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Ukrainian Competition Law, Recent and Planned Developments

By Tatiana Iurkovska and Liudmyla Gorodnycha

Ukrainian competition law has greatly improved in the last few years and there are further business-friendly changes on the agenda. In 2016, merger control procedures have been simplified since (i) the Parliament has increased the merger control thresholds (effective from 18 May 2016); (ii) the Antimonopoly Committee of Ukraine (“AMCU”) revised its procedural rules for merger filings (effective from August 2016) and the AMCU explains its approaches to the assessment of horizontal mergers [mergers between the competitors] (effective from 29 December 2016).

In 2017, the AMCU proceeded with the improvement of the competition law. Its main achievement was the adoption of the Vertical Block Exemption Regulation (“Regulation”), effective from 5 December 2017.

The Regulation explains and unifies the approaches of the AMCU in the assessment of agreements on the supply, distribution, and use of products (vertical agreements). The main points of the Regulation concern the conditions under which a vertical agreement can benefit from the block exemption.

The vertical agreements containing vertical restraints (i.e. supplier-customer level) are exempted from the prohibition of anti-competitive agreements and do not require obtaining of the prior approval of the AMCU provided that the market share of each of the parties does not exceed 30% on the markets where they, respectively, buy and sell relevant goods or services (except stringent restrictions).

The exemption from the AMC approval also applies to vertical concerted actions related to buyer’s use of IP rights and certain vertical concerted actions between contractor and subcontractor.

The following restrictions are not covered by the exemption and are subject to obtaining prior individual approval from the AMCU:

- vertical agreements between competing undertakings (except for the non-reciprocal agreements);
- vertical agreements which contain “hard-core” vertical restraints:
 - on resale prices (except for provisions regarding maximum or recommended prices);
 - territorial restrictions and customers’ restrictions (except for some restrictions on active sales under the exclusive distribution and on sales to unauthorised distributors under the selective distribution, others);
 - restrictions of cross-supplies between members of a selective distribution system;
 - restrictions to sell products’ components as spare parts to consumers and repairers;
- non-compete clauses the duration of which is indefinite or exceeds five years (subject to exceptions);
- obligations of a buyer not to manufacture, purchase, sell or resell goods/services after termination of the agreement;
- obligation of a member of a selective distribution system not to sell brands of a particular competitor.

In case of any doubt as to whether a vertical agreement contains any provisions which may qualify as anti-competitive vertical restraints, the parties may apply to the AMCU for guidance on qualification of planned actions.

The Regulation should help the market players to review the terms of their contracts and avoid fines, which became more impressive.

For-example in November 2017, the AMCU imposed fines on Sanofi-Aventis Ukraine (the sole importer of pharmaceuticals produced by Sanofi) and its distributors BaDM and Optima-Farm in the aggregate amount of almost €5 million.

The AMCU’s concern raised terms and conditions of distribution contracts which include rebate schemes regarding the distribution of pharmaceuticals which have already lost their patent protection and have many cheaper generic substitutes.

The AMCU decided that such agreements may (i) lead to the restriction of competition, (ii) prevent market access to generic products and (iii) enabled Sanofi to set higher prices for its products sold through public procurement procedures.

The amount of fine was calculated by taking into account the social-economic effect of violations and the fact that pharmaceutical products are socially important and any restriction of competition on these markets has a significant negative impact on the end customer.

The parties appealed the AMCU’s decisions to court.

State Aid

On 2 August 2017, the Law of Ukraine “On State Aid to Undertakings” (the “State Aid Law”) entered into force.

The state aid is defined as any support to undertakings through state or local resources in any form which distorts or threatens to distort economic competition by creating advantages for the production of certain kinds of goods or for carrying out certain business activities.

The relevant public authorities (state aid providers) should notify the new or substantially altered state aid to the AMCU and await the AMCU’s decision (positive or conditional) before its

implementation. The state aid implemented before the AMCU’s decision or without notifying to the AMCU is illegal and can be recovered.

According to the State Aid Law the AMCU should develop and maintain a Register of State Aid in Ukraine. In this respect, from 2 August 2017 the relevant public authorities (state aid providers) have to (i) submit notifications of the new state aid to the AMCU, (ii) provide the AMCU with data on the existing state aid granted during the preceding financial year, (iii) notify the AMCU of state aid programs existing on 2 August 2017.

Currently we can monitor the first steps of State Aid Law rules implementation.

Future Developments

On 29 December 2017, the AMCU launched for public discussion the draft Methodology of Market Definition. Currently the AMCU uses the Methodology for Establishment of the Monopoly (Dominant) Market Position of Undertakings, dated 5 March 2002 No. 49-p (the «Monopoly Methodology»), which also contains rules on market definition. In this respect, in order to avoid double regulation of market definition, the AMCU plans to approve a new version of the Monopoly Methodology and the Methodology of Market Definition.

After summarising and analysing all propositions and amendments raised during the public consultations, the AMCU is likely to approve Non-Horizontal Merger Guidelines as well as Methodology of Market Definition in 2018.

Moreover, draft laws amending procedural rules of investigations, increasing the list of cases for simplified procedure for obtaining of merger clearances and provide for removal of the seller from the calculation of turnover and assets value are on the agenda of the Ukrainian Parliament.