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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from Ukraine

-- Session II --

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-- Ukraine --

1. Improvement of International Cooperation in Cartel Investigation

- 1. This day, successful economic development of the countries in the world directly depends on availability and implementation efficiency of the national competition legislation. However, under the conditions when the trading policy, due to the functioning of the World Trade Organization, left the competition policy behind and taking into consideration certain difficulties, which arise from unilateral enforcement of the competition law limited to the national jurisdiction, the establishment of cooperation in the area of competition policy becomes of particular importance.
- 2. The Antimonopoly Committee of Ukraine is committed to using in the proceedings various instruments of international cooperation on the matters of competition. Depending on the specific objectives, all these instruments belong to the following areas.

2. Development of bilateral cooperation with foreign competition authorities on voluntary grounds

- 3. The experience of such cooperation is highly valued by experts, in particular, the principle of positive comity which has recently been put to the foundation of international cooperation in the area of competition, is deemed to show more promise in order to ensure interaction and mitigate the tension between the trading policy and the competition policy compared to the other forms of cooperation.
- 4. In 2011, international treaty framework of the AMCU's bilateral cooperation in the area of competition policy is formed by <u>4 intergovernmental agreements</u> (with Russia, Armenia, Azerbaijan and Georgia) and <u>11 inter-agency agreements</u> (with Austria, Belarus, Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia, Hungary, Czech Republic and Switzerland).
- 5. In evaluation of the AMCU's bilateral agreements on cooperation in the area of competition policy in their entirety, attention shall be drawn to 3 important factors as follows:
 - Firstly, it is a bilateral basis that enables the best consideration of the interests of each party and provides versatile instruments of their complete implementation.
 - Secondly, such cooperation is provided on voluntary grounds and based on the principle of sovereignty of the parties by taking into account the actual degree of their economic and political integration.
 - Thirdly, the instruments of bilateral cooperation contain accessible for the parties and feasible interaction procedures in relation to prevention and termination of transnational anti-competitive practices and providing control of economic concentration, when the national economic interests of the member states are at stake.

- 6. We should note that in drafting of the said bilateral documents we managed, in our opinion, to achieve the utmost consideration of the said 3 factors. They are oriented towards achievement of several mutually related specific objectives that is to say, harmonization of competitive laws of the parties, provision of the instruments for interaction in relation to prevention and termination of practices having negative impact on competition in markets of the parties and provision of conditions for efficient functioning of the parties' commodity markets.
- 7. The intergovernmental bilateral agreements of the Committee provide for both traditional and new ways and methods for achievement of the objectives specified therein. The traditional forms should include sharing of experience, information, holding of expert consultations. That being said, they specify the approaches towards cooperation, which are based on the principle of positive comity. This principle, known worldwide in international cooperation practices in the area of competition policy, finds increasingly broader application in the international legal documents, which govern the relations between the member countries of the Commonwealth of Independent States. The principles of positive comity essentially means that one of the parties is able to apply to the other party with a request to initiate or expand of actions intended against anti-competitive practices that exist in the territory of such Party and affects important interests of the applying Party. That being the case, taking the relevant action is voluntary. In addition, the applying Party, also reserves the right to initiate or reinstate own law enforcement procedures.
- 8. In all 4 intergovernmental agreements, the principle of positive comity is implemented via such forms of bilateral interaction as sending notices on behavior, which would have a negative impact on competition and joint investigations in certain sectors of the economy, if they show indications of behavior, which negatively impact the competition.
- 9. The <u>inter-agency agreements</u> provide for information exchange, internship, training visits, organization of common events, such as conferences, workshops, round tables, and the like. One of the key provisions of such agreements is sharing information by the parties on cases investigation in relation to violations of competitive laws. Nevertheless, we should note that the interaction under those agreements has been so far limited to general information exchange and holding of conferences, workshops and the like.
- 10. In addition to the said agreements, bilateral cooperation mostly takes the form of joint informal training sessions with some countries, without the framework documents. The most active cooperation is conducted with the USA taking into consideration the long-term relations with the experts at the Federal Trade Commission of the USA.
- 11. An important instrument of the AMCU's international co-operation is its participation in the implementation of <u>multilateral international agreement</u> on cooperation in the field of competition: the Agreement on Conducting Coordinated Antimonopoly Policy of the CIS Member States.
- 12. This day, the said Agreement, the original wording of which was revised in 2000, is a document, built on the modern conceptual framework. The Agreement takes into consideration the relevant OECD recommendations, the provisions of the UN Set of Principles on Competition, experience and approaches of the countries with well-settled market traditions. The objective of the Agreement is to facilitate the establishment of conditions for successful social and economic development of the member states, formation of full-fledged market relations among the CIS countries based on the principles of fair competition, improvement of the competition culture, convergence of national laws in the area of competition protection.

- 13. The Agreement contains the specific procedure of interaction of the Parties in order to prevent and terminate transnational anti-competitive practices and provide control of economic concentration, where the national economic interests of the parties are at stake. The application of such procedure makes it possible to improve efficiency of economic competition protection in the territory of the Agreement's member states and facilitates termination of competition distortion in the cases, which go beyond the jurisdiction of the national antimonopoly legislation.
- 14. For implementation of the multilateral Agreement on Conducting Coordinated Antimonopoly Policy and on its basis, the Intergovernmental Council on Antimonopoly Policy (ICAP) was set up as early as in 1993. Since the formation of the ICAP, 35 meetings have been held. The experience gained in the 20 years of proceedings of the Intergovernmental Council on Antimonopoly Policy is seen as extremely important, as it provides the conditions for systematic expert information sharing between the antimonopoly agencies of the CIS countries, thus providing development of agreed principles of competition policy, the capability of forming comprehensive mutual understanding and prompt resolution of possibly problematic situations.
- 15. In May 2006, the Headquarters on joint investigations of violations of the antimonopoly legislation in the CIS member states was established within the framework of the said Agreement for the purposes of joint investigations in certain markets within the CIS in order to detect and terminate the transnational anti-competitive practices.
- 16. The task forces are set up in the Headquarters for market research of passenger air transportation, telecommunications, electric power engineering, grain, retail chains and some others. Based on the findings of the said research, the Headquarters prepares analytical reports in relation to the situation of competition in the said markets of the CIS member states and propositions in relation to improvement of the relevant antimonopoly regulation.
- 17. It is important to note that at the initiative of Ukraine, a task force on cartel investigation was also set up within the proceedings of the Headquarters. With a view to specifying the capacity of the CIS member states in relation to joint investigations in the said area, the task force based on specially designed questionnaire examined the provisions of the national laws and practices relevant to cooperation in cartel investigations.
- 18. Two objectives were set for the examination. Firstly, to look into the level of compliance in the approaches towards the legal regulation of the institution of concerted action by business entities in the laws of the member states as this is important to specify those types of concerted action and the assessment criteria of their wrongfulness or lawfulness, which would serve as the basis of joint investigations. Such compliance to the extent of substantive provisions of the law considerably determines the capacities and success of cooperation between the competition authorities in cartel investigation in 2 or more CIS countries. Secondly, to compare the laws and practices that were deemed to be required in order to determine the degree of readiness for holding of joint investigations and detection of possible problems, which would lower the efficiency of such investigation.
- 19. The specification of specific features of the national treatment in the legal regulation of concerted action also became an important factor of the examination. In their entirety, the results of the examination demonstrated availability of sufficient legal prerequisites to cooperation of the CIS member states in investigation of many types of violations manifested as anti-competitive concerted action.
- 20. That being said, we should note that a number of important aspects, which would affect the efficiency of prospective cooperation, were identified in the course of the examination.

- 21. The first aspect is institutional, that is to say, the matters pertaining to government authorities, interaction with which will be required in cartel investigation. In some cases, investigation of anti-competitive concerted action in the CIS countries is included completely in the competence of the competition authorities (Armenia, Ukraine), while the others distribute the competence among several government authorities. By way of example, in the Russian Federation some functions in the area of combating anti-competitive concerted action, at a stage of decision making and application of penalties are assigned to courts within the framework of administrative and criminal processes; in Kazakhstan these may include the antimonopoly authority, the Ministry of Interior, the prosecution and the court. Therefore, parallel or mutually exclusive competence of 2 or more national authorities in investigation of anti-competitive concerted action might lead to certain specifics in the interaction pattern at the international level.
- 22. Liability is also an important aspect. By way of example, where, along with the administrative responsibility of legal entities to be determined, as a rule, by the competition authorities, certain national treatment provides for criminal responsibility of individuals pertaining to the competence of the Ministry of Interior, the prosecution and the court, the problem of institutional interaction would re-appear. If we imagine a situation that a business entity applies to competition authorities of one country and furnishes information on cartel in hopes for amnesty and such cartel affects the interests of another country, which would also initiate an investigation, should the former country take such surrender into consideration? Where the business entity has no guarantees, they would hardly so surrender even in a single country. A conclusion is that taking into consideration the necessity to interact at various stages of cartel investigation, such interaction shall always go beyond the level of anti-monopoly authorities.
- 23. The problem of information exchange undoubtedly remains a key aspect efficient of international co-operation in cartel investigations. Even at a stage of preliminary inquiry into possible violations, risks and problems arise in relation to obtaining and sharing of information on detection (suspicion) of cartel and the intents in relation to initiate an investigation on the part of every country. At that stage, information on the market structure, its participants and their possibly anti-competitive behavior may be needed, evaluation of the concerted action type in light of the impact on the interests of other countries shall also be provided, and the coordinated strategy of investigation, the instruments of evidence gathering and the like shall be determined.
- 24. Based on the aforesaid, Ukraine proposed to put to discussion at the ICAP the capacity to govern expert information sharing by drafting a special international agreement on interaction of the competitive authorities of the CIS in the area of information exchange. In particular, such agreement would provide for an instrument of information exchange on requests of the competition authorities of the CIS, types of information and scopes of its disclosure, requirements in relation to ensuring the storage of the received information and responsibility for its unauthorized disclosure. That being the case, the agreement, in compliance with the requirements laid down in the national laws, shall have the status of international regulatory act, binding in the territory of the CIS member states.
- 25. The Agreement on Conducting Coordinated Antimonopoly Policy dd. 25 January 2000 establishes the opportunity of information exchange. However, the agreement specifies only the general provisions, which pertain to information, which can be shared among the competition authorities.
- 26. Therefore, a decision was made to compile a list of information, which the authorities would be able to share. Such information can be classified as general or pertaining to specific investigation. In particular, general information might include the results of market analysis, information in relation to court decisions on cases with the participation of competition authorities, information in relation to commencement of proceedings on violations of competitive laws, and the like. Preparation of such information shall adhere to confidentiality, i.e. the information shall contain only general indicators.

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- 27. Information in relation to a specific investigation can be provided as a notice or furnished upon request. That being the case, the competition authorities, which provide such information, might set some limitations of its dissemination (degree of disclosure, publicity and the like). Within the framework of sharing in relation to a specific investigation, the competition authorities may share information in relation to the stage of investigation, application of leniency program, methods used in order to determine penalties and in relation to the time frames of the investigation.
- 28. With a view to efficiently examining the cases on violations of competitive laws, which affect the interests of several member states of the Agreement, the procedure of information exchange needs to be improved. The regulations, which form an annex to the Agreement on Conducting Coordinated Antimonopoly Policy contain a requirement that a country may refuse to provide information if such information is confidential for the purposes of their national law.
- 29. Therefore, the notion "confidential information" is likely to differ depending on their definition in the national laws of the Agreement's member states. This produces inequality in sharing of the relevant information between the competition authorities and might result in violations of reciprocity, one of the principles of international law.
- 30. Taking into consideration the above, the Antimonopoly Committee of Ukraine proposed the following amendments to the Regulations:
 - Firstly, as the notion "confidential information" is broad by contents and covers various areas of
 life and activity of a nation, the contents of confidential information, which the competition
 authorities may provide upon the relevant request of the competition authorities of another
 country, shall be specified.
 - Secondly, a condition precedent shall be set that a permit shall be obtained from the party, which
 provided the confidential information to the competition authority of the Agreement's member
 state for the investigation, to provide such information to the competition authorities of another
 country.
 - Thirdly, the relevant protection of information disclosed to another member state of the Agreement under the Regulations shall be provided.
- 31. Interaction at a stage of decision making is another important issue. In relation to every subject of violation, every nation, the interests of which are affected by the violation, shall make decision and impose penalties, proceeding from the national criteria. The examination showed that national laws may provide for penalties in the form of fines, compulsory reimbursement of damages, and/or seizure of unjust profit; in addition, some countries also set criminal responsibility. Therefore, the ratios between the applicable penalties require more consideration.
- 32. Unavoidability of punishment is extremely important element of cartel enforcement. With this in mind, provision of instruments for enforcement of decisions made by anti-monopoly authorities and courts has a significant role to play in development of cooperation in investigation of international cartels. The AMCU's examination shows unavailability of legal documents, which would provide enforcement of decisions made by anti-monopoly authorities and enforceability of the decisions made by courts on enforcement of decisions made by the anti-monopoly authorities.