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COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION PROVISIONS IN TRADE AGREEMENTS – Contribution
from Ukraine****- Session II -****5 December 2019**

This contribution is submitted by Ukraine under Session II of the Global Forum on Competition to be held on 5-6 December 2019.

More documentation related to this discussion can be found at: oe.cd/cpta.

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Competition Provisions in Trade Agreements

- Contribution from Ukraine -

1. Trade Agreements of Ukraine

1. The Law of Ukraine “On international agreements of Ukraine” (“the Law”) distinguishes three categories of international agreements (depending on their scope, character and internal procedures required for signing, ratification and entering into force):

- interstate;
- intergovernmental;
- interagency.

2. Generally, all Ukrainian international trade agreements (“TA”) are interstate ones (they are concluded on behalf of Ukraine as a state). Since international agreements with wide economic scope are subject to ratification by the Ukrainian Parliament, TAs fall under this procedure as well.

3. Therefore, the moment of TA’s entering into force depends on its final provisions and/or the date of its ratification by the Parliament of Ukraine and/or accession by the other parties of the treaty in question (for instance, the Ukraine-Belarus Free Trade Agreement was signed in 1992 but entered into force only in 2006).

2. Objectives and Classification of Competition Provisions in TAs

4. Due to the fact that fair competition is one of the milestones of market economy and economic growth, almost all TAs in force, to which Ukraine is a party (over 15) include provisions concerning competition issues. TAs with competition provisions (“TACP”) can be divided into two groups:

- General provisions stating that unfair or anti-competitive business practices are incompatible with the TACP;
- More detailed provisions addressing wider range of competition-related issues.
- Nearly 10 of the Ukrainian TAs consist of general competition-related provisions, which are usually phrased as follows:

“The Contracting Parties shall recognize unfair business practices as being incompatible with the purposes of the present Agreement and shall undertake not to resort, in particular, but not exclusively, to such of their methods:

agreements between enterprises, decisions made by associations of enterprises, as well as joint methods of business practices that aim to hinder or restrict competition or violate the terms for it on the territories of the Contracting Parties;

actions by which one or several enterprises use their dominating status, restricting competition on the entire or a substantial part of the Contracting Parties’ territories”.

5. There are also 5 TACPs in force that have more detailed provisions on competition, namely:

- Free Trade Agreement between the Government of Ukraine and the Government of Montenegro, 2011 (MUFTA);
- Agreement on free trade between the Republic of Macedonia (the Republic of North Macedonia) and Ukraine, 2001 (UMFTA);
- The Agreement on free trade between Ukraine and the states of EFTA (Switzerland, Norway, Iceland and Liechtenstein), 2010 (Ukraine-EFTA FTA);
- Canada – Ukraine Free Trade Agreement, 2016 (CUFTA); and
- Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part, 2014 (EU – Ukraine AA).

6. There is also the Free Trade Agreement between Ukraine and Israel, which was ratified by the Ukrainian Parliament in July, 2019 but has not been ratified by Israel yet.

2.1. The Agreement on free trade between the Government of Ukraine and the Government of Montenegro (“MUFTA”)

7. Annex V (Telecommunications Services) of MUFTA provides for the special rules for the major suppliers in telecom sector. For instance, it has the definition of *major supplier* as a supplier (or a group of suppliers) which *has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for telecommunication services as a result of control over essential facilities or the use of its position in the market.*

8. Article 2 of this Annex states that both Ukraine and Montenegro shall take appropriate measures to prevent potential anticompetitive practices by major suppliers and provides the list of such practices, namely:

- engaging in anti-competitive cross-subsidization;
- the use of information obtained from competitors for anti-competitive purposes; and
- refusal to provide technical information about essential facilities and commercially relevant information to other service suppliers on a timely basis in cases when such information is necessary for them to provide their services.

9. The impact of MUFTA on competition is limited and refers to telecom services only, its main rule is for major suppliers *not to distort competition*. Thus, MUFTA sets forth competition enforcement principles in the telecommunication services sector.

10. The competition provisions are also established in Annex V of the MUFTA, which regulates the sector of post and delivery services.

2.2. Free Trade Agreement between Ukraine and the Republic of Macedonia (the Republic of North Macedonia, “UMFTA”)

11. Except for general rules, UMFTA establishes the procedure of dispute settlement if either Party to the Agreement takes measures that are incompatible with the competition principles set forth in Article 26 (1). Article 22 contains rules of application of safeguard measures: *“As regards Article 26 (Rules of Competition Between Undertakings. State Aid) the Contracting Party concerned shall provide the Joint Committee with the assistance required in order to examine the case and, where appropriate, to put an end to the practice objected to. If the other Contracting Party fails to put an end to the practice objected to within the period of time established by the Joint Committee, or if the Joint Committee fails to reach an agreement on the matter within the period of thirty working days, being referred to it, the Party concerned may take appropriate measures to deal with the difficulties resulting from the practice in question.”*

12. UMFTA also requires the transparency of state aid measures, inter alia by sending a report on all the state aid measures taken to the Joint Committee. UMFTA provides for competition enforcement principles as well as for cooperation and coordination mechanisms between the signatory jurisdictions.

2.3. The Agreement on free trade between Ukraine and the states of EFTA (Switzerland, Norway, Iceland and Liechtenstein, “Ukraine – EFTA FTA”)

13. This TACP provides for principles of competition enforcement, cooperation and consultation between the Parties aimed at of putting an end to possible anticompetitive practices. Such cooperation may be carried out by the exchange of information between the Parties’ competition authorities.

2.4. Canada – Ukraine Free Trade Agreement (“CUFTA”)

14. A separate chapter of CUFTA is devoted to competition issues, monopolies and state enterprises. The Article 9.2 provides for:

- Discussion on the effectiveness of measures undertaken by parties to proscribe anticompetitive business conduct;
- Competition enforcement principles of transparency, non-discrimination and procedural fairness.
- Cooperation between competition agencies of Ukraine and Canada in the form of information exchange with the aim of putting an end to possible anticompetitive practices.
- According to Article 9.3 each Party shall notify the other Party in writing on identification of a monopoly if this designation may affect the interests of a person of the other Party. Article 9.4 set forth rules concerning state enterprises on non-discriminatory treatment in the sale of the state enterprise’s good or service to an enterprise in the Party’s territory.

3. Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part (“EU – Ukraine AA”)

15. In 2014, Ukraine has declared the EU integration as a national strategic policy. In order to bring the Ukrainian legislation in conformity with EU *acquis*, Ukraine has concluded the EU-Ukraine Association Agreement.

EU – Ukraine AA has Chapter 10 “Competition” which consists of 2 Sections, namely:

- Section 1 “Antitrust and mergers”;
- Section 2 “State Aid”.

16. Antimonopoly Committee of Ukraine (“the AMCU”) is responsible for implementation of Chapter 10 provisions which include numerous obligations for Ukrainian side (e.g. to launch the state aid monitoring and control system, to draft and adopt a list of amendments to Ukrainian legislation in the spheres of antitrust and state aid etc.), most of them have already been implemented while the others await implementation in the nearest years.

17. There is also a permanent obligation for Ukraine to submit annual state aid reports to the European Commission. This TACP has the greatest impact on legislation and enforcement not only of competition policy but on a wide range of trade-related issues as well.

18. As a result, EU – Ukraine AA has deeply affected establishment and improvement of the Ukrainian competition framework.

4. Role of the AMCU

19. Although the state body responsible for bi- and multilateral negotiations in the sphere of TA is the Ministry of Economic Development, Trade and Agriculture of Ukraine (MEDTA), the AMCU is always involved in such negotiations if a draft trade agreement contains provisions relating to competition. AMCU involvement in the process may have two forms:

- the AMCU’s representatives taking part in such negotiations as members of the official delegation of Ukraine; and
- the AMCU drafting amendments or observations to the text of the draft TACP during the course of Ukrainian internal prior negotiations.

20. The AMCU plays a major part in the implementation of the EU – Ukraine AA. For instance, it is responsible for drafting national competition and state aid laws in pursuance of the EU – Ukraine AA. Ukraine has already implemented Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Article 30), Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices and Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.

21. Regarding the state aid, Ukraine adopted the Law on State Aid to Undertakings, which is to be amended, with draft amendments being under preparation by the AMCU. Furthermore, Criteria for assessing the compatibility of state aid in a number of sectors have already been adopted. In cases which are not sufficiently addressed by the national laws AMCU directly applies principles of *acquis communautaire* on the basis of Article 264 of the EU – Ukraine AA.