"The accession of 10 new states to the European Union is finally here. The impact of accession and the challenges and opportunities for businesses will not be limited to the Member States of the European Union, but will be perceived throughout the world business community as their dealings with the enlarged block undergo change.

During the last six months, our clients in the new Member States, the Czech Republic, Hungary, Poland and Slovakia and elsewhere in the region, in Europe, Asia and the Americas have asked us many questions relating to accession.

Most questions have focused on understanding the regulatory aspects of accession, notably finding out what changes -if any- need to be made to the current production of goods, the delivery of services or business practices in view of the fact that by May 1, the Acquis Communautaire must have been adopted by the new Member States.

In the final stretch to the accession date, the business community has started to realise that the success of accession for businesses will very much be influenced by the ability of the administrations and the judiciary in the new Member States to implement and enforce the EU rules. Businesses are therefore now wanting to know more than just the regulatory aspects of accession. They want to be aware of their newly acquired rights and obligations in the fields of e.g. public procurement, state aid, competition laws in general, competition with state run enterprises, and how to enforce these rights. They are preparing themselves to develop defensive or offensive strategies to deal effectively with the new situation. How accession will play out in the reality of every day life remains to be seen. With growth figures almost double those of the current EU, business clearly is well placed to pursue success throughout the new Member States."
Co-existence of Community Designs and Czech Industrial Designs after 1 May 2004

This article follows on from our article in the January Issue of the Czech Republic EU Accession Newsletter on Community and Czech Trade Marks after accession.

As of 1 May 2004, existing registered and unregistered Community Designs will also extend to the territory of the Czech Republic, raising inevitable questions as to how the two will co-exist after accession and whether any difficulties in interpretation or application are likely to surface as a result.

What is a Community Design?
A Community Design (introduced by a Council Regulation in December 2001) is the exclusive right to the outward appearance of the whole or part of a product “resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation”. This very broad definition includes even “get-up”, graphic symbols and graphic typefaces. Equally broad is the type of products to which such design can be applied, which can be any industrial or handicraft item including packaging and parts that are intended to be formed into “complex” products.

How are Community Designs protected?
Community Designs can be either registered or unregistered. To apply for a registered Community Design, a single application is made to the Office for Harmonisation in the Internal Market (OHIM) which gives protection to the design holder throughout the whole of the EU for a period of five years (renewable for subsequent five year periods up to a maximum of 25 years). Unregistered Community Designs are nevertheless protected throughout the EU but only for a period of three years from the date on which the design was first made available to the public within the EU.

Community Designs and Czech Industrial Designs as of 1 May 2004
The Treaty of Accession in 2003 provided for the EC Community Design Regulation to be amended to safeguard the rights of owners of “earlier national rights” in the accession states. Therefore, in the event of a conflict after accession, the Czech “earlier national right” holder can prohibit the
holder of a Community Design from using his design (registered or unregistered) in the territory covered by the right (i.e. in the Czech Republic). An "earlier national right" in this context means a right acquired or applied for in good faith before accession. The Czech Industrial Property Office has specified that these earlier national rights need not in fact be older (i.e. older in terms of priority), as long as they are acquired before 1 May 2004.

**Potential difficulties in applying the new rules?**

One area which may cause difficulties post accession is the criteria relating to the “functional features” of a design. Under EC law, a Community Design cannot consist of “features of appearance of a product which are solely dictated by its technical function”. In effect this means that some functional features (even on products predominantly technical in nature) can be protected and only those which are solely dictated by the function that the product is intended to perform are excluded from protection.

However, the current wording of the Czech Industrial Design Act adopted in 2000 purporting to harmonise Czech law with the EC requirements contains a similar provision on functional features but omits the word “solely”. This could in principle make a significant difference to the scope of protection offered under Czech law compared to that offered under EC law. It suggests that Czech law excludes from protection all technical features, not just those which are solely dictated by the product’s technical function. The design right would therefore only apply to the remaining (i.e. non-functional) aesthetic features of the product. Indeed, this is what was specified under the previous Czech act on industrial design valid between 1990 and 2000. This narrower interpretation is also not unknown in other parts of the world, such as in Canada.

There is therefore the potential that owners of Community Designs will benefit from broader protection than Czech design holders under Czech law. Whilst in principle the interpretation of a national act should not run counter to EC law, it remains to be seen whether the Czech Industrial Property Office and the Czech courts will in practice hesitate to follow the letter of Czech law and initially adopt the narrower approach - and if so, whether and when this will be challenged and resolved by means of a preliminary ruling addressed to the European Court of Justice.

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Effective this month: the Takeover Directive

The EU Directive on Takeover Bids, i.e. on public purchase offers for the shares in a listed company, is now expected to become effective in May 2004. Member states will then have until May 2006 to implement the Directive into national laws.

After more than 14 years of debate, on 16 December 2003 the European Parliament voted in favour of the Commission’s latest proposal. Subject to numerous changes, on 22 December 2003, the Council agreed to the text approved by Parliament. The Directive’s formal adoption is expected in May 2004, once the text has been finalised by legal and linguistic experts.

Approval of the latest proposal comes over two years after the European Parliament rejected the previous proposal for a Takeover Directive in July 2001. At that time, Parliament rejected a draft Directive which had been 12 years in the making and which had reached the final stages of approval.

The object of this Directive, which is a framework directive, is to establish standard rules on takeover bids throughout the EU. However, the final form of the Directive, which has been shaped by lengthy and convoluted political wrangling, has been widely criticised for watering down the draft rejected two years ago. Critics included the Internal Market Commissioner, Frits Bolkestein, who sought to have the proposal for the Directive withdrawn on the basis that the compromise text “was gutting the takeover directive of all of its essential elements”.

Generally, the Directive requires that Member States have rules governing a wide variety of matters without specifying what those rules should be. Member States are, however, required to respect the general principles in the Directive and they may, in practice, take the opportunity to introduce proper regulatory regimes going beyond the minimum required by the Directive. As a result, despite a directive harmonising the takeover rules in Europe being accepted, it is unlikely that there will be any dramatic impact on the European M&A market.

The core rule of the Directive is the mandatory offer obligation upon acquiring a certain interest in a publicly listed company. However, it does not specify the threshold at which control is acquired in order to trigger that obligation, instead Member States are left to determine their own threshold. The Directive does define the “equitable price” at which a mandatory offer must be made, but allows some flexibility, for example, permitting a mandatory offer to be made on a securities exchange basis.
The most controversial provisions of the Directive relate to the prohibition on frustrating action and provisions enabling an offeror to “break through” an offeree company’s defence mechanisms. However, Member States have the option of whether or not to apply these provisions. Member States which opt into these provisions may subsequently opt out. Member States which opt out must give companies the right to opt in and a company which opts in may subsequently opt out. These provisions nearly destroyed the Directive but were finally included only on a voluntary basis.

Nonetheless, the Directive does introduces a number of provisions which may in some jurisdictions afford important protection for minority shareholders of offeree companies. Among others, the Directive introduces “squeeze-out” and “sell-out” rights to be effected at a fair price.

Throughout the last decade, Member States and Accession Countries, including Hungary, have largely been putting in place takeover regulation designed to meet the evolving requirements of the proposed Directive, thus further reducing the impact of the Directive itself.

**Takeover rules in Hungary**

Takeover offers in Hungary are regulated by the Act CX of 2001 on capital markets. When accepted in June 2001, compared to the regime in effect in the previous three years, the rules aimed to create stricter provisions relating to takeovers and reporting requirements regarding shareholdings in publicly quoted companies.

Key elements of the Hungarian takeover rules include the following:

- The threshold for a mandatory takeover offer is 33%. However, in a publicly quoted company where no shareholders have a voting percentage greater than 10%, any shareholder acquiring an interest above 25% is also required to make a purchase offer.
- The minimum offer price for each share must be at least the greatest of, (a) the weighted average share price for the previous 180 days; (b) the highest purchase price the bidder has, or parties connected to the bidder have, paid for a share in the previous 180 days; or (c) the aggregate of the price of a share to be purchased according to the call option and the strike price of the option in the case of a repurchase right or a call option.
- The takeover process is supervised and the offer document is approved by the Hungarian Financial Supervisory Authority.

Detailed rules of the Hungarian regulatory regime, including the rules on “squeeze-out” and “sell-out” rights, are in line with the newly accepted Directive, no amendment of the regulations covering the takeover process seems to be required. However, it is yet to be decided by the codifier, Hungary.
whether any amendments to the current regime of defensive measures is necessary for the Hungarian capital market.

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Recognition and enforcement of judgements in civil and commercial matters under European Community Law

On 22 December 2000 the “Council of the European Union has adopted Regulation no 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters” (the “Regulation”) . This seeks to unify national rules governing jurisdiction and the recognition of judgements as well as to simplify related formalities with a view to facilitating the rapid and straightforward recognition and enforcement of judgements from Member States. The Regulation, which replaced the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters of 27 September 1968 in relations between EC Member States, came into force on 1 March 2002.

As an instrument of the highest rank within the European Community’s system of law and one having direct binding effect in the Member States without the performance of any adjustment procedures being necessary. The Regulation and its provisions will automatically apply to Poland as well as to the other new Member States acceding to the EU on 1 May 2004.

This article highlights key features of the Regulation’s provisions on the recognition and enforcement of judgements in civil and commercial matters.

Regulation scope and principal rules

The Regulation is divided into seven Chapters, with the recognition and enforcement provisions set forth in Chapter III (Articles 32-56 of the Regulation). Article 1 outlines those matters that are excluded from its scope and states that the Regulation does not apply to revenue, customs and administrative matters. It also does not apply to bankruptcy, proceedings relating to the winding up of insolvent companies and of other legal persons, judicial arrangements, composition and analogous proceedings. Furthermore, it does not cover arbitration, which is regulated by other legal instruments, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 10 June 1958 in particular.

In terms of those entities that fall within its scope, the Regulation applies to all EU Member States except for Denmark, as on the basis of the “Protocol on the position of Denmark” annexed to the Treaty on European Union and

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the Treaty establishing the European Community, Denmark is neither bound by nor subject to the application of the Regulation.

Within the meaning of the Regulation, a “judgement” is considered to be any judgement given by a court or of a Member State, whatever the judgement may be called, including a decision on the determination of costs issued by court officer.

The Regulation lays down the principle that under no circumstances may a foreign judgement be reviewed as to its substance, either in respect of recognition or of the enforcement of judgements.

**Recognition**

Under the Regulation, judgements issued in one Member State are to be recognised in another Member State without any special procedure being required.

In order to recognise a judgement, the party seeking recognition is only obliged to produce a copy of the judgement that satisfies those conditions that have to be met in order for its authenticity to be established. A translation may be required by a court or a competent authority, but no legalisation or similar formalities are applicable.

However, recognition may be denied in the following cases: 1) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought, 2) where it was given in default of appearance, i.e. if the defendant was not served with the document which instituted the proceedings (or equivalent document) in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgement when it was possible to for him to do so, 3) if it is irreconcilable with a judgement given in a dispute between the same parties in the Member State in which recognition is sought, and 4) if it is irreconcilable with an earlier judgement given in another member state or in a third state involving the same cause of action and between the same parties, provided that the earlier judgement fulfils the conditions necessary for its recognition in the member state addressed.

The Regulation also sets forth a few additional restrictions on the recognition of judgements deriving from specific provisions of the Regulation, but those could be described as being of “marginal” significance compared to the “main” reasons cited above and thus do not merit closer description.

Furthermore, the Regulation stipulates that when a judgement is recognised under the Regulation, the applicant is also authorised to provisional, including protective measures, even without a declaration of enforceability being required.
Enforcement

Enforceability of a judgement in accordance with the Regulation is declared under a simplified procedure initiated by the applicant and governed by the law of the Member State in which enforcement is sought.

The application is submitted to the court or competent authority indicated in the Annex attached to the Regulation. The local jurisdiction for the application is determined on the basis of the domicile of a debtor or the place of enforcement.

In contrast to the recognition of judgements (where no specific procedure is envisaged by the Regulation) and in deciding upon an application for the declaration of enforceability, a competent court declares enforceability without even examining possible grounds for refusing declaration and relies solely on the receipt of the following documents: 1) a copy of the judgement which satisfies those conditions that have to be met in order for its authenticity to be established, and, 2) a certificate of the court or competent authority where a judgement was issued in the form specified in the Regulation; this second requirement is not absolute, as the court or competent authority deciding on the application may either accept an equivalent document or waive its presentation entirely. As in the case of recognition, a certified translation may be required by a court or a competent authority, and no legalisation or similar formalities apply to the documents.

The declaration of enforceability is served on the party in relation to which enforcement is being sought and may be appealed by that party.

An examination by a court of possible grounds for refusing enforceability therefore does not take place until the appeal stage, that is, of course, once an appeal has been lodged by the party in relation to which enforcement is being sought. Such examination of the grounds for refusing to declare enforceability is performed applying the same criteria as those stipulated in the Regulation in the context of refusing recognition of judgements.

A declaration of enforceability automatically confers authorisation to proceed with any protective measures available.

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Financial assistance under Romanian law

The financial assistance concept under Romanian law generally mirrors the provisions of the European legislation (i.e., Directive 77/91/EEC). Given the importance of identifying new funding sources for the acquisition of shares in Romanian companies, particularities of such regime should also be taken into account. Especially if financial support from the company is sought. This article aims to briefly present the legal background related to financial assistance in Romania, including the particularities vis a vis the acquis communautaire.

The following article is intended to provide a brief introduction to financial assistance, and the extent to which Romanian law supports this concept.

Concept of “financial assistance”

As understood in other jurisdictions, financial assistance can be defined as a gift, loan or security granted in order to put the buyer or subscriber of shares in a company (the “Target”) into funds necessary for such acquisition.

Examples of such financial assistance include a Target granting a loan to a party to enable that party to purchase shares in the respective Target, and a Target guaranteeing a loan granted to a party in order for that party to acquire shares in the Target.

The concept of financial assistance is not clearly defined. Consequently, there are no legal definitions and it is difficult to clearly assess the applicability of the various exemptions or the applicability of the various exemptions available to it.

Financial assistance under Romanian law

Relevant provisions

Although under Romanian law there is no express mention of “financial assistance” as a concept, there are certain legal provisions contemplating it. The main legal provisions are set out in Article 105 of Law No. 31 of 1990 regarding companies, as republished in the Official Gazette No. 33 of 29 January 1998 and further amended (the “Company Law”).

This article provides that the Target cannot grant advance payments or loans or issue any guarantee when a third party subscribes for or acquires its own...
shares.\(^1\) (“O societate nu poate să acorde avansuri sau împrumuturi și nici să constituie garantii în vederea subscrierii sau dobândirii propriilor acțiuni sau acțiuni către un terț.”) (the “Rule”). However the Rule does not prevent the payment of dividends by the acquired company to its potential subscriber or buyer.


Exemptions from the Rule

The Company Law establishes two exemptions from the Rule:

(i) when such financial assistance is granted to the employees of the Target in order for those employees to acquire shares in the relevant company or any of its subsidiaries; and

(ii) when such financial assistance is granted by credit institutions (societăți bancare și de credit) in their ordinary course of business (operațiuni curente).\(^2\)

Although the second exemption is also set out in the Directive, the first exemption is not at all similar to the provisions of the European regulation. Thus, the exemption from the Directive provides that financial assistance rules do not apply to “acquisition of shares by or for the company’s employees or the employees of an associate company”, whereas the Romanian legislation refers to acquisition of shares in the Target or its subsidiaries by the Target’s employees.

Since the text of the Directive is very clear, this difference may hardly be treated as an incorrect translation. It may therefore be concluded that the Romanian legislation amended on purpose the exemptions provided for in the Directive.

Romanian jurisprudence and doctrine

There is little Romanian jurisprudence doctrine in this area. Most of the doctrine reiterates the Rule and opines sometimes on the direct consequences arising from the applicability of the Rule. For non-observance of the Rule, please see our comment in Section 2.4.4 below.

Subjects falling under the Rule

Joint stock companies only?

The Rule applies to joint-stock companies. Although there is an opinion in the doctrine pursuant to which the provisions regarding joint-stock

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\(^1\) See the Company Law, Art. 105(1).

\(^2\) A certain level of net assets was imposed by the Directive even in the case of such operations. Such limitation was not included in the Romanian text.
companies should be applied to other types of companies (e.g. limited liability companies), such an opinion remains rather isolated and is currently not adopted in practice as it is not endorsed by relevant legal provisions.

In addition, the original Directive only refers to joint stock companies further supporting this position.

**Target company: national or international?**

Since Romanian law governs the capacity of Romanian companies, only such companies must observe the Rule.

As the rule refers only to the Target, it is therefore possible for a Romanian company to act as a financed buyer of shares in a foreign Target, if the foreign Target's legislation allows financial assistance to be granted.

**Relationship with subsidiaries**

On a strict interpretation of the Rule’s wording, it follows that subsidiaries, as they have separate legal capacity, are not subject to this restriction and therefore they would be able to finance a third party to acquire shares in their parent company.

**Sanction**

There is no express sanction for failure to observe the restriction imposed by the Rule; however, the doctrine is of the opinion that non-observance of this provision triggers absolute nullity of the financing and this nullity will operate only in favour of the Target and its creditors.

Since there are two legal operations involved, this would mean that both the financing and the acquisition or subscription for the shares in the Target are void. This appears to be a very severe sanction, especially since the nullity is deemed to operate only in favour of the Target and its creditors.

**Purpose of the financial assistance**

**General purpose**

The purpose of the financial assistance must be the subscription for or acquisition of shares in the financing company. The text is poorly drafted and does not cover the possibility of financial assistance being granted with no actual acquisition taking place, in the end.
A strict literary interpretation of the Rule would lead however to the conclusion that the financial assistance operations are void although the purpose – acquisition or subscription – is not reached. Also, since there is no doctrine, it is difficult to assess the type of connection between the assistance and the final result, the acquisition or subscription of shares. Yet, since this is an exception ("exceptio est strictissime intepretatione"), there should be a direct connection between the financial assistance and the acquisition and not merely a financing from the Target to a third party who in the end will acquire the Target’s shares.

Financial assistance operations
Since the law is loosely drafted, it is arguable whether the restrictions imposed by the Rule shall apply in the following cases:

(a) an auction sale in which a due diligence report prepared and paid for by the target is included in the data room;
(b) taxes related to the acquisition paid by the Target;
(c) material support (assets) provided by the Target to the buyer or subscriber; or
(d) a takeover in which the target-company wishes to agree to pay the bidder a “break fee” in the event a competing bid is successful,

As there is no Romanian doctrine or jurisprudence in this respect, a clear answer cannot be provided. However, international doctrine shows that (a), (b) or (c) are likely to fall under the Rule.

Exemptions in other jurisdictions
Since entirely legitimate commercial objectives backing up such financial assistance are sometimes frustrated by this restriction, exemptions are provided in other jurisdictions. One of these exemptions is the so-called “whitewash procedure”. This allows consent to be given the assistance by special resolution (usually 75% or more of the shareholders’ vote) and the Directors making a statement confirmed by the company’s auditor, that the company will remain solvent for the next 12 months. Although, such a procedure can usually be challenged by shareholders holding not less than 10% of the issued share capital.

No whitewash procedure under Romanian law
Romanian law does not provide any similar “whitewash procedure”.
Therefore, apart from:

(i) the express exemptions under the Rule, mentioned under Section 2.2. above; and
(ii) the debatable cases listed under Section 2.5.2 above, there is no other legal possibility to avoid the restriction imposed on granting financial assistance under Romanian law.

Relations with the acquis communautaire

As pointed out under Section 2.1 above, the Rule repeats the provisions of Article 23 of the Directive.

We have reviewed the Romanian National Program for Accession to the European Union dated June 2002 and the harmonisation of the Romanian legislation with the Directive appears as one of the further steps to be taken in the light of the accession process. However, as the Company Law reflects the same approach on financial assistance as the Directive, it may be concluded that as far as financial assistance is concerned, Romania has already adopted the acquis communautaire.

Therefore, three issues should be highlighted:

(i) The Company Law already reflects the general provisions of the Directive;
(ii) Pursuant to our independent research on the Romanian Senate website, no amendment to the Company Law is intended; and
(iii) Pursuant to the information on the Ministry of European Integration website, during the first semester of 2004 no amendment to the Company Law is envisaged.

In the light of the above, it is likely that the current legal framework on financial assistance will not be amended in the near future. However it may be clarified by future doctrine.

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New Russian Currency Control Law

In this Memorandum we provide an introduction to currency control regulation in the Russian Federation following the adoption of the new currency law, Federal Law No. 173-FZ of 10 December 2003 “On the Currency Regulation and Currency Control” (the “Law”). This advice is not intended to be exhaustive, but rather seeks to be a comprehensive summary of the new regime. Most provisions of the Law will come into effect in mid-June 2004. The Law provides a regulatory framework, but the precise currency control restrictions will depend upon the terms adopted in the implementing legislation by the Government of the Russian Federation (the “Government”) and the Central Bank of the Russian Federation (the “CBR”, together with the Government - the “Regulators”). Therefore, in structuring particular transactions it will be necessary to review the implementing regulations of the Government and the CBR as they exist immediately prior to the making of the transaction.

The Law establishes a number of general principles intended to liberalise currency regulation. In particular, currency control restrictions are supposed to be introduced by the Regulators to avoid the deterioration of certain macroeconomic factors and should be abolished when the situation improves (although it should be noted that the deterioration of such factors is defined rather broadly). Furthermore, currency operations between a non-resident and a resident may only be restricted by imposition of the restrictions specified in the Law (the Special Account, the Reserve Requirement and the Prior Registration) and only in respect of the types of transactions expressly set out in the Law.

Another important principle is that the procedure by which the CBR has the discretion to grant transaction-specific permissions will no longer apply. Instead, the Regulators may, under certain conditions, impose Reserve, Special Account and Prior Registration requirements in respect of certain categories of operations. By 1 January 2007 the majority of these restrictions, including those in respect of operations between residents and non-residents, special accounts and mandatory reserves, and mandatory sales of currency proceeds will cease to apply.

Although the Law provides a reasonably detailed framework for future currency control regulation and describes the basic mechanics of the

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1 There is some debate about the date on which the Law will come into effect, 17 or 18 June.
possible currency control restrictions, there is still a considerable degree of uncertainty associated with the new Law. The actual form which the currency control regime will take is heavily dependent upon implementing regulations yet to be passed by the Government and the CBR. According to statements made by a CBR official at a recent currency control conference, the CBR reserves the right to introduce currency control restrictions contemplated by the new Law unexpectedly, without notice to the market and, possibly, without detailed justification of the need for such restrictions. On this basis it is impossible to predict the changes that will actually be made to the currency control environment after the Law has come into effect and to assess fully the practical impact of such changes on various transactions as compared to the existing regime. Therefore, in structuring particular transactions it will be necessary to review the implementing regulations of the Government and the CBR as they exist immediately prior to the making of the transaction.

**Particular Concepts**

**Currency Values**

Under the Law, **Currency Values** include foreign currency and external securities. **External Securities** include any securities which do not qualify as **Internal Securities**. **Internal Securities** include issue securities denominated in roubles where the issue is registered in the Russian Federation ("RF"), and other securities certifying a right to receive roubles and which are issued in the territory of the RF.

**Currency Operations include:**

- transfer of or payment by means of Currency Values, or using them as a tender, between residents;
- transfer, or using them as a tender, of Currency Values, Russian currency or Internal Securities between a resident and a non-resident, or between non-residents;
- the import or export of Currency Values, Russian currency and Internal Securities;
- transfers of foreign currency, Russian currency, Internal Securities and External Securities between accounts of the same person opened outside Russia and such person’s account within Russia; and
- the transfer by a non-resident of Russian currency, Internal Securities or External Securities from its account (section of account) in Russia to another account (section of account) within Russia.
**Authorised Banks**

**Authorised Banks** are credit organisations established under Russian law and licensed by the CBR to carry out banking operations in a foreign currency, and branches of foreign credit organisations acting in Russia in accordance with CBR permissions, and licensed by the CBR to carry out banking operations in a foreign currency.

**Reserve Requirement**

Where the Law requires a certain amount to be reserved (the "Reserve Requirement"), such amount should be paid by a resident or a non-resident in roubles into a separate account with an Authorised Bank (with a corresponding obligation on the Authorised Bank to deposit an equivalent amount in its account with the CBR) on an interest free basis. Reserve Requirements are established by the CBR, and only one type of such requirement may be established in respect of a particular Currency Operation.

A resident or a non-resident may carry out an operation which is subject to the Reserve Requirement before the expiry of the reservation period, except in the case of Reserve Requirements imposed in connection with: (a) operations involving External Securities between a resident and a non-resident; (b) the acquisition of foreign currency by a resident; (c) transferring funds or Internal or External Securities from the Special Account of the resident or non-resident; or (d) transfers by residents of funds into their accounts outside Russia.

**Special Account**

The **Special Account** is an account with an Authorised Bank, or a sub-section of the deposit account or of the account in the securities’ register which must be used in order to carry out Currency Operations in cases set out in the Law.

Transferring cash, Internal and External Securities into or from a Special Account of a resident may only be subject to the imposition of the following Reserve Requirements on the resident: a deposit of up to 100% of the amount (value) of cash or securities to be transferred from the Special Account for up to 60 days prior to the date of the Currency Operation; OR a deposit of up to 20% of the amount (value) of cash or securities to be credited to the Special Account, for up to one year.

Transferring cash, Internal or External Securities into or from a Special Account of a non-resident may only be subject to the imposition of the following Reserve Requirements on the non-resident: a deposit of up to 100% of the amount (value) of cash or securities to be transferred from the Special Account for up to 60 days; OR a deposit of up to 20% of the amount (value) of cash or securities to be credited to the Special Account for up to one year.
**Prior Registration Requirement**

The requirement to apply for prior registration may be imposed on a resident in relation to the opening of an account or deposit account in countries which are not OECD or FATF member states, and on a resident or non-resident in relation to the export or import of Russian currency or certificated Internal Securities. Prior registration may only be refused on a number of technical grounds (such as where an incomplete set of documents is provided etc.).

**Security**

Security for the purpose of the Law (in respect of non-residents’ obligations) includes: an irrevocable letter of credit (covered by the payer thereunder) if the paying bank is an Authorised Bank or a bank outside Russia; a bank guarantee issued by the bank outside Russia in favour of the resident; certain types of insurance; and a promissory note issued by a non-resident to a resident and guaranteed by the bank outside Russia. The bank outside Russia should satisfy certain criteria set by the CBR.

**Currency Operations of non-residents**

**Foreign Trade Restrictions**

In accordance with Article 7 of the Law, settlements (between residents and non-residents) effected in the course of Foreign Trade2 where the deferral of payments is granted to non-residents for more than 180 days, or where advance payments are made to non-residents more than 180 days in advance, may be limited by the Reserve Requirement.

The Reserve Requirement (if imposed on the resident) may involve a deposit of up to 50% of the deferred/advance payment amount for a period ending with the performance by the non-resident, but not exceeding 2 years. The Reserve Requirement does not apply if the deferral/advance is for a period of up to one year and Security is provided. In certain cases, such as partial performance by a non-resident, the reserved amount may be reduced accordingly.

Any Reserve Requirement in respect of Foreign Trade transactions must be fulfilled on the expiry date of the 180-day period relating to the deferral of payment or the advance payment, as the case may be. For the export of certain goods, including certain machinery and vehicles, the Reserve Requirement must be fulfilled on the expiry of 3 years, and in connection with construction and other works carried out by residents outside of Russia - on the expiry of 5 years. For the import of certain goods (including certain machinery and vehicles) with advance payments to non-residents, the

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2 Under the new Federal Law of 8 December 2003 No. 164-FZ “On the Fundamentals of State Regulation of Foreign Trade Activities” (also entering into force in mid-June 2004) foreign trade includes carrying out transactions in the sphere of the external trade (i.e. import and export) of goods, services, information and intellectual property (as defined in this law).
Reserve Requirement must be fulfilled on the expiry of 3 years from the date of the advance payment.

**Interests in certain legal entities**

Settlements in connection with the acquisition by residents from non-residents of various equity interests (apparently excluding securities, such as shares) in non-Russian and arguably Russian legal entities and the making by residents of contributions to the assets of a simple partnership (a type of unincorporated joint venture) with non-residents, may be restricted by the Special Account and the Reserve Requirement imposed on the resident in the amount of up to 100% of the amount of such operation for up to 60 days. These rules (as well as the provisions described in paragraph 2.1 above) do not apply to operations between banks and other resident credit organisations of the Russian Federation and non-residents.

**Other**

In accordance with Article 8 of the Law, the following operations (between residents and non-residents) may be restricted (in various combinations) by:

- Special Account requirements imposed on the resident, Special Account requirements imposed on the non-resident, and one type of Reserve Requirement (the Reserve Requirement imposed on the resident or non-resident in the amount of up to 100% of the amount of the operation for up to 60 days OR the Reserve Requirement imposed on the resident or non-resident in the amount of up to 20% of the amount of the operation for up to one year).
- Settlements in connection with foreign currency and rouble loans between residents and non-residents.
- Operations involving External Securities and related settlements; and the performance by residents of obligations under the External Securities. Settlements between residents and non-residents in relation to External Securities may be carried out in roubles or foreign currency unless otherwise established by the CBR. Operations with External Securities and related settlements between physical persons of up to $150,000 per calendar year cannot be restricted.
- Operations of credit organisations excluding Banking Operations.\(^3\)
- Operations between non-residents and residents in connection with acquisitions of rights to Internal Securities and related settlements; and the performance by residents of obligations under the Internal Securities. Settlements between residents and non-residents in relation to Internal

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\(^3\) Under Article 5 of the Law “On Banks and Banking Activity” Banking Operations include: deposit taking and placing funds attracted through such deposits, lending, maintaining bank accounts, taking deposits in precious metals and investing them, cash collection and cashing in promissory notes and other payment and settlement documents, and buying and selling foreign currencies and issuing bank guarantees. Banks and other credit organisations can effect certain other transaction but they are not treated as “Banking Operations.”

Russia.
Securities should be carried out in roubles unless otherwise established by the CBR.

By way of example, settlements in connection with a drawdown under a foreign currency loan granted by a non-resident lender to the resident borrower may be subject to the Reserve Requirement envisaging an obligation of the borrower to deposit up to 20 per cent of the drawdown amount for up to one year. A similar Reserve Requirement may be imposed on non-resident lenders in connection with a rouble loan to a resident borrower. Transactions involving External Securities and related settlements between residents and non-residents may be subject to the Reserve Requirement in either of the two forms (a cash deposit of up to 100% of the transaction amount for up to 60 days or a deposit of up to 20% of the transaction amount for up to one year), such Reserve Requirements being capable of being imposed on residents and non-residents.

The Law specifically restricts the ability of the CBR to impose both forms of the Reserve Requirement in relation to one type of Currency Operation although the Law does not expressly rule out the possibility of the imposition of one of the forms of the Reserve Requirement simultaneously on both the resident and non-resident. However, at a recent currency control conference a CBR official suggested that the CBR does not intend to impose the Reserve Requirement on residents and non-residents at the same time, despite the discretion that the CBR formally has under the Law.

Special rules may be introduced by the CBR to apply to Banking Operations of credit organisations.

Currency operations involving Internal Securities between non-residents in Russia are subject to compliance with anti-monopoly and securities legislation. Such operations may be restricted by the Special Account requirement.

Conversion restrictions

The sale and purchase of foreign currency in Russia may only be carried out through Authorised Banks.

The CBR regulates procedures for the sale and purchase of foreign currency by residents (legal entities) and by non-residents, and may impose Special Account requirements (on residents or non-residents) and the Reserve Requirement (i) in the form of a deposit by the resident of up to 100% of the amount of the purchased foreign currency for up to 60 days prior to the purchase date, OR (ii) in the form of a deposit by the non-resident of up to 20% of the amount of the sold foreign currency for up to one year. These requirements do not apply to the sale and purchase of foreign currency: (a) by Authorised Banks; (b) by physical persons from Authorised Banks other than for the purpose of business activities; and (c) where the Reserve Requirement is already established in relation to the Currency Operation for which the foreign currency is purchased.
Domestic Securities Transactions

Currency control restrictions envisaged by Article 8 of the Law may take the form of a Special Account requirement OR a Reserve Requirement and may cover transactions involving the acquisition by non-residents from residents or by residents from non-residents of Internal Securities and related payments. Acquisition by a non-resident of Internal Securities from a resident and related payments may be subject to the Reserve Requirement for the non-resident to deposit up to 20% of the value of such securities for a period of up to one year. Transactions involving the acquisition by a resident of Internal Securities from a non-resident and related payments may be subject to the Reserve Requirement for the resident to deposit the amount of up to 100% of the value of such securities for a period of up to 60 days. With respect to both of these transactions the CBR is entitled to introduce a requirement for the non-resident to open a Special Account.

Where the non-resident is required by the CBR implementing regulations to effect domestic securities trades through a Special Account, in accordance with Article 13 of the Law, the CBR may require a non-resident to fulfil the Reserve Requirement (i) by depositing an amount not exceeding 100% of the amount of cash and/or the value of securities debited from the account for a period of up to 20 days; OR (ii) by depositing an amount not exceeding 20% of the amount of cash and/or the value of securities credited to the account for a period of up to one year.

Although it is not instantly clear from the Law, the CBR officials recently expressed a view that the Reserve Requirement which may be imposed by the CBR in relation to domestic securities transactions under Article 8 of the Law should be treated as a stand-alone Reserve Requirement applying only where no Special Account requirement is introduced with respect to such trades. In other words, purchases and sales by a non-resident of Internal Securities may be subject to only one of the two forms of the Reserve Requirement discussed above (i.e. those provided either in Article 8 or in Article 13).

Accounts of residents outside Russia

Residents are permitted to open accounts (deposits) with banks in OECD and FATF countries (subject only to registration requirements). In other cases they are permitted to open accounts in accordance with the procedure established by the CBR which may provide for the prior registration of the account which is to be opened. Resident legal entities will be able to open offshore accounts in OECD and FATF member states freely (subject only to registration requirements) from 17 June 2005; until then the opening of such accounts will still require a CBR licence.

The transfer of funds to accounts outside Russia by residents from their accounts with Authorised Banks may be carried out in accordance with the procedure established by the CBR. These may provide for the Reserve
Requirement in the amount of up to 100% of the currency operation for up to 60 days prior to the performance of the currency operation to be imposed on the resident.

Resident legal entities are permitted to carry out Currency Operations with funds in such accounts outside Russia without limitations (except for Currency Operations between residents).

Resident physical persons are permitted to carry out Currency Operations with the funds in such accounts except for Currency Operations relating to the transfer of assets or the provision of services within the territory of the Russia. It is not entirely clear, however, whether the limitations which may be imposed in the case of acquisitions of External Securities in excess of the $150,000 (see paragraph 2.3 above) apply to the funds in the foreign account.

The above requirements for accounts outside Russia do not apply to Authorised Banks and currency exchanges for which the CBR will establish a separate regime.

**Export from and import to Russia of Currency Values, Russian Currency and Internal Securities**

The import and export (subject to the exceptions for physical persons described below) of foreign currency and External Securities (in documentary form) is permitted subject to compliance with the customs regulations. Resident and non-resident individuals are permitted to export physical cash of up to $10,000 on a one-off basis (the amounts in excess of $3,000 to be declared to customs). Physical persons are permitted to export foreign currency in excess of $10,000 (on a one-off basis) and External Securities (in documentary form) which were previously imported in compliance with the customs regulations.

The import and export of Russian currency and Internal Securities (in documentary form) is carried out in accordance with the procedures to be established by the Regulators and may require prior registration.

**Repatriation and mandatory conversion of export proceeds**

When carrying out Foreign Trade, residents must generally ensure the receipt into their accounts with the Authorised Banks, within the timeframe provided by the relevant contract (see paragraph 2.1 above regarding deferral of payment) of amounts (in Russian or foreign currency) owed to them by non-residents for the goods, works, services, information or intellectual property provided to non-residents, and of any amounts paid to non-residents where the relevant goods, services, information or intellectual property were not actually provided by non-residents to residents.

However, the above repatriation requirement will not apply to foreign currency export proceeds paid into offshore accounts of such residents or
third parties in performance of the residents’ obligations under loan agreements with non-residents which are (i) agents of foreign governments or (ii) are resident in OECD or FATF members states if the maturity of the relevant loan exceeds two years. The Law also provides for a number of other exemptions from the repatriation requirement.

Up to 30% of foreign currency proceeds received by residents from non-residents for the provided goods, works, services, information and intellectual property (as reduced by the amount of certain costs and expenses specified in the Law) will continue to be subject to the mandatory conversion into roubles within seven days from the day when such proceeds are credited to the residents’ Russian bank accounts.

However, among other instances specified in the Law (and as with the repatriation requirement), the mandatory conversion requirement will not apply to foreign currency proceeds used by resident borrowers to service loans from non-residents which are (i) agents of foreign governments or (ii) are resident in OECD or FATF member states if the maturity of the relevant loan exceeds two years.

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Slovak competition legal framework after EU accession

This note highlights some of the most important changes to the Slovak competition legal framework after 1 May 2004 resulting from the recent legislative changes, as well as from the changes brought about by the EC Modernisation Regulation and the new EC Merger Regulation, though it cannot provide an exhaustive outline of all complex issues involved.

As of 1 May 2004, the EC Treaty provisions governing competition issues and the directly applicable implementing regulations will also apply in Slovakia, subject to certain transitional periods. Thus, after 1 May 2004, Slovak national law and EC competition rules will coincide.

On the eve of the accession of Slovakia to the European Union, the Slovak Parliament adopted an amendment to the Slovak Competition Act in an effort to further harmonise the national competition rules with the EU legislation which, itself, has gone through substantial changes in an attempt, inter alia, to accommodate the challenges stemming from the enlarged union of 25 Member States.

Cartels, restrictive agreements, abuse of dominant position

The range of activities that may constitute a breach of Slovak competition law are the same as under EU law. As of 1 May 2004, Article 81(1) of the EC Treaty prohibiting agreements and restrictive practices restricting competition in so far as they affect trade between member States, will directly apply in Slovakia. The Act on Accession provides some transitional periods within which undertakings will need to adapt their agreements capable of breaching Article 81(1) in order to avoid their potential unenforceability and heavy penalties. Under the transitional period undertakings have 6 months from the accession date to comply with certain block exemption regulations, including those relating to motor vehicle sector, vertical agreements, specialisation, technology transfer, research and development.

The EC Modernisation Regulation brings about important changes to the application of Articles 81 and 82 of the EC Treaty, including decentralisation of the powers to the national competition authorities, increased penalties and broader investigative powers of the Commission. The recently adopted
amendment to the Slovak Competition Act reflects the changes brought about by the EC Modernisation Regulation.

As a result, after 1 May 2004, the Slovak competition authority and Slovak courts will not only have the right but also an obligation to apply Articles 81 and 82 of the Treaty when they apply national law to the agreements/concerted practices or unilateral conduct prohibited by Articles 81 and 82, respectively, within the terms of such Articles that may affect trade between member States. Agreements/concerted practices that are permitted under Article 81 of the EC Treaty may not be prohibited by the Slovak competition authority and Slovak courts pursuant to the national laws, however, stricter national laws sanctioning unilateral conduct (abuse of dominant position) would not be precluded. It should be noted in this respect that the Slovak law sanctioning restrictive agreements/concerted practices and abuse of dominant position to a large extent mirrors Articles 81 and 82 of the EC Treaty and therefore it would appear rather exceptional that the application of the national laws along with the EC rules by the Slovak authorities would lead to conflicts.

The possibility to seek an individual exemption under Article 81(3) for an agreement which falls within the ambit of Article 81(1) will cease to exist. After 1 May 2004, also the current system of individual exemptions under the Slovak Competition Act will be abolished. It will be up to undertakings to ensure that their agreements meet the criteria set out by the EC Treaty and the Slovak laws for the exemption from the ban on restrictive agreements.

It is also important to mention that under the enhanced investigative powers of the Commission brought about by the EC Modernisation Regulation, investigation will now also be possible on the private premises of the managers, directors and other staff if there is a reasonable suspicion that books and records which may be relevant to prove serious breaches of Articles 81 and 82 of the EC Treaty are kept in such premises. The amended Slovak Competition Act creates the legal basis for such investigations to take place with the prior consent of the Slovak courts. In addition, the Slovak competition authority will have the same power of investigation when carrying out investigations under national competition law, also subject to prior consent of the court.

**Merger control**

After accession, the current double notification requirement applicable to transactions having a Community dimension under the EC Merger Regulation will be eliminated. The recently adopted amendment to the Slovak Competition Act also substantially changes the current notification thresholds by abolishing the market share threshold and by modifying the turnover threshold. As of 1 May 2004, the obligation to notify the Slovak competition authority will be triggered if, with respect to the most recent
financial year of the undertakings concerned, at least one of the following alternative thresholds is satisfied:

(a) the undertakings concerned achieved a combined aggregate worldwide turnover of at least SKK 1,200 million (approx. € 29.2 million), and each of at least two undertakings concerned achieved an aggregate turnover in Slovakia of at least SKK 360 million (approx. € 8.7 million); or

(b) at least one of the undertakings concerned achieved an aggregate turnover in Slovakia of at least SKK 500 million (approx. € 12.2 million), and at least one other undertaking concerned achieved an aggregate worldwide turnover of at least SKK 1,200 million (approx. € 29.2 million).

Any concentrations occurring after 1 May 2004 that meet the above thresholds but do not amount to a concentration of an EC dimension under the EC Merger Regulation, will be notifiable to the Slovak competition authority. Transactions meeting the above thresholds and, at the same time, having an EC dimension, will be notified only to the Commission.

It is worth mentioning that the new EC Merger Regulation permits undertakings to request, by a reasoned submission to the Commission prior to the notification of the transaction to the national competition authorities, that a transaction which does not have a Community dimension but is notifiable in at least three Member States be reviewed by the Commission. It is uncertain at this stage how this referral process will work as only one member State needs to express its disapproval of such referral to prevent the Commission taking over the case.

**State aid**

As of 1 May 2004, strict EC state aid rules will apply in Slovakia. Any state aid measures will need to be notified to the European Commission and failure to do so will have serious repercussions for the parties concerned, including the potential obligation of the recipient of such aid to repay it. As regards aid measures put in place prior to 1 May 2004, the Accession Treaty specifies three types of aid measures which will be deemed existing aid under the EC state aid rules and, thus, legal: (a) those put in place prior to December 1994, (b) those listed in the annexes to the Accession Treaty, and (c) those which were declared compatible with the EC state aid rules prior to the accession. However, existing aid will continue to be subject to review and control by the European Commission.

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