CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2024

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UKRAINE

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1. What are the main competition-related pieces of legislation in Ukraine?

During the 1919-1991 Soviet period in its history, Ukraine was not able to join the Western countries in their move toward establishing competition law. Thus, the competition law in Ukraine commenced its development in the early 90s shortly after Ukraine had gained its independence. The results that were achieved are quite satisfactory – although there is room for further improvement, Ukrainian competition law is a well-established and functioning institution.

First of all, it is worth noting that the Constitution of Ukraine mentions competition. To wit, Article 42 says that the state shall ensure the protection of competition within business activity. It goes further, prescribing that monopolistic abuse, unlawful restriction of competition, and unfair competition are not acceptable.

Then, there are four laws dedicated specifically to competition issues:

1) the Law of Ukraine, On Antimonopoly Committee of Ukraine (the AMC Law)

This law establishes the authority over Ukrainian competition – the AMC, and defines its composition, powers, and functions. The AMC Law provides for a 7-year tenure for AMC members, who are State Commissioners. This is longer than normal tenures for the president, the parliament, and the Cabinet of Ministers – which all were involved in the formation of the AMC.

2) the Law of Ukraine, On Protection of Economic Competition (the Competition Law)

This is the primary law governing competition issues in Ukraine. The Competition Law provides for the key definitions, defines the main antitrust violations (namely abuse of dominance and anticompetitive concerted actions), establishes the merger control regime, and establishes sanctions that the AMC can apply in instances of non-compliance.

3) the Law of Ukraine, On Protection Against Unfair Competition

This law prohibits unfair competition in general and provides for specific instances of unfair competition, such as defamation, trade libel, misleading consumers, etc.

4) the Law of Ukraine, On State Aid to Commercial Undertakings (the State Aid Law)

The State Aid Law establishes state aid regulation on the national level in Ukraine. It provides for the key compatibility rules as well as for the AMC's state aid monitoring system. Further state aid compatibility criteria are usually elaborated by the AMC and adopted by the Cabinet of Ministers.

Also, Ukraine's major codifications address competition issues. The Civil Code of Ukraine states, as a limitation of civil rights, that civil rights cannot be used for the abuse of monopoly, unlawful restriction of competition, and unfair competition. The Commercial Code of Ukraine contains more than 15 articles dedicated specifically to competition issues. However, these articles are mostly of a declarative nature and/or duplicate norms from the above-mentioned laws. Therefore, neither the AMC nor courts of law typically refer to the Commercial Code of Ukraine in the context of competition matters.

And, surely, there are plenty of regulations that have been elaborated and adopted, mostly by the AMC, to further develop provisions of the previously mentioned laws, inter alia:

- the regulation on the procedure for filing applications with the Antimonopoly Committee of Ukraine in order to obtain its approval prior to the concentration of undertakings (the Merger Regulation);
- the regulation on the procedure for filing applications with the AMC for obtaining its prior approval for concerted practices;
- the guidelines on the applicability of the Ukrainian merger control rules to joint ventures (the Joint Ventures Guidelines);
- the rules for consideration of claims and cases on the violation of the laws on protection of economic competition (the Investigation Rules);
- the procedure for the filing of applications with the AMC for release from liability for violation of Ukrainian competition law (the Leniency Regulation);
- the methodology for assessment of a monopoly (dominant) position of undertakings in a market;
- the guidelines on the application of the SSNIP test;
- the model conditions for the concerted practices of undertakings for the general exemption for the prior clearance for concerted practices obtained from the AMC (the General Block Exempts);
- the model conditions for the concerted practices of undertakings regarding the supply and use of goods (the Vertical Block Exempts);
- the guidelines on the application of the State Aid Law; and
- the guidelines on the calculation of fines for Ukrainian competition law violations (the Fines Guidelines).

2. Have there been any notable recent (last 24 months) updates of Ukrainian competition legislation?

On August 8, 2023, the Law of Ukraine "On amendments to certain laws of Ukraine regarding improving competition law and activities of the Antimonopoly Committee of Ukraine" No.3295-IX (Law 3295-IX) was adopted. It primarily amends the Competition Law and the AMC Law. These amendments are considered an important step within the ongoing "competition reform" aimed at further harmonization of Ukrainian laws and regulations with EU competition law.

The amendments introduced by Law 3295-IX can be grouped into three key blocks:

I. Amendments regarding investigations by the AMC

New procedural rules for obtaining dawn raid (inspection) court warrants via amendments to the Commercial Procedural Code and provide for the detailed powers of the AMC during dawn raids. Before Law 3295-IX the AMC did not need a court warrant to conduct a dawn raid. However, on the other hand, the AMC's powers within the context of a dawn raid were rather ambiguous and provided room for appeal. In consideration of this, the AMC mostly avoided dawn raids as an active tool of its investigations.

Accordingly, new powers for the AMC inspection team are envisaged:

- in accordance with a court warrant, to enter and to have unrestricted access to the premises and places of data storage owned or used by the subject of inspection;
- to receive copies or extracts from documents, as well as seize relevant property for further extraction of information from it;
- in accordance with a court warrant, to seal the premises that are subject to inspection;
- in accordance with a court warrant, to inspect the premises that are subject to inspection;
- to demand oral or written explanations from the company management and staff members;
- to conduct photo or video recording or to use other technical means to obtain evidence;
- to prohibit any persons who are present at the premises subject to inspection to conduct any actions regarding documents or other objects containing data.

II. Amendments regarding merger control:

- disregarding the financial results of the seller group in the event that the target is not active in Ukraine for two years preceding the year of the transaction, and subject to seller losing control over the target in the result of the concentration results. In other words, if the target and its subsidiaries have not had nexus to Ukraine for more than two years, then the seller group's assets or revenues are not taken into account when determining whether the proposed transaction triggers financial thresholds.
- excluding from the definition of concentration situations in which an undertaking reaches or exceeds 25% of the votes in a general meeting in cases where they do not obtain control (previously reaching or exceeding 25% was deemed concentration regardless of obtainment of control over the target undertaking).
- recognizing transactions concluded between the same companies within two years as a single concentration.

III. Amendments regarding the institutional capability of the AMC:

- increasing remuneration for AMC staff making it dependent on minimum wages, which are regularly updated;
- fine collection procedure improvements:

o instead of filing a statement-of-claim to the court in order to obtain an enforcement order from the court (where the court's decision could be appealed to a higher venue), according to the amendment, a decision from the AMC has the power of an enforcement order and can be enforced by authorities immediately after a 2-month period, during which the company may pay the fine;

o introduction of solidary liability regarding the payment of fines by affiliated companies;

- grants the AMC powers to access certain governmental databases;
- establishes settlement procedures for the AMC (governmental agencies in Ukraine rarely opt for settlements, as enforcement authorities see it as a corruption red flag);
- improving leniency policy by allowing decreases in fines beyond the first applicant.

Moreover, despite ongoing war and a new chairman, the AMC revised and adopted new versions of two important regulations:

1) Rules for determining the amount of a fine (a very important regulation, as the Competition Law provides for high maximum fines of 10%, 5%, or 1% of an undertaking's revenue; more detailed criteria will be put into place that will determine the amount for fines in various circumstances; this will provide business with an adequate level of certainty; the importance of these regulations is so high that establishing such rules was one of the conditions of the EU-Ukraine Association Agreement in 2014).

2) Rules for conducting consumer surveys (interviews).

Both adopted texts are pending approval from the Ministry of Justice, which reviews these types of regulations. Afterward, the new versions of these regulations will be published and will enter into effect.

Also, in 2023 the AMC published guidelines on the peculiarities of defining market boundaries for markets with significant buyer power.

3. What are the main concerns of the national competition authority in terms of agreements between undertakings? What is the sanctioning record of the authority?

Agreements between undertakings that do not amount to concentration could still be deemed concerted practice (when the agreement concerns competitive behavior in the market). The AMC's main concern is when such concerted practice can be anticompetitive, meaning that it may negatively impact competition or already do so (leads or may result in prevention, elimination, or restriction of competition, as the Competition Law states). Generally, the implementation of anti-competitive concerted practices is prohibited, unless the AMC grants a permit.

In 2021, the AMC imposed its largest total fine for anticompetitive concerted practice on petroleum-producing companies and fuel stations allegedly controlled by an oligarch. As the companies involved denied their affiliation, the AMC accused them of coordinating prices, which led to fines totaling EUR 140 million. To compare, the total amount of fines issued annually for anticompetitive concerted practice typically does not exceed EUR 20 million. This case was the AMC's second major move against oligarchs following the 2019 decision on the compulsory divestment of OSTCHEM (see the section below dedicated to abuse cases).

It is worth mentioning that the AMC is very active in investigating bidding rings. In fact, the vast majority of anti-competitive concerted practice cases are cases on bid rigging. For example, in the most recent available annual report (2022) the AMC does not highlight any other cases involving anticompetitive concerted practice.

As one of Ukraine's priorities is the fight against corruption, especially in times of war, the AMC is doing its part: they are attentive to one of the fields that are most exposed to corruption – public procurement. The AMC's investigations on bid rigging carry considerable significance, as they have additional consequences for violators. A company that is recognized as a participant in bid rigging is banned from public procurement for three years. In many B2G markets, it is a huge impediment to further businesses, as one cannot simply avoid consequences and register a new legal entity. Many public procurement tenders require specific experience or a history of governmental contracts from the applicants.

4. Which competition law requirements should companies consider when entering into agreements concerning their activities in Ukraine?

As mentioned above, the AMC may grant permits for concerted practices. Also, there are general and specific block exemptions and, if in compliance, do not require filing with the AMC in order to implement respective concerted practices.

When considering whether one should apply to the AMC, the following shall be taken into account:

The first step is to assess whether an agreement can be considered a concerted practice. Then it is essential to understand in which markets the agreement would take place and what the market shares of the participants in these respective markets are.

After that, it is possible to understand whether the agreement falls under any of the general exemptions provided by the Ukrainian competition law framework, which allows the implementation of concerted practices without the AMC's prior clearance.

Thus, horizontal agreements generally can be implemented, if there are no parties holding a dominant position and the combined market share of the parties in the relevant market is less than 15%.

In the case of vertical agreements, restraints are acceptable if the parties' combined market share is less than 30% of the relevant market and the restraint itself is not significant (for example, resale price maintenance via fixed or minimum prices, restriction of active sales, restriction of cross-supplies, etc.).

Following such self-assessment, it is possible to decide whether there is a need to file for AMC clearance. When filing for AMC clearance for concerted practice, one should demonstrate that the anti-competitive effect of the contemplated concerted practice is outweighed by other positive economic effects such as production improvement, technical development, providing advantages to SMEs, etc.

5. Does a leniency policy apply in Ukraine?

Yes, Ukraine has had a leniency policy for over a decade. Although leniency policies have proven to be beneficial around the world, in Ukraine they are not quite as popular. There could be a lot of factors to that, but one of them is definitely a cultural one. During the Soviet occupation, a "no-snitching"

culture and distrust of authorities was deeply embedded in Ukrainian society and is still affecting the coming generations. This effect is so deep it affects not only managers and owners of Ukrainian companies, but also local management of international businesses.

Nonetheless, according to the Competition Law, an undertaking involved in cartel activities may apply for total immunity from fines for anticompetitive concerted practices if it reports itself and provides the AMC with sufficient evidence of collusion.

The leniency conditions to obtain immunity are as follows:

- the AMC was unaware of the reported collusion;
- the applicant duly cooperates with the AMC;
- the applicant provides sufficient evidence regarding the collusion;
- the applicant exited collusion unless remaining in the cartel is essential for the investigation; and
- the applicant has not coerced other undertakings to participate in collusion, has not falsified or covered information from the AMC, etc.

Before the recent amendments, there was also a condition that the applicant should be the first to disclose the information on collusion. Now this condition has been altered, and though such applicants cannot obtain full immunity, they can receive reduced fines: 50%, 30%, and 20% decreases in fines are available for the second, third, and fourth applicants.

For the last decade, there have been only a few known instances of leniency application. We hope that with the amendments going into effect, this instrument will become more popular in Ukraine.

6. How is unilateral conduct treated under Ukraine's competition rules?

Like most European jurisdictions, Ukraine does not directly prohibit the mere existence of a monopoly or dominance in the market. Surely, such a situation is undesirable, and the AMC is obliged to prevent it via the merger control regime. However, when a monopoly occurs, for example, due to "survival of the fittest" (bankruptcy of major competitors) the AMC cannot apply any measures to the newly established monopolist based on the sole fact of having gained a monopolistic position.

According to the Competition Law, a company holds a dominant position in the market, if:

- it has no competitors in the market; or
- it is not subject to significant competitive pressure due to competitors' restricted access to raw materials, distribution channels, market barriers, etc.

Also, the Competition Law contains a presumption that an undertaking holds a dominant position if its market share exceeds 35% unless the undertaking proves it is subject to significant competition in the market. In some cases, an undertaking holding a market share of less than 35% can be viewed as dominant as well, if the AMC is able to prove it is not subject to significant competition.

Moreover, the Competition Law also operates with a concept of collective dominance. Therefore, several undertakings are considered to be holding collective dominancy, if:

- up to three undertakings hold a 50% market share; or
- up to five undertakings hold a 70% market share.

In such cases, each undertaking is considered to hold a dominant position in a relevant market.

As was mentioned above, the very holding of a dominant position is not an infringement. However, once a company, through whatever means, gains a monopolistic or dominant position in its market, it becomes subject to many more restrictions. Namely, a large portion of its behavior could be interpreted as abuse of dominance.

The wording of the Competition Law suggests that the abuse of dominance is an undertaking's action or failure to act, which causes or may cause the prevention, elimination, or restriction of competition or discrimination against other undertakings. Evidently, a dominant undertaking that is abusing its market power is prohibited and may be sanctioned with substantial fines or even a compulsory divestment.

The Competition Law provides a non-exhaustive list of examples of abusive behavior which effectively comprises the restrictions for any undertaking holding a dominant position. They are as follows:

- monopolistic pricing strategies, i.e., setting prices that could not be set in a competitive market;
- discrimination, i.e., unjustified application of different prices or conditions in equivalent transactions;
- imposing additional obligations on the counterparty to enter into the agreement, which by their nature or according to established commercial practice, do not relate to the subject matter of the agreement;
- the limitation of production, markets, or technological development, which harms or may harm other undertakings, buyers, or sellers;

the refusal to purchase or sell goods in the absence of other alternatives;

unjustified limitation of the competitive potential of other undertakings; and

creating barriers to entry or exit of the market or elimination of buyers, sellers, or other players in the market.

7. Are there any recent local cases of abuse that are of relevance?

The biggest case of the year was the investigation against state-owned, oil and gas company Naftogaz of Ukraine (Naftogaz). After the liberalization of the natural gas market, Naftogaz decided to develop its B2C branch by supplying natural gas directly to businesses and households. At the same time, Naftogaz and its subsidiaries held the major share in natural gas extraction and import. The AMC decided that Naftogaz being vertically integrated discriminated against other B2C players when concluding contracts for gas supply with them. In late December 2023, the AMC fined Naftogas quite heavily – fines for affiliated companies totaled around EUR 35 million.

This is probably the biggest fine the AMC has imposed on a state-owned company. It is very important that the AMC shows its willingness to scrutinize state-owned companies, as historically authorities in Ukraine have been very reluctant to confront other authorities or state-owned businesses. This trend should be reversed; this is particularly important given that Ukraine has large state-owned companies in many sectors.

It is quite rare for the AMC to conclude an investigation without declaring a violation. Usually, if the AMC sees that the case is not strong enough for such a declaration, they will drop it in the earlier stages. However, in 2023 the AMC concluded an investigation that did not result in the company being recognized as abusing its dominance. The case involved a state-owned company that operates the platform for government auctions. It was initially accused of "imposing additional obligations on the counterparty to enter into an agreement, which by their nature or according to the established commercial practices, do not relate to the subject matter of the agreement." Following the investigation, however, the accusation was dropped.

Also, though not very recent (the AMC decision was rendered in 2019), we should mention the OSTCHEM case, as it was the first case in 20 years in which the AMC imposed compulsory divestment. OSTCHEM was a major producer of mineral fertilizers in Ukraine and Europe (now many of its assets are destroyed by war). To understand its influence on the Ukrainian economy and on the global grain supply, we should mention that mineral fertilizers comprise up to 30% of the cost of grain production. Essentially, the AMC accused OSTCHEM of exploitative pricing practices. The AMC's case was not strong enough and did not survive litigation. However, it is an important milestone that demonstrates that the AMC is capable of moving against an oligarch-owned business with aggressive sanctions.

8. What are the consequences of a competition law infringement?

The main penalties under the Competition Law are of an administrative nature.

The most common sanction applied by the AMC is a fine, which is calculated as a percentage of the undertaking's revenue for the year preceding the year of the fine's imposition. Typically, the fine is applied (and measured) regarding the legal entity's commitment to infringement. However, in certain cases, the AMC can apply a fine to the entire group of companies (for example, if the infringing entity is an SPV and the direct beneficiary of the infringement is the group's parent company).

10% of the preceding year's revenue being fined is for the most serious violations, such as abuse of dominance and anti-competitive concerted practice (collusions). Infringements such as failure to file for a merger or anti-competitive practice clearance have a 5% fine limit. Relatively minor infringements such as providing the AMC with false information, ignoring the AMC request, or obstructing the AMC inspection have a 1% fine limit.

As mentioned, due to quite large potential fines, detailed criteria to determine the fine amount will be available. Establishing these rules was one of the conditions of the EU-Ukraine Association Agreement in 2014. They were published for the first time in 2015. The new version of the rules for determining the amount of a fine is currently in the process of approval.

For example, as mentioned, failure to file for merger clearance is subject to a fine of up to 5% of revenue. According to the 2016 guidelines on the determination of the amount of a fine, if the concentration resulted in monopolization or distortion of competition, the fine range should be 5-15% of the revenue from the relevant and adjacent markets; if concentration has not impacted markets, the fine should be in the range between UAH 255,000 (approximately EUR 8,000) and 7.5% of the revenue on the relevant and adjacent markets.

Besides fines, the AMC has a powerful instrument known as compulsory divestment. During the last two decades, it has been employed once, in 2019 (for the details, see the section above dedicated to abuse cases).

Also, Ukraine has private antitrust litigation. Unfortunately, it is quite unpopular despite the statutory rule, according to which damages caused by abuse of dominance or anti-competitive concerted practice shall be paid in double. The unpopular-

ity of private antitrust litigation is due to the Ukrainian court's flawed practice of calculating damages in general.

The courts are reluctant to award damages unless they can be very clearly calculated, as it was in the case of the Nibulon company. Nibulon is a major Ukrainian agricultural company. Upon receiving the complaint, the AMC decided that the state-owned railway company applying additional tariffs specifically to Nibulon was abusing its monopoly. The damages amounted roughly to EUR 2 million and were easily calculated as the additional tariff was applied for a limited period of time. Therefore, Nibulon was awarded approximately EUR 4 million in court.

9. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Ukrainian market?

Yes, and more. As it has been mentioned, Ukraine has a well-established merger control regime. It catches most typical transactions such as mergers, acquisitions, takeovers, JV establishments, etc. Moreover, any acquisition of control over an undertaking falls under the definition of concentration. An AMC permit is required for transactions that meet qualifying thresholds.

From the point of view of companies with international operations, the Ukrainian merger control regime has three major flaws, one of which has been mitigated with recent legislative amends:

1) Foreign-to-foreign transactions are often caught by the Ukrainian merger control regime

The Competition Law shall apply exclusively to transactions potentially affecting the competition landscape in Ukraine. Article 2 of the Competition Law states that this law is applicable to the relations that impact or may impact competition in Ukraine. However, the impact on competition is something intangible and vague, but merger control thresholds are real. Therefore, in practice, the AMC can impose a fine for not clearing a transaction that formally triggers the thresholds but has little to no effect on Ukraine.

Fortunately, this problem has been addressed by legislators in the recent amendments to the Competition Law. Moving forward, if Target and its subsidiaries do not have nexus to Ukraine for more than two years, then the Seller group's assets or revenues are not taken into account when determining whether the transaction triggers financial thresholds. In practice, this means that a good part of foreign-to-foreign transactions will not be caught by the Ukrainian merger control regime.

2) Thresholds are relatively low

Nowadays, Ukrainian law operates only with financial thresholds (before 2016 there was also a 35% market share threshold).

The current financial thresholds are:

I. Assets or revenue of the Buyer and Seller groups together – EUR 30 million worldwide

Assets or revenue of the Seller group (including the Target) – EUR 4 million in Ukraine

Assets or revenue of the Buyer group – EUR 4 million in Ukraine

OR (an alternative threshold)

II. Assets or revenue of any participant's group – EUR 8 million in Ukraine

Revenue of the group of any other participant in concentration – EUR 150 million worldwide

All the thresholds shall be calculated according to the financial statements for the last financial year in accordance with the exchange rate established by the National Bank of Ukraine and effective on the last day of the financial year.

3) Post-notification is not available

If a transaction is caught by the Ukrainian merger control regime, the respective parties shall obtain prior clearance from the AMC before concluding the deal. Closing a deal without prior clearance is a finable violation. Nevertheless, many international businesses opt to close the deal regardless of Ukrainian clearance. Then the post-factum filing is submitted. The AMC usually clears the deal post-factum and simultaneously fines the parties (usually, is the buyer party who is responsible for filing in most acquisition deals).

As to the procedure for obtaining merger clearance, the full procedure takes 45 days after filing. For cases in which the parties' combined market share does not exceed 15% of the relevant market or 20% of the adjacent markets, a fast-track procedure (25 days and less information disclosed) is available. In the event the competition authority finds grounds for prohibition of concentration (which are (i) potential monopolization of the market; (ii) potential restriction of competition in the market), it may start Phase II, which usually takes several months.

As to the volume of disclosure, it is quite reasonable in cases where the filing is eligible for the fast-track procedure. Otherwise, the full structure of the parties' groups must be disclosed

along with information on the activities. In practice, the AMC often grants motions not to disclose irrelevant information.

Also, Ukrainian merger control has pretty common exemptions such as transactions among affiliated entities (given that affiliation was established in compliance with the Ukrainian merger control regime), establishing JV for coordination purposes (it is deemed concerted practice and also requires the AMC permit but under another procedure), temporary investment by an investment or financial services company (given that an investment company would not participate in management including general meetings of shareholders), etc.

It is a joint obligation to file for both the buyer and the target in cases of acquisition and for all parties in a merger or when establishing a JV. In the latter case, the liability for failure to notify lies on every party. In cases of acquisition, the buyer is liable. Also, in case of acquisition, if the target or the seller is non-cooperative, the buyer can submit a solo filing, and the AMC will request the needed information from the other party.

The grounds for prohibiting concentration are very limited: i) potential monopolization of the market; (ii) potential restriction of competition in the market. Moreover, in recent years the AMC has actively applied remedies in cases that would have been prohibited concentration perhaps five or 10 years ago.

Also, the Competition Law prescribes that once the AMC prohibited concentration the Cabinet of Ministers can, with certain limitations, overrule the AMC's decision when national interests outweigh the interest of maintaining competition in the market. However, historically this procedure has been invoked once or twice around 20 years ago.

In general, the Ukrainian merger control regime, despite its flaws, is sufficiently developed and, which is more important, developing in the right direction. The AMC has competent merger control staff allocated among three key departments responsible for the energy sector, production and retail of goods, and service industries (including, inter alia, banking and telecom). Once one has submitted a filing to the AMC, they may expect professional communication and performance. ■

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