



Competition Law and Policy in Ukraine

How is competition law enforced in Ukraine?

What are its principal strengths and weaknesses?

How can Ukraine make its competition law system more effective?

How can the AMC improve its performance?

For further information

For further reading

Where to contact us?

Introduction

Ukrainian competition policy dates back to February 1992, shortly after independence from the Soviet Union, when the country's first competition law was adopted as part of the effort to establish a market-based economy. The Antimonopoly Committee of Ukraine (AMC), created in 1993, now has responsibility for two laws that evolved from the original competition legislation. The 2001 Law on the Protection of Economic Competition is the principal vehicle for competition law enforcement, and the 1996 Law on Protection against Unfair Competition deals with conduct by one company intended to exploit or injure the competitive vitality of a competing enterprise.

The Competition Law is modeled on statutes adopted in European competition law regimes, and its adoption and enforcement are part of a continuing effort by Ukraine to integrate with western markets. In particular, Ukraine is seeking admission to the European Union, which requires that applicants for membership implement an effective competition law system.

In 2008, the OECD issued a peer review report assessing the development and application of competition law and policy in Ukraine, focusing on the previous five years (2003-07). The report concludes that Ukraine has a comprehensive and well-designed competition law and, in the AMC, an effectively managed and well-regarded agency to enforce it. The report also identifies problems confronting Ukraine and proposes remedies. Recommendations concerning the AMC cover its budget allocation, autonomy, investigative tools, transparency, enforcement priorities and relationships with other law enforcement agencies. Other recommendations focus on merger notification requirements and procedures, state aid legislation, penalties for unlawful conduct and penalty collection procedures, competition advocacy, harmonization with the European Union's competition laws and the elimination of conflicting provisions in Ukraine's Commercial Code. ■

How is competition law enforced in Ukraine?

The competition law establishes the Antimonopoly Committee as an autonomous agency consisting of a chairman and ten commissioners appointed for seven-year terms. Originally, the chairman was appointed by the President of Ukraine with the consent of Parliament, and the other commissioners were appointed by the President on recommendation of the Prime Minister. Constitutional amendments adopted at the time of Ukraine's Orange Revolution in late 2004 reduced the power of the President and moved the country's system of government closer to a parliamentary model, with a strong Prime Minister elected by the majority coalition in Ukraine's Parliament. Those amendments became effective 1 January 2006. Now, the chairman is appointed by the Parliament on the recommendation of the Prime Minister, and the other commissioners are appointed by the Cabinet on the recommendation of the Prime Minister. Once appointed, AMC's members may not be removed from office except for cause. The AMC, headquartered in Kyiv, has 27 regional offices – one for each of the 24 Ukrainian *oblasts* and one each for the Autonomous Republic of Crimea, the city of Kyiv, and the city of Sevastopol. The agency has about 850 regular employees, of whom 590 are assigned to the regional offices, and a 2007 budget appropriation of about UAH 45 million (EUR 6.5 million).

The substantive provisions of Ukraine's main competition law are grouped into five categories: 1) concerted actions, 2) abuse of dominance, 3) concentrations, 4) certain "restricting and discriminating" activities of business entities and associations, and 5) anticompetitive actions of government bodies. The prohibitions on concerted actions are similar to those of the EU, but Ukraine's block exemptions are generally less detailed and its procedures still call for companies to apply to the AMC for approval of concerted agreements. The standards for evaluating concentrations and conduct by dominant firms are also similar to the EU's, although Ukraine's law also establishes a rebuttable presumption that a firm with a market share exceeding 35% is dominant.

Concentrations exceeding certain thresholds must be notified to the AMC and may not be consummated until a waiting period has elapsed. The notification thresholds are subject to criticism on the grounds that they do not require a sufficient local nexus with Ukraine and do not effectively focus on transactions likely to pose competitive concerns. The AMC has issued guidelines on defining a relevant market and for determining the existence of a dominant position (which include instructions on calculating market shares and concentration ratios), but has not issued merger guidelines to explain its method of analysing applications to permit concentrations. With respect to both concentrations and concerted actions, the competition law provides that Ukraine's Council of Ministers may grant permission on public interest grounds to allow conduct or mergers that the AMC has rejected.

The competition law's prohibitions on "restricting and discriminating" activities of business entities are based in large part on similar provisions in German competition law. Although all of these prohibitions deal with unilateral conduct, they do not replicate the abuse of dominance provisions because they do not require a showing of market dominance to establish a violation. They include restrictions protecting small and medium-sized enterprises from abuse of economic dependence.

The separate Law on Protection against Unfair Competition is also enforced by the AMC. This law deals with conduct by one company intended to exploit or injure the competitive vitality of a competing enterprise. The law prohibits such activities as exploiting another firm's reputation; gaining an unlawful competitive advantage by disseminating false information, inducing third parties to boycott or bribing another company's employee, as well as illicit acquisition or unauthorised disclosure of commercial secrets.

With respect to public procurement, the AMC has traditionally had responsibility for ensuring enforcement of the competition laws with respect to government purchases of goods and services, and has also played a competition advocacy role in developing the legislation and regulations that control the procurement process. Since 2006, its jurisdiction has been augmented to include certain duties in administering the procurement system, including responsibility for audits on agency compliance with the procurement laws, and staff work relating to examinations of alleged tender

BOX 1.
PROHIBITION
OF ANTI-COMPETITIVE
ACTS BY GOVERNMENT
AGENCIES

Ukraine's competition law includes comprehensive prohibitions on anti-competitive behaviour by government agencies that cover ministries, agencies regulating natural monopolies, and local government bodies. Only a few entities at the top of the government structure fall outside the AMC's jurisdiction, including the Parliament, the President, the Cabinet, the courts, and the National Bank of Ukraine.

Government bodies covered by the competition law are prohibited from taking any action where such acts "have led or may lead to denial, elimination or distortion of competition". The law provides a non-exhaustive list of unlawful conduct by government agencies, including actions that:

- obstruct the formation of new business entities or restrict commercial activity in particular markets;
- coerce firms to join associations, participate in sectoral or regional communities, or undertake concerted actions or concentrations in other forms;
- coerce firms to enter priority contracts, or favour certain buyers or sellers with high priority purchases or sales;
- attempt to centralise distribution of commodities or to divide and allocate markets by commodity, territory, or customer class;
- prohibit (or impose volume restrictions on) the sale of commodities across regional lines;
- grant benefits or other advantages that favour a firm or group of firms over others, such that competition is restricted or distorted, or take any other action that places one firm at a disadvantage in competing with other firms;
- restrict the independence of business entities, other than as provided by law, in determining such matters as prices, profit distribution, purchases and sales of commodities, and future business plans;
- delegate government authority to business entities, associations, or other enterprises, if such delegation leads or may lead to the denial or distortion of competition; or
- induce other bodies, business entities, or officials to violate the competition laws or to facilitate or legitimise such violations.

violations by procuring agencies and to authorization of restricted tendering and single-source procurement procedures.

AMC decisions in permit application and violation cases are subject to judicial review. Over the past five years, appeals were filed against approximately 11% of all AMC decisions rendered. About 83% of the appealed decisions were affirmed, while 17% were reversed in full or in part. If penalties are not paid, the AMC must go to court for a judicial order requiring payment of the penalty and of any fine accumulated due to non-payment. In the event of continued non-payment, the court order is referred to Ukraine's State Executive Service for collection. Only about 10% of penalties assessed over the past five years have been collected, in part because several cases involving very large penalties remain in the uncollected category. All significant penalties are appealed, and appellate procedures often take several years. Collection by the State Executive Service is also often delayed, because that agency too has a heavy workload.

Persons that are injured by anticompetitive conduct may seek indemnification from the perpetrator in an economic court. Double damages may be awarded for certain violations, including anticompetitive concerted actions, concentrations, and abuse of dominance, and retaliation for complaining to the AMC. ■

What are its principal strengths and weaknesses?

The AMC is vested with a broad array of law enforcement and advocacy powers and has a wide jurisdictional reach, covering virtually every business entity operating in Ukraine and virtually every executive branch agency below the highest organs of power. The agency is thus effectively positioned to advance competition policy objectives, and has compiled a praiseworthy record in realising that potential. Particular strengths of the AMC include its dedication to fair and responsive operations, its commitment to vigorous outreach, and its traditional status as an autonomous agency secure from interference by other government bodies. The agency is widely regarded as stable, well-administered, and free from corruption.

The weaknesses in Ukraine's competition system arise in part from deficiencies in certain aspects of Ukraine's system of government that result in heavy demands on the AMC's attention and resources. The agency's reputation as one of Ukraine's best agencies has brought responsibilities to its agenda that it did not previously bear, such as administering certain functions of the public procurement system. More fundamentally, a significant part of the AMC's caseload would be reduced if courts dealt effectively with disputes between business entities over claims of unfair competitive methods; if privatisation proceedings were carried out with greater attention to the creation of multiple competing entities; if regulatory bodies controlled monopoly enterprises more astutely; and if market systems affecting entry, exit, and investment operated more efficiently.

The AMC must also contend with legislation that conflicts with the competition laws, such as parts of the Commercial Code, and with the failure to enact other legislation necessary for Ukraine to meet international norms for competition policy systems, notably mechanisms for control of state aid. Difficulties are also presented by public prosecutors who are unfamiliar with

the complexities of investigating anticompetitive conduct, and by judges schooled in a civil law tradition who do not readily focus on the economic dynamics of the cases before them.

Other significant weaknesses are associated with deficiencies in the AMC's statutory authority and operating policies. The Committee does not have the full statutory equipment necessary to deal with cartels and it also needs to strengthen co-operative relations with other law-enforcement agencies. The Competition Law's merger notification requirements conflict substantially with accepted international standards. Further, although the AMC is one of Ukraine's most transparent agencies, it could articulate its decisions and policies more fully to facilitate understanding and compliance by the private sector. ■

How can Ukraine make its competition law system more effective?

Provide adequate resources to assure that the AMC can maintain high standards of performance in accomplishing its mission.

If the AMC's operational procurement functions are not reassigned elsewhere, the agency's budget allocation should be increased commensurately. Further, the previous policy of coupling the AMC's personnel compensation rates to those of the ministries should be re-instated.

Assure the autonomy of the AMC.

The appointment process for AMC chairman and commissioners offers little security against politicisation. A better approach would be to re-institute some form of the previous system, under which the AMC Chairman was appointed by the President with the consent of the Parliament, and the other commissioners were appointed by the President on recommendation by the Prime Minister.

Enact an effective system for controlling anticompetitive state aid.

The Partnership and Co-operation Agreement between Ukraine and the European Community, which took effect in 1998, commits Ukraine to meeting the EU's standards for controlling state aid to commercial enterprises. That commitment should be fulfilled by appropriate legislation.

Establish effective penalties for hard core collusion.

Ukraine's Criminal Code only covers coercion to commit anticompetitive concerted acts. Some competition law enforcement agencies have found that interdiction of hard core horizontal collusion is improved by exposing corporate officers to criminal penalties. Criminal liability both deters new cartels and encourages participants in existing cartels to submit notifications under leniency programs, such as that established in Ukraine's Competition Law.

Improve regulatory systems for natural monopolies.

A regulatory commission for the transportation sector should be established and the appointment process for all regulatory agency commissioners should be modified to assure autonomy.

Authorise the AMC to seek court injunctions against competition law violations while AMC proceedings are pending.

The AMC should be empowered to apply for a judicial injunction against anticompetitive conduct when an AMC case is pending. Such an injunction would be appropriate where the agency submits evidence to show that a violation is likely in progress and that delay in terminating the anticompetitive conduct is likely to make effective relief impossible or cause serious harm to the public interest.

Modify procedures for collecting monetary penalties imposed by the AMC.

Procedures should be modified to require that, if a defendant loses an appeal against penalties imposed by the AMC, it must pay interest at market rates on the penalty amount for the period between the original payment due date and the actual payment date. A defendant initiating an appeal should also be required to post a bond in the amount of the fine, to assure that the fine will be collected without any further delay if the appeal fails. The AMC should be authorised to transmit its penalty orders directly to the State Executive Service (“SES”) for execution. Finally, the government should initiate a project to reform and streamline the process by which the SES collects unpaid penalties by the AMC or any other government agency or court.

Adopt other measures to improve enforcement and reduce inconsistencies.

The AMC needs authority to search business premises and, subject to approval by a court, personal residences. Administrative penalties for violations should be established or increased, applied through AMC procedures. Private actions should be limited, temporarily, to cases where the AMC has found a violation, and the AMC should be notified about competition claims in private suits. The Commercial Code should be amended to eliminate conflicts with the competition laws. ■

How can the AMC improve its performance?***Modify merger notification thresholds to focus on transactions likely to pose competitive concerns.***

The merger notification requirements are flawed. First, the clause dealing with assets and turnover in Ukraine could require notification even if the acquired entity has no Ukrainian presence at all. Second, in an acquisition of a Ukrainian subsidiary operation, the assets and turnover of the entire control group are counted toward the threshold. The other basis for requiring notification entails a market share test, which is undesirable because it obliges applicants to develop a necessarily subjective definition of the relevant market. Finally, the monetary amounts in the notification requirements are too low, thus requiring unnecessary notifications.

Issue merger guidelines and increase transparency of decisions to provide more guidance and predictability to the private sector.

The AMC has not issued guidelines concerning its analysis of concentrations or its computation of monetary penalties. AMC decisions are not detailed

enough for monitoring consistency, predictability, and fairness. Only “summary information” about Committee determinations in permit application cases and violation cases is made available to the general public, and no information at all about the AMC’s advisory opinions is released. Increased guidance to the public on these topics would promote better compliance with the competition laws and enable the private sector to engage in more efficient business planning.

Consider invoking existing authority so that orders terminating anticompetitive conduct will not be stayed automatically during judicial review.

Although the AMC already has authority to rule that an order terminating anticompetitive conduct should not be automatically stayed for the duration of the judicial appeal process, this authority has never been invoked. In every proceeding where a violation is found and an appeal is filed, the AMC should assess whether the statutory standard is met and, if so, issue the appropriate determination.

Adjust case enforcement priorities to correct the imbalance between abuse of dominance and horizontal concerted actions.

About half of the AMC’s present caseload involves abuse of dominance violations, while only 4% involves concerted actions, and less than 3% entails horizontal concerted actions. Horizontal concerted actions such as cartels are widely considered to be the most pernicious form of anticompetitive behaviour by business entities, and should therefore be a prime focus of enforcement efforts.

Exercise due care in demanding documentation in concentration permit application proceedings.

The AMC’s concentration notification requirements call for the production of extensive documentation, from the parties participating directly in the transaction and from all others in a control relationship with them. Strict application of these requirements can oblige the parties to submit documents respecting large numbers of affiliated entities that have no involvement in the relevant markets affected by the transaction. The AMC provides an opportunity for permit applicants to negotiate reductions in the scope of required documentation in such circumstances. It is important that AMC personnel exercise due regard for the costs imposed by documentation requirements and avoid demanding any more documents than are truly required for effective review of a transaction’s competitive implications.

Continue harmonising the Ukrainian competition law regime with that of the European Union, including the development of additional block exemptions.

Improve co-operation with other Ukrainian law enforcement agencies.

Continue serving as a competition advocate to other parts of the government, with particular focus on increasing the understanding of competition policy principles among judges, prosecutors, and other law enforcement and regulatory agency personnel.



Continue existing agency programs to:

- expand cooperation with international competition organisations and competition agencies of other nations, and develop the staff's foreign language capacity so as to facilitate consultations with European and American competition authorities;
- enhance the investigative and analytic skills of agency staff (including regional office personnel) through training programs, the exchange of personnel with other competition agencies, and other available means; and
- increase the recognition and acceptance of competition principles in society at large, as an advocate for the development of a competition culture in Ukraine. ■

For further information

For further information on the OECD's work on competition policy, see the website at www.oecd.org/competition. For further information about this Policy Brief and the 2008 report on Ukraine, please contact Michael Wise, tel.: +33 1 45 24 89 78, e-mail: Michael.wise@oecd.org.

For further reading

OECD (2007), **Economic Survey of Ukraine**, ISBN: 978-92-64-03753-3, € 49, 144 pages.

www.oecd.org/competition

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