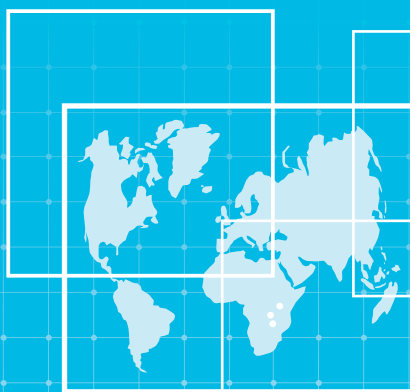




VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

UKRAINE

Overview





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NOTE

Voluntary peer reviews of competition law and policies carried out by UNCTAD fall within the framework of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices, known as the United Nations Set of Principles and Rules on Competition, adopted by the General Assembly in 1980. The Set seeks, among other things, to assist developing countries in adopting and enforcing effective competition law and policy suited to their development needs and economic situation.

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(OVERVIEW)

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PREFACE

1. This report examines the current state of competition law and policy in Ukraine. The report is based on extensive desk-based research and a fact-finding visit to Ukraine held in October 2012 and January 2013. The desk-based research covered a review of the Constitution of Ukraine, competition legislation, other legal texts on competition law and policy, decisions by the AMCU, and actions taken by other government agencies. The report also draws upon interviews with AMCU managers and officials, as well as representatives of other Ukrainian Government agencies and non-governmental organizations whose work affects competition policy and consumer protection. The report builds on previous studies on competition law and policy in Ukraine by other institutions.

I. FOUNDATIONS AND HISTORY OF COMPETITION POLICY IN UKRAINE

2. Ukraine enacted its first competition legislation in 1992. For the past two decades, the AMCU has been responsible for enforcing Ukraine's competition laws. In a short time, through the AMCU's efforts, competition law has assumed an important place in Ukraine's legal tradition.

3. Ukraine adopted its competition law system at the beginning of a period of rapid growth in the number of jurisdictions with competition laws throughout the world. Ukraine has a lot of experience to share with countries that are developing their competition regimes. Ukraine clearly shows how competition law can facilitate a successful transition from deeply rooted central planning and government ownership to a market-oriented economy.

4. The journey towards an effective competition policy system (CPS) in Ukraine has been arduous. The prolonged and comprehensive domination of central economic planning led to the concentration of most economic activity in massive State-owned enterprises and uprooted all remnants of a market system. Among other destructive consequences, economic policy in the Soviet era stifled intermediate markets and spurred extraordinary vertical integration. Under the closed economy conditions, this approach led to the domination of various clusters of State-owned enterprises which monopolized all sectors of the economy.

5. The centralization of economic activity within State-owned enterprises was accompanied by government policies that made the larger examples of such enterprises the chief providers of myriad social services. In such conditions, the possible collapse of State-owned enterprises potentially had such enormous adverse social and revenue effects that the government felt compelled to artificially

sustain them, despite their inefficiency, particularly through State aid which was practically irrecoverable. Due to the long existence of such approaches, in the early 1990s Ukraine lacked the base of substantive expertise and public administration norms required to build an effective CPS. The Soviet era of public administration prevented government bodies from making decisions aimed at sound public administration.

6. In the early 2000s, various market reforms and de-monopolization measures were taken. Despite various market reforms and de-monopolization measures, Ukraine's economy still features exceptionally high levels of concentration unrelated to superior economic performance. Government subsidies reinforce positions of dominance, and artificial regulatory controls imposed at all levels of government deter the entry of new businesses. Weaknesses in key infrastructure sectors such as energy, financial services, telecommunications and transportation discourage growth, curtail investment, and restrict entry and expansion by new firms. The regulatory regimes that govern natural monopolies also often decline to endorse procompetition policies.

7. These problems were clearly identified and used as a basis for the development of a plan to improve the efficiency and competitiveness of the economy. Ukraine has recently started implementing this plan. Considering these developments, there are prospects for improved implementation of an effective CPS.

8. A major impetus for reform comes from the awareness of Ukraine's political leadership that greater competition is necessary to improve economic performance. To this end, Ukraine has committed itself to adopt a National Competition Programme (NCP) for 2014–2024. The NCP will be adopted in 2013 and implemented starting from 2014. The NCP will provide a platform for addressing structural obstacles to competition in Ukraine's economy and removing artificial regulatory barriers to entry by new firms, and facilitate increased efficiency of market mechanisms. The AMCU is expected to play a major role in its implementation.

9. Beyond the NCP, international commitments provide a valuable stimulus for Ukraine to adopt procompetitive economic reforms. In 2008 Ukraine joined the World Trade Organization. It assigns a high priority to achieving full membership in the Organization for Economic Cooperation and Development (OECD). Ukraine also aspires to a deeper relationship with the European Union. Since November 2011, Ukraine participates in international networks such as the International Competition Network (ICN), the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, and the Interstate Council for Antimonopoly Policy established by the Commonwealth of Independent States. The AMCU concluded

bilateral cooperation agreements with the competition authorities of Armenia, Austria, Azerbaijan, Bulgaria, France, Georgia, Lithuania, Poland, Romania, the Russian Federation, Switzerland and the former Yugoslav Republic of Macedonia.

II. LEGAL FRAMEWORK

10. The protection of competition in Ukraine enjoys a constitutional mandate. Article 42 of the Constitution of Ukraine provides that “the State shall ensure the protection of competition in the pursuit of entrepreneurial activity” and bars “abuse of a monopolistic position in the market, the unlawful restriction of competition, and unfair competition.” It further states that “the types and limits of monopolies shall be determined by law” and provides that “the State protects the rights of the consumers.” Article 3.1 of the Law on the Protection of Economic Competition (LPEC) provides that the laws on protection of economic competition are based on norms established in the Constitution of Ukraine and consist of the LPEC (2001), the Law on the Antimonopoly Committee of Ukraine (1993) and the Law on Protection against Unfair Competition (1996), as well as other normative and legislative acts adopted in accordance with these laws.

11. In addition, sectoral legislation and acts of the President of Ukraine and the Cabinet of Ministers include provisions facilitating the protection of competition. Currently, there are more than 140 effective laws in Ukraine that regulate specific aspects of competition policy. The President, the Cabinet of Ministers, ministries and agencies have adopted more than 400 acts on issues of competition policy.

A. The Law on the Protection of Economic Competition

12. As its preamble observes, the LPEC provides the legal foundation for the protection of competition and the limitation of monopolies. It aims at ensuring the efficient functioning of the economy.

1. Overview

13. For the most part, the LPEC has the same substantive and procedural features found in most competition laws today. The LPEC governs the relations between bodies of State power, local self-government and administrative and economic management and control on the one hand, and consumers and other legal and natural persons on the other, in connection with economic competition. It applies to all practices that influence or may influence competition in Ukraine.

14. Article 4 lays down the basic principles of State policy in the field of competition and restriction of monopolies. Bodies of State power and local self-

government, and bodies of administrative and economic management and control shall pursue the State competition policy, undertake all such measures which lead to de-monopolization of the economy, and provide support to economic entities that facilitate the development of competition. Economic entities and the aforementioned bodies shall facilitate the development of competition and shall not commit any infringement of laws that can have a negative impact on competition. The AMCU and its bodies are the competent authorities in exercising State control over compliance with the laws on protection of economic competition, as well as protection of interests of economic entities and consumers from their infringement.

LPEC sections

15. Section II deals with anticompetitive concerted actions of economic entities and abuse of dominant position on the market.
16. Section III regulates anticompetitive actions of bodies of State power and local self-government as well as bodies of administrative and economic management and control.
17. Section IV contains regulations on restrictive and discriminatory activities of economic entities and associations.
18. Section V deals with concentration of economic entities (merger control).
19. Section VI elaborates on the consideration of applications and cases concerning authorization for concerted actions and concentration of economic entities.
20. Section VII contains procedures for the consideration of cases of violation of the competition legislation, the rights of persons involved in a case, and certain procedural measures (seizure of evidence and arrest of property).
21. Section VIII regulates the responsibility for violations of the laws on protection of economic competition, defines their types and respective fines.
22. Section IX contains procedures for fulfilling, verifying, reviewing and appealing against AMCU decisions and orders.
23. Section X contains the final provisions of the law.

2. Anticompetitive agreements

24. “Concerted practices” under Article 5.1 of the LPEC cover agreements in any form among economic entities, decisions by associations and other forms of interaction by which firms coordinate behaviour. Economic entities subject to
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LPEC's coverage include (a) legal entities regardless of their administrative, legal and ownership form, (b) any individual performing economic activities, including those associated with exercising supervision over another legal entity or another individual, (c) State agencies, bodies of local self-government, as well as administrative and control bodies performing economic activities (Article 1).

25. Article 6.1 of the LPEC defines "anticompetitive concerted practices" to be concerted acts "which result or can result in the prevention, elimination or restriction of competition". Article 6.4 forbids all anticompetitive concerted practices, and such conduct is subject to sanctions under Articles 50.1 and 52.

26. The prohibition of concerted practices in Article 6.4 does not distinguish between horizontal and vertical conduct. This approach is similar to that of Article 101 of the Treaty on the Functioning of the European Union and Section 1 of the Sherman Act. Horizontal arrangements ordinarily pose greater competitive concerns than vertical restraints.

27. Article 6.2 enumerates eight forms of anticompetitive concerted actions. These include setting prices or other conditions with respect to the purchase or sale of products; and the restriction of production, product markets, technical and technological development, investments or the establishment of control over them. As mentioned above, these examples do not distinguish between horizontal and vertical restraints. Nevertheless, some practices are more often of a horizontal nature (for example, Article 6.2.3) while others are vertical (for example, Article 6.2.6).

28. Article 6.3 contains a provision which is relatively uncommon in competition laws. It states: "Anticompetitive concerted practices shall also include performing by economic entities of similar acts (omissions) in product markets, which have led or may lead to prevention, elimination or restriction of competition if the analysis of situation in product markets shows that there are no objective reasons to perform such acts (omissions)". This paragraph deals with parallel behaviour of economic entities. In practice, the AMCU first analyses the parallel conduct that Article 6.3 addresses. If the analysis does not reveal a benign explanation for the parallel activity or inactivity of the economic entities, the AMCU deems that the Article 6.3 prerequisites are fulfilled and concerted action (cartel) can be presumed. The presumption is an important element of the AMCU's practice, and its application has resulted in the imposition of fines. In 2012, 20 per cent of all cartel cases relied upon the presumption of Article 6.3. This area of enforcement is another instance where AMCU can improve its competition-law enforcement by providing secondary guidance about the circumstances in which the prerequisites of Article 6.3 would be satisfied.

29. Other LPEC provisions provide for certain exemptions that appear in many competition laws. Article 7 provides an exception for certain horizontal agreements between small and medium-sized enterprises. Article 8 and 9 exempt certain vertical agreements related to the supply and use of products, and the exercise of intellectual property rights, respectively. Article 10 provides for the authorization of restrictive agreements under mainstream criteria similar to those established under the European Union competition law.

30. In order to improve transparency and efficiency in the interpretation and application of the LPEC, the AMCU should clarify its legal intentions regarding horizontal and vertical restrictions through regulations, guidelines and other policy instruments. Such secondary legislation may explain how the law will be used to impede the attempts of dominant enterprises to use vertical restraints to prevent access of their competitors to upstream or downstream markets. These secondary policy instruments have proven to be very useful in a number of jurisdictions, including the European Union and the United States of America.

3. Abuse of dominance

31. Article 12 of the LPEC defines the conditions under which an undertaking is deemed to hold a dominant position on the market. An undertaking is understood to be dominant if its market share exceeds 35 per cent, unless it proves that it is exposed to substantial competition. A market share equal to or less than 35 per cent may be considered dominant if the economic entity does not face substantial competition, particularly due to the relatively small market shares of its competitors (Article 12.3).

32. The use of a 35 per cent rebuttable presumption to determine dominance is a common feature of the competition laws of the former Soviet republics. The practice in many other jurisdictions is to set the threshold at 40–50 per cent. In addition to the 35 per cent threshold for individual entities, LPEC defines joint dominance as the situation where two or three undertakings collectively hold market shares of above 50 per cent, or where the combined share of not more than five undertakings exceeds 70 per cent. The smaller the relevant geographical market, the more likely this presumption will be fulfilled. The significance of these thresholds depends on how carefully market boundaries are delineated and what proof suffices to rebut the presumption of individual or joint dominance.

33. Article 13.1 provides the general standard for abuse of a dominant position. A dominant entity's activity is abusive when the conduct has resulted or can result in the prevention, elimination, or restriction of competition, especially by diminishing the competitiveness or infringing the interests of other entities or

consumers, which would be impossible if substantial competition existed in the market. Article 13.2 enumerates the forbidden acts similar to those in Article 102 of the Treaty on the Functioning of the European Union. These prohibitions provide a platform for expansive intervention by the AMCU to address a broad range of behaviour by dominant firms. It provides the basis for the AMCU to control excessive pricing by dominant enterprises. The persistently high levels of concentration in many markets in Ukraine have induced the AMCU to perform price control and rate setting functions usually associated with sector regulation. This practice is likely to continue unless the NCP and other economic reforms succeed in overcoming obstacles to entry of new firms.

4. Mergers

34. Ukraine established a merger control regime in 1994. Article 22.1 of the LPEC directs the AMCU to exercise control over the concentration of undertakings. The situations considered to be a concentration include: the merger of economic entities or the affiliation of one economic entity to another; acquisition of control directly or through other persons over one or several economic entities or over parts of economic entities by one or several entities; acquisition of 25 per cent or 50 per cent of shares directly or through other persons; establishment of such an economic entity by two or more than two economic entities that will independently perform economic activities in the long term, that is, joint ventures (Article 22.2). Article 23 defines the participants to a concentration.

35. Similar to other modern competition laws, the LPEC requires prior notification of concentrations satisfying certain thresholds (Article 24.1). Article 24.5 employs the widely accepted standard that any concentration falling within the merger control regime may not be consummated before authorization.

36. Consistent with international standards, any concentration that would lead to the monopolization of a whole market or a substantial part of it, or to a substantial lessening of competition in either, will not be authorized (Article 25.1). The Cabinet of Ministers may authorize a concentration which the AMCU has disapproved because of its anticompetitive effects if it concludes that public interest considerations outweigh the negative competitive impact of the transaction (Article 25.2).

37. In 2002, the AMCU approved the Regulation for Concentration which contains detailed requirements on information and materials to be submitted with authorization requests. It also issued guidelines on the application of certain merger control provisions of the law in response to the need to give clear guidance to undertakings that plan a concentration.

38. A draft amendment to the LPEC provides for a significant increase in thresholds in order to avoid the control of economically and competitively less important transactions. If adopted, this measure would substantially improve the merger control regime by allowing competitively benign transactions to proceed expeditiously and by focusing the AMCU's resources on mergers that are more likely to restrict competition.

39. One substantial problem in merger control in Ukraine is the lack of transparency in the ownership relations established as a result of privatization and a wide concentration activity of companies which are registered offshore and are reluctant to disclose their real owners.

5. Procedure

40. The procedures for Ukraine's CPS are set out in Section VII of the LPEC and in the Law on the Antimonopoly Committee of Ukraine. The consideration of a case involving an infringement of the competition legislation starts with the issuance of a case opening order by the AMCU and ends with its decision on the case. If facts indicate an infringement, the AMCU shall issue an order to initiate a case (Articles 35 and 36 of the LPEC). The AMCU has no discretion as to whether to open a case or not if it has received a duly submitted complaint even if the circumstances described in the complaint do not suggest a substantial effect of the conduct in question on competition. It can neither use resource constraints as an excuse, nor can it refuse to proceed on the ground that a specific matter, compared to other cases of greater importance, lacks the gravity to warrant the AMCU's attention. The AMCU's inability to separate wheat from chaff impedes its efforts to set coherent priorities and focus attention on matters of especially pressing concern.

41. Article 36.1 stipulates the bases on which the initiation of a case is decided. Triggering events consist mainly of applications submitted by economic entities, private citizens, bodies of State power, or bodies of local self-government. The AMCU can initiate a case *ex officio*.

42. Article 40 defines the procedural rights and obligations of persons involved in a case. This provision gives the parties involved the right to familiarize themselves with the materials of the case, to provide evidence, petitions, written explanations, to receive copies of decisions on the case, and to appeal against AMCU decisions.

43. Article 44 deals with the seizure and collection of written and material evidence, including documents, objects, or other media for information, to prepare cases of infringement.

44. A detailed description of the procedural norms with respect to consideration of cases, infringement complaints, site inspections of undertakings, and expert reviews is contained in the Case Consideration Rules, the Regulation for Inspections and the Regulation for Review approved by the AMCU.

6. Fines and other sanctions

45. Articles 50 to 55 of the LPEC set the responsibility for infringements of the competition law. Article 50 enumerates all acts that constitute violation of the law. These include anticompetitive concerted practices, abuses of a monopoly (dominant) position, and the concentration of economic entities without a required authorization from the AMCU. Article 52 provides that fines shall be imposed on associations and economic entities. The concept of economic entity includes legal and natural persons, as well as a group of economic entities (legal or natural persons) under prerequisites laid down in Article 52.4.

46. The AMCU shall impose fines not exceeding 10 per cent of income (proceeds) earned by an economic entity in the accounting year directly preceding the year in which the fine is imposed. Such fines apply to anticompetitive concerted practices, abuses of a monopoly (dominant) position, and the failure to fulfil a decision or a preliminary decision taken by the AMCU, as defined by Article 6 of the Law on the Antimonopoly Commission (AMCU Law – see section III.A below), as well as the incomplete fulfilment of AMCU decisions. If there is an unlawfully obtained profit which exceeds 10 per cent of the mentioned income, the AMCU shall impose a fine not exceeding threefold the amount of the unlawfully earned profit. For minor infringements of the law, Article 46.3 authorizes the AMCU to issue a recommendation and close the file.

47. In 2012, approximately Hrv 40.6 million (US\$ 5.08 million)¹ have been paid to the State budget. This amount is roughly 5 per cent of the total amount of fines the AMCU imposed in 2012 (Hrv 814.7 million, or US\$ 101.9 million). Between 2009 and 2011, the AMCU imposed a total of Hrv 1,175.1 million in fines. Of this amount, until today Hrv 109.7 million have been paid to the State budget – that is, less than 10 per cent of the total owed by violators. According to the AMCU, liable entities often achieve non-payments by liquidating the fined entity and reregistering the violators as new legal entities.

¹The conversion into US\$ is based on the official exchange rate of the National Bank of Ukraine as of 26 February 2013 (US\$ 100 = Hrv 799.3).

7. Leniency regulations

48. Since January 2001, Article 6.5 of the LPEC provides for a “basic leniency programme”. To a limited extent, the new provision resembles the more sophisticated leniency programmes of other competition laws. Article 6.5 stipulates: “A person, who had committed anticompetitive concerted actions, but earlier than the remaining participants in the actions voluntarily informed the Antimonopoly Committee of Ukraine or its territorial office of the fact and submitted information of essential importance to taking a decision on the case must be relieved from the responsibility for committing anticompetitive concerted practices which are provided for by Article 52 of the present law”. The LPEC obliges the AMCU to ensure the confidentiality of all information about such individual.

49. Leniency is not provided if the person:

- (a) Having informed the AMCU on anticompetitive concerted practices, did not take efficient measures to terminate the actions;
- (b) Was the initiator of the anticompetitive concerted practices or managed them;
- (c) Did not submit all such evidence or information on the relevant violation committed by the person that was known to and that could be freely got by the person.

50. A regulation entitled “The Procedure of Exemption from the Responsibility” and approved by the AMCU contains a detailed procedure for the submission and consideration of leniency applications, requirements to their content and the procedure of further cooperation between the undertaking and the AMCU. As the Ukrainian leniency procedure provides protection only to the first applicant, unlike most other leniency programmes, it spreads even greater uncertainty among the members of a cartel, since only one undertaking has the possibility to cooperate and to get immunity from fine. Since the issuance of the new leniency regulations, there have been no applications for exemption from responsibility.

B. The Criminal Law

51. For several years there has been a debate in Ukraine about the advantages and disadvantages of criminalization of competition law infringements, especially for cartel cases. Supporters of the latter expect criminalization to enhance deterrence and place cartel proceedings on a better procedural footing. With criminalization, cartel matters would be carried out pursuant to the clear procedural regulations established under the Criminal Procedure Code. The competent enforcement authority would have strong investigatory powers. At present, the Criminal Procedure

Code of Ukraine does not foresee any liability for infringement of competition law. Nevertheless, Article 228 of the Criminal Code makes it a crime to use compulsion to induce a party to engage in anticompetitive concerted actions.

52. Bid rigging is not regulated as a special criminal act and is considered as a form of fraud.² To date the public prosecution has not used Ukraine's anti-fraud measures to investigate cases of bid rigging.

C. The Law on Protection against Unfair Competition

53. The Law on Protection against Unfair Competition (LPUC) which came into force in 1997 contains an updated and enhanced version of the prohibitions of unfair competition which first appeared in the 1992 LPEC. The LPUC is aimed at the "establishment, development and maintenance of trade and other fair practices of competition in entrepreneurial activity in market conditions".

54. The LPUC has four substantive parts. The first part (Articles 4 to 7) deals with unlawful use of the business reputation of another economic entity. Several related provisions under Articles 16 to 19 bar the misappropriation of commercial secrets. The second part (Articles 8 to 15) forbids wrongful interference in contractual relations between an economic entity and its suppliers and buyers. The third part (Article 151) forbids the dissemination of misleading information. The fourth part (Articles 16 to 19) focuses on the protection of commercial secrets.

55. Enforcement of the LPUC is the responsibility of the AMCU, which may impose fines up to 5 per cent of revenues in the wrongdoer's previous fiscal year (Article 21). The AMCU can apply to courts to seize products that are unlawfully copied or labelled (Article 25). Persons who suffer injury due to infringements of the LPUC may apply to courts and claim compensation in damages (Article 24).

D. The Public Procurement Law

56. Ukraine is one of a growing number of jurisdictions that have assigned important public procurement policy responsibilities to the competition agency. Ukraine enacted a new Public Procurement Law (PPL) in June 2010. Articles 1.19 and 8.3 of the PPL assign the AMCU responsibility for bid protests (the complaint review function), whereas the Ministry for Economic Development and Trade (MEDT) is invested with powers to monitor performance in the public procurement system. The implementation of the monitoring function by the MEDT and the review function by the AMCU leads to a conflict of powers.

² Article 190 of the Criminal Code.

57. In 2011, Ukraine adopted additional amendments to ensure that the PPL conforms more closely to standards established by the European Union and the World Bank. Additional refinements seem appropriate. Future amendments should clarify the respective roles of the AMCU and the MEDT and resolve the conflict between the enforcement competencies of the two institutions. Further legislation could serve to mandate the use of competitive purchasing techniques by natural monopoly enterprises, particularly in utilities.

58. Ensuring an equal access to participation in procurement procedures and the protection of legal rights and interests of bidders should be a priority area for the development of the public procurement system. Transparency at all stages from the preparation of annual plans to fulfilment of contractual obligations should be achieved through the setting up, at the primary law level, of a clear, transparent and unambiguous procurement mechanism.

III. INSTITUTIONAL FRAMEWORK AND POLICY IMPLEMENTATION

59. The AMCU is responsible for implementing the LPEC and the LPUC. The main task of the AMCU is to contribute to the development and implementation of the competition policy. The AMCU has two functions: to enforce the laws to ensure protection of competition, and to advocate for competition to promote liberalization and de-monopolization of the economy.

A. Organizational structure of the Antimonopoly Committee of Ukraine

60. The AMCU was founded in November 1993 pursuant to the AMCU Law. By the end of 1993 a Chair and nine other commissioners had been appointed and staff members had been recruited. The AMCU began to operate in 1994 and has been in existence for almost two decades.

61. By the legislation adopted in 2011, the AMCU became a central executive body with a special status. The AMCU is currently governed by a Chair and eight State Commissioners. The AMCU Chair is appointed by the President of Ukraine with the approval of the Parliament, namely, Verkhovna Rada, for a term of seven years (Article 9 of the AMCU Law). The President may dismiss the Chair with the Verkhovna Rada's approval. State Commissioners and First Deputy and Deputy-Chair are appointed by the President upon submission of the Prime Minister based on the AMCU Chair's proposals.

62. The AMCU has 27 territorial offices with individual enforcement competences. The Chair has the power to appoint and dismiss the heads of these bodies. The AMCU has five operational and five administrative departments. All departments and the regional offices are managed by the State Commissioners.

B. Powers of the Antimonopoly Committee of Ukraine

63. The AMCU Law gives the AMCU the following powers:

- (a) Control over compliance with the legislation on protection of economic competition;
- (b) Exercise of control over concerted actions and concentrations;
- (c) Development and implementation of competition policy, promotion of competition and provision of methodological support to competition law enforcement.

64. Article 3 of the AMCU Law directs the Committee to participate in the development and implementation of competition policy in Ukraine, thereby giving the AMCU the right to be involved in all political decisions that have an effect on competition.

65. Article 41 of the LPEC empowers the AMCU to request evidence, but not to obtain it by means of “dawn raids.” This omission is a grave weakness in the AMCU’s portfolio of investigation tools. The power to conduct dawn raids is essential for the effectiveness of competition law enforcement, especially in combating cartels. Because the AMCU collects evidence on a “voluntary basis,” potential violators, notably cartelists, would decline to supply proof that might result in an infringement decision and fines for them. In order to improve the law enforcement, the AMCU urgently needs legal grounds for conducting dawn raids and being able to apply other investigatory tools. Since dawn raids increase the likelihood that cartel offenses will be detected, their availability to the AMCU will be critical to the effectiveness of its new leniency programme. A greater likelihood of detection will increase the incentives for wrongdoers to reveal their misconduct.

66. The absence of adequate powers to gather evidence has at least one other serious adverse consequence. Without better investigation tools to inform law enforcement, the AMCU may tend to rely heavily on relatively crude, second-best criteria, such as market share, to determine whether an infringement of the law has occurred. For example, it is undesirable to draw powerful inferences of concerted action from parallel price movements when a more complete, probing investigation might reveal either direct evidence of collusion or decisively indicate that parallel price changes result from benign or procompetitive forces.

C. Resources of the Antimonopoly Committee of Ukraine

67. The AMCU has 846 employees of which 243 are in the Kiev central office and 603 are in regional offices. Of the total staff, 51 per cent are economists and 24 per cent are lawyers. The AMCU Chair has no power to allocate staff between the central and regional offices, although he approves the appointment of staff in the regional offices.

68. The Division for Accounting and Financial Planning of the AMCU assembles and submits the AMCU's budget requests to the Ministry of Finance. The AMCU is funded solely from the State budget. In 2012 its annual budget was Hrv 64.5 million (approximately US\$ 8 million). The Ukraine Parliament sets the AMCU's budget for every coming year. All fines imposed by the AMCU go to the State budget.

69. The OECD Peer Review on Ukraine in 2008³ recommended that the State provide adequate resources to assure that the AMCU can maintain high standards of performance in accomplishing its mission. This recommendation remains to be fulfilled, and its attainment is crucial for the AMCU to perform its tasks effectively – especially in light of new responsibilities likely to be taken on as part of the National Competition Programme.

D. Competition law enforcement

70. The AMCU has accumulated extensive enforcement experience under the competition law. In 2012, the AMCU has made more than 3,000 decisions with sanctions. More than 1,000 decisions were in the field of abuse of market dominance, and between 250 and 600 cases involved concerted actions and unfair competition. In 2012, the AMCU detected 521 cartel cases. In one recent matter (the wood case), a fine of approximately €40 million was imposed. The case was appealed to 14 different courts. The AMCU imposed a total fine of over €300,000 for bid rigging in a tender for the procurement of batteries with charging devices. As for merger notifications, they have, at the time of writing, reached a number from 697 to 944 per year over the last three years.

71. A review of this experience reveals three important phenomena. First, the large amount of cases is due to relatively lower enforcement thresholds and related criteria that admit a significant number of matters with minor competitive significance or those that have to be dealt with by other public authorities. The high number of matters involving concerted actions seems to be due to the relatively low standards of evidence for proving collusion, notably the presumption in Article

³ OECD (2008). *Competition Law and Policy in Ukraine. OECD Peer Review 00 2008 1N 3P1*. Paris. p. 80 paragraph 6.2.1. Available at <http://www.oecd.org/regreform/sectors/41165857.pdf> (accessed 26 April 2013).

6.3 of the LPEC. The merger notification thresholds are also very low. The AMCU is aware of the reasons causing the volume of cases per year. In all areas the AMCU is seeking to lower its overall workload by eliminating cases in which the competitive effect is negligible. With a more selective approach, the AMCU would spend most of its resources on matters implying serious competitive concerns.

72. Second, the AMCU invests substantial time in price control. The central government places heavy demands upon the AMCU to react immediately to price hikes in “socially sensitive” markets. Responding to these requests, the AMCU’s abuse of dominance initiatives focus heavily on excessive pricing. However, the AMCU should focus on the development of competition in markets rather than on price regulation.

73. Third, as discussed previously, the AMCU lacks the authority to conduct dawn raids. Investigations depend heavily on voluntary cooperation by business entities – a condition inimical to effective enforcement, especially for cartel offences.

IV. THE JUDICIARY

74. Effective competition law enforcement requires highly specialized judges and fair and transparent judicial procedures. Judges must understand the wider implications of competition with respect to issues beyond pure law enforcement such as privatization or deregulation of markets where competition principles have not yet been introduced.

75. Article 60 of the LPEC gives the applicant, the defendant and third parties the right to file appeals against AMCU decisions to an economic court. The LPEC establishes the exclusive competence of economic courts to deal with appeals against decisions of AMCU bodies. Appeals against decisions of AMCU’s territorial offices must be filed with the economic courts located in the same territory as the AMCU body in question.

76. According to the Administrative Court Procedure Code of Ukraine, any decision, act or omission of the AMCU may be appealed to administrative courts unless the Constitution or legislation requires otherwise. If the parties to a case appeal a decision to an administrative court, the regional competence of the court depends on the appellant’s choice. It can be the administrative court in the area where the appellant is located or the administrative court in the area where the defendant (AMCU body) is located. Usually a court at the applicant’s location is chosen.

77. Thus, the jurisdiction of the courts handling competition cases is unclear and split between the administrative and commercial courts. This lack of clarity

constitutes a weakness in Ukraine's CPS. The fact that a decision has not been made as to which higher court would have the exclusive competence in handling appeals against AMCU's decisions in competition cases prevents respective judges from obtaining sufficient knowledge and experience needed to scrutinize AMCU decisions effectively.

V. COMPETITION ADVOCACY

78. The AMCU is aware that strong competition advocacy is a vital complement to law enforcement. Its advocacy activities include cooperation with other government bodies, issuance of recommendations to promote competition and prevent infringements, and raising awareness of the public on the importance of competition.

79. In 2012, the AMCU reviewed 2,005 regulations, decisions and draft decisions of public authorities, of which 451 were not concurred. Most draft regulations with potential negative effects on competition concerned the housing and utility markets, administrative services, drugs, and fuel and energy. Proposals on compliance with competition law were provided for 266 regulations. They were taken into account in 55 cases. In 2012, AMCU bodies provided 2,544 recommendations to other public authorities, local self-government bodies and economic entities proposing actions to ensure respect for competition principles. Of these recommendations, 84.7 per cent were taken into consideration.

80. The AMCU approaches different target groups to advocate for measures strengthening competition.

A. The President of Ukraine, the Parliament and the Cabinet of Ministers

81. According to Article 2 of the AMCU Law, the AMCU is controlled by the President of Ukraine and is accountable to the Parliament. The AMCU may submit to the President and the Cabinet of Ministers of Ukraine proposals regarding laws related to competition, competition policy and de-monopolization of the economy.

82. The AMCU reports to the Parliament and submits its annual report informing parliamentarians of its activities, competition problems in Ukraine and ways to resolve them. The AMCU advises parliamentary committees on draft laws on issues related to its competence and examines draft laws to ensure their compliance with the competition legislation and, if necessary, submits proposals on their improvement.

83. The AMCU interacts with the Cabinet of Ministers in the development and implementation of economic development programmes. It drafts and submits to the Cabinet regulations on issues within its competence which are aimed at improving the legislation and resolution of competition problems.

B. The business community

84. Competition advocacy efforts of the AMCU vis-à-vis the business community target not only undertakings in production and trade, but also business associations and chambers of commerce. The AMCU disseminates information not only about the scope and contents of the competition legislation, but also on the rights of undertakings before courts, including the possibility to benefit from its leniency programme in cartel cases and exemptions offered by the law. Transparency and legal security are important elements for the business community to make investments decisions in Ukraine. Especially during the past two years, the authority has paid great attention to communication with the business community and their representatives through awareness-raising events.

C. The public administration and sector regulators

85. Sector regulators play a significant role not only in the opening up of regulated sectors to competition, but also in the privatization of State-owned enterprises in the regulated sectors. The AMCU should initiate a more competition-oriented change of economic policy in Ukraine in a joint effort with the above-mentioned governmental target groups. The initiative could start with market studies in less competitive sectors. This may become the basis for AMCU's mandate for competition development in certain priority sectors. With the support of the Cabinet of Ministers, working groups could be established, involving regulated sector representatives from the respective ministries and the regulated undertakings.

D. The media

86. For better dissemination of a competition culture within other public institutions and the public in general, as well as for its visibility, it is highly important for a competition authority to establish a good cooperation with the media. The AMCU appeared in the media more often in 2012 than in 2011. To raise awareness on its role and work in the area of competition and ameliorate its image, the AMCU should not only publish its decisions on the website but also disseminate information about their positive effects. For this purpose, it needs a comprehensive public-relations policy and well-trained personnel to implement it.

E. Civil society

87. The consumer is directly affected by restrictions to competition through price, choice, quality and innovation in markets. The civil society can be seen as the interface between the interests of the consumer and competition policy, law and its enforcement. In this context, the civil society, including the academia as the foundation for higher education, expects full transparency and publicity of the AMCU's policy moves and decisions resulting from competition law enforcement.

VI. FINDINGS AND POLICY RECOMMENDATIONS

88. The comparison of Ukraine's competition law with international best practices demonstrates that Ukraine's statutory framework does not require drastic changes. However, much remains to be done in order to create the preconditions for the modernisation of the AMCU into a truly independent and powerful competition authority that would not only punish infringements or control prices, but would also help to establish an effective competitive environment and ensure competition in markets in Ukraine. Thus, it is not so much the competition law that needs reform but rather the enforcement of the law by the AMCU which needs a stronger direction towards conformity with international best practices.

89. Ukraine's adoption of an NCP for 2014–2024 provides an excellent opportunity to adopt reforms directly related to the AMCU and to the broader reorientation of Ukraine's economic system to a more competitive and market-based approach. The recommendations presented below anticipate that the NCP would provide a platform for a far-reaching reassessment of Ukraine's CPS and the enhancement of the AMCU as an institution to promote economic progress.

A. Recommendations addressed to the legislature

90. The following recommendations are addressed to the legislature:

- (a) **Prevent evasion of obligation to pay fines:** The law should be amended to prevent violators from escaping the responsibility to pay fines by the practice of liquidating existing economic entities and then re-registering as new enterprises;
 - (b) **Strengthen AMCU's investigation powers:** The law should define detailed procedures for the exercise of the AMCU's powers to conduct dawn raids to search business premises and seize evidence relevant to possible violations of the competition law;
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- (c) **Enhance discretion to set priorities:** The law should be amended to give the AMCU greater discretion to determine the need for opening a case following the receipt of a duly prepared complaint and cases that it will investigate pursuant to its authority under the LPEC and the LPUC;
 - (d) **Establish unconditional liability for bid rigging:** The law should be amended to establish unconditional liability for bid rigging for its participants and to impose sanctions in the form of fines and disqualification for violators;
 - (e) **Revise the leniency programme to reduce fines for parties other than the first to file:** The law should be amended to permit the AMCU to provide a reduction in fines or other sanctions to parties who seek leniency subsequent to the initial leniency request;
 - (f) **Clarify the jurisdiction of the courts to promote specialization:** The law should be amended to promote judicial specialization in the treatment of competition cases and to specify that AMCU decisions in competition cases be appealed in the first instance exclusively to the commercial courts or the administrative courts;
 - (g) **Refine the public procurement law:**
 - (i) The attribution of competencies between the AMCU and the Ministry for Economic Development and Trade should be clarified and overlapping of competencies should be avoided;
 - (ii) The Ministry should focus on the regulatory function and the AMCU should be the competent authority for handling complaints;
 - (iii) For reasons of legal certainty, a definition of the term “monitoring” should be amended to ensure that the MEDT is focused only on the economic analysis of the efficiency of public procurement procedures;
 - (iv) The procedures for the fulfilment of the monitoring function by the MEDT should be defined in the primary law (the PPL);
 - (h) **Improve the efficiency of merger control:** The law should be amended to prohibit concentrations of economic entities which conceal their real owners through offshore registration.
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B. Recommendations addressed to the Government

91. The following recommendations are addressed to the Government:
- (a) **Increase the efficiency of State regulation:** The establishment of an independent transport regulator should be accelerated;
 - (b) **Use the NCP to upgrade Ukraine's competition policy system:**
 - (i) The NCP should become the platform for implementing the recommendations set out in this peer review report;
 - (ii) The AMCU should be given a central role in the formulation of specific NCP elements and in their implementation;
 - (iii) The NCP should call for dismantling artificial barriers to entry and expansion by new enterprises and the withdrawal of State subsidies and other forms of support that entrench incumbent dominant firms;
 - (iv) The NCP should ensure the augmentation of AMCU resources (financial, human, scientific and information) for the implementation of the Programme and the achievement of its goals;
 - (c) **Establish a standing committee on economic efficiency:** The NCP should be used as an occasion to form a permanent standing committee that will prepare periodic assessments of competition in Ukraine's economy and conduct studies relating to the improvement of competitive conditions;
 - (d) **Treat the causes and not the symptoms of competition failures – the case of price control:** The strategic plan should identify a vision for addressing the basic structural barriers to competition that, if eliminated, will enable the AMCU to diminish resources focused on excessive pricing and other price control measures;
 - (e) **Eliminate non-transparency in public procurement:** A transparent public procurement system should be established through the implementation of e-procurement based on best international practices.
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C. Recommendations addressed to the Antimonopoly Committee of Ukraine

92. The following recommendations are addressed to the AMCU:
- (a) **Enhance the process for setting priorities and develop annually a strategic plan to realize them:**
 - (i) The AMCU should perform an annual exercise in which it decides what allocation of resources across its mandate arising from the LPEC, LPUC, and PPL will provide the greatest benefits to Ukraine's economy and its consumers;
 - (ii) The outcome of the AMCU's strategy-setting process should be published annually as a strategic plan;
 - (iii) The AMCU should conduct periodic public consultations to elicit suggestions about its choice of priorities and to discuss its strategic plan;
 - (b) **Establish mechanisms to improve and formalize the relationship with sector regulators:** The AMCU should establish formal mechanisms to improve its relationship and cooperation with sector regulators. This could be through setting up working groups involving representatives from both institutions or signing memoranda of understanding with respective regulatory agencies;
 - (c) **Clarify and streamline the merger review process:**
 - (i) The AMCU should provide greater transparency concerning the operation of its merger review process;
 - (ii) The AMCU should take additional steps to provide timely responses to requests of merging parties about the status of existing merger reviews and the likely timetable for completing the authorization process;
 - (iii) The AMCU should devise a more effective "fast-track" procedure to dispose of notified transactions that pose no competitive dangers to Ukraine's economy;
 - (d) **Strengthen the mechanism to monitor the implementation of remedies:**
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- (i) The AMCU should develop an electronic database that records all outstanding remedies, tracks compliance with remedial obligations, and identifies all changes in ownership or status of parties subject to remedial obligations;
 - (ii) The AMCU, as part of its routine practice, should require parties subject to remedies to file periodic compliance reports that, among other information, account for progress made to fulfil remedial duties and identify changes in ownership;
- (e) **Provide more guidance concerning enforcement intentions:** The AMCU should provide further guidance, in the form of guidelines or other policy instruments, about its enforcement intentions concerning the fulfilment of responsibilities assigned by the LPEC, the LPUC, and the PPL. Useful subjects for further elaboration in such guidelines or regulations would include enforcement against horizontal restraints, vertical restraints, and the treatment of parallel conduct as concerted action;
- (f) **Develop an evaluation programme:**
- (i) The AMCU should establish a programme for regular evaluation of competition law enforcement;
 - (ii) One focal point for such an evaluation programme should monitor the implementation of the revised leniency programme;
- (g) **Strengthen media outreach:** The AMCU should improve its media relations, develop a media plan to reach additional media organizations and conduct regular trainings for its press service employees;
- (h) **Expand the use of market studies:** The AMCU should expand its use of market studies to identify the state of competition and propose improvements, especially in public utility sectors and in areas featuring high levels of concentration.
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