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FIGHTING CORRUPTION AND PROMOTING COMPETITION

Contribution from Ukraine

-- Session I --

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FIGHTING CORRUPTION AND PROMOTING COMPETITION

-- Ukraine --

1. The application of competition law by public authorities and, in particular, anti-corruption agencies in order to stimulate competition and combat corruption

1. The legislation of Ukraine (Article 1 of the Law "On Principles of Preventing and Counteracting Corruption") finds corruption as a use by a person authorized to perform functions of state or local government (or conferred the status of these persons), or a person who permanently or temporarily hold position involving the performance of organizational-dispositive or administrative-economic functions, or a person who is specially authorized to perform such duties in private law legal entities of entrusted official authority and of opportunities associated with such authority, for the purpose of gaining illegal benefit. Also corruption means the acceptance of a promise/offer of such benefit for him/herself or for other persons. On the other hand corruption is considered a promise/offer or provision of illegal benefit to a person, or upon their demand, to other physical persons or legal entities, with the purpose of inducing such person to unlawfully use entrusted to him/her official authority and the opportunities associated with such authority.

2. Therefore, the presence of official powers and the opportunities associated with such authority is an essential element of corruption. Thus, the impact of corruption on competition should be considered in the context of institutional factors of impact on competition related to functioning primarily of state mechanisms.

3. Law of Ukraine on protection of economic competition provides the use by competition enforcement agency of specific legal instruments aimed at preventing and terminating occasions of negative effect of institutional factors on competition. In particular, Article 15 of the Law "On Protection of Economic Competition" prohibits the issue of any acts (decisions, orders, directions, enactments, etc.), the making of written or verbal instructions, the conclusion of agreements or any actions or inactivity of bodies of state power, bodies of local self-government, bodies of administrative and economic management and control (a collegiate body or an official) which resulted or can result in the prevention, elimination, restriction or distortion of competition. The relevant actions are considered as violation of the law on protection of economic competition, and competition enforcement agency, which is the Antimonopoly Committee of Ukraine (AMCU), in case of uncovering such actions must take measures to terminate them and use responsibility.

4. According to the legislation of Ukraine, violations in the form of anticompetitive actions of bodies of power, bodies of local self-government, bodies administrative and economic of management and control include, in particular, certain categories of actions that create or may create benefits and competitive advantages for the individual market participants. Such actions include:

- direct or indirect compulsion of economic entities to conclude contracts with priority, to supply primarily a certain circle of consumers with products or to purchase products primarily from a certain circle of sellers;

- the distribution of markets between economic entities according to the territorial principle, according to: the assortment of products; the volume of their sale or purchase or according to the range of consumers or sellers;
- establishment of a prohibition to sell certain products from one region of the country to another or the granting of permission to sell products from one region to another only in a certain volume or provided that certain conditions are met;
- granting of such privileges or other advantages to some economic entities or groups of economic entities that place them in a privileged position in comparison with competitors;
- such an action that results in the creation of unfavourable or discriminatory conditions of activities for certain economic entities or groups of economic entities in comparison with the relevant conditions created for competitors.

5. It should be noted that violations of this category are fairly common: in 2012 - 9 months of 2013 the Antimonopoly Committee of Ukraine detected more than 2500 of them. Analysis of cases considered by the AMCU allows to determine the two main groups of motives that induce the commission of such violations.

6. The first is not directly related to the receipt of unlawful benefit by specific individuals. Prevention, elimination, restriction or distortion of competition in these cases are caused by the desire to provide as quickly and as simply as possible solution of specific economic or social problems without considering the impact of such decisions on competition (for example, providing a certain area with various food products by prohibiting their exportation; to create conditions for rapid scale-up of production of core within designated area company by granting advantages over the competitors) , to promote local budget revenues.

7. At the same time, in certain circumstances, during the investigations of relevant cases the AMCU may have reasonable suspicion that the anticompetitive decisions, which restrict or distort competition in favor of the individual entities, are motivated by receiving unlawful advantages for certain officials, i.e. have signs of corruption. However, only an individual can be the subject of a corruption offense under the laws of Ukraine; gathering and analyzing evidences that indicates the presence of a relevant offense requires specific tools, for the use of which the Antimonopoly Committee does not have authority. Therefore, the legal way is to transfer of received during the investigation of anticompetitive actions of state bodies case materials to the relevant law enforcement agencies whose competence belongs to investigation of corruption offenses.

8. Investigations into anticompetitive concerted actions of economic entities concerning the distortion of the auctions, contests, tenders, in which customers are the executive authorities or local government bodies, are the another category of measures, which may be taken within the competence of the AMCU and which allow revealing signs of corruption. It is also a quite common category of violations detected by AMCU: about 950 violations were found in 2012 - 9 months of 2013. Thus, in some cases, officials of the contracting authority may facilitate the distortions of the competitive procurement, in particular, by artificially limiting the quantity of bidders, and to prevent the participation of entities that do not participate in bid rigging. In most cases there is a reasonable suspicion that the motive for these actions is to gain undue advantage. However, in these cases, as in the above, the AMCU doesn't have any authority to conduct investigations in regard to the commission of corruption offenses by such officials, and the legal ways to counter it is to transfer the relevant materials to the bodies authorised to fight corruption.

9. Interaction between competition protection agencies and anti-corruption agencies is not only limited to the transfer of materials, which have signs of corruption offenses, to the law enforcement authorities. During the consideration of the cases on corruption offences lastly may be revealed the signs of violations of the law on protection of economic competition in the form of anticompetitive actions of state authorities, anticompetitive bid rigging, the materials on which should be transferred to the bodies of the AMCU with the purpose of taking the measures provided by law.

2. The distribution of competences between state authorities

10. Anticompetitive practices of economic entities, abuse of dominant position, unfair competition is not only caused by corrupt motives. In this context, waiver of competition authority of solution of "traditional problems of application of competition law" actually meant the encouragement of those cases of above practices that are not directly motivated by the desire of officials to obtain undue advantage. In addition, as noted above, the investigation of violations of the law on protection of economic competition committed by entities, generally by legal entities, and do not entail criminal liability of individuals, and corruption offenses, which are subject only to individuals and which, in some cases, are criminal in nature, provides differ tools and instruments of investigation and proof.

11. In this regard, in accordance with the laws of Ukraine, the Antimonopoly Committee of Ukraine in an authority, whose task belongs to prevent, detect and deter violations of the law on protection of economic competition, and specifically authorized entities in combating corruption that are directly take measures within their competence for the detection, termination and investigation of corruption offenses – prosecution authorities, special organized crime divisions of the Ministry of Internal Affairs of Ukraine, special anti-corruption and organized crime units of the Security Service of Ukraine.

3. Bid rigging

12. First, as noted above, not all the cases on anticompetitive concerted actions of bidders have a component of corruption. Second, in cases where the distortion of tenders is also associated with corruptly motivated behavior of officials of the contracting authority, it provides at least facilitation of tender distortion on the part of bidders. In this regard, the threat of prosecution for horizontal anticompetitive concerted actions will be as an additional factor of deterring the use of corrupt practices in the relationship with the contracting authority during the tender.

4. Monopoly rent

13. Monopoly rent is one of the essential conditions that create the possibility of using corruption mechanisms in the relationship between the business community and government. However, in order for businesses to be prepared to bear the costs of corruption, it is necessary for them to have motives for that. If a large market share, which allows to obtain monopoly rent, is the result of objective economic mechanisms (for an electricity supplier – primarily the economies of scale), not related to the influence of institutional factors, the relevant entity does not have any motives to spend a part of the monopoly profits for bribery. These incentives arise only if the additional profit depends upon institutional factors, for example, tariff regulation, regulation of access to its services, the parameters of their services quality, control over compliance with established rules by energy supplier, complaints on its performance and so on. However, in this case, the contrast between "limitations of monopoly rent" and "combating corruption" is incorrect. A prerequisite for obtaining additional monopoly rent is exercising corrupt practices to obtain opportunities to affect these mechanisms of state regulation of economic relations. Therefore, combating corruption is an essential and necessary part of the elimination of institutional factors, which increase the monopoly power of the entity and create opportunities for him to abuse it. Without it the effectiveness of measures to limit or eliminate the monopoly position of the entity may be extremely low.

5. Extraterritorial application of national legislation

14. Generally, adopted in Ukraine legal doctrine does not provide for automatic extraterritorial application of neither national legislation of Ukraine, nor legislations of other jurisdictions, nor the legislations of other jurisdictions in the territory of Ukraine.

15. However, the use of harmonized rules that govern various aspects of public relations is possible on the basis of international legal acts and voluntary desire of national jurisdictions for providing such harmonization.

16. Harmonization is possible and desirable in regard to legislation on protection of economic competition, because, despite the differences in national traditions and cultures, economic phenomena regulated by its rules have an objective character and unique nature. The trend towards the harmonization of legislation on protection of economic competition and practice at this time is commonly used in the world and is both under the aegis of the international (UNCTAD, ICN) and regional organizations. Competition law of Ukraine as reported by international experts on the basis, in particular, of the OECD 2008 and UNCTAD 2013 reviews, is largely harmonized with the EU legislation.

6. Anticorruption measures

17. Primarily fight corruption in the AMCU is ensured through the system of general anti-corruption measures provided by the laws of Ukraine on combating corruption. Such measures include, in particular, limitations on use of official position, limitations on plurality of offices and on engaging in other types of activity, limitations on acceptance of gifts (donations), limitations on employment of close persons, limitations concerning persons who quit their position or terminated the activities associated with the performance of state and local government functions, implementation of codes of conduct, adjustment of claims concerning settlement of conflict of interests, anti-corruptive expert examination of normative-legal acts, compliance of the requirements for the transparency of information, ban on acceptance of services and property by state authorities and local government bodies.

18. However, a number of procedural rules, which regulate the preparation and adoption of decisions of the AMCU bodies, is directed to prevent corruption.

19. First, these rules are aimed at ensuring the principle of collective decision-making. They lie in the fact that all decisions related to prosecution for the violation of the law on protection of economic competition, providing mergers permissions, concerted actions of economic entities, giving preliminary conclusions and conclusions on the qualification of actions shall be carried out solely on the collegiate basis, by the administrative boards of the AMCU and its territorial branches formed of at least three people. Second, rules that ensure openness and transparency of the decision-making of the AMCU bodies are aimed at preventing corruption. Parties in the cases of violation of the law on protection of economic competition, other persons, whose rights and interests may be substantially affected, acquire equal rights to inspect the case materials (with the exception of restricted access information and information whose disclosure can infringe the interests of other persons or can hinder the further consideration of the case), to provide evidence, to submit applications, verbal and written explanations (objections), to receive copies of decisions on the case. The obligatory element of the case is the preparation and submission of preliminary findings for the parties of the case, and they have a right to make objections. Third, in order to prevent corruption during the decision-making of the AMCU bodies the rules for judicial control over any of their decisions are provided. At the same time, the facilities of public control of the activities of the AMCU have the anti-corruption nature, which are extensively introduced in recent times.