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## Competition & Antitrust Round Table 2016

By Tatiana Iurkovska

### 1) Have there been any recent regulatory changes or interesting developments?

At the end of 2015, Antimonopoly Committee of Ukraine (AMCU) published Guidelines on the method of setting fines for antitrust law infringements.

Based on that, a two-step methodology will be used when setting the fine. First, AMCU will determine a basic amount depending on the degree of gravity of the infringement. Second, it may adjust that basic amount upwards or downwards with up to 50% taking into account aggravating or mitigating circumstances.

The principal law on competition was significantly amended in 2015 and already in 2016. Key amendments are as follows:

Publication of AMCU decisions: currently, AMCU decisions are not published. The new rule requires publication of all decisions, excluding confidential information and commercially sensitive data. This will take effect on March 2016.

Increased thresholds: the new threshold system provides for increased

thresholds triggering notification requirement as well as for two basic alternative options. Namely, a) worldwide sale/assets of all parties exceed €30m (instead of €12m currently applied) and the sales/assets in Ukraine of at least two parties exceed €4m (instead of €1m currently applied) OR sales/assets in Ukraine of the target exceed €8m and sales of either party exceed €150m worldwide. This amendment will take effect on April 2016.

Fast track procedure: the fast track procedure of 25 days from filing date (instead of 45 days currently applied) will be available in case of meeting certain requirements regarding market share in Ukraine. This amendment will take effect also on April 2016.

### 2) Can you talk us through the current competition and antitrust landscape in your jurisdiction?

Ukrainian laws reflect largely the key principles set forth in TFEU, while including certain local specifics. For instance:

Mergers reaching certain turnover thresholds are subject to merger control. The key difference is that Ukrainian laws provide for lower financial

threshold triggering a notification (currently €12 m, and starting from April 2016 €30m or €150m worldwide in foreign-to-foreign transactions).

Concerted practices are defined similarly as in TFEU. However, concerted practices require prior approval of AMCU and there is no self-assessment procedure. At the same time, the issue of the state aid in competition is very new to Ukraine. The respective law adopted in 2014 will become effective in August 2017.

### 3) What areas of litigation currently rank highest on competition and anti-trust regulators agenda?

According to recent court rulings, the most frequently challenged AMCU's decisions relate to concerted practices, abuse of dominant position and unfair competition (misleading representation). However, appeal procedures against regulator are not successful as a rule. This is also due to the fact that in Ukraine the court has no authority to decide on purely competition issues: definition of market, amount of market shares, etc., and normally may rule only on procedural issues.

AMCU pays close attention to the pet-

rol product market. Recently, AMCU adopted the decision on infringement of competition law (in the form of anti-competitive concerted actions) in automobile petrol market (petrol price-fixing). Fines were imposed on eight major petrol station chains (OKKO, WOG, Lukoil, etc.). The fine for each company amounted to approximately €2,700.

AMCU decision was challenged by several companies. The court dismissed the claims on the grounds that AMCU decision can be declared invalid if it conflicts applicable laws and/or was issued by the authority beyond its competence, or if it violates the rights and lawful interests of the undertaking which was not the case.

AMCU imposed a fine on the large local energy supplier (PJSC "Poltavaoblenergo") for abuse of dominant position (setting unreasonable demands for customers in the technical terms for connection to the local electric networks). The fine amounted to approximately €1,980,000.

The courts satisfied the claim and declared AMCU decision invalid. The reason for invalidation was that the court determined that in the past AMCU fined the company essentially for the

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same infringement, and no one can be held accountable twice for the same violation.

**4) “Platform” regulation has received considerable interest of late following a number of EU Member States (notably Germany and France) expressing their frustration at how competition law would not be enough to tackle certain issues. In your opinion, is the current competition law sufficient to address the challenges raised by platforms?**

Behind online platforms there are many different business models with their specific features. Such a complex area should be tackled from many sides and no doubt requires sector specific regulation, but which in all cases would not be cumbersome and precluding the sector to develop.

By analogy with telecoms, effective regulation has brought competition to telecoms markets and managed to stimulate investment and innovation. However, this should be done in a very careful and timely manner, weighing risks and benefits so that in pursuit of quick regulatory reaction not to harm incumbents and encourage new market entrants, primarily Pan-European

service providers. I would agree with [the position of CMA Chief Executive, Alex Chisholm](#) that antitrust law and sectoral regulation must work in unison, but ex ante would be hardly appropriate in this sector at this stage. In Ukraine, for instance there is so far no competition regulation of the digital market.

**5) How has the appointment of Margrethe Vestager as the EU Antitrust Commissioner shifted the current landscape?**

The appointment of a new EU Antitrust Commissioner has not directly affected the current landscape in Ukraine. However, her achievements over quite a short period of time were visible to us. In particular, undertaking proceedings against Gazprom, one of Europe’s main gas suppliers, over allegations of breaking EU antitrust rules by putting in place artificial barriers to trade with eight European countries.

Her activities may prove useful to AMCU, as it also held investigation against Gazprom related to abuse of dominant position on the market of gas transportation and has recently announced on its completion.

**6) Have there been any noteworthy case studies or examples of new case law precedent?**

In 2015, in fact there was only one big and loud investigation – cartel between retail chains of supermarkets (Silpo, Novus, Auchan, etc.). The fine amounted to approximately €7.5m. This was noteworthy because of the huge amount of fine which is not typical for Ukraine, and shall be considered as exception rather than tendency.

**7) What considerations do companies need to make to avoid abuse of dominance?**

If an undertaking already holds a dominant position in a relevant market, it is recommended, to refrain from carrying out actions considered as abusive on the determined territory (e.g. price fixing, application of different prices or other different conditions to equivalent agreements with undertakings, etc.). It is also recommended to monitor on a regular basis the market shares of undertaking on all markets where it conducts activity. This will impart additional comfort, since availability of the relevant market shares may facilitate adoption of accurate decisions related to conclusion of a certain agreement

or other cooperation with the market players. Additionally, the awareness of the market shares may potentially reduce the risk of eventual violation of antitrust law.

In Ukraine, for instance, undertaking is considered holding a dominant position on the relevant market providing that:

- its market share exceeds 35% ;
- the aggregate market share of three undertakings at maximum on the same market exceeds 50%; or
- the aggregate market share of five undertakings at maximum on the same market exceeds 70%,
- unless such undertaking, fails to prove, inter alia, availability of substantial competition on the market.

**8) How can a company conduct effective global antitrust and competition risk assessment and how important is the implementation of an effective compliance program?**

Implementation of the compliance program is indeed essential for large companies active in several jurisdictions and of special relevance for Ukraine in the context of extraterritorial effect of Ukrainian merger clearance, i.e. cur-

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rently, foreign-to-foreign mergers may be subject to mandatory merger clearance in Ukraine even if they are not directly linked to Ukrainian market but at least one of the undertakings involved has a turnover of €1m in Ukraine (from April 2016 this threshold will be increased to €8m).

We usually prepare Competition Compliance Guidelines for our international clients to help avoid violation of antitrust law and ensure that their activities are conducted in accordance with Ukrainian laws. Such Guidelines are custom tailored according to the needs of the client and covers the areas of applicable to particular case. They always contain exact and practical recommendations to the management. The universal recommendations are to:

- appoint the person responsible for compliance with the antitrust law of Ukraine;
- bring the Guidelines to the attention of top management and other persons entitled to decide on strategic business related issues;
- follow recommendations and procedures stipulated by Guidelines;
- seek legal advice in case of doubt re how this or that situation may affect the group.

## 9) What advice can you offer to companies that find themselves subject to an antitrust raid?

Unlike the European Commission, AMCU is not authorised to raid businesses in Ukraine. And the maximum pressure that AMCU can apply is a) to request information posing certain questions and giving a reasonable period to provide the answers and b) impose certain fines to undertakings that refuse to submit answers or submit them not in full or not in time.

## 10) What action should a company take if it uncovers a potential anti-trust/competition breach? Are companies encouraged to self-report any wrongdoing?

Sometimes it is better to self-report and AMCU indeed encourages companies to do so.

In terms of merger clearances, AMCU has temporarily decreased the fines for admission of guilt in conducting M&A deal in the past without AMCU merger clearance. Until mid-March 2016, a fine shall amount to approximately €780, and in the period from mid-March to mid-September 2016, a fine shall be approximately €3,900. After that, in-

fringing undertakings will have to pay fines in full, starting from approximately €19,500 and up to 30% of turnover received as a result of infringement.

In terms of anticompetitive concerted practices, undertaking shall be relieved from payment of fines if it voluntarily and prior to other parties to concerted practices reports the violation to AMCU and provides information which shall be essential for AMCU to take its decision on the case. Self-reporting, however, does not release from claims for double damages.

## 11) What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

The EU-Ukraine Deep and Comprehensive Free Trade Area (DCFTA) became effective on 1 January 2016. Positive changes are expected in terms of transparency and effectiveness of AMCU. Moreover, there are a number of documents that must be adopted in compliance with DCFTA which relate to further harmonisation of Ukrainian competition laws to the European.