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Voluntary Peer Review of Competition Policy: Ukraine

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Regime

- Competition law regime adopted in the early 1990s.
- Adoption of the Ukrainian Competition Act in February 1992.
- Foundation of the Antimonopoly Committee of Ukraine (AMCU) by adoption of the Law on the AMCU in November 1993.
- Beginning of operation of the AMCU in 1994.
- Transformation of Ukraine's economy from central economic planning towards economic liberalization.
- State De-Monopolisation Program in 1993.
- Decrees of the President of Ukraine on the main areas of competition policy for 1999 to 2001 and for 2002 to 2004.
- Competition Development Program for 2014 to 2024.

Legal Framework

- Enactment of the Constitution of Ukraine in 1996: Separation of powers into a legislative, an executive and a judicial branch; separation of country into 24 oblasts and one autonomous republic (Crimea); capitals Kiev and Sevastopol with special legal status and **laying down of basic principles of state protection of competition** in Art. 42 of the Ukrainian Constitution.
- Enactment of the Law on Protection against Unfair Competition in 1996.
- Enactment of the Law on Protection of Economic Competition (LPEC) in 2001.



Institutional set up of the AMCU

- In 2011 the AMCU has become a central executive body with special status.
- The AMCU consists of the Chairman and eight State Commissioners. The Chairman, the First Deputy and the Deputy Chairman of the AMCU are appointed and dismissed by the President of Ukraine for a term of seven years.
- The AMCU has 27 regional offices and 846 members of staff (24% lawyers, 51% economists).
- The AMCU is solely funded by the State budget (USD 8,06 million in 2012).
- The AMCU has four operational departments (Market Studies Department, Investigation Department, Legal Department, Directorate for Merger and Concerted Actions).

Legal Framework

Scope of the LPEC

The LPEC was enacted

- to determine the legal foundation for support and protection of competition,
- to restrict monopolism in economic activity and
- to provide conditions for effective operation of the economy of Ukraine on the basis of the development of competition relations.



Anti-Competitive Agreements I.

- The LPEC does not distinguish between horizontal and vertical restraints by agreement, decisions of associations and concerted conduct.
- Anticompetitive concerted actions (cartels) mean concerted actions which have resulted or may result in prevention, elimination or restriction of competition, Art. 6.1 LPEC.
- In Art. 6.2 LPEC cases of concerted actions are specified that are considered as anticompetitive (e.g. setting of prices).
- The LPEC includes different anticompetitive actions that are exempt from the general prohibition, Art. 7, 8 and 9 LPEC (block exemptions).

Anti-Competitive Agreements II

- **Art. 6.3 LPEC** contains a **presumption**:
“Anti-competitive concerted practices shall also include performing by 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).
- The presumption is an important element of AMCU practice, and its application has resulted in the imposition of fines. In 2012 approximately **20 % of all AMCU cartel cases** relied upon the presumption of Art. 6.3 LPEC.

Leniency Program

- Since January 2001: Art. 6.5 LPEC contains a „basic leniency-program“.
- September 2012: First Leniency Regulation – „Procedure of Exemption from the Responsibility“ became effective:
 - Leniency procedure does not allow any subsequent applicant.
 - No exemption from responsibility for the ringleader.
- The exemption of leniency for any subsequent applicant caused difficulties for the AMCU in the „Insurance Cartel Case“ (2005) and the „Wood Auction Cartel Case“.



Procedural issues

The AMCU investigatory powers include:

- collect and require information,
- inspect offices and vehicles,
- seize or arrest evidence,
- implement the leniency program.

LPEC empowers the AMCU to request evidence, but not through dawn raids. This is a grave weakness in the AMCU's portfolio of investigation tools. Dawn raids are vital for effective competition law enforcement, especially to combat cartels. Because the AMCU collects evidence on a "voluntary basis" potential violators (e.g., cartelists) can decline to supply proof that might result in an infringement decision and fines.



Abuse of dominance

- LPEC Article 12 sets a presumption of dominance at 35%
- Joint dominance exists.
- Article 13.1 defines exclusionary practices in manner generally similar to TFEU 102.
- High levels of concentration in Ukraine's economy have led AMCU to spend considerable resources of excessive pricing.
- This pattern of enforcement likely will persist unless public policies succeed in reducing barriers to entry.

Mergers

- Establishment of a merger control regime in 1999 to avoid further monopolization in the nation's economy.
- Article 22.1 LPEC directs the AMCU to exercise state control over the concentration of undertakings.
- Consistent with international standards, any concentration which 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.
- Cabinet of Ministers can override the AMCU decision if it concludes that public interest considerations outweigh the negative competitive impact.



The Judiciary

- Article 60 of the LPEC establishes the **exclusive competence of economic courts** to deal with appeals against decisions of AMCU bodies.
 - 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. The regional competence of the court depends on the appellant's choice.
- Thus, the jurisdiction of the courts handling competition cases is unclear and split between the administrative and commercial courts.

Enforcement Record

- The AMCU has accumulated extensive enforcement experience under the competition law. The number of proceedings conducted by the AMCU as well as the amount of fines being imposed has increased steadily over the past years.
- In 2012 the AMCU made more than 3000 decisions with sanctions: More than 1000 decisions in the field of abuse of market dominance, between 250 and 600 cases involved concerted actions and unfair competition, 750 were merger cases.
- In 2012 a total amount of 814,7 million UAH of fines has been imposed, out of which 40 million UAH have been paid in 2012.

Recommendations addressed to the legislature

- Strengthen AMCU's investigation powers.
- Prevent evasion of obligation to pay fines.
- Clarify the jurisdiction of the courts to promote specialization.
- Revise the leniency Program to reduce fines for parties other than the first to file.
- Enhance discretion of the AMCU to set priorities.
- Improve the efficiency of merger control by a significant raise of thresholds.



Recommendations addressed to the Government

- Use the National Competition Plan (NCP) to implement recommendations in UNCTAD peer review report.
- Give AMCU key role in NCP formulation and implementation
 - Focus on dismantling artificial barriers to entry and expansion by new enterprises, and withdrawal of subsidies the entrench incumbent firms
- Use NCP as basis for establishing permanent Standing Committee on Productivity to assess competition in Ukraine's economy and perform studies of competitive conditions.

Recommendations addressed to the AMCU

- Enhance process for setting and adjusting priorities.
- Devise vision to correct structural market conditions that compel use of resources for excessive pricing.
- Streamline merger review and increase transparency.
- Strengthen monitoring of implementation of remedies.
- Provide more guidance about enforcement intentions.
- Establish program to evaluate enforcement program.
- Enhance media outreach.
- Expand reliance on market studies