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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/independent-sector-regulators.htm>

Please contact Mr Chris PIKE if you have any questions about this document
[Email: Chris.Pike@oecd.org]

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Ukraine

1. Introduction

1. Competition authorities are the driving force of the countries' economic competition protection systems. Therefore, the efficiency of these systems largely depend on the effectiveness of the competition authorities' activities and interaction with the independent sector regulators.

2. Sector regulators, in the process of fulfilling their mission, should interact with competition authorities, mostly by conducting mutual exchange of information on the regulated markets in order to tackle any possible competition-related issues promptly.

3. In Ukraine, there are numerous regulators in a wide sense of this term. For example, the Ministry of Healthcare of Ukraine may be considered as regulator in the market of public procurement of medicines since it regulates numerous technical aspects for the medicines tenders, and the list of this kind of regulators in Ukraine is excessively long. But it becomes much more shorter when we talk about independent regulators.

4. While there is no universally accepted definition of an independent regulator, usually those public authorities are defined by the following list of characteristics:

- Special status in the system of state power (provided for by the dedicated law or even the Constitution);
- Independency in decision-making (from the President, the Government, the Parliament and the regulated markets);
- Different sources of funding (the State budget, fees for the certain services provided etc.) with the long-term planning and independency in allocation of the budget;
- Collegiate form of management and decision-making;
- Special procedure for the appointment/withdrawal of the top management (stipulated by the dedicated law or even the Constitution) etc.

5. In Ukraine, the list of independent regulators (according to the definition above) is comparatively short. It includes the following public authorities:

- The National Energy and Utilities Regulatory Commission – regulator of the energy and utilities sector;
- The National Bank of Ukraine – regulator of the banking and currency exchange sector;
- The National Commission for the State Regulation of Communications and Informatization – regulator of the telecommunications sector;
- The National Securities and Stock Market Commission – regulator of the securities and stock markets.

6. The Law of Ukraine “On natural monopolies” provides for the creation of the transportations sector regulator, but despite the AMCU's constant advocacy efforts aimed at creation of this regulator, it has not been created yet due to certain reasons. We would

like to elaborate on those reasons together with the AMCU's relationships with the National Energy and Utilities Regulatory Commission, the National Bank of Ukraine.

2. The National Energy and Utilities Regulatory Commission

7. The National Energy and Utilities Regulatory Commission of Ukraine (the NEURC) was established by Decree of the President of Ukraine on August 27th, 2014 and substituted 2 previous regulators in the energy and utilities sector. Then, the Ukrainian Parliament has adopted a dedicated law on September 22nd, 2016 which became effective on August 26th, 2016.

8. The NEURC consists of the Chairman and 6 Commissioners with the 6 years term of office. The special provisional commission (consisting of 5 members among whom 2 are delegated by the President, 2 by the Parliament and 1 by the Government) appoints them on a competitive basis.

9. It is obvious, that healthy and effective functioning of the energy and utilities markets requires close cooperation of the AMCU and the NEURC in order to prevent competition distortions and to ensure the effective monitoring of these markets, as provided for in Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (Remit).

10. The Regulation states "National regulatory authorities, competent financial authorities and the national competition authority in a Member State may establish appropriate forms of cooperation in order to ensure effective and efficient investigation and enforcement and to contribute to a coherent and consistent approach to investigation, judicial proceedings and to the enforcement of this Regulation and relevant financial and competition law".

11. In pursuance of the Law of Ukraine "On the Electricity Market", Ukraine launched the liberalized model of the electricity market in July 2019.

12. Moreover, in accordance with paragraph 10 of Article 6 of the Law of Ukraine "On the Electricity Market", the Regulator has the responsibilities to monitor:

- functioning of the electricity market and its segments;
- the level and effectiveness of the electricity market liberalization, transparency and competition in the electricity market (including prices under bilateral agreements and prices in the organized market segments, prices for the household consumers, including the practice of applying the advance payment terms), indicators of the electricity supplier changes, the practice of disconnection of consumers from the power supply, level of prices and quality of maintenance works, consumer complaints (including complaints of the household consumers), as well as any practices that lead to distortion or restriction of competition in the electricity market;

13. Pursuant to paragraph 13 of Article 13 of the Law of Ukraine "On the Electricity Market", the electricity market Regulator shall inform the AMCU of the facts that may be considered as violation of the legislation on protection of economic competition by participants of the market or any actions of the market participants that distort or restrict competition. The AMCU, in turn, shall take certain measures when such information is received from the Regulator.

14. Today, the electric energy generation market operates in conditions of significant concentration, in which the combined share of 5 companies constitutes more than 90 percent of the country's electricity generation. This market structure creates the prerequisites for possible abuse of market power in the new model of the electricity market e.g. by establishing monopolistically high prices for electricity or artificially creating a deficit that may result in an increase in prices for electricity.

15. Therefore, prompt identification of signs of violations of the legislation on protection of economic competition in the new electricity market model requires close cooperation of the AMCU with the Regulator, but in practice this cooperation is not always fruitful enough.

16. Thus, the full implementation of the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) remains an important priority, which shall resolved such issues as sanctions against price manipulation and anticompetitive agreements of the market participants.

17. Therefore, the AMCU plans to take all the possible measures within its competence in order to implement REMIT in the Ukrainian legislation. It will provide the AMCU with the possibility to conduct monitoring of the electricity markets in a more efficient way, especially when it comes to analysis of activities of the players with significant market power. It will allow the AMCU to identify signs of violations of the legislation on the protection of economic competition shortly after they were committed and even to prevent them.

3. The National Bank of Ukraine

18. The National Bank of Ukraine (the NBU) is special governmental body of Ukraine with its legal status, mission, functions, powers and principles of organization determined by the Constitution of Ukraine and a dedicated law. The NBU regulates the banking sector and policy of the Ukrainian national currency (UAH). The National Bank is accountable to the President and the Parliament of Ukraine.

19. The Chairman of the National Bank is appointed by the Parliament of Ukraine on the proposal of the President of Ukraine for a term of 7 years, the same legal procedure is also applied in order to remove the Chairman from his/her position.

20. The National Bank also has a Council - a collegiate body that develops the basic principles of monetary policy and exercises control over its implementation. It consists of members appointed by Parliament and the President (4 members to be appointed by each). The Chairman of the National Bank is a member of the Council of the National Bank ex officio. The President of Ukraine and the Parliament shall may remove the members of the Council appointed by them by adopting an appropriate decision with identification of grounds for such dismissal.

21. Management of the National Bank is carried out by the Board - a collegiate body consisting of six people: the Chairman of the National Bank, the First Deputy and four Deputies of the Chairman.

22. The AMCU has a history of fruitful cooperation with the NBU, mainly through exchange of information and conduction of joint working meetings aimed at tackling any possible competition-related issues.

23. Despite the fact that the AMCU's right to address binding recommendations to public authorities is not applicable to the NBU (due to its special legal status), in cases where the NBU's actions restrict or harm economic competition, the AMCU exercises its right to provide the NBU with proposals to refrain from this kind of actions.

4. Regulator of the Transportation Sector

24. The Law of Ukraine "On Natural Monopolies" provides for the creation of regulators in the markets where natural monopolies operate. In pursuance of the Law, regulators were created in such sectors as telecommunications and energy/utilities, while the transportation sector still lacks its regulator.

25. The Antimonopoly Committee of Ukraine is constantly emphasizing the necessity of creating the transport regulator as soon as possible. The AMCU has even provided suggestions and comments relating to the functions and competence of this authority in the drafts of relevant legislation submitted for approval to the AMCU.

26. The Ministry of Infrastructure of Ukraine performs the transport regulator's functions now and is not interested in creating such a body and transferring a part of its functions to it. The reason is that the Ministry is trying to increase the profitability of the SOEs in the transportation sector, which are currently under the Ministry's control.

27. Naturally, the Ministry is not interested in the emergence of real competitors for those enterprises, because it would probably lower profitability of those SOEs and force them to reduce the price of services, streamline the costs, optimize the structure etc. In fact, the Ministry's intention to increase the profitability of the transport SOEs results in a constant increase in price of the services provided by them.

28. The development of competition in the transport sector requires appropriate regulation of the market participants' activities by conducting constant monitoring, analysis and predicting the state of development of these markets, imposing certain obligations on undertakings operating in monopolized markets or easing/withdrawing obligations when the market becomes competitive.

29. The transport regulator's main functions are:

- determination of the feasibility and methods of the transportations markets' regulation;
- ensuring stable and non-discriminatory regulation, primarily in the field of tariff/pricing policy;
- formation of equal relations between the natural monopolies and consumers of their services;
- ensuring the development of competition in transportations markets.

30. Therefore, the creation of a regulator in the field of transport is an important step for the balancing the interests of the State, natural monopolies and consumers.

5. Conclusion

31. Analysis of the world's best experience and practice shows that the function of market analysis shall be attributed to sector regulators, while clear delimitation of this function between them and competition authorities should also be in place.

32. Thus, EU acquis comprise the principles, according to which national regulatory authorities shall analyze the relevant markets (if necessary, this analysis shall be carried out in close cooperation with national competition authorities) and determine whether those markets are effectively competitive, identify undertakings with significant market power and assign/withdraw corresponding obligations on them. Moreover, effective and timely identification of competition-related issues in regulated markets is almost impossible for competition authorities in the absence of relevant information received from regulators.

33. Therefore, competition authorities and regulators should actively exchange information and work shoulder-to-shoulder in order to establish the level playing field and promote competition in regulated markets, ensure the balance of powers between natural monopolies and their consumers. Only this synergy may bring efficiency and competition to regulated markets.