OECD Global Forum on Competition

CONTRIBUTION FROM UKRAINE

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COMPETITION LAW AND POLICY IN UKRAINE

2000

Ukraine is a country which has nearly a ten year experience in the application of general competition laws.

In Ukraine the first general competition law, namely the Law of Ukraine "On the Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities," was adopted on 18 February 1992. At present the system of competition laws of Ukraine, including the basic general competition laws, namely the Laws of Ukraine "On the Antimonopoly Committee of Ukraine" and "On the Protection Against Unfair Competition" which have been adopted later, and legal acts which regulate relations in particular spheres of economic activities and contain antimonopoly (procompetitive) norms, consists of over a thousand normative and legal acts, including more than 80 laws of Ukraine. The duty of the state to protect competition in entrepreneurial activities is fixed at the level of the Constitution of Ukraine.

A need to renew national laws cardinally for the purpose of bringing them to conformity with new economic realities and harmonising them with modern European and world laws came into being at the end of 1990s. Amendments to the Law of Ukraine "On the Antimonopoly Committee of Ukraine," which were adopted in 2000, have regulated the procedure of appointing the Chairman and other members of the Committee together with the procedure of relieving them of their posts, have strengthened the legal and organisation basis for the Committee's activities, have provided a firmer guarantee of the Committee's independence. The Draft Law of Ukraine "On Amending Certain Legal Acts of Ukraine," which provides for the establishment of a uniform procedure of considering cases concerning violations of competition laws and the establishment of a uniform responsibility to be borne by both legal and natural persons, has been considered by the Supreme Rada (Parliament) of Ukraine. In addition, this draft law provides for the enforcement of such a responsibility for the dissemination of deceitful information that is equal to the responsibility for unfair competition.

The Law of Ukraine "On the Protection of Economic Competition," which was adopted on 11 January 2001 and which will come into force on 27 February 2002, replacing the Law of Ukraine "On the Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities," is the core of the renewed system of competition laws of Ukraine.

This law combines such tested norms of current laws that have been improved due to both the Committee's experience in their application and world practice with an effective legal regulation of matters of economic concentration; the law includes the most important procedural provisions of the Committee's activities.

The system of institution support to the implementation of competition policy in Ukraine provides for the participation of all central and local bodies of executive power, which have functions of management in the sphere of economic circulation, in the formation and implementation of antimonopoly policy being an element of competition policy, both as a whole and according to particular directions. At the same time a special body of executive power whose goal is to ensure the state protection of competition in entrepreneurial activities, namely the Antimonopoly Committee of Ukraine, has been established.

The exercising of state control over the observance of antimonopoly laws, the prevention, detection, and termination of violations of antimonopoly laws are the basic tasks of the Committee.

For the recent years stabilisation in the number of that sort of violations has taken place (there were 1,711 detected and terminated violations in 1998 as against 1,587 in 1999 and 1,595 in 2000). In
2000 the preventive aspect of activities of the Committee’s bodies was strengthened, which was reflected in the increase in the number of actions which were committed by economic entities, bodies of state power, bodies of local self-government and bodies of administrative and economic management and control and which were terminated as a result of the Committee’s officials’ having made recommendations to take measures to prevent violations of antimonopoly laws.

The structure of detected and terminated violations of antimonopoly laws has been stable for the recent years. Abuses of a monopoly position constitute the largest group of that sort of violations (for example, in 2000 the Committee’s bodies terminated 721 violations of that sort).

Violations in the sphere of prices, namely setting discriminatory and monopoly high prices (tariffs) for products (work, services), accounted for the largest part (60.7%) of the total number of detected and terminated abuses of a monopoly position. Violations of that sort were detected and terminated by the Committee’s bodies on the bulk of investigated product markets, most frequently on markets of housing and communal services (those of centralised supply of heat and water, centralised sewerage, processing hard domestic waste materials, maintenance of housing resources and ordinary repairs to them), on markets of rendering complex services in the sphere of both providing places for trading in food-stuffs (non-food-stuffs) on markets and guarding. The Committee’s bodies terminated a significant number of violations of antimonopoly laws in the form of establishing monopoly high prices on markets of rendering such services that are associated with the performance of functions of the state.

The present state of the economy of Ukraine has the following peculiarity: tariffs for the bulk of services rendered by subjects of natural monopolies are regulated by the state and, consequently, control over the observance of the requirements for the formation, establishment, and application of prices and tariffs of that sort is beyond the competence of the Antimonopoly Committee. That is why measures to prevent duplicating functions in the sphere of exercising control over the observance of both requirements fixed in competition laws and state price discipline have been taken.

In 2000 the Committee’s bodies detected and terminated a number of abuses of a monopoly position in which the establishment of discriminatory or monopoly high prices was combined with the imposition of such contractual conditions that created a disadvantage for contractors or with the imposition of such additional conditions that had nothing in common with the subject of the contract. Violations of that sort took place, in particular, on markets of the advance sale of railway tickets, on markets of rendering specialised services by sea ports, on markets of receiving and servicing motor transport in the area of customs inspection.

Abuses of a monopoly position in the form of imposing such contractual conditions or such additional conditions that had nothing in common with the subject of the contract were detected and terminated by the Committee’s bodies on markets where the agricultural and industrial complex operates, on markets of gas and electric power supply, on markets of housing and communal services, transport, communication, on markets of the organisation of land exploitation, on markets of sanitary, hygienic and laboratory researches, on markets of rendering ecological services.

In 2000 the Committee’s bodies detected and terminated 49 abuses of a monopoly position in the form of such limitation or stoppage of the production of products that resulted or could result in the creation or maintenance of a deficit on the market or in setting monopoly prices and in the form of such partial or complete refusal to sell or purchase a product in the absence of alternative purchase or sales sources that resulted or could result in the creation or maintenance of a deficit on the market or in setting monopoly prices. Violations of that sort were detected and terminated on markets of communication, electric power supply, housing and communal services and transport. At the same time there is a tendency which is characterised by the fact that the purpose of actions of that sort is to compel contractors of monopoly formations to fulfil certain obligations which are unlawful or disputable. In any case that sort of
measures to compel contractors to fulfil the above obligations would be impossible if there had been competition on the market.

The number of detected and terminated violations in the form of such actions that resulted or could result in the creation of barriers to the entry into (withdrawal from) the market with respect to other economic entities was low (32 violations). Violations of that sort were detected predominantly on markets of communication, gas and electric power supply, housing and communal services, and on markets of undertakers’ services.

The number of detected and terminated violations of antimonopoly laws in the form of anticompetitive concerted actions, though it increased in 2000 in comparison with the number for the previous year, remains comparatively insignificant (44 violations).

Actions that resulted or could result in setting (maintaining) monopoly prices (tariffs), discounts, additional charges (extra payments), increases in prices constituted the largest group of violations of that sort.

Anticompetitive concerted actions of that sort were detected and terminated on markets of rendering services in the sphere of providing places for trading in food-stuffs and industrial products, on markets of rendering services that are associated with the performance of functions of the state, services in the sphere of compulsory preventive narcological examination, services associated with the preparation of documents for the privatisation of dwellings, on markets of servicing electronic cash-machines. Certain entrepreneurs that operate in the Donetsk and Kherson regions on markets of servicing electronic cash-machines, having terminated that sort of violations, began to apply prices lower than those set by their competitors.

Anticompetitive concerted actions which resulted or could result in the distribution of markets on the principle of territory, according to the volume of product sale or according to the circle of consumers were detected and terminated on regional markets where some offices and organisations which have certain administrative powers, concertedly with some economic entities, applied the powers to distribute markets.

The basic cause of a small number of such violations in the form of anticompetitive concerted actions that were detected and terminated by the Committee's bodies consists, on the one hand, in the imperfection of the legal basis, in particular in the fact that laws do not provide for many actions which take place in practice, and, on the other hand, in the insufficiency of the Committee's powers to collect evidence. The entry into force of the Law of Ukraine "On the Protection of Economic Competition" will make it possible to resolve these problems to a great extent.

The number of violations of antimonopoly laws in the form of discrimination practised by bodies of state power, bodies of local self-government, bodies of administrative and economic management and control against economic entities remained significant. In 2000 the Committee's bodies detected and terminated 448 violations of that sort as against 399 in 1999. Violations in the form of restricting the rights of economic entities to purchase and sell products and those in the form of establishing prohibitions or restrictions with respect to certain economic entities or groups of economic entities account for nearly half the total number of violations in the form of discrimination practised against economic entities. As a result of the termination of these violations the above economic entities were relieved from the fulfilment of numerous unlawful requirements that impeded their economic activities. For example, unlawful restrictions of economic activities on markets of agricultural products, in particular on markets of grain, were terminated and prohibitions and restrictions concerning trade activities and activities associated with collecting scrap metal were repealed due to actions of the Committee’s bodies.
In 2000 the Committee’s bodies detected and terminated 91 violations in the form of giving particular economic entities such tax and other privileges that place them in a privileged position with respect to other economic entities, which resulted or could result in the monopolisation of the market of a certain product. The bulk of violations of that sort were detected and terminated on markets of rendering transport and insurance services.

Sixty-three violations in the form of compelling economic entities to practice a priority conclusion of contracts and to provide a primary supply to a particular circle of consumers, in particular on markets where the agricultural and industrial complex operates, on markets of insurance services, on markets of the organisation of land exploitation, on markets of rendering ecological services, sanitary and epidemiological services, were terminated in 2000. For example, some regional departments of ecological security and some regional sanitary and epidemiological services, using the combination of their power and economic functions, compelled economic entities to conclude contracts with them (departments and services) as with economic entities for services requiring payment.

Thirty-eight violations in the form of prohibiting against the establishment of new enterprises or other organisation forms of entrepreneurship in any sphere of activities and in the form of establishing such limitations with respect to certain types of activities that resulted or could result in the restriction of competition were detected and terminated in 2000. In particular, groundless refusals to give permissions to private entrepreneurs for establishing trade units, for establishing places of accept of scrap ferrous and non-ferrous metal, for concluding contracts for rendering undertakers’ services were removed and unlawful restrictions with respect to rendering everyday services to the population, those with respect to repairing and servicing vehicles, restrictions concerning the independent organisation of land exploitation were repealed.

A significant number of violations in the form of establishing prohibitions against selling products from one region of the republic into another and those in the form of making decisions on the centralised distribution of products which resulted or could result in a monopoly position on the market were detected and terminated on markets where the agricultural and industrial complex operates.

In 2000 the Committee’s bodies terminated 79 violations of antimonopoly laws in the form of unfair competition. A relatively small number of terminated violations of that sort was caused by the fact that cases of the mentioned category, in accordance with laws of Ukraine, are considered on the bases of applications to be submitted by entrepreneurs. The number of that sort of applications, however, is small, which is associated first of all with the insufficient level of law knowledge of entrepreneurs of the possibility of applying antimonopoly laws to unfair actions of their competitors. At the same time entrepreneurs independently begin to use antimonopoly laws in conflict situations and during talks and begin to apply directly to courts.

The most widespread violations in the form of unfair competition were associated, first, with actions in the sphere of the unlawful use of the business reputation of an economic entity (49.4% of the total number) and, second, with creating barriers to economic entities in the course of competition and gaining an unlawful advantage in competition (44.3% of that sort of violations).

In addition to customary powers of bodies of that sort, the Committee has such rights that enable it to facilitate the development of competition in all spheres of the economy on a complex basis. For this purpose the Committee gives its conclusions with respect to the privatisation of monopoly formations, approving the relevant privatisation documents only if there is no need to take demonopolisation measures, and watches closely that the administrative regulation of prices for products (work, services) of monopoly formations be introduced only on those markets where competition, at least imperfect, is not possible in a medium-term future. In 2000 the state regulation of prices and tariffs was repealed on the initiative of the Committee’s bodies with respect to 75 economic entities operating on 22 relevant product markets.
The general peculiarities of privatisation processes in Ukraine caused the decrease in the number of privatisation documents considered by the Committee’s bodies in comparison with the respective number for the previous year, namely 249 in 2000 as against 307 in 1999. At the same time the significance of work associated with the consideration of privatisation documents of enterprises being of strategic importance to the economy and security of the state and those of economic entities occupying a monopoly position on national markets increased. The establishment of clear-cut requirements with respect to coming to an agreement about both privatisation procedures and the procedure of getting the Committee’s consent to the purchase of blocks of stock of enterprises being privatised made the unlawful monopolisation in the course of privatisation practically impossible.

In 2000 the Committee’s bodies considered 697 applications for giving its consent to economic concentration. In 436 cases it gave its consent to economic concentration, whereas in 3 cases it refused to give that sort of consent.

The restriction of competition on national markets of beer and cement and the monopolisation of regional markets of rendering services in the sphere of processing agricultural products in the Kharkiv region (the restriction and the monopolisation being particular examples) were prevented due to measures taken by the Committee’s bodies. It is important from the methodological point of view that in 2000 mechanisms of taking into account, in the course of giving the Committee’s consent to economic concentration, financial support to be given by third parties were worked out.

The improvement in mechanisms of exercising control over economic concentration has resulted in the acceleration of the legalisation of control relations between economic entities. This not only ensures the effective prevention of the monopolisation of product markets, but also, increasing the transparency of powerful industrial and financial groups, strengthens their responsibility to the society. In 2000 a significant part of potential buyers in advance submitted applications to the Committee for giving its consent to economic concentration together with all necessary information. It is worth mentioning that foreign companies more actively participated in economic concentration in Ukraine in 2000: nearly 60% of considered applications for giving the Committee’s consent to economic concentration had been submitted by foreign economic entities.

The Committee’s participation in the development of legal norms by making conclusions, remarks and proposals concerning such drafts for laws, decisions of the President of Ukraine and the Cabinet of Ministers of Ukraine that are developed by other bodies and by developing drafts for the relevant decisions on its own initiative is an important direction of its work. In 2000 the Committee’s bodies processed 640 drafts for legislative and other normative acts together with 1,261 drafts for decisions of central and local bodies of state power, bodies of local self-government, bodies of administrative and economic management and control. This made it possible, first, to prevent making nearly 660 decisions which could result in the restriction or distortion of competition or would not ensure the protection of the rights of contractors of monopoly formations and, second, to amend nearly 200 normative acts to include procompetitive norms.

Changes in the nature of competition policy have taken place recently, with the basic features of the system of institution and organisation support to the implementation of competition policy being preserved. In particular, the Law of Ukraine “On Natural Monopolies” was adopted on 20 April 2000, it has established the legal basis for the creation of a system of a non-departmental state regulation in the sphere of natural monopolies.

The implementation of the Decree of the President of Ukraine “On the Basic Directions of Competition Policy for 1999-2000 and on Measures to Implement Them” has been completed, a draft decree on the basic directions of competition policy for 2001-2004 has been developed. The draft decree provides for specific measures directed towards the improvement of competition rules, the creation of an effective competitive environment, the reduction of the share of the monopoly sector in the economy of
Ukraine, the optimisation of activities of the state being a direct participant in market relations, the completion of the introduction of laws on natural monopolies, the development of laws on the protection of economic competition and on the institution support to be given to the implementation of competition policy.

According to the draft decree, the regulation of a mechanism of rendering and using state aid will be an important direction of the improvement of rules of competition in Ukraine. In this connection a draft for the special Law of Ukraine "On State Aid" has been developed. The regulation of state aid will make it possible to ensure equal conditions of competition on external markets to national producers of goods, in particular it will make it possible to prevent their removal from those markets as a result of the application of antidumping procedures by other countries.

In order to optimise activities of the state being a direct participant in market relations, the draft law provides for, in particular, a clear-cut delimitation of management functions and economic activities of state bodies, the definition of the necessary and advisable volume of economic activities of bodies of executive power, the prevention of the establishment of restrictions during economic activities by state bodies with respect to economic entities which are real or potential competitors.

The basic ways of lessening the market share of the monopoly sector are as follows: first, the maximally-possible removing of barriers placed to the entry of new economic entities into monopolised product markets together with encouragement to be given to that sort of entry; second, ensuring the development of competitive sectors of the economy at an outstripping pace in comparison with the development of monopolised sectors. The latter is directly linked with improvements in competition rules. The basic task, however, is not only to attain a formally-competitive structure of markets, but also to create an effectively-competitive environment which could ensure a steady development of a socially oriented economy.

In 2000 the Committee substantially strengthened its work in the sphere of international co-operation. A treaty of co-operation in the development of competition was signed between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation in 2000 in addition to seven interdepartmental bilateral agreements in which the Committee has been taking part. The treaty contains a modern procedure of specific interaction between bodies of power and government of Ukraine, on the one hand, and those of Russia, on the other hand, in the application of national antimonopoly laws, the co-ordination of common actions to prevent, limit, and terminate anticompetitive activities of economic entities, the overcoming of negative consequences resulting from that sort of activities or from the meddling of governmental bodies in economic activities of partner countries if the consequences infringe important interests of the relevant parties and have a negative impact on their trade relations.

In January 2000 the Treaty of Concerted Antimonopoly Policy of Countries of the Commonwealth of Independent States (CIS) in a new wording was signed, which signifies a qualitatively new stage of the development of co-operation on the basis of the priority of national laws.

The Antimonopoly Committee of Ukraine, due to the organisation and financial support provided by the United Nations Conference on Trade and Development (UNCTAD) together with the European Commission, held the Regional Conference on Competition Policy of the CIS Countries and Countries of Central and Eastern Europe in Kyiv on 13-14 July 2000.

The conference has adopted the Kyiv declaration of representatives of the region comprising the CIS countries and countries of Eastern and Central Europe which is addressed to the Fourth Review UNCTAD Conference and which stresses the importance and urgency of the creation and development of effective international instruments to protect competition during the further liberalisation of international trade.
The Committee, when performing its international activities, pays meticulous attention to its interaction with international organisations which deal with the development and protection of competition. The co-operation between the Antimonopoly Committee and the Organisation for Economic Co-operation and Development (OECD) makes it possible for the Committee to familiarise itself with experience in the application of competition laws in different countries of the world and to exchange opinions on principles and criteria of the introduction of competition laws.

The Committee takes part in activities of the Interstate Council on Antimonopoly Policy of the CIS Countries which has a considerable impact on the formation of relations of fair competition between economic entities of the CIS countries.

An agreement-free co-operation which provides for participation in conferences, seminars, bilateral and multilateral consultations, in particular those concerning specific matters of case investigations, etc, has been broadening.

**DESCRIPTIONS OF CASES**

1. **Case Concerning the Committee’s Giving Its Consent to the Purchase of Blocks of Shares in the Public Companies Pyzavod "Rogan" and Oleksandriysky Pyzavod by the Company Interbrew Rgn Holding B. V.**

   The Company Interbrew RGN Holding B. V. (the Netherlands) applied to the Antimonopoly Committee of Ukraine for giving its consent to, first, the direct purchase of such a block of shares in the Public Company Pyzavod "Rogan" (the city of Kharkiv) that would enable the Dutch company to have over 81% of the voices at the high body of management of the emitter and, second, the indirect purchase of such a block of shares in the Public Company Oleksandriysky Pyzavod (the city of Oleksandriya, the Kirovograd region) being under the control of the Public Company Pyzavod "Rogan" that would enable the Dutch company to have over 63% of the voices at the high body of management of the emitter.

   The Committee, proceeding from a preliminary analysis of markets, found out that the Public Company Pyzavod "Rogan" and the Public Company Oleksandriysky Pyzavod operated on national markets of beer and non-alcoholic refreshing drinks where they did not occupy monopoly position which, in accordance with Ukrainian laws, is considered to exist if a share in a certain product market exceeds 35%.

   As the applicant had informed, the shares in the Public Company Pyzavod "Rogan" were to be purchased in order to make strategic investments in the technical reequipment of the brewery, to shift to the world quality standards and production systems, to broaden the range of brands of the brewery products, to produce certain brands of beer of the Company Interbrew RGN Holding B. V. (Jersey, the Norman Isles), a world-known brewery and the parent company of the Company Interbrew RGN, to implement export programme, to build and to put into operation a plant for the production of malt, and to grow high-quality brewer’s barley in Ukraine.

   At the moment of the submission of the above application the Company Interbrew RGN Holding B. V., however, through its subsidiaries had control over the following Ukrainian breweries: the Public Closed Company Chernigivsky Pyzavod "Desna" (the city of Chernigiv), the Public Company Mykolaisky Pyzavod "Yantar" (the city of Mykolai), and the Public Company Pyvobezalkogolny Kombinat "Krym" (the city of Simferopol) whose joint share in the Ukrainian beer market was over 20%. This fact did not make it possible to conclude that the purchase of the shares in the Public Company Pyzavod "Rogan" and the Public Company Oleksandriysky Pyzavod would not result in the establishment
of such a monopoly formation on the mentioned market that would comprise economic entities which were linked by relations of control and whose links would be more stronger as a result of the concentration.

In cases of that sort, as the normative document, namely the "Statute of Exercising Control over Economic Concentration" which was approved by the order of the Antimonopoly Committee of Ukraine and registered by the Ministry of Justice of Ukraine, provides for, in order to conduct a more detailed research in the state of the market and consequences of the concentration for competition on the market, a decision to begin the consideration of a case concerning economic concentration is to be made. The relevant decision was made.

In order to define the joint market share of the group of economic entities which were linked with the Company SUN Interbrew Limited (hereinafter referred to as "the Group") by relations of control and whose links would be stronger if the Committee gave its consent to the concentration, the effective statistical reports on beer output, its exports and imports and information on the state of the market were received from bodies of state power, economic entities, consumers, etc. in the course of the case consideration.

As a result of an analysis of the received materials, it was found out that in 1999 the joint share of the Group in the national market of beer was over 35%. The level of the market concentration was characterised by such physical indices that made it possible to consider the market of beer to be moderately concentrated or potentially competitive, whereas after the concentration analogous indices would make it possible to consider the market of beer to be highly concentrated while the high concentration would result in significant restrictions of competition.

Thus, as a result of the preliminary case consideration, it was concluded that the purchase of the shares would result in the establishment of a monopoly formation on the national market of beer. At the same time, the applicant did not submit official decisions to confirm the declared purpose of the concentration, in particular decisions to build and to put into operation the plant for the production of malt, decisions to implement the programme of growing high-quality brewer's barley in Ukraine, and in this connection the advantages of a positive effect of the concentration for public interests over negative consequences for competition were not considered to be permanent.

Having taken into account the above information, officials of the Antimonopoly Committee of Ukraine, in their conclusion concerning preliminary results of the case consideration, proposed the Committee to refuse to give its consent to the purchase of the shares in the Public Company Pyvzavod "Rogan" and the Public Company Oleksandriisky Pyvzavod by the Company Interbrew RGN Holding B. V. in accordance with the proposed conditions.

Having received the above conclusion, the applicant sent a memorandum to the Committee, in which it informed that in case of the Committee's consent to the purchase of the shares in the Public Company Pyvzavod "Rogan" the Company SUN Interbrew Limited would sell its block of shares in the Public Company Pyvobezalkogolny Kombinat "Krym."

The Committee received a certified extract from a legalised written decision of directors of the Company SUN Interbrew Limited which provides for that the company, acting on its behalf and on behalf of its subsidiaries, pledged, on condition that the Committee's consent was received, to alienate, from the moment when 50% of shares in the Public Company Pyvzavod "Rogan" were purchased and not later than 31 December 2001, any rights for such shares in the Public Company Pyvobezalkogolny Kombinat "Krym" that are directly or indirectly owned by the Company SUN Interbrew Limited and, from the moment when control over the Public Company Pyvzavod "Rogan" was established or from the moment when more than 25% of its shares were purchased, not to exercise the rights of the owner of shares in the Public Company Pyvobezalkogolny Kombinat "Krym" for defining its behaviour in competition on the markets and to exercise the rights exclusively for preparing those shares for sale (alienation).
The Company **SUN Interbrew Limited** pledged to return (sell, alienate, etc.) all the shares in the Public Company **Pyvzavod "Rogan"** purchased in accordance with terms and conditions of the relevant sale contract to their former owners if the purchase of shares in the amount ensuring 50% of the votes at the high management body of the Public Company **Pyvzavod "Rogan"** was not completed within a calendar year from the date of the Committee’s giving its consent. The possibility of events of that sort was provided for by the above sale contract.

The joint share of the Group (without the share of the Public Company **Pyvobezalkogolny Kombinat "Krym"**) in the national market of beer was less than 35% in 1999. If shares of the Public Company **Pyvzavod "Rogan"** are purchased and if shares of the Public Company **Pyvobezalkogolny Kombinat "Krym"** are sold, the concentration level of the beer market will be higher than that before the purchase, at the same time physical indexes which characterise the concentration level will be within such limits that make it possible to consider the beer market to be moderately concentrated or potentially competitive.

In addition, in the course of the case consideration the Kharkiv Regional State Administration and the Company **SUN Interbrew Limited** held relevant meetings which resulted in signing an official agreement, first, on the participation of the latter in the implementation of the project to construct and put into operation the plant for the production of malt and, second, on the initiation of such a broadened programme of development that provides for making investments in the growth of high-quality brewer’s barley in Ukraine, which must have positive effects on the brewer’s industry of Ukraine at least because in the course of the intensified production and consumption of beer Ukrainian malt-producing plants, the bulk of which are obsolete, will not be able to ensure the production of malt in necessary quantities. The above arguments changed the initial position of the Kharkiv Regional State Administration on the purchase of shares in the Public Company **Pyvzavod "Rogan"** by the Company **SUN Interbrew Limited** for the opposite position.

Thus the implementation of the announced purchase of the blocks of shares in the Public Company **Pyvzavod "Rogan"** and the Public Company **Oleksandriysky Pyvzavod** by the Company **SUN Interbrew Limited** will not result in the establishment of the monopoly formation on the national market of beer if the Company **SUN Interbrew Limited** fulfils its pledges to alienate any rights concerning all shares in the Public Company **Pyvobezalkogolny Kombinat "Krym"** and if it does not use rights of the owner of those shares for defining the behaviour of the Public Company **Pyvobezalkogolny Kombinat "Krym"** in competition on markets, which actually excludes the possibility of exercising simultaneous control over activities of the Public Company **Pyvzavod "Rogan,"** the Public Company **Oleksandriysky Pyvzavod,** and the Public Company **Pyvobezalkogolny Kombinat "Krym"** by the Company **SUN Interbrew Limited.**

The Committee gave its consent to the direct purchase of the block of shares in the Public Company **Pyvzavod "Rogan"** and to the indirect purchase of the block of shares in the Public Company **Oleksandriysky Pyvzavod** by the Company **SUN Interbrew Limited** and obliged the Company **SUN Interbrew Limited** to fulfil the pledges provided for by the legalised written decision of directors of the Company **SUN Interbrew Limited.**

At the same time, the Committee took into account information of the Company **SUN Interbrew Limited** on the possible return of the purchased shares to their former owners and absolved the company from the pledge to sell shares in the Public Company **Pyvobezalkogolny Kombinat "Krym"** if that sort of return did not take place.

The Company **SUN Interbrew Limited** made concrete steps towards the fulfilment of obligations which had arisen in connection with the above concentration, in particular the Companies **CA²B Investment Bank** and **CA²B Security (Ukraine) AO** were set to be financial advisers to the Company.
SUN Interbrew Limited on the preparation and implementation of the alienation, by 31 December 2001, of the whole block of shares in the Public Company Pyvobezalkogolny Kombinat "Krym."

According to the information submitted by the Company CA ²B Security (Ukraine) АО in April 2001 information about the sale of a block of shares in the Public Company Pyvobezalkogolny Kombinat "Krym" was sent to potential buyers (nearly 60 companies). Companies which had expressed their intention to purchase the mentioned block of shares were familiarised with technical, financial, and other data concerning the Public Company Pyvobezalkogolny Kombinat "Krym." Later companies which had reiterated their interest in the purchase of shares in the Public Company Pyvobezalkogolny Kombinat "Krym" were allowed by the seller to make a detailed analysis of activities of the enterprise, including an analysis to be made due to visits to the enterprise.

2. Case Concerning the Committee's Giving Its Consent to the Purchase of Blocks of Shares in the Public Companies Kirovogradoblenenergo, Power Company "Sevastopolenergo," and Khersonoblenenergo by the Company Chodoslovenske Energeticke Zavody

The Antimonopoly Committee of Ukraine considered applications submitted by the Company VY Chodoslovenske Energeticke Zavody (hereinafter referred to as "the Purchaser") (the city of Kosice, Slovakia) for giving its consent to the direct purchase of blocks of shares in the Public Companies Kirovogradoblenenergo, Power Company "Sevastopolenergo," and Khersonoblenenergo in the course of the privatisation of these companies.

According to information given by the Purchaser, it has no direct or indirect links in the form of relations of control with any economic entities, with the exception of the Public Company Zhytomyroblenergo whose block of shares it had purchased earlier.

The regional power companies whose blocks of shares are the object of the purchase, operate, first, on local relevant markets of electric power where they use local power networks and occupy a monopoly position on those markets as subjects of natural monopoly and, second, on the national market of electric power in which they, using a regulated tariff, have such an insignificant total share that does not make it possible to occupy a monopoly position either jointly or individually.

An analysis of the amount of the assets and sales of the Purchaser, which was made in the course of the consideration of the application, was indicative of the fact that the Purchaser's own financial resources were not enough for the purchase of the mentioned block of shares and that they could be purchased only with the use of attracted financial resources. At the Committee's request the Purchaser informed that financial assistance was given by the Ukrainian Energetic Partnership (Wilmington, Delaware, USA).

An analysis of conditions of rendering the financial assistance showed that the conditions did not provide for the transfer of control over economic activities of the mentioned regional electric power companies from the Purchaser to third parties.

Consequently, these purchases will not result in significant changes in markets of services in the sphere of supplying electric power at a regulated tariff and transmitting electric power through local power networks where the mentioned public companies operate and will not result in the restriction of competition on other product markets.

The Committee, taking into account the above information, gave its consent to the purchase of blocks of shares in the Public Companies Kirovogradoblenenergo, Power Company "Sevastopolenergo," and Khersonoblenenergo by the Company Chodoslovenske Energeticke Zavody.
3. **Anticompetitive Concerted Actions Committed by the Private Enterprise Zovnishnio-Torgivelna Firma "Prommasheksport" and the Limited-Liability Company Gepard**

In Ukraine a monopoly position on the national market of concentrated kaolin is occupied by the Public Company *Prosianskyi Girnycho-Zbagachuvalnyi Kombinat* (hereinafter referred to as "the Integrated Plant").

In December 2000 the Integrated Plant jointly with the Limited-Liability Company *Gepard* (hereinafter referred to as "the Company Gepard") (the city of Dnipropetrovsk), which operates on markets of rendering mediator's services, in particular those rendered in the course of the sale of kaolin, established the Limited-Liability Company *Torgovyi Dim "Prostiana-Kaolin"* (hereinafter referred to as "the Trading House").

After that, at the end of 2000, the Integrated Plant applied to its buyers with the proposal to conclude contracts with the Trading House on the supply of kaolin because, in connection with the reorganisation of the marketing service of the Integrated Plant, all made products would be sold exclusively through the Trading House. The Integrated Plant and the Trading House had concluded a contract on the supply of nearly the whole volume of products planned for 2001 at prices being higher than previous ones by 10 to 20%.

At the end of December 2000 the Private Enterprise *Zovnishnio-Torgivelna Firma "Prommasheksport"* (hereinafter referred to as "the Firm Prommasheksport") (the town of Berdychiv, the Zhytomyr region), a competitor of the Company Gepard on the market of rendering mediator's services, received a consent of the Antimonopoly Committee of Ukraine to the purchase of such a block of shares that ensures over 25% of voices at high management bodies of the Integrated Plant.

At the same time, the Firm *Prommasheksport* applied to its contractors with the proposal to conclude contracts on the purchase of kaolin produced by the Integrated Plant exclusively from the Firm *Prommasheksport* and the Company Gepard.

It was established in the course of the consideration of the case having signs of anticompetitive concerted actions that the Firm *Prommasheksport* and the Company Gepard had acted in accordance with a contract concluded on 30 October 2000 on joint activities which provided for, first, the sole strategy with respect to mechanisms and volumes of the sale of kaolin (kaolin products) and, second, coming to an agreement with each other about all the rest of contracts to be concluded by them. When applying to the Antimonopoly Committee of Ukraine, the Firm *Prommasheksport* did not submit information about the existence of contracts which could result in increasing the monopolisation of the market of kaolin despite the fact that the above contract had been concluded and had come into force. Although the contract at the moment of its conclusion could not substantially impact on the state of competition on the market of kaolin, after the establishment of the group of linked economic entities comprising, on the one hand, the participant in the contract on joint activities, namely the Company Gepard, and, on the other hand, the entrepreneur occupying a monopoly position on the market of kaolin, namely the Integrated Plant, the implementation of this contract could result and, in fact, resulted in the restriction of competition.

The Committee qualified the above actions of the Firm *Prommasheksport* and the Company Gepard in accordance with Paragraphs 2 and 4 of Article 5 of the Law of Ukraine "On Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities" as violations of antimonopoly laws in the form of anticompetitive concerted actions to be committed on the basis of a concluded contract on joint activities which could result in setting monopoly prices for kaolin and kaolin products and in the removal of other sellers of kaolin and kaolin products from the market.
In addition, the above actions of the Firm Prommasheksport were also qualified in accordance with Paragraph 2 of Part 1 of Article 19 of the mentioned law as violations of antimonopoly laws in the form of the submission of deliberately falsified information to the Antimonopoly Committee of Ukraine.

Fines were imposed on the violators.

The Firm Prommasheksport was obliged to cancel such provisions of the contract concluded with the Company Gepard on joint activities that provide for the sole strategy with respect to mechanisms and volumes of the sale of kaolin or kaolin products.

The Antimonopoly Committee of Ukraine, by its order, repealed its consent to the purchase of such a block of shares in the Integrated Plant by the Firm Prommasheksport that ensured over 25% of voices at high management bodies of the Integrated Plant.

4. Anticompetitive Concerted Actions Committed by the Limited-Liability Companies Poshuk-Service, Delta-Azov, Interkvant, and Interkvant-Service

Before 1999 on the market of servicing electronic cash-machines in the city of Mariupol (the Donetsk region) there had operated two centres, namely the Limited-Liability Companies Poshuk-Service and Delta-Azov. The price of their services had been equal to 15 hryvnias. In 1999 the Limited-Liability Company Interkvant entered into the market. The price of its service was equal to 10 hryvnias.

As a result of the fact that the price of the service rendered by the Limited-Liability Company Interkvant, being of equal quality, was in 1.5 times lower, a part of consumers switched from the Limited-Liability Companies Poshuk-Service and Delta-Azov to the Limited-Liability Company Interkvant.

The Limited-Liability Companies Poshuk-Service and Delta-Azov, in retaliation, began to exert pressure on the competitor. They, in particular, required from the Limited-Liability Company Interkvant to return their customers, required from factories producing electronic cash-machines to terminate their supplying the Limited-Liability Company Interkvant with completing and spare parts, the Limited-Liability Company Delta-Azov initiated the extraordinary certification of the Limited-Liability Company Interkvant by one of the largest producers of electronic cash-machines and managed to force another producer to introduce such changes in its contracts with entrepreneurs servicing its cash-machines that prohibited any switch of customers from this servicing centre to another.

The Limited-Liability Company Interkvant under the pressure of the Limited-Liability Companies Poshuk-Service and Delta-Azov agreed to meet with the management of the latter servicing centres and to discuss matters with respect to raising tariffs for services. In June 1999 the management of the three servicing centres agreed to set the sole tariff for technical services of electronic cash-machines in the amount of 20 hryvnias which, in fact, was introduced by all the participants in the agreement at intervals of a month.

In January 2000 the Limited-Liability Company Interkvant-Service instead of the Limited-Liability Company Interkvant began to service electronic cash-machines. It continued to maintain the sole tariff set jointly with the Limited-Liability Companies Poshuk-Service and Delta-Azov.

The participants in the concerted actions substantiated the raise in the tariff by an increase in prices for spare parts and power resources. The relative extant of the increase in the prices for spare parts and power resources, however, was significantly less than the extant of the raise in the tariff for the service. At the same time, different participants in the concerted actions adduced such "increased" prices for the same spare parts bought from the same producers that differed in 1.6 to 1.8 times. Finally, the increase in
the prices for spare parts and power resources took place in November 1998, whereas the tariffs for services raised in July and August 1999.

The fact that the Limited-Liability Company *Delta-Azov* practically stopped its advertising campaign, reducing its advertising expenses in 24 times within four months, after the raise in the tariffs is additional evidence of the termination of competition between the participants in the agreement.

In the course of the consideration of the case concerning violations of antimonopoly laws the management of the Limited-Liability Company *Delta-Azov* denied the fact that the above talks had been conducted and that the sole tariff had been set, but the fact was confirmed by the rest of the participants.

The Donetsk Territorial Office of the Committee qualified the actions of the Limited-Liability Companies *Poshuk-Service*, *Delta-Azov*, *Interkvant*, and *Interkvant-Service* in accordance with Paragraph 2 of Article 5 of the Law of Ukraine "On Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities" as such anticompetitive concerted actions that had resulted in setting (maintaining) monopoly prices (tariffs).

Fines were imposed on the violators.

The violations were terminated, the Limited-Liability Company *Interkvant-Service* set a tariff being lower than those set by its competitors.
SOME ASPECTS OF INTERNATIONAL CO-OPERATION
IN THE PROTECTION OF ECONOMIC COMPETITION:
THE VIEWPOINT OF THE ANTIMONOPOLY COMMITTEE
OF UKRAINE

The Antimonopoly Committee of Ukraine since first steps of its activities has considered international co-operation to be an important direction of work. For seven and a half years of the Committee’s activities it has concluded seven bilateral interdepartmental agreements on co-operation; the Bilateral Treaty of Co-operation Between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation in the Development of Competition and the Treaty of Concerted Antimonopoly Policy of Countries of the Commonwealth of Independent States (CIS) have been developed with the participation of the Committee. For this period the Committee twice has welcomed participants in international fora on competition policy in Kyiv. The Committee has been co-operating with international organisations which deal with competition matters. In this connection the Committee would like to express its deep gratitude to the Organisation for Economic Co-operation and Development (OECD).

The Law of Ukraine "On the Protection of Economic Competition," whose draft has been developed by the Committee and which has been adopted recently, is based on world experience in the development of competition laws and is harmonised with laws of OECD member countries.

At the same time acquired experience convinces the Committee of the fact that international co-operation in the sphere of competition policy, especially multilateral co-operation, can be effective only if certain specific and stable mechanisms of that sort of co-operation are introduced.

Even today, in the Committee’s opinion, there is a number of problems for which the creation of mechanisms of that sort is both possible and advisable.

These problems constitute, in particular, a group of matters associated with the global information support to activities in the protection of economic competition. In the Committee’s opinion, three directions are the most important in terms of the future. The first direction is associated with the creation of a bank of data concerning cases of violations of competition law, violators, and sanctions applied against them. It is desirable that the work done by the Forum organisers in the sphere of collecting and processing information about anticartel actions should be considered to be the first step towards the creation of that sort of data bank. The second direction is associated with the creation of an analogous bank of data concerning decisions on matters of economic concentration. The third direction is associated with the creation of a bank of data concerning competition laws and materials with respect their application (in particular, judgements). In this connection the Committee points out that the creation of a bank of data concerning competition laws of CIS member countries has been initiated within activities of the Interstate Council on Antimonopoly Policy. If common consent in principle is achieved, the creation of the above data banks will consist in the definition of mechanisms of accumulating, storing, and renewing relevant information together with mechanisms of getting access to the information.

Another problem, whose solution requires the creation of mechanisms of international co-operation on a multilateral basis, is associated with anticartel measures. Concrete proposals concerning this matter were made, in particular, in the Kyiv Declaration of the Regional Conference on Competition Policy for CIS Member Countries and Countries of Central and Eastern Europe (Kyiv, Ukraine, 13-14 July 2000). They provide for, in particular, initiating the preparation and signing of an international agreement on the mutual recognition of decisions on cartels with a view to simplifying the procedure of fulfilling decisions which concern foreign economic entities; fixing, in official international documents, a provision stating that the establishment of a cartel has or can have an impact on competition in any country where its participants operate; introducing a procedure of notifying for countries which intend to give their consent to the establishment of cartels from among enterprises operating in the territory of more than one country.
The next group of matters, whose solution requires multilateral international co-operation, is the development of a mutually acceptable conception scheme of international rules of competition in the sphere of mergers. At the present stage it is important to study thoroughly remarks which substantiate the prematurity of and barriers to the introduction of that sort of rules and to take into account the remarks later, during the development of that sort of rules in the form of the limitations with respect to the sphere of application and the number of participants or in any other form. In order to ensure the observance of established principles, it is also necessary to provide for, from the outset, mechanisms to settle arising disputes.

Finally, there are problems which are specific for Ukraine and which have an international aspect, namely the development of mechanisms of co-operation between, on the one hand, international organisations comprising countries which have broad experience in the application of competition laws (for example, OECD member countries) and, on the other hand, transition economy countries which are not members of the organisations. The matter concerns, in particular, the insurance of the further harmonisation of competition laws of OECD member countries and those of non-member countries, the creation of special conditions for transition economy countries and developing countries, and technical assistance to be rendered to transition economy countries and developing countries. The Committee, proceeding from previous experience, hopes for OECD assistance in resolving these matters.