



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

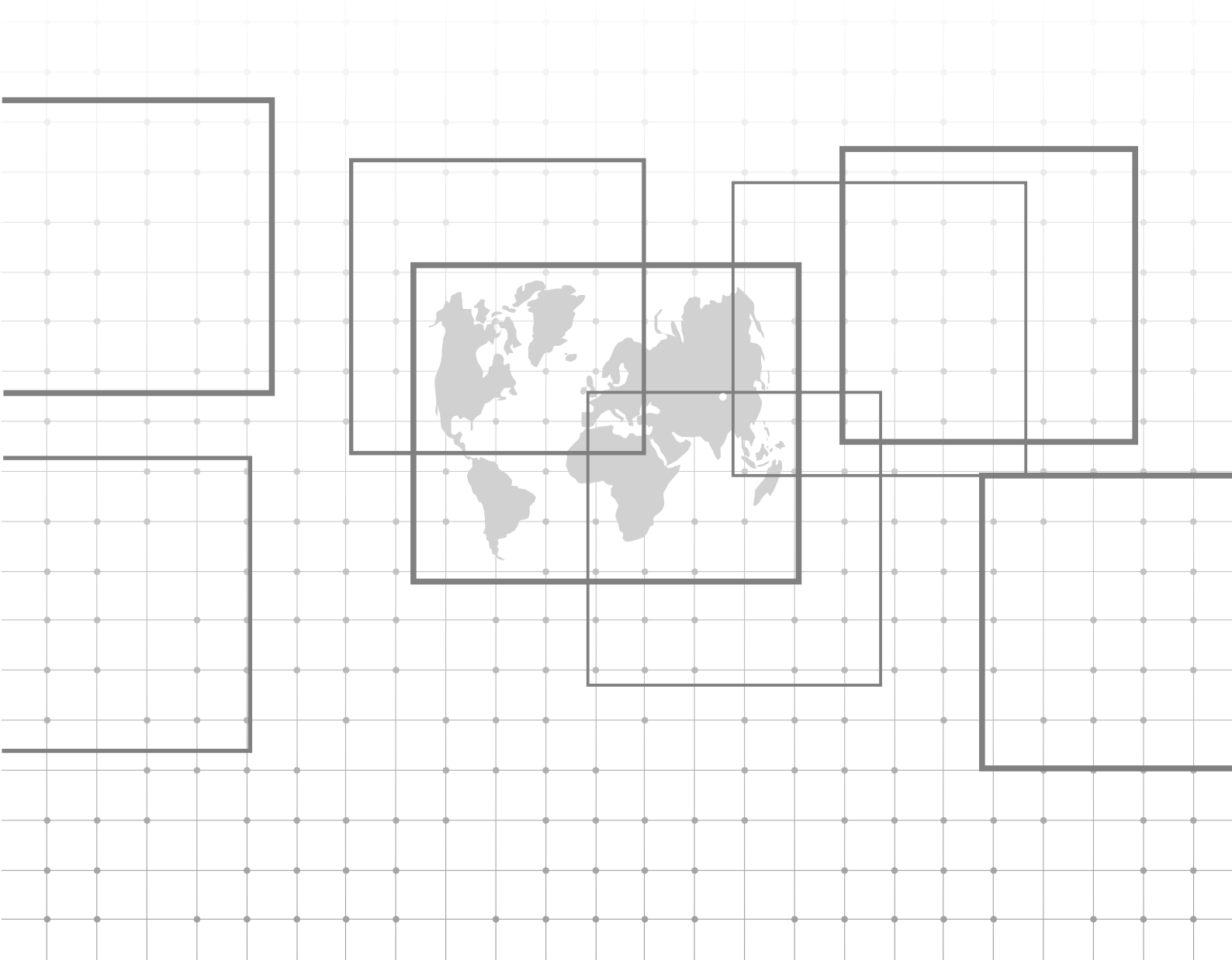
UKRAINE





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PREFACE

This report examines the current state of competition law and policy in Ukraine. The report is based upon extensive desk research and a fact finding visit to Kiev undertaken from 15 October to 17 October, 2012. The desk research covered a review of the Constitution and competition legislation of Ukraine inter alia, as well as other legal texts on competition law and policy issues, decisions by the AMCU and by other government agencies. The report's observations and recommendations also draw heavily upon information provided by the AMCU, including interviews with AMCU managers and officials, and by representatives of other Ukrainian Government agencies and non-governmental organizations (NGOs) which are relevant for competition policy development and consumer protection. To a substantial extent, the report builds upon studies and other reports related to competition law and policy in Ukraine, and it uses comparisons with international best practices and materials from other international sources, including UNCTAD, the Organization for Economic Cooperation and Development (OECD) and the International Competition Network (ICN). A very important document regarding the assessment of competition law enforcement and competition policy in Ukraine is the OECD Peer Review of 2008.¹ Furthermore, the OECD Competition Assessment Toolkit, the European Union–Ukraine Action Plan and the agenda for the association between the European Union and Ukraine as well as the sections on competition and State-aid law and policy in the Draft Association Agreement with the European Union also have to be mentioned among relevant documents for evaluating Ukraine's competition system.

The report focuses on the legal and institutional framework for competition law enforcement in Ukraine, the structure of the national economy, economic goals of the Ukrainian Government and the proliferation of a competition culture within different categories of Governmental and non-governmental stakeholders, including lawmakers, Government officials, judges, legal professionals, the business community, consumer associations and the general public. The report's observations and recommendations account for the history and current status of the development of competition law and policy in Ukraine.

The report consists of two main parts:

- The general assessment of the economic and political environment and the foundations and history of competition policy in Ukraine;
- The specific assessment of the legal and institutional framework for competition law enforcement in Ukraine.

The part on the economic and political environment examines the historical context of the introduction of competition law and policy in Ukraine. The review of important historical circumstances and initial conditions helps explain the formidable challenges facing Ukraine in adopting a competition law system and illuminates problems that continue to beset the

¹ Competition Law and Policy in Ukraine. An OECD Peer Review; OECD 2008 available at: (<http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/41165857.pdf>).

Ukrainian competition regime. Owing to Soviet-era economic policy, Ukraine confronted what might be described as some of the highest barriers to the formation of an effective competition policy system. The accomplishments of the AMCU and the problems that lie ahead must be understood against the backdrop of this history.

The report elaborates on the substantive issues of the competition legislation of Ukraine, including collective and unilateral anticompetitive practices and merger review. It also examines competition aspects of other public policies, including sector regulation, industrial policies and public procurement, as well as competition advocacy issues. The report further reviews the institutional framework of competition law enforcement and implementation of pro-competitive policies in the country.

The improvement of Ukraine's competition law and the AMCU's enforcement policies will require expanded efforts to develop and safeguard the AMCU's status as an independent modern competition authority. This has been a central point in previous studies and will remain a matter of continuing attention in the future. This process is a permanent task, as recognized in previous national and international studies and in statements by Ukraine's political leadership.

In many respects, Ukraine's experience with competition law has succeeded. Ukraine has made considerable progress toward building competition policy institutions and implementing advocacy and law enforcement programmes. Measured against the magnitude of the obstacles that confronted Ukraine in the early 1990s and have persisted to the present, this is a considerable achievement. Yet much remains to be done. The report concludes that Ukraine has a comprehensive and well-designed competition law. Nevertheless, it identifies several areas for improvement where an amendment to the law might be needed. This report builds on the main legislative recommendations made by the OECD Peer Review and is based on the political and legal developments which have taken place in Ukraine since 2007.² Moreover, the recommendations of this report have to be seen in the overall context of the further development of competition law enforcement and a competition culture in the country since then. Currently, the AMCU faces some challenges regarding the collection of evidence during cartel investigations. Therefore, special attention was attached to this field. Another crucial point is the necessity of an independent and effective judicial control of the decisions taken by the AMCU. Thus, the report also focuses on the judicial system as far as it deals with competition matters.

In April 2012, the President of Ukraine requested the AMCU to prepare a "National Programme for the Development of Competition in Ukraine from 2013 to 2023". The aim of the programme is the establishment of a long-term development plan, embracing all sectors of the economy and all relevant administrative and governmental institutions, to find a common approach to competition development with two particular objectives: First, the actual competition on Ukrainian markets shall be enhanced through supportive administrative measures, including deregulation and privatization, where possible, and second, through more effective control of the competitive process in Ukrainian markets, improving the legal

² The OECD report is based on information until 2007.

basis and making the enforcement practices of the AMCU more effective and efficient. The Government approved the Concept for the National Programme of Competition Development. It was planned to present the draft National Competition Programme (NCP) to the Verkhovna Rada (the Parliament) until the end of 2012 to be adopted as a law. However, the adoption of the draft Programme in 2012 was postponed in order to take the UNCTAD Peer Review recommendations into account in the Programme. This Peer Review provides recommendations that can be implemented within the framework of the NCP.

Ukraine, particularly the AMCU management and staff members as well as officials from other Government agencies, demonstrated admirable cooperation and willingness to invite critical inquiry concerning competition legislation, its enforcement and competition policies. AMCU considers the Peer Review important for the finalization of the NCP. The Peer Review will serve as an opportunity to increase its capacity in competition law enforcement, and a source of competition advocacy with governmental and non-governmental stakeholders the agency is engaged with to promote competition principles in the national economy and public domain in general.

I. Foundations and history of competition policy in Ukraine

The legislation on competition protection in Ukraine has existed now for two decades. The AMCU as the authority for the enforcement of the competition law began its work almost twenty years ago. In the Ukrainian legal tradition competition law takes a relatively new place. However, according to the Chair of the AMCU, competition protection and the competition authority are an inalienable part of the society.

A. The historical background

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. In the beginning of 1990s, only around twenty jurisdictions had enacted competition laws and established institutions to implement them. Currently, there are over 100 countries with competition regimes in place.

Compared to other nations with competition systems, Ukraine faced some of the most difficult initial conditions for the enactment of a competition law and the establishment of implementing institutions. The economic and political circumstances in Ukraine and other republics of the former Soviet Union³ were especially daunting. Stated bluntly, among all of the nations that would embark upon a competition policy system from 1990 to the present, the prospects for a successful transition were weakest in Ukraine and in other of the oldest former Soviet republics.

Four major initial conditions significantly impeded the development of an effective competition regime in Ukraine. First, nearly seven decades of central economic planning had concentrated nearly all economic activity in massive enterprises under the direct control of the State. Few Ukrainians had a living memory of life in a State in which private ownership and voluntary exchange governed economic life. The centrality of the Government in all economic affairs meant that none of the formal or informal institutions essential to the operation of a market system existed. The essential foundations of a market economy and the market-oriented “culture of competition” needed to be built from scratch.

Second, economic policy in the Soviet era gave the typical State-owned enterprise (SOE) a form and set of functions that would later complicate the transition to a market economy. The absence of thriving intermediate markets caused extraordinary levels of vertical integration and the formation of conglomerate firms. Because firms could not rely heavily upon intermediate markets to obtain needed inputs, they brought a wide range of functions in-house. This condition created sprawling companies whose structure and vast holdings would be difficult to rationalize.

Third, centralization of economic activity within State-owned enterprises was accompanied by government policies that made the State’s firms the conduits for delivering a wide array of social services. Beyond owning assets for the production of goods and services, SOEs often owned the houses in which their workers lived, owned the farms that grew the food their workers consumed, and provided a wide array of other social services that market economies typically provide through other institutions. Not only were SOEs, in effect, large

³ After the dissolution of the former Soviet Union, Estonia, Latvia, and Lithuania stood on a different footing. Because these nations had been absorbed into the Soviet Union in the 1940s, a significant base of knowledge of private ownership and market-based transactions remained.

social service organizations, they also generated income vital to the functioning of the State. These circumstances made it extremely difficult for government officials to contemplate the dissolution or bankruptcy of SOEs. The collapse of an SOE had such enormous adverse social and revenue effects that Governments felt compelled to provide subsidies or forestall new business entry that might undermine an SOE.

The fourth impediment dealt with the establishment of a new competition agency. Ukraine and many other former Soviet republics had no ready pool of market-trained talent to draw upon to staff new antimonopoly agencies. The Soviet era of public administration discouraged government bodies from making decisions aimed at sound public administration. The human capital and administrative norms necessary for an effective competition agency would have to be developed from the ground up.

These conditions are mentioned to underscore the magnitude of the challenges facing Ukraine as it embarked upon its new competition policy regime in the 1990s. The Ukrainian parliament adopted the Declaration of State Sovereignty on 16 July, 1990. By this declaration the principles of self-determination of the Ukrainian nation, its democracy and political and economic independence have been established. It also included the regulation of the priority of Ukrainian law on Ukrainian territory over Soviet law. On 24 August, 1991 the Act of Independence was been adopted by the Ukrainian parliament. On 1 December, 1991 the first presidential elections took place. The President is elected by popular vote for five years. He is the formal Head of State.

Since 1996 Ukraine has a constitution according to which Ukraine is a republic under a presidential/parliamentary system with a separation of powers into a legislative, an executive and a judicial branch. The country is subdivided into 24 oblasts (territories) and one autonomous republic, Crimea, with unified legal and administrative regimes. The capital city of Kiev and the city of Sevastopol have special legal status.

B. The economic and political environment

The transformation of Ukraine's economy from central planning towards liberalization has featured progress, but major difficulties remain. Discussions with officials in the Ukrainian Government have revealed several important obstacles. Despite a variety of market reforms and demonopolization measures, Ukraine's economy continues to feature high levels of concentration not always related to superior economic performance. This situation is due to several reasons. Government subsidies reinforce positions of dominance and artificial regulatory controls set barriers to new entry. Weaknesses in key infrastructure sectors such as energy, financial services, telecommunications and transportation further restrict the emergence of new firms and discourage investment. The regulatory regimes that govern natural monopolies sometimes decline to endorse pro-competitive policies.

In the early 2000s, the competitive sector of the economy broadened significantly due to the ownership transformation processes and the entry of new economic entities in commodity markets. The high level of concentration in many Ukrainian markets is explained by factors such as high entry barriers, high investment intensity, lack of resources, restricted demand, and the like. At the same time, the high level of openness of the Ukrainian economy (the

index of openness for 2012 is around 110 per cent⁴), the high level of integration of Ukraine in the global economy and the substantial effect of international competition very often offset the potential advantages that some enterprises and even financial/industrial groups may achieve due to their high production share.

Nevertheless, the Ukrainian economy lacks efficiency and competitiveness due to a number of problems which were not resolved at previous stages of economic reforms and insufficient efficiency of the newly established market relations. Among the problems which affect the level of competition, the following institutional problems should be mentioned:

- A substantial amount of complex authorization procedures relating to market entry;
- Unequal competition conditions for different economic entities;
- A wide practice of combination of public governance and economic functions of public authorities which in reality creates an additional tax burden for economic entities;
- Inadequate provision of information necessary for market functioning and, as a result, a substantial information asymmetry for market participants.

The efficiency of competition is also affected by:

- Insufficient level of competition culture and underdevelopment of civil society institutions that stimulate the development of market mechanisms;
- Insufficient State-aid monitoring and control systems;
- Insufficient efficiency of the regulation of natural monopolies;
- Incomplete reforms in a number of key sectors such as energy, financial services, telecommunications and transport which hamper their growth, discourages investments, restricts market entry and expansion.

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.

C. The actual Ukrainian competition system

Ukraine has a well-established system of competition protection and a quite comprehensive competition law that covers traditional antitrust issues, unfair commercial practices, as well as anticompetitive acts and decisions by public authorities.

Ukraine's first competition law, namely, the Law on Limiting Monopolization and Preventing Unfair Competition in Entrepreneurial Activity, was drafted by academics at the University of Kiev by using competition acts of other countries as an example for developing their law. This so-called Law on Limiting of Monopolism was adopted during the initial period of the

⁴ The openness of the Ukrainian economy is the ratio of the total of exports and imports of Ukraine to its gross domestic product calculated on the basis of national official statistics available at: http://ukrstat.gov.ua/operativ/operativ2012/vvp/vvp_kv/vvp_kv_e/vvpf_kv2012_e.htm.

formation of the Ukrainian State in February 1992. The law focused on abuse of dominance, anticompetitive agreements and discrimination of enterprises by public authorities, as well as methods of “unfair competition” applied by one business entity to another. It did not include regulations on the establishment of a competition authority. In November 1993 the AMCU was founded by the enactment of the Law on the Antimonopoly Committee (henceforth the AMCU Law). The Chair of the AMCU was appointed in 1992 and ten State commissioners were appointed in 1993. Staff members were recruited and the AMCU began to operate in 1994. Since then, the AMCU Law has undergone many amendments. Consequently, the organizational structure of the AMCU has changed as well.

Since 2009, continuous changes in the composition of staff of the Ukrainian competition authority took place. Within this period the AMCU had three different chairmen. At the same time there has been a certain rotation of responsibilities among State commissioners and some commissioners have been dismissed from their offices. These changes in the AMCU senior management made it very difficult to develop competition policy priorities in Ukraine. By the end of 2010 Victor Yanukovich had been elected as the new President of Ukraine. The situation became even more difficult for the AMCU when the new Government started an administrative reform in 2010 to cut public expenditure by about 20 per cent. This reform had serious effects not only on the AMCU but also on other central executive authorities. Consequently, in 2011, the AMCU readjusted its institutional structure in order to address the growing challenges of enforcing the competition law with reduced staff.

The AMCU has to deal with various challenges in its daily work. In addition to the problems mentioned in the above section, during the fact-finding mission the Deputy Chair of the AMCU pointed to other problems currently encountered in the field of competition law and policy. These include:

- A high degree of concentration in commodity markets;
- Inefficient functioning of markets;
- The need for policy coherence between decisions taken or policies implemented by other government bodies, on the one hand, and competition principles, on the other;
- Insufficient awareness of civil society about the work of the AMCU and the benefits for consumer welfare resulting thereof.

Solutions to the aforementioned problems are seen in the creation of conditions for further enhancement of competition on markets. A prerequisite for achieving this goal is the improvement of the national competition policy and further harmonization of the Ukrainian competition legislation with international best practices. The establishment of a State-aid monitoring and control system is another important measure in this regard. Moreover, State regulations for the monopolized commodity markets have to be improved and public awareness about competition policy and the work of the AMCU needs to be increased.

D. The Competition Development Programme for 2014 to 2024

The measures foreseen by the State De-Monopolization Programme (1993) approved by the Verkhovna Rada, as well as the decrees of the President of Ukraine on the main areas of competition policy between 1999 and 2001, and for the period 2002–2004 contributed to the establishment of market relations in Ukraine. Significant changes were achieved in the Ukrainian economy as a result of the implementation of these measures. However, at a later stage the positive dynamics of structural changes in commodity markets and their efficiency somewhat slowed down. The absence of such dynamics and negative trends in the development of the competitive environment required the development of a new programme for the resolution of issues in the sphere of competition. In response to this, the President approved by his decree the task to develop a National Competition Development Programme for the next ten years. The legal basis for the development of this Programme is the Commercial Code of Ukraine, according to which the State shall implement the antimonopoly/competition policy on the basis of nation-wide programmes.

The starting point for developing the Programme was the identification of problems that hamper competition. These problems were identified through scientific research, enforcement practice and the AMCU's analysis of relevant markets. The conceptual framework of the Programme is based on such research and analysis and is approved by the Cabinet of Ministers.

According to the conceptual framework, the Programme is aimed at:

- Establishing an effective competitive environment;
- Ensuring conditions for efficient functioning of markets;
- Improving the antimonopoly regulation;
- Improving the efficiency of competition protection.

To achieve these objectives, the Programme includes the following measures:

- For markets with a competitive structure, but without substantial competition, creating preconditions for an efficient competitive environment;
- For markets with a competitive structure and signs of substantial competition, improvement of the national competition policy, including further harmonization of the competition law with the European Union acquis;
- For markets which do not yet have a competitive structure, improving the efficiency of the State regulation on such markets.

In addition, the Programme envisages:

- The establishment of a system for monitoring the status and development of competition in markets;
- The introduction of regular reporting on the status of competition in markets;
- The formation of a clear understanding of competition as a social value in Ukrainian society;
- Ensuring active participation of civil society institutions in the protection and development of fair competition.

Expected results of the Programme are:

- Reduced monopolization of markets;
- Increased market entry by new economic entities;
- Minimization of the influence of decisions of public authorities on competition;
- Harmonization of the competition law with the European Union acquis;
- Raised awareness in the society about the benefits of competition.

The findings and recommendations of this Peer Review will substantially contribute to the development of this Programme.

E. International cooperation

Several recent developments are promising for further improvements in Ukraine's competition system. One of the most important is international engagement that will accelerate the adoption of pro-competitive economic reforms in Ukraine. In 2008 Ukraine became a member of the World Trade Organization (WTO). It has assigned a high priority to achieving full membership in the OECD.⁵ Ukraine also aspires to a deeper relationship with the European Union. Means to this end would include the establishment of a free trade agreement and other bilateral commitments with the European Union.

Ukraine has signed a number of international cooperation or other binding agreements with relevance to competition. The European Union–Ukraine Partnership and Cooperation Agreement (PCA) which entered into force in 1998 is to mention in particular. Section VI of the PCA includes competition provisions, covering in a wider sense competition, intellectual, industrial and commercial property protection and legislative cooperation. Article 49 of the PCA in particular concerns the remedy to or removal of restrictions on competition through the enforcement by parties of their competition laws. This Article also covers State aid practices which may distort competition, exchange of information between the parties to the PCA, non-discrimination between nationals of the Parties in procurement in case of State monopolies of a commercial character, and non-distortion of trade between the Parties in case of public undertakings.

At the meeting in November 2011, the OECD Council decided to invite Ukraine to participate as a regular observer in the OECD Competition Committee and the Working Parties on Competition and Regulation, and on Cooperation and Enforcement. The terms and modalities of Ukraine's participation in the Competition Committee and its Working Parties were determined by the procedures and guidelines established by the Council on the participation of non-members in the work of official bodies. In accordance with these rules, the invitation has been issued for a period of two years, thus until December 2013. Currently, the AMCU is working towards fulfilling the requirements for Ukraine to be granted the status of an associate in the Competition Committee in accordance with the resolution of the Council on Partnerships in OECD bodies. In addition, the AMCU is actively participating in the ICN, and the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy.

⁵ Ukraine is currently an observer in the OECD's Competition Committee.

The cooperation of the AMCU with respective authorities of other States on the basis of cooperation agreements or internationally binding treaties is explicitly foreseen in Article 22.2 of the AMCU Law. Such cooperation mainly relates to the exchange of information between competition authorities. The AMCU has concluded bilateral cooperation agreements with competition authorities of Armenia, Austria, Azerbaijan, Belarus, Bulgaria, Czech Republic, France, Georgia, Hungary, Latvia, Lithuania, Poland, Switzerland, Romania, the Russian Federation and Slovakia.

The international engagement initiatives outlined above provide a significant force for reform. Each step, whether in the form of bilateral commitments or participation in international bodies, creates incentives for Ukraine to adopt market-oriented economic reforms and improve its system of public administration. The prospect of deeper economic integration with the European Union and fuller participation in the work of OECD should encourage the pursuit of domestic measures to strengthen competition as the central organizing principle of Ukraine's economy.

A further impetus for reform comes from the awareness of Ukraine's political leadership that greater competition is necessary to increase growth and otherwise improve economic performance. To this end, Ukraine has committed itself to adopt an NCP, see under the part "Preface" of this Peer Review. To be launched in 2014 and carry through to 2024, the NCP will provide a policy platform for addressing structural obstacles to competition in Ukraine's economy and removing artificial regulatory barriers to entry and expansion by new firms. The adoption of the NCP will join Ukraine with Armenia, Australia, Brazil, Mexico, South Africa and other countries that have implemented or are contemplating such measures as a way to lift economic performance. The NCP will assign a major role to the AMCU in implementing its provisions.

II. Legal framework: scope of competition law and policy

According to Article 3.1 of the Law on Protection of Economic Competition, the laws on protection of economic competition in Ukraine are based on the norms established in the Constitution of Ukraine and consist of the Law on the Protection of Economic Competition of 2001, the Law on the Antimonopoly Committee of Ukraine of 1993, and the Law on Protection against Unfair Competition of 1996, as well as other normative and legislative acts of Ukraine adopted in accordance with these laws.

A. The Constitution of Ukraine

Since 1996, the protection of competition has been rooted in Article 42 of the Constitution of Ukraine. According to this article “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”. Article 42 further stipulates that “the types and limits of monopolies shall be determined by law”. In the same article it is declared that “the State protects the rights of the consumers”. Laying down these basic principles of State protection of competition in the Constitution was – according to high representatives of the AMCU – the most significant event in building the system of competition legislation in Ukraine.

B. The law on the protection of economic competition

Article 42 of the Constitution establishes the basis for the implementation of competition principles. In the Preamble of the Law of Ukraine on the Protection of Economic Competition (LPEC), it is stated that this Law defines the legal grounds for the maintenance and protection of competition, restriction of monopolism in economic activities and aims at ensuring the efficient functioning of the economy of Ukraine on the basis of the development of competitive relations. The AMCU is responsible for the implementation of the LPEC as well as for the Law on the Protection against Unfair Competition. Accordingly, the AMCU has two main functions:

- An enforcement function regarding the protection of economic competition, which, besides the AMCU, is also performed by the courts;
- An advocacy function (competition policy function), which, besides the AMCU, is performed by all public authorities and institutions and is carried out through market liberalization, demonopolization of the economy, interaction with the State authorities within the competition policy formation, and implementation.

1. Overview

The Law covers what is, for the most part, the standard set of issues contained in most competition acts.

Section I includes the general provisions, mainly the definition of terms.

The scope of application of the LPEC is defined in Article 2. Accordingly, the law regulates the relations between bodies of State power, local self-government and administrative and economic management and control on the one hand and economic entities on the other

hand. It is applied to practices that influence or may influence economic competition on the territory of Ukraine.

The basic principles of State policy in the field of competition and restriction of monopolies are laid down in Article 4 of the LPEC. They can be summarized as follows:

- Bodies of State power, bodies of local self-government, and bodies of administrative and economic management and control shall undertake all such measures which lead to the demonopolization of the economy or provide all kind of support (financial, material, technical, consultative, and the like) that facilitate the development of competition to economic entities;
- Economic entities, bodies of State power, bodies of local self-government, and bodies of administrative and economic management and control shall facilitate the development of economic competition and shall not commit any infringement of laws that can have a negative impact on competition.

Furthermore, Article 4 includes regulations on competencies for the application of respective State policy and control measures foreseen in the field of competition. In the first place the AMCU and its bodies are the competent authorities. Respective detailed regulations on competencies are contained in Article 20 of the Law on the Antimonopoly Committee of Ukraine.

Section II of the LPEC deals with anticompetitive concerted actions of economic entities and abuse of dominant position on the market.

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.

Section IV contains regulations on restrictive and discriminatory activities of economic entities and associations.

Section V deals with concentration of economic entities (merger control).

Section VI elaborates on the consideration of applications and cases concerning authorization for concerted actions and concentration of economic entities.

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).

Section VIII regulates the responsibility for violations of the laws on protection of economic competition, defines their types and respective fines.

Section IX contains procedures for fulfilling, verifying, reviewing and appealing against AMCU decisions and orders.

Section X contains the final provisions of the Law.

In the whole context it has to be taken into consideration that the legislation for protection of economic competition is a relatively new sphere for Ukraine. The assessment of such a complex phenomenon as market relations requires taking into account a substantial number of factors and having prior experience of the application of a special legal toolkit, as well as economic analysis of the situation on the relevant commodity market.

2. Anticompetitive agreements

Ukrainian competition law takes the same approach as Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Section 1 of the Sherman Act and does not distinguish between horizontal and vertical restraints in the relevant Articles 5 and 6 of the LPEC. It contains an outright prohibition of both horizontal and vertical restraints in Article 6.4 combined with sanctions provided for particularly in Article 50.1 and Article 52. The fact that Article 7 of the LPEC contains a rule providing preferential treatment for specific horizontal restraint for small and medium-sized enterprises (SMEs), probably inspired by the German competition law (purchasing cooperations), Article 8 for specific vertical restraints and Article 9 for certain vertical restraints related to intellectual property rights are all mainstream elements found in most competition laws. These exceptions may mitigate, but do not solve the problem connected with the absence of distinction between horizontal and vertical agreements. Likewise, Article 10 provides for the authorization of restrictive agreements, decisions and concerted conduct irrespective of their horizontal or vertical nature in line with mainstream competitive criteria and similar to the one provided by the European Union law. This does not solve the problem either, but may contribute, if adequately applied, to establishing appropriate enforcement policies.

While horizontal arrangements have in most instances a negative competitive impact, vertical restraints have often pro-competitive rather than anticompetitive effects. Accordingly, if the first and often recommended option to deal with horizontal and vertical restraints at primary law level is not chosen, as in primary Ukrainian competition law, the second option is to interpret and enforce primary law according to their different competitive significance. This option could and should be further complemented by appropriate secondary regulation, guidelines, and the like, clarifying the different actions to be expected in horizontal and vertical cases. The most important issue is, as regards vertical restraints, that the law must permit effective action against strategies undertaken by dominant enterprises to foreclose markets by using vertical restraints. This is exactly what had to be achieved in the United States of America and the European Union at secondary law levels and in corresponding enforcement policies.

According to Article 6.1 of the LPEC, anticompetitive concerted actions (cartels) mean concerted actions of economic entities which have resulted or may result in prevention, elimination or restriction of competition. Economic entities under this Law are legal entities regardless of their administrative, legal and ownership form, and any individual performing activities associated with manufacture, sale and purchase of goods or performing any other economic activities, including those associated with exercising supervision over another legal entity or another individual. Moreover, State agencies, bodies of local self-government, as well as administrative and control bodies performing activities associated with manufacture, sale and procurement of goods or other economic activities are embraced by the term “economic entity”, under Article 1 of the LPEC.

Article 6.2 of the LPEC specifies cases where concerted actions are considered as anticompetitive. In particular, the setting of prices or other conditions with respect to the

purchase or sale of products, the restriction of production, product markets, technical and technological development, investments or the establishment of control over them are to be mentioned here. All these examples do not distinguish between horizontal and vertical restraints and all may be realized in a horizontal or a vertical context. Nevertheless, some of them may more often be associated with horizontal agreements, for instance in Article 6.2 point 3, and others with vertical, for example in Article 6.2 point 6.

In contrast to the first and second paragraph of Article 6, a provision as in paragraph 3 is not common in many other countries' competition laws: "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 carries out an analysis and if this analysis leads to the result that similar action or inactivity of economic entities cannot be justified in economic terms, then the prerequisites of this provision are fulfilled and a concerted action (cartel) may be presumed. The presumption is an important element of AMCU practice, and its application has resulted in the imposition of fines. In 2012, 20 per cent of all AMCU cartel cases relied upon the presumption provision in Article 6.3. This area of enforcement is another instance where AMCU can improve the quality of its competition law enforcement by providing additional secondary guidance about the circumstances in which it considers the prerequisites of Article 6.3 to be satisfied.

At the same time the LPEC establishes that anticompetitive concerted actions that do not present a substantial threat to competition on the market while having a concrete positive effect on the economic development of Ukraine may be performed either on the basis of block exemptions or on the basis of an individual authorization from the AMCU or the Government of Ukraine. If certain anticompetitive actions are exempt from the general prohibition, their performance is not considered illegal. The LPEC includes the following block exemptions:

- Concerted actions of SMEs relating to joint purchase of goods, which do not lead to substantial restriction of competition and facilitate increased competitiveness of SMEs (Article 7);
- Concerted actions relating to the supply and use of goods if such concerted actions do not lead to substantial restriction of competition on the whole market or a part thereof, do not restrict the access of other economic entities to the market, and do not lead to an economically unjustified price increase or a shortage of goods (Article 8);
- Concerted actions relating to intellectual property rights (Article 9);
- Other concerted actions meeting the standard requirements established by the AMCU according to the powers foreseen by Article 11 of the LPEC.

Individual exemptions can be granted by the AMCU for anticompetitive concerted actions if their parties can prove that such actions facilitate: the improvement of production, purchase or sale of goods; technical, technological or economic development of SMEs; optimization of export or import of goods; development and application of unified technical conditions or standards for goods; rationalization of production, if such concerted actions do not lead to

substantial lessening of competition in the entire market or a part thereof (Article 10 of the LPEC). It is prohibited to perform the concerted actions defined in Article 10 of the Law until the authorization of the AMCU or the Cabinet of Ministers of Ukraine is received. The performance of the concerted actions defined in Article 10 prior to authorization by the AMCU or the Cabinet of Ministers of Ukraine is a violation of the legislation for protection of economic competition as laid down in Article 50.5 of the LPEC.

To improve the transparency and efficiency of the interpretation and application of the LPEC, the AMCU should clarify its legal intentions as regards horizontal and vertical restrictions in the corresponding regulations, guidelines and other policy instruments. Such secondary legislation acts may explain how the LPEC will be used to prevent the attempts of dominant enterprises to use vertical restraints in order to prevent the access of their competitors to upstream or downstream markets. Such secondary policy forms have proved to be very useful in a number of countries, including the European Union and the United States.

3. Abuse of dominance

Article 12 of the LPEC defines the conditions under which an undertaking is deemed to hold a monopoly (dominant) position on the market. One typical feature of this Article is the significant reduction of the role of structural market indicators (market share of enterprises) in the designation of dominance and the substantial increase of the role of behavioural aspects, such as economic analysis of the market situation, and negative effects on competition and consumers. In such circumstances, the structural indicators only play the role of a certain procedural test indicating a threshold after which the economic entity in question has to prove that it is exposed to substantial competition. Thus, if the company's market share exceeds 35 per cent, it has to prove that it is exposed to substantial competition, and the AMCU can counter such arguments. When the market share is 35 per cent or less, the undertaking may also be considered as dominant, but only if the AMCU can prove that it is not exposed to substantial competition and the undertaking cannot refute this, especially in case where market shares of its competitors are relatively small.

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 structural indicators in this case play the same role as in the case of individual dominance.

The use of structural indicators as only necessary rather than sufficient criteria of dominance allowed ensuring the adequacy of the AMCU approaches to the designation of a dominant position, taking into account the specificities of Ukrainian markets and the influence of international competition on them. As a result, mostly undertakings with a 50 per cent or higher market share have been recognized as dominant in recent years. This situation is in line with the approach to the designation of a dominant position in many other countries, for example many European Union countries where the structural threshold is established at 40–50 per cent. On the other hand, this obliges the AMCU to permanently monitor the situation on all more-or-less concentrated markets which have social and economic importance in order to prevent their remonopolization.

Article 13.1 of the LPEC provides the general standard for determining when an entity has abused its dominant position. A dominant entity's activity is abusive when (a) 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, and (b) the restriction of competition would be impossible if substantial competition existed in the market. Article 13.2 enumerates specific actions (or forms of inaction) similar to those in Article 102 of the TFEU which are considered to be abuse of a dominant position and are prohibited by Article 13.3 of the LPEC. These prohibitions provide grounds for expansive intervention by the AMCU to address a broad range of conduct by dominant firms. In particular, it provides the basis for the AMCU's considerable efforts to control excessive pricing by dominant enterprises. In effect, 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 into markets.

4. Anticompetitive actions of public authorities

A unique feature of the Ukrainian competition law is that it gives the AMCU the powers to control anticompetitive actions of public authorities. Such prohibitions apply to "bodies of power, local self-government, administrative and economic management and control". According to the definition in Article 1 of the LPEC, "bodies of power and local self-government" include practically all public authorities in the executive branch of power in Ukraine. In particular, they include ministries, services, agencies, inspectorates, other central executive authorities, bodies that regulate natural monopolies, privatization bodies, the Supreme Council of the Autonomous Republic of Crimea and local self-government bodies. In addition, this category includes bodies of administrative and economic management and control which largely comprise economic entities entrusted with certain controlling or management functions, for example, self-regulation organizations on relevant markets.

These powers of the AMCU are aimed at ensuring procompetitive management decision-making.

Article 15.1 of the LPEC prohibits public authorities from adopting any acts (making agreements, refusing to act, issuing orders, regulations or instructions) when such acts have led or may lead to prevention, elimination, restriction or distortion of competition.

Article 15.2 of the LPEC contains a list of actions by public authorities which are considered to be anticompetitive:

- Banning or obstructing the establishment of new enterprises and placing of restrictions on performing certain economic activities;
- Forcing undertakings to enter into associations or other forms of union of enterprises or coordinated concentration of economic entities in other forms;
- Forcing undertakings to conclude contracts on a priority basis, to supply primarily to certain consumers or to purchase primarily from certain sellers;

- Any action towards a centralized distribution of products, as well as market sharing between undertakings on a territorial basis, according to the range of products, volume of sales or purchase, or circle of customers or suppliers;
- Prohibiting the sale of certain products from one region of the country to another;
- Granting benefits or other advantages to certain undertakings or groups of undertakings putting them into a privileged position with respect to their competitors, which results or may result in the prevention, elimination, restriction or distortion of competition;
- Creating unfavourable or discriminating conditions of operation for certain undertakings as compared to their competitors;
- Prohibiting and restricting the independence of enterprises, including as regards the purchase or sale of products, price setting, formation of operational and development programmes, use of profits.

Article 15 of the LPEC is an effective tool. If a public body issues an anticompetitive regulation or decision, the AMCU may open a case and pass a decision which would require the authority to revoke or to amend the regulation or the decision and to terminate any agreements made with third parties on the basis thereof.

According to Article 16 of the LPEC, public authorities shall be prohibited from delegating their authorities to associations, enterprises and other economic entities, if this results or may result in the prevention, elimination, restriction or distortion of competition.

Article 17 of the LPEC prohibits acts or omissions of public authorities which coerce or lead other bodies, economic entities or officials to violate competition legislation, or to facilitate or legitimize such violations.

5. Restrictive and discriminatory actions

Articles 18 to 21 of the LPEC regulate restrictive and discriminatory activities: Article 18.1 prohibits economic entities and associations to induce other economic entities to commit violations of the legislation on the protection of economic competition or to facilitate such violations; Article 18.2 of the LPEC prohibits them to compel other economic entities into anticompetitive concerted actions or participation in concentrations of economic entities.

Article 19.1 of the LPEC applies to economic entities which were authorized by the AMCU according to Article 10 of the LPEC to perform concerted actions prohibited by Article 6 of the LPEC, or which perform concerted actions exempt by Articles 7 (SMEs), 8 (agreements for supply or use of goods), and 9 (transfer of intellectual property rights). Such economic entities are prohibited from restricting the economic activities of other economic entities or treating some economic entities differently from others without objective grounds.

Article 19.2 of the LPEC applies to economic entities authorized by the Cabinet of Ministers to proceed with concerted actions which were not allowed by the AMCU pursuant to Article 10. Such undertakings are prohibited from taking actions which are considered as abuse of a monopoly (dominant) position on the market pursuant to Article 13 of the LPEC.

Article 19.3 of the LPEC applies, similarly to Article 19.1, to economic entities authorized to proceed with concerted actions according to Articles 10, 7, 8, and 9. Such undertakings are

prohibited from coercing other undertakings into granting advantageous conditions of commercial activities without objectively justified reasons.

Article 19.4 applies the provisions of Article 19.1 and Article 19.3 of the LPEC to undertakings on which SMEs depend in the receipt and supply of goods. It is also indicated in this article that the seller is dependent on the buyer if the buyer receives from the seller a special benefit not received by other similar buyers.

Article 20 of the LPEC prohibits the restrictive behaviour of undertakings which have a substantially larger market power compared to SMEs which compete with them. Article 20 protects SMEs from any behaviour that creates obstacles for their economic activity, in particular from any behaviour that violates Articles 19.1 and 19.3.

Article 21.1 of the LPEC prohibits groundless and unjustified restrictions on membership in associations of undertakings. The prohibition applies to associations which bring together all participants of a given market or in a given territory and do not have profit making as their purpose, and whose establishment and operation do not lead to economic concentration and concerted actions (Article 21.2).

6. Mergers

The merger control regime was established in Ukraine in 1992, but the first version of the Procedure for Concentrations (Mergers) was approved by the AMCU in late 1994 and came into force in early 1995 under the formal title "Procedure of Submitting Applications to the Antimonopoly Committee of Ukraine for Obtaining Preliminary Permit for Concentration of Economic Entities (Regulations on Concentration)".⁶ In addition, the AMCU has issued a number of advisory clarifications and provides clarifications and guidelines to applicants regarding the preparation of materials and the main principles of its in this area.

Mergers are addressed by Section V of the LPEC. According to Article 22.1 the AMCU shall exercise State control over the concentration of undertakings. Article 22.2 enumerates situations that are considered as concentration. These include merger of economic entities or the affiliation of an economic entity to another entity; 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; establishment of such an economic entity by two or more than two economic entities that will independently perform economic activities for a long period, that is, joint ventures. Article 23 of the LPEC clarifies which economic entities are to be considered as participants to a concentration.

Article 24.1 of the LPEC, similar to other modern competition laws, establishes that any concentration falling under Ukrainian merger control requires prior authorization. The threshold for mandatory prior authorization is detailed in Article 24.1(1) and the specific rules for calculating the relevant criteria in Article 24.2. Article 24.5 establishes that any concentration which requires prior authorization must in no way be realized prior to its authorization.

⁶ *Compendium of Legislation of Ukraine on Protection of Economic Competition*, Volume I, 2012, Chapter III, Section 3.5.

The AMCU assesses competitive effects of a planned merger according to the standard established in Article 25 of the LPEC. According to this standard, a merger will be cleared if it does not lead to monopolization or substantial lessening of competition on the entire market or a part thereof. The legislation of Ukraine on the protection of economic competition sets deadlines for the review of applications (notices). The LPEC has the so-called automatic authorization according to European norms, that is, a merger is deemed to be cleared automatically if the AMCU does not prohibit it. The AMCU observes the deadlines under the Law in its review of applications. Article 25.2 provides that the Cabinet of Ministers of Ukraine may authorize a concentration which was not authorized by the AMCU due to its anticompetitive effects for public interest considerations that outweigh the negative competitive impact.

Article 29.1 gives undertakings, bodies of power, local self-government, administrative and economic management and control the right to request the AMCU to issue preliminary conclusions as regards concerted actions and concentrations. The AMCU issues the preliminary conclusions based on such requests and information provided by the applicants.

Article 29.2 establishes mandatory requirements to the content of preliminary conclusions, whereas Article 29.3 contains a reservation according to which the receipt of preliminary conclusions regarding concerted actions or concentration does not relieve their participants from the requirements to turn to the AMCU with the authorization request for such actions (transactions) in the cases foreseen by Articles 10 and 24.

The legal institution of preliminary opinions as regards lawfulness of concerted actions (concentrations) of economic entities makes it possible for economic entities to verify the need to obtain the consent of the AMCU for the planned transaction, to assess the risks of non-obtaining of the AMCU's consent, and (if the consent is not required) to save financial, time and human resources on the preparation of a notice.

All modern competition law systems have published merger guidelines in order to give clear guidance and support to undertakings that are planning or preparing a concentration regarding the principles and rules applied by the respective competition authority. The preparation of a merger is costly and time consuming for the involved undertakings. Merger guidelines are of high importance to merging parties for them to have legal certainty and predictability with regard to their concentration plans. Based on interviews with law firms experienced in dealing with Ukraine's merger review process, this aspect of policy implementation elicited criticism. Many observers contended that Ukraine applies low thresholds that trigger notification of transactions with no possible competitive effect on Ukraine's economy. To respond to these concerns and to avoid the control of economically and competitively less important transactions, the AMCU submitted to the Ukraine Parliament amendments to the LPEC to raise the thresholds.

7. Procedure

Procedure is mainly regulated in Section VII of the LPEC. A detailed description of the procedural norms relating to the 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.

The consideration of a case because of the infringement of the laws on protection of economic competition starts by issuing an order and ends with taking a decision on the case. If there are signs of an infringement of the laws the bodies of the AMCU shall issue an order on the initiation of the case (Article 35 and 37 of the LPEC). According to the information received during the fact finding mission, the AMCU has no discretion as to whether to open a case or not. It is not able to take into account certain circumstances, such as lack of personnel or the priority of a specific infringement because of its gravity.

Article 36.1 of the LPEC stipulates that the initiation of a case is decided mainly upon applications submitted by economic entities, private citizens, bodies of State power or bodies of local self-government; or by the AMCU bodies on an ex officio basis.

The procedural rights and obligations of persons participating in a case are defined in Article 40 of the LPEC. Participants of a case, which, according to Article 39, are the parties, third persons and their representatives, have the right:

- To familiarize themselves with materials of the case;
- To provide evidence;
- To receive copies of decisions on the case;
- To appeal against decisions.

Under Article 44 on seizure and arrest of evidence, written and material evidence, in particular documents, objects or other media for information which can be evidence in the case of an infringement of the law, can be seized on the basis of an order of a State commissioner of the AMCU or the head of a territorial office of the AMCU. Evidence can be any actual data that make it possible to establish the existence of the infringement (Article 41 of the LPEC). The prerequisite for the issuing of such an order is that:

- The evidence is not given and there are sufficient grounds to consider that documents, objects or other media for information which can be evidence in the case are at a certain place;
- There is a threat that the relevant documents, objects or other media for information can be destroyed.

This provision only gives the staff of the AMCU based on an order of a State commissioner the right to demand evidence, but not to search for it. The LPEC does not contain any specific legal basis for conducting a dawn raid and to search for evidence. This lack of regulation causes difficulties for the staff while conducting an investigation. In order to obtain evidence during a search, they must rely on the cooperation, support and honesty of the accused legal or natural person. This weakens the position of the AMCU vis-à-vis the entity that infringed the law.

According to the information received during the fact-finding mission from the staff of the Investigation Department, during an investigation procedure the following steps are regularly carried out by them and the respective State commissioners where their involvement or decision is foreseen by the law:

- Review of the complaint received, consideration of all available facts and submission to the State commissioner;
- Initiation of a proceeding by the State commissioner;
- Notification of the parties of the procedure about the opening of the case;
- Conducting the investigation, which includes a market research whereby the demand and supply on the relevant market are analysed;
- Review of the facts of the case by a case handler and drafting of the preliminary findings;
- Notification of the parties of the case about the preliminary findings of the AMCU, which has to be sent out at least ten days before issuing the decision;
- Drafting of a decision;
- Adoption of the decision by the AMCU (as a collective body), administrative boards of the AMCU (composed of three State commissioners of the AMCU, headed by the First Deputy or Deputy Chair of the AMCU) with the majority of their members or by a State commissioner.

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. It is not surprising that cartelists, for example, are very reluctant to provide evidence to a competition authority, which would sanction them and impose fines for having participated in cartel activities. It is rather self explanatory that a system of voluntary cooperation between an investigating and prosecuting authority on the one hand and the perpetrator on the other hand does not function. There are very good reasons that in most national legislations the right of non-self-incrimination is constitutionally secured (at least in criminal cases). The European competition legislation does not recognize the right of non-self-incrimination, which is explained among other reasons by the fact that on a European level only legal persons can be fined. In competition cases the European Union Commission carries out a procedure sui generis. In Germany, for instance, almost every cartel case is conducted on the basis of the Law on Misdemeanours which refers to the regulations of the Code on Criminal Procedure. Consequently, the procedural rights that apply in criminal proceedings, including the right of non-self-incrimination, also apply in cartel proceedings.

In order to improve the law enforcement the AMCU urgently needs a legal basis for conducting dawn raids and being able to apply other investigatory tools. There are different possibilities for the lawmakers of how to regulate such investigatory tools for the AMCU. One option would be to amend the LPEC. Another option would be to refer to the existing

regulations, such as the Code on Criminal Procedure. A corresponding draft proposal for amendments to the LPEC with regard to the collection of evidence in proceedings under review by bodies of the AMCU was prepared by the AMCU in 2011.

These amendments include clarifications regarding the conduct of inspections by the AMCU and give the authority the clear rights to require evidence and to seize evidence during an inspection. According to Article 44 paragraph 3 of the draft amendments, the AMCU's authorized officials shall have in particular the following rights:

(a) To freely enter the premises (offices, cabinets, ancillary and storage rooms, and the like), vehicles or any other possessions owned or used by an entity subject to inspection provided such entity was presented an official identification card and a duly certified copy of the resolution requiring to carry out such inspection;

(b) To require showing the certificate or any other document which identifies its holder and his/her official capacity;

(c) To require to show or to issue documents, items, other media and copies (abstracts) thereof;

(d) To receive shown or issued documents, items, other media and copies (abstracts) thereof;

(e) To require the chief official, officials and other staff members of the entity subject to inspection, to give oral or written explanation with regard to facts, documents (in particular, the contents of notes, symbols, codes, and the like) and other matters pertaining to the purpose of such inspection;

(f) To engage officers of law-enforcement agencies to take, where necessary, measures set forth by the law to overcome (eliminate) obstacles during inspection;

(g) To apply photography and filming, audio and video recording, other technical or software/hardware facilities;

(h) To make reports on administrative violations in such manner as set forth by the law;

(i) To have free and direct access to data storage facilities (computers, cabinets, safe boxes, staff workplaces, and the like);

(j) To seize documents, things, or any other data media;

(k) In order to avoid destruction, relocation or substitution of documents, things, or any other data media, to seal premises, communication (information, telecommunication, information/telecommunication, computer, and the like) systems or data storage facilities or to otherwise restrict access to data media for the period not exceeding ten business days.

Compared to the powers of other enforcement authorities to conduct searches, the foreseen powers of the AMCU during inspections remain less strong, even if these new draft regulations enter into force. These draft amendments have not yet passed the legislative procedure; they will not give AMCU officials the right to search for evidence in the premises of an undertaking; officials of the AMCU are only allowed to "require" or to "receive" documents, items, other media or copies. This means that their role is still a more "passive"

one. In case a certain undertaking does not cooperate, the conduct of a dawn raid remains rather difficult. Moreover, experiences in other countries have shown that the support of police forces during dawn raids carried out by competition authorities are of essential importance to a successful investigation, but this issue has not yet been regulated in Ukraine.

8. Recommendations given by the Antimonopoly Committee of Ukraine according to Article 46 of the Law of Ukraine on the Protection of Economic Competition

Another efficient tool provided by the Ukrainian laws on protection of economic competition for fighting infringements is AMCU's recommendations. This tool permits no action to be taken against undertakings, associations, bodies of administrative and economic management and control if:

- Their market behaviour does not cause substantial damage to society or specific persons, even though it contains signs of an infringement;
- The recommendations are fulfilled and the unlawful behaviour is discontinued in a timely way;
- All necessary actions have been taken to eliminate the consequences of such behaviour and to prevent it from happening in the future.

Article 46.1 of the LPEC gives the AMCU the right to issue recommendations to bodies of power, local self-government, administrative management and control, undertakings and associations provide for the termination of actions having signs of infringements of the legislation on protection of economic competition, for the elimination of causes of such infringements and conditions that facilitate them; and for taking actions to eliminate the consequences of the infringement when the latter has been brought to an end.

Article 46.2 of the LPEC obliges bodies or persons to which such recommendations have been issued to consider them and to notify the results of such consideration to the AMCU within the established deadline. Article 46.3 defines the conditions under which the AMCU, following the provision of recommendations, does not open a case of infringement of the legislation for protection of economic competition; or closes already initiated proceedings.

The AMCU's enforcement practice demonstrates that the use of the recommendation tool is justified. Thus, the share of actions with signs of infringements which were brought to an end following AMCU's recommendations has grown from 22 to 36 per cent of all infringements stopped by the AMCU in the last three years.

Besides the possibility to issue recommendations, Article 4.6 of the LPEC gives the AMCU the powers to issue advisory clarifications on the application of the law based on accumulated experience and enforcement practice. The idea of such advisory clarifications is to ensure a uniform application of provisions of the legislation for protection of economic competition.

Even though such recommendations are advisory rather than binding for economic entities and public authorities, they have legal significance since they summarize the practice of the application of the legislation for protection of economic competition and reflect the official position of the AMCU on specific issues.

With the purpose of preventing violations of the legislation on protection of economic competition and to improve the predictability of its application, Article 14 of the LPEC gives economic entities the right to request the AMCU to issue its conclusions in the form of advisory clarifications as regards compliance of their actions with Articles 6, 10 and 13 of the LPEC and Article 15¹ of the Law on the Protection against Unfair Competition (LPUC) (see section D).

Such advisory clarifications are issued by the AMCU on the basis of information contained in the request of the undertaking, are addressed to specific undertakings and concern specific situations. They are based solely on the information provided by economic entities which are interested to receive official information from the competent authority. The purpose of the provision of the advisory clarifications is to prevent infringements of the law.

9. Fines and other sanctions

The responsibility for infringements of the LPEC is laid down in Articles 50 to 55. Article 50 enumerates all infringements that constitute a violation within the meaning of these laws, which include, among others, anticompetitive concerted practices, abuses of a monopoly (dominant) position or concentration of economic entities without the relevant authorization, if necessary, to be granted by the AMCU, as well as non-submission of required information or submission of incomplete or untrue information. According to Article 52, fines shall be imposed on associations, economic entities, which can be legal or natural persons as well as a group of economic entities (legal or natural persons) under the specific prerequisites laid down in paragraph 4 of Article 52.

Fines for anticompetitive concerted practices, abuses of a monopoly (dominant) position and for the failure to fulfil a decision or a preliminary decision taken by bodies of the AMCU as well as their incomplete fulfilment shall be imposed in amounts not exceeding 10 per cent of the income (proceeds) earned by an economic entity in the accounting year directly preceding the year in which the fine is imposed. If there is an unlawfully obtained profit which exceeds 10 per cent of the mentioned income, a fine shall be imposed which does not exceed the threefold amount of the unlawfully earned profit. Fines for non-submission of required information or submission of incomplete or untrue information may be imposed up to 1 per cent of the economic entity's income (turnover).

During the last decade fines remained the primary instrument of deterrence of anticompetitive practices. The punitive character of the competition policy has been reduced in its effectiveness by a low level of fines imposed in reality and non-payments by the liable undertakings. In 2012, approximately Hrv 40.6 million (US\$5.08 million)⁷ have been paid to the State budget, which is close to 5 per cent of the total amount of fines imposed in 2012. The total amount of fines imposed by the AMCU in 2012 was Hrv 814.7 million (US\$101.9 million). For the years 2009–2011 the total amount of fines that the AMCU imposed was Hrv 1175.1 million. Out of this amount until today Hrv 109.7 million have been paid to the State budget, which is less than 10 per cent. Such a limited amount of fines actually paid is due to the fact that defendants use their legal right to challenge AMCU's decisions in court exercising their right to defence. As a result of this, a significant number of AMCU's decisions

⁷ Official exchange rate of the National Bank of Ukraine as of 26 February, 2013: US\$100 = Hrv 799.3.

on fines are currently under court review. According to the information received from the AMCU, violators of the law succeed in avoiding the consequences of their conduct by liquidation and reregistration of their enterprise and afterwards establishing a new economic entity.

10. Leniency regulations

Since January 2001, Article 6.5 of the LPEC contains a “basic leniency programme”: “A person, who had committed anticompetitive concerted practices, 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 individuals. The person defined in this part may not be relieved from the responsibility if the person:

- Having informed the Antimonopoly Committee of Ukraine on anticompetitive concerted practices, did not take efficient measures to terminate the actions;
- Was the initiator of the anticompetitive concerted practices or managed them;
- 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.

On 25 June, 2012 the first leniency regulation, the so-called “Procedure of Exemption from the Responsibility”, was approved by the AMCU.⁸ In September 2012, the regulation entered into force. Before the leniency regulation became effective in September 2012 a public discussion in Ukraine had taken place for almost two years on whether the introduction of a leniency programme in order to fight cartels more efficiently would be wise at that time. There were some serious arguments against the immediate introduction of a comprehensive leniency programme due to the current situation of competition law enforcement in Ukraine. Challenges such as AMCU’s practices regarding the definition, and legal and economic assessment of cartel activities, non-transparent methods of calculation of fines, ineffectiveness in the collection of fines, and the weak position of undertakings in litigation against the AMCU in courts were mentioned to support such counter arguments.

The objective of the Procedure of Exemption from the Responsibility is to implement the provisions of Article 6.5 of the LPEC. Section I of the Procedure includes definitions of terms and describes the prerequisites for a leniency application. Such a “leniency case” starts with an application for leniency or for a marker letter. In the marker letter the applicant has to declare the existence of concerted practices and has to make the commitment to provide information of essential importance on the case to the AMCU. The applicant of a marker letter can be any legal entity or natural person. The term “person” in Article 6.5 of the LPEC is legally defined as any person who has directly initiated, managed or given instructions regarding the concerted practices. The law only speaks about “a person”, which excludes the possibility for a second application for leniency.

⁸ Registered with the Ministry of Justice of Ukraine under No. 1553/21865 on 7 September, 2012.

On the basis of such a “first” application, the AMCU can issue a marker letter. A marker letter confirms the primacy of the applicant for an exemption from the responsibility; it indicates the date and time of the application and the deadline for the submission of the “essential information and evidence”, which may not exceed thirty days. An application for a marker letter can be filed before the date the AMCU files its preliminary decision on the case (Article 47 of the LPEC). This means that a person may apply for leniency not only before an investigation has started or at an early stage of the investigation, but even later in the investigation procedure. Section II of the Procedure of Exemption from the Responsibility contains precise regulations on the submission of such applications. Accordingly section 2.4 provides that the application for exemption from the responsibility shall contain:

- (a) Full designation/surname, first name, patronymic, location/place of residence and other details of the applicant;
- (b) Information about all participants of concerted practices known to the applicant;
- (c) Time from which the applicant participated in concerted practices;
- (d) Detailed description of concerted practices;
- (e) Information that could confirm anticompetitive concerted practices;
- (f) Information and explanations about the applicant’s participation in concerted practices, including the absence of circumstances referred to in item 1.5, Section I of this Procedure;
- (g) A list of documents attached to the application.

The conditions described in Article 6.5 of the LPEC – “voluntarily and earliest” as well as “essential information” – have to occur simultaneously. The Procedure sets out that:

- (a) A person shall be deemed to have voluntarily reported of the participation in concerted actions and earliest then the remaining participants:
 - If the AMCU has not received any application from any other participant of this specific infringement of the law before;
 - The person has provided the information at their own discretion.
- (b) Information is considered to be essential to take a decision on the case if it includes:
 - The participants of the anticompetitive concerted practices concerned;
 - The availability and content of agreements, notes, memoranda, correspondence, minutes of the meetings confirming the concerted anticompetitive behaviour, supported by relevant documents and evidence on paper or other forms.⁹

It is not required that the applicant admits the infringement of the laws committed. In principle, a full confession is not a prerequisite to receive a marker letter.

⁹ Information can be submitted as paper documents or documents in electronic form (including e-mail messages) notes and records (including audio and video recordings).

As mentioned above, an exemption from responsibility shall not be provided, if the applicant has failed to take effective measures to suspend his/her participation in anticompetitive concerted actions after having notified the AMCU unless further participation is justified by the need to obtain additional information. The extent and the terms for this kind of “further cooperation” with other participants of the anticompetitive concerted practice has to be agreed upon with the AMCU in each individual case. Moreover, an exemption from responsibility is excluded if the applicant initiated or managed the anticompetitive concerted practice (the so-called ringleader) or failed to submit all evidence or information which he or she was aware of and which he or she could easily obtain. The applicant has to provide all evidence or information, may not destroy, nor falsify, nor conceal information or evidence regarding the respective anticompetitive concerted practices and has to cooperate with the AMCU during the case proceeding.

The Ukrainian leniency procedure, which does not allow any subsequent applicants and requires a marker letter, implies a high risk for the reporting party to admit a certain infringement without knowing if cooperation with the competition authority is (still) possible at all. Experience has shown that cartelists are often not friends and there is usually no trust among them. Therefore, one advantage of a leniency regulation is to spread uncertainty among the members of a cartel that every moment there is the potential danger that one of the cartelists applies for leniency. With the Ukrainian leniency programme the risk is even higher since only one undertaking has the possibility of cooperating and obtaining immunity from a fine.

According to the information provided by the AMCU during the fact finding mission, the authority has faced problems in cases of subsequent applicants for leniency. In the case of the insurance cartel in 2005 one undertaking reported about the concerted actions on the insurance market and applied for leniency. During the investigation procedure the undertaking received full immunity. At the final stage of the cartel investigation three other undertakings applied for leniency after they had received the preliminary findings. The AMCU had to handle the same situation in the wood auction case. Three undertakings applied for leniency after having received the preliminary findings. The law only regulates cases of the first applicant. Due to the problems experienced in practice, during the drafting process of the Procedure of Exemption from the Responsibility, the AMCU had proposed to allow for leniency for subsequent applicants. The proposal had been supported by different stakeholders, but had been rejected by the Ministry of Justice. The latter was of the opinion that the application of leniency of every further applicant would require the amendment of Article 6.5 of the LPEC and such amendment by secondary legislation would not be possible.

Since the entry into force of the new leniency regulation, there have been no applications for exemption from responsibility. The experience of the AMCU during the next few years will show whether the Ukrainian leniency system will be successfully implemented in practice.

C. The criminal law

For several years there has been an ongoing discussion in Ukraine about the advantages and disadvantages of a criminalization of competition law infringements, especially for cartel cases. The supporters of this approach expect from such a criminalization in this field, first,

an enhanced deterrence effect and, second, that cartel proceedings would be carried out on the basis of clear procedural regulations, namely the Law on Criminal Procedure Code. In this case, the competent authority would have strong investigatory powers. Currently, there are ongoing decriminalization reforms which started in 2012 in Ukraine and according to these reforms, criminal liability is being abolished for economic crimes.¹⁰

D. The Law on the Protection against Unfair Competition

In 1996, the regulations on unfair competition have been transferred from the Law on Monopolism to a separate law, the LPUC. The LPUC, which came into force in 1997, contains an updated and improved version of the prohibitions of unfair competition which first appeared in the 1992 Law of Ukraine on the Protection of Economic Competition. The LPUC is aimed at “establishing, developing and ensuring trade and other fair customs in competition in the course of economic activities in conditions of market economy”. Article 1 of the LPUC contains a general definition of unfair competition as “any acts performed in the course of competition running counter to the trade and other fair customs in economic activities”.

The LPUC has four basic parts. The first part (Articles 4 to 7) deals with the unlawful use of business reputation of an economic entity.

Article 4 of the LPUC prohibits any person from using commercial names and trade marks for goods and services, advertising materials, design of product packaging and periodicals, other designations without permission (consent), which may lead to confusion with the activity of other economic entities.

Article 5 of the LPUC prohibits the use of products made by other producers and marketing of goods of other producers under own marks without the consent of the authorized person.

Article 6 prohibits copying of the appearance of products of other economic entities.

Article 7 prohibits comparative advertising unless the provided information about goods, works or services are supported by facts and are true, objective and useful for informing consumers.

The second part (Articles 8 to 14 of the LPUC) forbids wrongful interference in contractual relations between an economic entity and its suppliers and buyers. This part includes the prohibition of commercial bribery (Articles 13 to 14) and the presentation of false information about a rival enterprise (Article 8).

The third part (Article 15¹ of the LPUC) forbids the dissemination of misleading information. In particular, such information may include incomplete, inaccurate and untrue data which have influenced or may influence the consumer’s intentions as regards purchase or sale of a commodity of an economic entity.

The fourth part (Articles 16 to 19 of the LPUC) is focused on the protection of commercial secrets. Article 16 prohibits the illegal obtention of commercial secrets, Article 17 prohibits their disclosure, and Article 18 prohibits the instigation to disclose commercial secrets if such

¹⁰ According to the information received from AMCU.

disclosure has caused or may have caused damage to an economic entity. Article 19 forbids illegal use of commercial secrets in the planning or pursuit of commercial activity.

Actions committed in violation of the LPUC entail liability. According to the LPUC, the AMCU may impose fines up to 5 per cent of revenues in the wrongdoer's previous fiscal year (Article 21). The AMCU also can apply to the courts to seize products that have been unlawfully copied or labelled (Article 25). Persons who have suffered injury due to infringements of the LPUC may apply to the courts and claim compensation in damages (Article 24).

One typical feature of the LPUC is Article 33 which empowers undertakings to develop professional ethical rules subject to AMCU's approval. The rules of professional ethics in competition may be developed for specific spheres of economic activity, as well as for specific sectors of the economy.

Article 33 of the LPUC provides a mechanism for the development of fair practices from within the market, which allows the establishment of fair and transparent rules of the game under the AMCU's supervision. In addition, such a mechanism makes it possible for the AMCU to effectively apply Article 1 of the LPUC which prohibits any actions in competition that contradict trade and other fair practices in economic activity.

The procedural basis for the activity of AMCU bodies relating to protection from unfair competition is defined in the corresponding procedural provisions of the LPEC on the consideration of cases, collection of evidence, imposition of fines, and the like.

E. The Public Procurement Law

Ukraine is one of a growing number of jurisdictions that involve the competition agency in the control over public procurement. The new Public Procurement Law (PPL) was enacted in June 2010. According to Article 1.19 and Article 8.3 of the PPL, the AMCU is assigned the complaint review function, whereas the Ministry for Economic Development and Trade is invested with powers to monitor public procurement.

According to the PPL the AMCU set up a permanent administrative board to review complaints on public procurement operations. However, the regulatory, monitoring and methodological functions, including operation of the official Public Procurement Web Portal, where tender notices and tender documentation is published, have been retained by the Ministry for Economic Development and Trade.

The monitoring of public procurement should include economic analysis of performed procurement, collection of relevant information, provision of recommendations regarding increased economic efficiency of procurement, and analysis of annual procurement plans of contracting entities with the issuance of recommendations on the procurement of goods at favourable prices. However, at present the monitoring mechanism (defined in a regulation rather than in a law) is, in fact, a controlling function which includes the verification of the compliance of specific procurement procedures with the PPL. This function is currently fulfilled by the AMCU as the review body under the law. Therefore, the practical implementation of the monitoring function by the Ministry for Economic Development and Trade and the review function by the AMCU leads to a conflict of powers.

In Article 3 of the PPL, the public procurement principles are enumerated, which are:

- Fair competition among bidders;
- Maximum cost-efficiency and effectiveness;
- Openness and transparency at all stages of procurement;
- Non-discrimination of bidders;
- Objective and impartial evaluation of a bid;
- Prevention of corruption practices and abuse.

Generally, bidders can challenge a public procurement process at any stage until contract signing, except for the tender documents, where a challenge is only possible until the bid is opened. If the bidding decision is to be challenged, it should be done after the contract is awarded. There is a 14-day deadline to appeal a case from the date the bidders learn about the infringement of their rights. Three AMCU commissioners, chaired by the Deputy Chair of the AMCU, review the public procurement complaints and hold hearings for the parties involved. A decision has to be taken within 30 working days from the receipt of a complaint.

Since the enactment of the new PPL the Ukrainian Government has acknowledged a number of shortcomings and an amending legislative act was prepared in December 2010. This draft law contained a number of important elements approximating the PPL with international standards. In particular, it introduced a new definition of contracting authorities and entities, cancelled the mandatory approval by the Ministry for Economic Development and Trade of the single source procurement procedure (where personal influence always is possible), or introduced a legal basis for framework agreements as a method that might be useful for contracting entities with centralized budgets. Nevertheless, the Verkhovna Rada passed this draft law in January 2011 in a different version with a number of new exemptions from the scope of the law and postponed the adoption of special regulations for procurement of utilities. This approach drastically modified the agreed draft supported jointly by the Cabinet of Ministers, the delegation of the European Union Commission and the World Bank. Consequently, a joint letter issued by the World Bank and the European Union delegation to the Ukrainian Government clearly stated the incompatibility of the new amendments to the PPL with international standards.

In May 2011 the Verkhovna Rada adopted the next series of amendments to the PPL that were again found to be incompliant with the European Union standards. The President of Ukraine vetoed these additional amendments and returned the draft law to the Verkhovna Rada for reconsideration. After consideration of the Presidential comments the Parliament accepted adjustments proposed by the President of Ukraine and in July 2011 the PPL was amended once again.

Another important aspect of regulation in the public procurement sector was to find an effective mechanism to regulate procurement by enterprises operating in markets characterized by natural monopolies, in particular utility markets. This has been required under Article 2 part 4 of the PPL. In this regard the Ministry for Economic Development and Trade compiled a new draft law "On special regulation of procurement in certain spheres of economic activities" (Utilities Law) which was adopted by the Verkhovna Rada in May 2012. The overall purpose of these regulations was to establish a more flexible regime for procurement of utilities products and services and introduce competitive procurement procedures into contracts made by the natural monopoly operators. The Verkhovna Rada

changed the central concept of utilities and established high thresholds for application of competitive tendering by the utilities.

In 2012 the Verkhovna Rada adopted several new exclusions from the scope of the PPL regarding competitive tendering. Most of these exclusions seem to reflect various industrial groups' interests.

The effective PPL, following numerous changes and amendments introduced during 2011 and 2012, still needs a comprehensive revision. The attribution of competence between the AMCU and the Ministry for Economic Development and Trade should be clarified and the overlapping of competences should be avoided. It is recommendable that the Ministry focus on the economic analysis of the efficiency of tender procedures and that the AMCU be the competent authority for handling complaints.

Ensuring an equal access to participation in procurement procedures and guaranteeing the protection of legal rights and interests of bidders should be a priority area for the development of the public procurement system. The implementation of the transparency principle on all public procurement stages from the preparation of annual plans to fulfilment of contractual obligations should be achieved through indication, at the primary law level, of a clear, transparent and unambiguous understanding by the State and its institutions of a mechanism of economic initiatives which correspond to technical progress. This problem can be solved by the introduction of an e-procurement system in accordance with international best practices.

F. Sector regulators

The separation of the regulatory and competition policies is one of the most important topics for Ukraine. Other public authorities at both central and local levels have corresponding powers relating to the implementation of the antimonopoly policy.

Adopted in 2000 (last amended in 2012), the Law of Ukraine on Natural Monopolies defines the need to establish national commissions for the regulation of such natural monopolies (sector regulators). The law does not define which specific commissions should be established, but only defines typical tasks, functions, powers and operating procedures for such regulators that can be established by the President of Ukraine in the natural monopoly spheres.

According to Article 5 of this Law, the activities performed by natural monopoly entities shall be regulated in the following areas:

- Transportation of oil and petroleum products by pipelines;
- Transportation of natural and oil gas by pipelines;
- Distribution of natural and oil gas by pipelines and their distribution;
- Storage of natural gas in volumes that exceed the level established by the conditions and rules for the entrepreneurial activity associated with the storage of natural gas (licensing conditions);

- Transportation of other substances through pipelines;
- Transmission and distribution of electricity;
- Using railways, traffic services, railway stations and other infrastructure facilities ensuring the functioning of railway transportation;
- Air traffic control;
- Centralized water supply and water disposal;
- Heat transportation;
- Specialized services provided by transport terminals, ports and airports according to a list established by the Cabinet of Ministers of Ukraine;
- Burial of domestic waste.

The AMCU keeps a consolidated list of natural monopolies on the basis of registers of natural monopoly entities in the housing and utility sphere which are kept by the National Commission for State Regulation in the Sphere of Utility and, in other spheres, by other national commissions or executive authorities fulfilling the functions of such regulatory commissions until they are established.

As of the end of 2012, the following sector regulators were in place in Ukraine:

- National Commission for the State Regulation in the Sphere of Communications and Informatization;
- National Commission for the State Regulation in the Sphere of Utility (Municipal) Services;
- National Commission for the State Regulation in the Sphere of Energy;
- National Securities and Stock Market Commission;
- National Commission for the State Regulation in the Sphere of Financial Services Markets.

The establishment of a sector regulator for transport is currently being decided.

III. Institutional framework

The application and enforcement of competition law should not be influenced by political and volatile considerations. Therefore the independence of a competition authority is essential for the effectiveness of its work. In general, it is difficult to preserve coherence between competition law enforcement on the one hand and a well-balanced system that would protect public interest and ensure the protection of private rights and business initiative in the economy on the other. Under these circumstances the AMCU's independence, further separation of investigatory and decision-making functions within its structure, should be of particular importance both for policymakers and for the business community.

A. Organizational structure of the Antimonopoly Commission of Ukraine

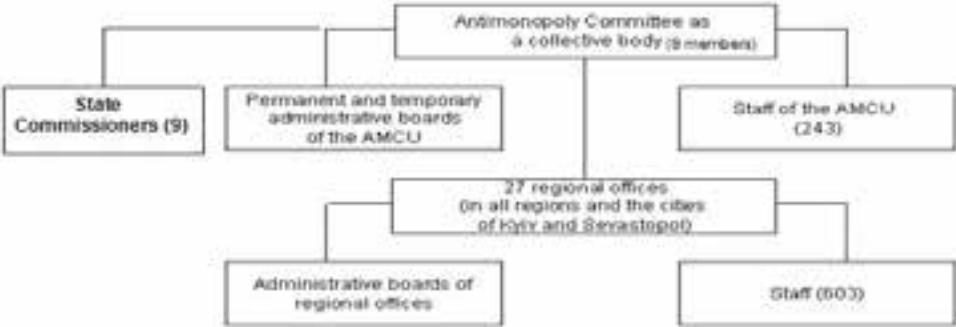
The AMCU was founded in November 1993 by the enactment of the AMCU Law and started its operations in 1994. The AMCU Law has been amended several times during the past years. Currently, according to Article 6 of the AMCU Law and the Law on Central Bodies of Executive Power, the Commission consists of the Chair and eight State commissioners. From among the State commissioners one First Deputy and one Deputy Chair are appointed. Since the latest amendment to the AMCU Law it is at the discretion of the President of Ukraine to appoint an additional Deputy Chair. The Chair of the AMCU is appointed for a term of seven years and may be dismissed by the President of Ukraine with the approval of the Verkhovna Rada (Article 9 of the AMCU Law). The First Deputy and the Deputy Chair, as well as all other State commissioners, are appointed by the President of Ukraine upon the proposal of the AMCU Chair and the Prime Minister of Ukraine, and dismissed by the President of Ukraine. Figure 1 below shows the system of bodies and staff of the AMCU.

In 2011 the Verkhovna Rada passed the Law on Central Bodies of Executive Power and the Law No. 4287-IV. According to these laws, together with the Law on the Cabinet of Ministers of Ukraine, the AMCU formally became a central executive body with special status. This special status is defined in the Constitution of Ukraine and the AMCU Law. According to the AMCU Law, this status is determined by the tasks and powers of the AMCU, including its role in the formation of the competition policy and the special procedure for the appointment and dismissal of the Chair of the AMCU, the Deputies, State commissioners, heads of regional offices of the AMCU, as well as special procedural grounds for the AMCU's activities, provision of social guarantees, protection of personal and property rights of AMCU employees at the same level with law enforcement offices, and in the labour remuneration conditions.

The independence of a competition authority from political influence is a fundamental principle in all market economies. Such independence is a prerequisite to handle conflicts of interest and to avoid corruption. It is not rare for a market economy that conflicts of interest between different ministries or politicians in relation to competition cases arise. Such conflicts of interest are almost "natural". For example, in the case of a merger, the merger might be in the public interest, because it would secure jobs. Therefore, it would be also in the interest of the local politicians. However, this specific merger might at the same time lead to a decrease of competition in the relevant markets. A competition authority must be in the position to decide on such cases free from any influence. The guarantee of neutrality of decision-making of the competition authority to fulfil its function of protection of competition against the

interest of Governments or ministries and to carry out its economic visions is in the public interest.

Figure 1. The system of bodies and staff of the AMCU



Source: AMCU.

The AMCU has 27 territorial offices, which are bodies within the organizational structure of the AMCU. Their heads are appointed and dismissed by the Chair of the AMCU. The main tasks, competencies, authority and organizational principles of the territorial offices are regulated by the Provisions on Territorial Offices of the AMCU.¹¹

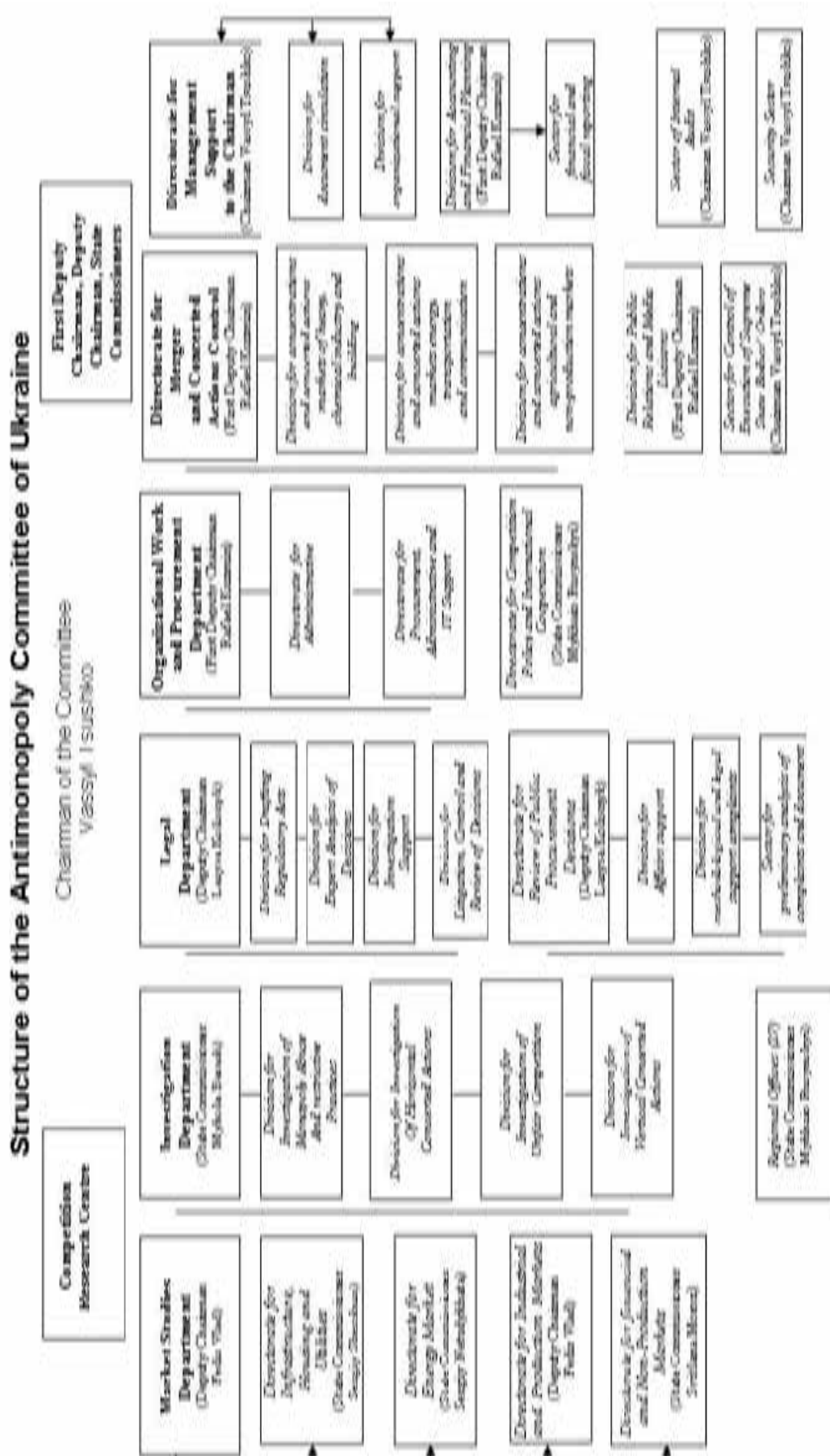
There are four operational departments within the AMCU: the Market Studies Department, the Investigation Department, the Legal Department and the Directorate for Mergers and Concerted Actions.¹² Administrative support to the AMCU and its Chair is provided by the Organizational and Procurement Department and the Directorate for Management and Support to the Chair, respectively. All departments and the regional offices are managed by a State commissioner of the AMCU.

Figure 2 shows the organizational structure of the AMCU in detail. The department responsible for investigations is the Investigation Department. This Department was only established in May 2011 in the context of a comprehensive reorganization of the AMCU. In the past few years a process of transformation has taken place from a sectoral to a more functional approach regarding the organizational structure of the Commission. Today, the AMCU has 46 different functions, including the investigative function.

¹¹ Provisions on Territorial Office of the AMCU, registered by the Ministry of Justice of Ukraine under register number No 291/5482 on 30 March 2001.

¹² Although the unit for Merger and Concerted Actions functions operationally, it is called Directorate and not Department.

Figure 2.



The Investigation Department has currently 29 staff members. It is divided into four divisions: the Division for Investigation of Monopoly Abuse and Restrictive Practices (eight employees), the Division for Investigation of Horizontal Concerted Actions (seven employees), the Division for Investigation of Unfair Competition (seven employees) and the Division for Cases of Bid Rigging (five employees). It is responsible for investigation of cartels, bid rigging cases, unfair competition and abuse of dominance cases, as well as infringement by public authorities.

The Market Studies Department is divided into four directorates, all of them dealing with specific economic branches. Each directorate is again managed by a State commissioner. The four directorates within the Market Studies Department do consist of divisions. Each division is competent for a specific field of the economy or specific markets (for example, the Division for Food Markets, the Division for Financial Markets). Within the above mentioned transformation and reorganization process of the AMCU the functions of the Market Studies Department have been extended. Based on the analysis carried out, the Department now has the power to initiate cases and to conduct investigations. The Department investigates in particular cases that require in-depth economic analysis or those in which government institutions are involved. Hence, it combines market research and investigative functions. As of September 2012, the Department had referred 13 cases to the Investigation Department. In these procedures the Market Studies Department has a rather supportive function.

The Directorate for Infrastructure, Housing and Utilities is responsible for transport, communications, housing and the utilities sectors. It carries out market research ex officio based on available information and not necessarily upon complaints received. In 2012 the highest number of abuse of dominance cases handled by the AMCU concerned the housing and utilities sector (32.2 per cent of the total number of abuses).

The Directorate for Energy Markets comprises the Division of Oil and Petroleum Products and the Division of Gas and Electricity Markets. Both divisions are competent for the detection and prevention of infringements of competition law in the energy markets. The main method used in the detection of infringements in this field is price monitoring through the regional offices.

The Legal Department provides legal advice to all departments, directorates and divisions of the AMCU. It is responsible for drafting responses to complaints. It also has the function to draft amendments to the main laws, regulations and procedures. In the defence of AMCU decisions at courts, the Legal Department works closely with the Investigation Department. A lawyer and a case handler defend the AMCU decisions at courts.

In 2004 a specific directorate dealing with merger cases and cases of concerted actions was established within the AMCU, namely the Directorate for Merger and Concerted Actions Control. Before the establishment of this specific Directorate, the Department for Market Studies was responsible for merger control.

B. Powers of the Antimonopoly Commission of Ukraine

The AMCU Law regulates the powers and rights of the AMCU as well as the enforcement of competition law. It prescribes in detail the powers of the AMCU in different categories:

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

According to Article 3 of the AMCU Law the AMCU shall participate in the development and implementation of competition policy, thereby giving the AMCU the right to be involved in all political decisions that have an effect on competition. An amendment law of the year 2000 (Article 7 of the Law No. 1907-III of 13 July, 2000) states that “no other State authorities may exercise powers of the Antimonopoly Committee of Ukraine...”. Against this background, the AMCU participates in the development of other laws and regulations that deal with issues relevant to competition development and competition policy, as well as demonopolization of the economy by submitting recommendations. Moreover, the AMCU is engaged in drafting and submitting proposals or recommendations to the President of Ukraine and the Cabinet of Ministers, the coordination of draft regulations of the President, the Cabinet of Ministers, central and local administrative bodies, local authorities and administrative and control authorities, which may have an impact on competition (Article 7 of the AMCU Law).

Article 20 of the AMCU Law obliges, in particular, State and local authorities to participate in the development and implementation of specific policies and cooperate with the AMCU in matters of development of competition and regional programmes of economic development and demonopolization. Article 20.1 describes in more detail the relations between the AMCU and the Verkhovna Rada and the Cabinet of Ministers. The Article also relates to the cooperation with the legislative bodies on matters of economic development and implementation of programmes.

The investigatory powers of the AMCU are enumerated in Article 7 of the AMCU Law and can be summarized as follows:

- Power to collect and require information;
- Power to inspect offices and vehicles;
- Power to seize or arrest evidence, in particular documents or other data carriers;
- Power to apply for intervention of the enforcement agencies in cases of interference of the concerned economic entity;
- Power to engage other law enforcement agencies (for example, the police, customs) to facilitate inquiries;
- Power to implement the leniency programme.

At present, the AMCU does not have the power to conduct a dawn raid in line with similar powers attributed to competition authorities in the European Union and other jurisdictions.¹³ An “inspection” under the LPEC always depends on the support and cooperation of the involved economic entity and therefore cannot be considered as a strong investigatory tool. Dawn raids or searches are known investigatory measures in Ukrainian legislation: Articles 234, 235 and 236 of the Criminal Code of Practice of Ukraine contain precise regulations on this strong investigative tool.

Currently, the AMCU invests substantial time in price control. The majority of the AMCU assignments are initiated by the Government and the AMCU is expected to immediately react to price fluctuations in so-called “socially sensitive” markets. The AMCU should focus on the development of competition in markets, the promotion of deregulation and liberalization rather than on price regulation.

C. Resources of the Antimonopoly Commission of Ukraine

With respect to AMCU’s resources, one major recommendation of the OECD Peer Review is still valid: The State should provide adequate resources to assure that the AMCU can maintain high standards of performance in accomplishing its mission. This recommendation relates to three aspects as prerequisites to perform the required tasks in a professional manner:

- The amount of financial resources available to the AMCU;
- The number of staff available;
- The quality of staff.

It is in particular highly recommendable to make jobs in the AMCU attractive for well educated and trained personnel by, for instance, paying adequate salaries. Well educated staff trained by the AMCU should remain in the authority and not be hired by industry or law firms.

Another issue to be noted is the fact that currently various other government bodies in Ukraine perform functions that overlap with or are closely related to the work of the AMCU. The Ministry for Economic Development and Trade devotes resources to State price-inspection functions that overlap with the price-monitoring responsibilities of the AMCU. In addition, Ukraine has a separate consumer protection body whose mandate is contiguous to the AMCU’s mandate to address unfair competition, false advertising, and deceptive marketing practices. The unification of these resources and mandates within the AMCU holds out the prospect of more coherent and effective policy development by concentrating the relevant work within a single institution.

1. Staffing and human resources

¹³ Regarding the procedural regulations, see part II B section 7 on procedure in this report.

The Department of Organizational Work and Procurement is responsible for human resources and recruitment issues. The AMCU has 846 employees in total; 243 in the central office in Kiev and 603 in the 27 regional offices which are distributed all over the country. Of the total staff, 51 per cent are economists (434 staff) and 24 per cent are lawyers (207 staff). Among the remaining 25 per cent are found specialists in other fields such as international relations and agriculture.

Generally, the salary of officials who work in a Ministry in Ukraine – which includes the staff of the AMCU in the headquarters in Kiev – is identical. The salary of employees who work in regional offices can be lower.

New staff members of AMCU can go through an internship programme in order to get familiar with the work of the AMCU. There are currently no special manuals or guidelines for new staff, but each new member is assigned to a supervisor and gets on-the-job-training. New staff also take part in an induction course which is prepared and approved by the supervisor. Such induction courses mainly consists of two parts: a legal part, to make the new colleagues familiar with the specific laws and regulations; a practical part, which provides an overview on cases and proceedings of the AMCU. Every year 20 new members of staff of the AMCU have the opportunity to receive a special training at the National Academy of Public Services.

The Chair of the AMCU has no control on staff allocation between the central and the regional offices. Such mobility decisions can only be taken by the Government. The Chair can move staff between different regional offices as long as the total number of staff in regional offices is respected (table 1). He also approves payroll and appointment of staff in the regional offices.

Table 1. Distribution and number of AMCU personnel in 2008–2012

<i>Year</i>	<i>Headquarters</i>	<i>Regional offices</i>	<i>Total</i>
2008	300	664	964
2009	260	664	924
2010	260	664	924
2011	270	664	934
2012	243	603	846

Source: AMCU.

2. Budget and financial resources

The Division for Accounting and Financial Planning is responsible for budget and financial issues of the AMCU. It is an independent unit and directly reports to the Chair and the First Deputy of the AMCU. Nine employees work in this area. The Division has the following tasks: preparation of accounting reports for the AMCU; estimation and submission of the State budget for AMCU to the Parliament for approval; the implementation of the budget.

The AMCU is solely funded from the State budget. The annual budget for the AMCU was Hrv 64.448 million (US\$8.06 million) in 2012, and Hrv 66.312 million (US\$8.29 million) in 2011. The budget of the AMCU is decided by the Parliament for every upcoming year. All fines imposed by the AMCU go directly to the state budget (table 2).

According to the Law of Ukraine on the State Budget, for the relevant year AMCU operates on the basis of specific budget programmes with specific objectives. The AMCU has two separate budget programmes. One programme is defined as “competition”, the other budget programme is for the “Competition Research Centre” which is a think tank within the AMCU. Institutions subject to specific budget programmes may submit proposals with progress and target indicators based on four different categories:

- (a) Costs – which, in case of the AMCU, include the number of regional offices, the number of vehicles and the money spent for real estate (lease contracts);
- (b) Outcome/output;
- (c) Efficiency;
- (d) Quality.

The most important factor for estimating the budget is the costs. The proposal of the AMCU for the budget is based on the costs for the number of staff, for real estate, including costs for the consumption of electricity, water, and the like. The calculation of these costs has to be in line with the regulations of the Council of Ministers on how many employees or vehicles, or number and size of offices are needed by governmental institutions. The AMCU submits the budget proposal to the Ministry of Finance. Each government institution is required to submit the full cost breakdown for the following year. Funds are only allocated on the basis of such a compulsive budget proposal. Reallocation of funds is only possible between specific budget categories, such as stationary or fuel. The Ministry of Finance has to be involved in the reallocation funds. It is within the responsibility of the Internal Audit of the AMCU to control the use of budget funds. The Internal Audit Unit reports directly to the Chair.

Table 2. Budget and fees received by the AMCU

Year	Budget allowance (Hrv millions)	Budget allowance (€ millions)	Fees received (Hrv millions)	Fees Received (€ millions)
2008	60.0	5.8	5	0.5
2009	50.3	4.8	3.4	0.3
2010	54.4	5.2	3.8	0.4
2011	62.7	6.0	4.1	0.4
2012	61.3	5.9	4.6	0.4

Source: AMCU.

IV. Competition law enforcement

Law enforcement is the principal foundation for a successful competition policy programme. It is important for both the specific results to be achieved in individual cases and for awareness raising and deterrence. Strong and effective law enforcement demonstrates the willingness and the potential of a competition authority to use compulsory measures in order to achieve compliance with the law.

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 AMCU imposed a total fine of over €300,000 for bid rigging in a tender for the procurement of batteries with charging devices.

In 2012, the AMCU bodies conducted 565 announced and 380 unannounced inspections. The inspections were conducted by the central office of the AMCU, as well as its regional offices. The Investigation Department has carried out some inspections in bid rigging cases with the support of police forces. Tables 3–5 detail the numbers of proceedings in various sectors and their evolution with time.

Table 3. Cases of anticompetitive concerted actions in 2011 and 2012

	2011	2012
Total number of cases	303	450
Cases ended by recommendations	2	15
Total amount of fines imposed (Hrv millions)	17.5	441.3
Cases of bid rigging	273	436

Source: AMCU.

Table 4. Cases of abuse of a dominant position between 2010 and 2012

	2010	2011	2012
Total number of cases	621	991	1 090
Cases ended by recommendations	39	104	122
Total amount of fines imposed (Hrv millions)	8.4	11.8	339.3

Source: AMCU.

The AMCU only records information on the total amount of fines being paid and does not have information available on the percentage of fines being paid for separate types of violations.

As for merger notifications, they reached a number from 697 to 944 per year in the last three years.

Table 5. Applications for authorization of concentrations

Year	Number of applications received*	Number of applications on which decisions were made	Authorized without conditions	Authorized with conditions	Not authorized
2007	911	723	715	4	4
2008	1 027	815	814	1	0
2009	599	481	476	4	1
2010	697	559	548	11	0
2011	756	585	575	10	0
2012	944	750	748	2	0

Source: AMCU.

In addition to the high number of proceedings, as detailed in tables 3 to 5, there has also been a continuous increase in the amount of fines imposed (table 6). As noted previously, a serious weakness in Ukraine's competition regime is the AMCU's limited success in obtaining the payment of fines imposed. This is due to the fact that defendants use their legal right to challenge AMCU's decisions in courts exercising their right to defence. As a result of this, a significant number of AMCU's decisions on fines are currently under judicial review. In addition, defendants avoid the payment of fines through liquidation with subsequent reregistration of economic entities.

Table 6. Fines imposed and collected under the LPEC and the LPUC

Year	Fines imposed in (Hrv millions)	Fines imposed (€ millions)	Fines collected (Hrv millions)	Fines collected (€ millions)
2007	11.6	1.7	5.9	0.9
2008	13.3	1.7	10.5	1.4
2009	289.8	26.7	12.2	1.1
2010	27.1	2.6	34.9	3.3
2011	43.5	3.9	22.0	2.0
2012	814.7	79.3	40.0	3.9

Source: AMCU.

As can be seen in table 6, the amount of fines imposed in 2009 is too high compared to other years. This is due to the fact that this amount includes a fine of Hrv 265 million, imposed on several enterprises for abuse of a dominant position in the market of aviation fuel bundled with aircraft refuelling services. Another remarkable fact from table 6 is that the amount of fines imposed in 2010 is less than the amount paid. This is because the amount of fines paid includes the payment of fines that had been imposed in 2009.

A review of AMCU's experience in competition law enforcement reveals three important phenomena. First, the large number of cases that the AMCU deals with is due to relatively lower enforcement thresholds and related criteria that sweep in 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. The merger notification thresholds are also very low. The AMCU is aware of the reasons causing the high 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 could focus most of its resources on matters implying serious competitive concerns.

Second, the AMCU invests substantial time and effort in price control. The central Government places heavy demands upon the AMCU to react immediately to price hikes in "socially sensitive" markets. In order to respond to these requests, the AMCU's abuse of dominance initiatives focus heavily on excessive pricing. However, the AMCU should focus on the promotion of competition in markets rather than on price regulation.

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

V. Judicial review

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.

Article 60 of the LPEC gives the applicant, the defendant, and third parties the right to file appeals against AMCU decisions, in full or in part, to an economic court. Economic courts have the jurisdiction over cases seeking to dismiss decisions of AMCU bodies. The LPEC establishes the exclusive competence of commercial courts to deal with appeals against decisions of AMCU bodies. According to the Commercial Procedure Court of Ukraine, appeals against decisions of AMCU bodies must be filed by economic entities with the commercial courts located in the same territory as the AMCU body in question.

According to the Administrative Court Procedure Code of Ukraine, any decision, act or omission of a public authority, including 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.

Table 7. AMCU decisions appealed under Article 60 of the LPEC and Article 32 of the Administrative Court Procedure Code between 2007 and 2012

<i>Year</i>	<i>Total number of AMCU decisions</i>	<i>AMCU decisions appealed</i>
2007	1 425	148
2008	1 415	153
2009	1 743	238
2010	1 915	248
2011	2 443	244
2012	2 843	402

Source: AMCU.

Table 8. Judicial review of AMCU decisions under Article 60 of the LPEC and Article 32 of the Administrative Court Procedure Code between 2007 and 2012

<i>Year</i>	<i>Affirmed</i>	<i>Reversed in part</i>	<i>Reversed in full</i>	<i>Total number of appeals resolved</i>
2007	124	4	6	134
2008	140	3	5	148
2009	213	6	7	226
2010	325	24	29	378
2011	294	7	18	319
2012	430	4	15	449

Source: AMCU.

The jurisdiction of the courts handling competition cases is still unclear and split between the administrative and commercial courts. If the parties of the case appeal a decision to an administrative court, the jurisdiction of the court depends on where the undertakings are registered. In the above mentioned “wood case” this has led to a situation in which 14 different courts were not only competent but also handled the same case. For both the administrative and the commercial courts, there are good arguments regarding which would be the most appropriate, but in any case a decision as to which higher court would have the exclusive competence in handling appeals against AMCU decisions in competition cases has to be made in due time to allow the judiciary to achieve a better reorganization to make fair and proper decisions in a specialized field.

Thus, this lack of clarity constitutes a weakness in Ukraine’s competition policy system. Competition law is a difficult and complex field of law and requires well-educated experts not only within the competition authority but also at courts. The fact that the 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 does not encourage Ukrainian judges to be specialized in this field of law. The actual distribution of cases among Ukraine's courts prevents the judges of any single tribunal to obtain sufficient knowledge and experience needed to scrutinize AMCU decisions effectively. Due to the limited expertise and experience of courts, they are not in a position to exert sufficient pressure on decisions of the AMCU. All this advocates strongly for the establishment of a specialized court for competition cases either in the administrative or commercial jurisdiction.

VI. Competition advocacy

Strong competition advocacy is an important function for modern competition authorities in achieving both competition policy objectives and better law enforcement. The development of a competition culture to the extent that it exists in many European Union member States is given high priority by the AMCU. Under competition advocacy the AMCU understands all its activities which are performed outside the area of law enforcement and aims at safeguarding and promoting economic competition within Ukraine and beyond its borders.

The term "competition culture" covers the understanding of the function of the competitive process in a market economy, with acknowledgement of the benefits of this process both for consumers and the economy as a whole.

The type of competition advocacy message of the AMCU in order to develop a competition culture in the country substantially depends on the characteristics of the different stakeholders. Today the Ukrainian society includes numerous social sectors that can be considered as actual or potential stakeholders in competition law enforcement and policy implementation. These include the political level, that is, the President of Ukraine, the Verkhovna Rada and the Cabinet of Ministers, the judiciary, public administration and sector regulators, the business community, the media, the academia and last but not least consumers and the general public. Different stakeholders have different understanding of competition issues and their ability to support or oppose to particular competition-related initiatives is on different levels. As a consequence the measures to be taken within the framework of competition advocacy have to be tailor-made for different target groups.

The AMCU is committed to developing a consistent policy and strategy to improve competition law enforcement and to assume a stronger competition advocacy function to enhance competition in the economy. Stronger competition advocacy would help AMCU in prioritizing mid-term activities, in making them better understood by the society and in saving resources. A reinforced competition advocacy would also contribute to interaction with other public authorities and increase appreciation of the AMCU's role in the society. Transparent decision making, focusing on the most serious competition concerns rather than prices, and undertaking well-targeted market studies should become the benchmarks of the AMCU modernization strategy. Such advocacy agenda should be officially approved by the AMCU. The implementation of this strategy might need certain restructuring within the AMCU.

Competition advocacy measures may serve different objectives, some of which may be given higher priority than others. The AMCU approaches different target groups in Ukraine to advocate for competition strengthening measures. The closer the target group is with respect

to the legislator, the more precisely the AMCU formulates its proposals. The following subsections show the main target groups for the AMCU and the type of messages it sends.

A. Verkhovna Rada

The Parliament of Ukraine has a decisive influence on the formation and implementation of the State antimonopoly/competition policy. According to Article 92 of the Constitution of Ukraine, the legal grounds and guarantees for entrepreneurial activity, the rules of competition and the norms of antimonopoly regulation shall be defined exclusively by laws, whereas Article 42 guarantees the State protection of competition in entrepreneurship and prevention of abuse of a monopoly market position, unlawful restriction of competition and unfair competition. It also defines that types and limits of monopolies shall be defined by law. The Verkhovna Rada of Ukraine, in particular, defines the main principles of the domestic and foreign policy and approves economic and social development programmes. Therefore, the Parliament is considered to be an important target group for competition advocacy. The AMCU Annual Report is presented to the Parliament and is reviewed by the parliamentarians. This provides an opportunity to make parliamentarians familiar with competition problems in Ukraine which are beyond the competence of the AMCU and may arise as a result of legally available exemptions in certain sectors of the economy or because of sector or product regulation for purposes beyond pure competition (public policy purposes, such as control of prices for social reasons).

In the case that the Verkhovna Rada takes up an initiative from the AMCU to open markets to more competition, the AMCU interacts with the lawmaker in the preparation of suitable legislative acts. This includes advisory work together with the Parliamentary committees on a detailed basis of lawmaking. To convince the Parliamentarians of the need for more far-reaching approaches as to the privatization of State-owned undertakings or for the deregulation of markets, time is needed. Experience in the European Union and its member States has shown that the deregulation of markets such as energy markets or telecommunication, transport, or communal services (water, including water disposal) is to be counted in tens of years. But, nevertheless, the initiatives are important to be carried on for further development of a market economy based on competition.

B. The President of Ukraine

The President of Ukraine as the country's leader has the right of legislative initiative, signs laws adopted by the Verkhovna Rada and has the right to veto them, issues decrees and orders, which are binding in the whole territory of Ukraine, and has a number of other powers defined in the Constitution of Ukraine. The President of Ukraine undoubtedly has a substantial influence on the State antimonopoly/competition policy as he controls the activity of the AMCU and appoints the heads and members of the AMCU and national regulators. This presidential power structure offers an opportunity to directly involve the AMCU in the development of presidential decrees and other legislative acts. The advice provided to the President may include competition advocacy matters which might find their way into the legislative channels. This process may be used in parallel with AMCU advocacy proposals sent to the Verkhovna Rada.

C. Cabinet of Ministers and bodies of executive powers

The Cabinet of Ministers is the highest body in the system of executive authorities, which steers, coordinates and controls the activity of other central executive authorities, the Council of Ministers of the Autonomous Republic of Crimea, oblast administrations, as well as Kyiv and Sevastopol city administrations. It has the right of legislative initiative, issues resolutions and ordinances which are binding in the whole territory of Ukraine, develops and implements national programmes for economic, scientific/technical, social and cultural development of Ukraine which are directly linked to the development of competition policy in the country. In addition, the Cabinet of Ministers of Ukraine has special powers to authorize anticompetitive concerted actions (Article 10.3 of the LPEC) and economic concentrations (Article 25.2 of the LPEC) prohibited by the AMCU, if the participants can demonstrate that the positive effect of such actions outweighs the negative effects of restricted competition.

The afore-mentioned as to the Parliament and the President is in principle also valid for the relationship between the AMCU and the Cabinet of Ministers. On that level, the AMCU, in a closer cooperation relationship, is more directly involved in giving opinions and proposals as to a proper balancing of the need to respect competition principles in the Ukrainian market economy with the interests of the Government and the business community on the one hand, and to set priorities for industrial and trade development on the other hand. Conflicts of interest may occur in the case of mergers and acquisitions, in import and export regulations, or in any other way that may hinder free trade between Ukraine and other nations. The Cabinet of Ministers is also a valuable partner for the AMCU in questions of initiating legal proposals for deregulation and privatization.

D. The judiciary

The judiciary plays an important role in effective implementation of competition law and policy. Court decisions in competition cases are crucial in ensuring legal certainty in this sphere with respect to enforcement results and the protection of economic rights and interests of economic entities and consumers. The advocacy function of the AMCU towards the judiciary system is of particular importance, since the strict enforcement of the competition law by the AMCU requires highly specialized judges in the appropriate courts to ensure transparency, fairness and appropriate assessment of partly subjective decisions (such as the appropriate definition of relevant markets). Since such specialization has not yet been introduced into the court system, as described in Part V, the training of judges gains particular importance in this regard. In addition to an enhanced understanding of special competition issues by courts, it is also important for the development of the Ukrainian market economy that the judges fully understand the wider implications of competition with respect to issues beyond pure enforcement of the law, like privatization issues or the deregulation of markets where competition principles have not yet been introduced.

E. The business community

The business community includes both enterprises in and outside Ukraine and business associations and chambers of commerce. Competition advocacy measures by the AMCU are directed to all these target groups and consist of dissemination of information not only about the scope and contents of the competition law, but also on the rights of undertakings before

courts, including the possibility of benefitting from its leniency programme in cartel cases, the exemption rules and procedures¹⁴ under the competition law, and draft legislation on competition. Transparency and legal certainty are important elements for the business community to make investment decisions in Ukraine. The AMCU is in a positive way trying to improve its relationship with the business community to become a partner of the business community rather than be seen as a policeman. 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, such as round tables, conferences and briefings. The events were dedicated to current problematic issues in the field of competition protection in socially sensitive areas of the economy. The participants were informed about the existing competition legislation and the advantages of competition protection for consumers.

F. The public administration and sector regulators

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 undertakings in the regulated sectors. Sector regulators are themselves in a position of conflict of interest, since the deregulation process may at least partly destroy their own position as regulators. The same is true for privatization initiatives where private ownership may make governmental regulation of their businesses at least partly redundant.

Therefore, the AMCU needs to initiate a more competition-oriented change of economic policy in Ukraine in a joint effort with the above-mentioned governmental stakeholders. 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. As a result, the political climate may be further developed to the point that draft laws take into consideration the competition principles.

G. The media

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. It should also be taken into account that the only lobby of a competition authority is a free press. Therefore, good cooperation with the media in this field is crucial. 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 effectively inform the public through the media about their positive results, and form a positive image of the authority. For this purpose it is important to have a comprehensive public relations policy in the authority and well-trained personnel to implement it. A good public relations policy requires sufficient skills in working with the media, the ability to explain complex competition issues and the link between competition and consumer welfare in an easily understandable way to a broad public, and substantive

¹⁴ According to part 2.2 of the Procedure of Exemption from the Responsibility, information about the contact numbers of the AMCU's authorized officials shall be published on the official website of the Committee.

knowledge and understanding of competition law and policy. According to the information provided by the AMCU, the representatives of the authority appeared in the media more often in 2012 than in 2011.

H. Civil society and consumers

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. Competition advocacy in this field supports not only the market economy but in a wider context also democracy.

VII. Findings and policy recommendations

Among the majority of competition authorities and policymakers in the world there is a common understanding that the main objective of competition policy and law in a market economy is to safeguard and promote competition. Although the objective of competition policy is formulated in general terms, it has many positive side aspects, including maximization of consumer welfare through lower prices and increased choice and higher quality of products and services, promotion of economic efficiency, these aspects ensuring free competition, fighting against restraints on competition, and complementing other policies designed to achieve economic growth.

The objective of competition policy is formulated in general terms, but it is clear that the development of competition policy and law is not an isolated policy task. There are several other economic and social policies that are essential for effective competition policy, such as trade and investment policy. In many areas, particularly in regulated sectors of the economy, there are other interests and reasons outside pure competition aspects. This interface between competition policy and other policies relates to very complex questions to be addressed by policymakers. They have to compromise between public interests and competition policy objectives. At the same time other factors, which go beyond national interests, for instance, international agreements and obligations as well as international legal principles, have to be taken into consideration. The following recommendations have to be seen against this background.

A. Findings

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 modernization of the AMCU so that it can become 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.

In terms of substantive competition rules, the control over horizontal and vertical restraints, the concept of abuse of dominant position and the merger control system are quite well developed, although a number of major concepts and enforcement practices in Ukraine need adjustments. This does not mean that the Ukrainian enforcement practices are generally wrong or misleading. They are to some extent quite acceptable in consideration of the preconditions for the general economic context, the protection of economic freedom and the rule of law in the country.

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 competition policy system and the reinforcement of the AMCU as an institution to promote economic progress.

B. Recommendations

The following recommendations are addressed to the Legislature, the Government and the AMCU.

1. Recommendations addressed to the legislature

Recommendation 1: Prevent evasion of the obligation to pay fines

It is recommended that the law be amended to prevent violators from escaping the responsibility to pay fines by liquidating existing economic entities and then reregistering as new enterprises.

Recommendation 2: Strengthen AMCU investigation powers

It is recommended that the law 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.

Recommendation 3: Enhance AMCU discretion to set priorities

It is recommended that the law 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.

Recommendation 4: Denominate bid rigging as an offence under the Public Procurement Law

It is recommended that the Public Procurement Law 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.

Recommendation 5: Revise the leniency programme to reduce fines for parties other than the first to file

It is recommended that the law 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.

Recommendation 6: Clarify the jurisdiction of the courts to promote specialization

It is recommended that the law be amended:

- To promote judicial specialization in the treatment of competition cases;
- To specify that AMCU decisions in competition cases must be appealed in the first instance exclusively to the commercial courts or the administrative courts.

Recommendation 7: Refine the Public Procurement Law

It is recommended that:

- The attribution of competencies between the AMCU and the Ministry for Economic Development and Trade (MEDT) be clarified and that the overlapping of competencies be avoided;
- The Ministry focus on the regulatory function and that the AMCU be the competent authority for handling complaints;
- For reasons of legal certainty, a definition of the term “monitoring” be amended to ensure that the MEDT focuses only on the economic analysis of the efficiency of public procurement procedures;
- The procedures for the fulfilment of the monitoring function by the MEDT be defined in the primary law, that is the Public Procurement Law.

Recommendation 8: Improve the efficiency of merger control

It is recommended that the LPEC be amended to prohibit concentrations of economic entities which conceal their real owners through offshore registration, and to increase the merger notification thresholds.

Recommendation 9: Unification of resources and mandates relevant to the work of the AMCU within the AMCU

It is recommended that:

- Consideration be given to transferring the resources currently used by the MEDT for State price inspection to the AMCU;
- Consideration be given to transferring the functions and resources of the State agency for consumer protection to the AMCU.

2. Recommendations addressed to the Government

Recommendation 1: Use the NCP to upgrade Ukraine’s competition policy system

It is recommended that:

- The NCP become the platform for implementing the recommendations set out in this Peer Review Report;

- The AMCU be given a central role in the formulation and implementation of specific elements of the NCP;
- The NCP call for the dismantling of 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;
- The NCP ensure the augmentation of the AMCU resources (financial, human, scientific and information) for the implementation of the NCP measures and achievement of its goals.

Recommendation 2: Increase the efficiency of State regulation

It is recommended that the establishment of an independent transport regulator be accelerated.

Recommendation 3: Establish a standing committee on economic efficiency

It is recommended that the NCP 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.

Recommendation 4: Treat the causes and not the symptoms of competition failures: the case of price control

It is recommended that the NCP 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.

Recommendation 5: Eliminate non-transparency in public procurement

It is recommended that a transparent public procurement system be established through the implementation of e-procurement based on international best practices.

3. Recommendations addressed to the Antimonopoly Commission of Ukraine

Recommendation 1: Enhance the process for setting priorities and identify a strategy to realize them

It is recommended that:

- The AMCU 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;
- The outcome of the AMCU's strategy-setting process be published annually as a strategic plan;
- The AMCU conduct periodic public consultations to elicit suggestions about its priorities and to discuss its strategic plan.

Recommendation 2: Establish mechanisms to improve and formalize the relationship with sector regulators

It is recommended that the AMCU establish formal mechanisms to improve its relationship and cooperation with sector regulators. This could be through the setting up of working groups involving representatives from both institutions or the signing of memoranda of understanding with respective regulatory agencies.

Recommendation 3: Advocate for the adoption of amendments to competition law proposed by the AMCU in the Verkhovna Rada

It is recommended that the AMCU engage in advocacy efforts to ensure that proposed amendments to competition law, including those aimed at increasing the merger notification thresholds so as to ensure efficiency and to focus AMCU resources on transactions likely to raise serious concerns for competition, are adopted by the Verkhovna Rada.

Recommendation 4: Strengthen the mechanism to monitor the implementation of remedies

It is recommended that:

- The AMCU 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;
- The AMCU, as part of its routine practice, 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.

Recommendation 5: Provide more guidance concerning enforcement intentions

It is recommended that the AMCU 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 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.

Recommendation 6: Develop an evaluation programme

It is recommended that:

- The AMCU establish a programme for regular evaluation of competition law enforcement;
- One focal point for such an evaluation programme monitor the implementation of the revised leniency programme.

Recommendation 7: Strengthen media outreach

It is recommended that the AMCU improve its media relations, develop a media plan to reach additional media organizations and conduct regular trainings for its press service employees.

Recommendation 8: Expand the use of market studies

It is recommended that the AMCU 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.

