enterprises or industries that are losing demand should be made in compliance with the legislation on state aid to undertakings. Establishing the parameters of the functional efficiency of goods and services satisfy the needs of consumers better than requirements for composition, technical characteristics or quality standards. This approach allows providing suppliers with the opportunity to choose the most economically beneficial solutions for them to meet market demand, and also stimulates innovation, diversification of goods and services.
- Better consumer awareness is the most effective means of correcting market failures caused by information asymmetry between suppliers and consumers. This approach makes it possible to provide, first of all, quality services without minimum or recommended prices, bans on advertising, barriers to the provision of professional services. Problems with the quality of goods or services are, first of all, a problem of insufficient information among consumers. In order to better inform consumers, regulation of the content of advertising may be established in order to prevent misleading or false advertising.
- Voluntary standards and specifications are more appropriate than mandatory specifications. This approach allows (in cases where there are no health or safety risks) to more fully satisfy consumer demand, in particular, due to better informing consumers about products that, although they do not meet certain quality standards, can be offered on market because individual consumers may consciously prefer such goods or services due to their low price and therefore have a wider choice;
- The general principles of the legislation on the protection of economic competition are more effective in protecting the rights and preventing anti-competitive actions of undertakings than sectoral regulatory acts.

4.4.6. In the process of searching for a better alternative solution, state bodies and local self-government bodies should always take into account the basic option

- the "leave it as it is" option. The number of alternative solutions may be different in each specific case. There may even be cases when a state body, a local self-government body, will come to the conclusion that there is no real alternative, since the proposed restriction of competition is a necessary condition for achieving the goal. However, before such a conclusion, it is necessary to consider possible alternative mechanisms for solving the problem.

4.4.7. When determining the best alternative solution to achieve the goals of regulation and minimize the negative impact on competition, an important

issue can be the deadline for the introduction of new rules, which is usually contained in the "transitional provisions" section of regulatory legal acts. Such a period is often determined by taking into account the size of the operating entities, the technologies they possess, the cost of such technologies, as well as a reasonable period for the amortization of irreversible investments. The most acceptable solution for the effective functioning of competition in such cases is to prevent the introduction of rules that require asymmetric costs from undertakings entering the market in comparison with existing enterprises.

4.4.8. Table 2 lists some typical questions that can help in finding alternative solutions to minimize the negative impact of state regulation on competition.

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Table 1

CHECKLIST OF QUESTIONS to assess the impact of a regulatory legal act (draft act) on competition		
Does the regulatory legal act (draft act) lead or can lead to the following consequences:	Answer	
	Yes	No
A. Limits the number or narrows the circle of suppliers Such a consequence may occur if the regulatory legal act (draft act):		
1. Gives the undertaking exclusive rights to supply goods or services;		
2. Introduces the regime of licensing, granting permission or requiring approval of undertakings with authorities;		
3. Limits the ability of certain categories of entrepreneurs to supply goods or provide services (narrows the circle of market participants);		
4. Significantly increases the cost of entering or exiting the market;		
5. Creates a geographic barrier to the supply of goods, performance of work, provision of services or investment.		
B. Limits suppliers' ability to compete Such a consequence may occur if the regulatory legal act (draft act):		
1. Limits the ability of entrepreneurs to determine prices for goods and services;		
3. Limits suppliers' ability to advertise or market their goods or services;		
4. Establishes quality standards that unduly favor certain suppliers over others, or standards of a higher level of quality than would be chosen by individual reasonably well-informed consumers;		
5. Significantly increases the costs of individual business entities compared to others (in particular, as a result of discriminatory treatment of existing and new market participants).		
C. Reduces the motivation of suppliers to actively compete Such a consequence may occur if the regulatory legal act (draft act):		

1. Introduces the mode of self-regulation or joint regulation;		
2. Requires or encourages the publication of information on the volume of production or sales, prices and costs of enterprises;		
D. Limits the choice and access of consumers to the necessary information Such a consequence may occur if the regulatory legal act (draft act):		
1. Limits consumers' ability to decide who to buy from;		
6. Reduces consumer mobility due to increased direct or indirect supplier switching costs.		
7. Significantly limits or changes the information necessary to make a rational decision regarding the acquisition or sale of goods		

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Table 2

Identification of alternatives that allow to eliminate or reduce the negative impact on competition

Proposal: Grant an exclusive or special right (Restriction type "A1" according to the Checklist)	
Question	Alternative solutions (Examples)
1. What is the purpose of granting an exclusive (special) right?	
2. Whether granting an exclusive (special) right is necessary to achieve the goal of regulation?	
	a) If the answer is "Yes": - Check the scope of the exclusive right: does exclusivity apply exclusively to that activity that requires the elimination of competition to achieve the goal?; - Narrow the scope of exclusive (special) right; - Shorten the term of the exclusive (special) right; b) if the answer is "No": do not introduce an exclusive (special) right.
3. (If an exclusive or special right is granted to a state or communal enterprise) - Does this right really provide the general needs of the state or community, or a certain public function, and not just additional economic benefits for the population or certain institutions?	
	a) if the answer is "yes, the need is really common to the community" or "this is a public function" - to narrow the scope of the exclusive right to the provision of an exclusively public function or general social need; - if possible, provide relevant general needs or functions through a public-private partnership or concession; - introduce a competitive mechanism for obtaining an exclusive (special) right (tender, competition); b) if the answer "no, but additional benefits are created for the population or for local or public institutions":

	- to introduce a more flexible means of regulation, for example, to regulate with
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Proposal: Regulate prices and volumes of sales (Restriction type "B1" according to the Checklist)	
Question	
	Alternative solutions (Examples)
What is the purpose of introducing price controls?	
	A) correction of market failure, namely: 1. Poor or unavailable services: - an alternative may be less strict standards or specifications, targeted support for certain most vulnerable categories of consumers. 2. Dominant position (monopoly) of the supplier; - ensure that the regulation applies to the price of only those services that are actually implemented under monopoly conditions 3. Asymmetry of information:
	not to introduce price regulation, but to replace regulation with measures that increase access to market participants or consumers to the necessary information. B) preventing sharp price fluctuations or ensuring a fair distribution of profitability in the industry, or providing the necessary investment resources for technical re-equipment and productivity growth: - the alternative is better access to financial resources; - use of tax incentives; - expanding information on pricing and attractiveness of the relevant industry for business.

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