

**Unclassified****English - Or. English****30 October 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by  
Ukraine**

4 December 2019

This document reproduces a written contribution from Ukraine submitted for Item 4 of the 130th OECD Working Party 3 meeting on 2-3 December 2019.  
More documents related to this discussion can be found at  
[www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm](http://www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm)

Please contact Ms Despina PACHNOU if you have any questions about this document  
[Despina.Pachnou@oecd.org, +(33-1) 45 24 95 25]

**JT03453801**

## *Ukraine*

1. The Antimonopoly Committee of Ukraine (the AMCU) is a Ukrainian national competition authority with the special status (which is set forth in the Constitution of Ukraine) which was established for the purposes of state protection of economic competition between undertakings and in the area of public procurement.

2. The AMCU exercises its powers under the Constitution of Ukraine, the Laws of Ukraine “On the Antimonopoly Committee of Ukraine” (the AMCU Law), “On Protection of Economic Competition” (LPEC), “On Protection against Unfair Competition” (LPAUF), “On State Aid to Economic Entities” (State Aid Law) and other relevant laws and regulations.

3. In accordance with Article 3 of the AMCU Law, the main tasks of the AMCU are to participate in the formation and implementation of competition policy, in particular:

1. Implementation of state control over compliance with competition laws legislation on the protection of economic competition on the basis of equality of economic entities before the law and the priority of consumer rights, prevention, detection and termination of violations of legislation on the protection of economic competition;
  2. Control over mergers, coordinated actions of business entities and compliance with the requirements of economic competition protection laws during the regulation of prices (tariffs) for goods produced (sold) by natural monopolists;
  3. Promotion of fair competition;
  4. Methodological support for the application of economic competition protection laws;
  5. Control over creation of a competitive environment and protection of competition in the field of public procurement;
  6. Monitoring of state aid to economic entities and monitoring the admissibility of such aid for competition.
4. In accordance with Article 7 (1) of the AMCU Law, in the field of control over compliance with competition laws, the AMCU has the authority to consider and investigate complaints and cases of antitrust infringements. In doing so, as well as in conducting inspections and in other cases specified for by law the AMCU has the authority to require information (including restricted access information and bank secrets) from economic entities, associations, state and municipal authorities, their officials and officers, other individuals and legal entities.

### **1. Access to the case file**

5. According to the LPEC, parties have a right to access to the case files and materials (except for information with restricted access, as well as for information, disclosure of which is capable of affecting interests of other case participants, or affecting further investigation of the case). Under the Rules Applicable to Proceedings on Applications and Cases on violations of Legislation on Protection of Economic Competition (Rules of

Proceedings) dated 19 April 1994, access to the case files is granted only after the parties received a copy of a statement of objections in the case.

6. The law does not restrict access to the case file after the case is closed which in principle becomes publicly available (except for the confidential information) as a part of a broader general right of access to public information.

7. The parties to the AMCU case access the file (its non-confidential part) in the AMCU's premises and may photocopy such documents. Under the Law "On Access to Public Information" (the APIL) requested information can be sent via e-mail. At the same time, if the information request requires hard copies documents exceeding 10 pages a person who requests the documents shall reimburse the cost of copying and printing of the copies.

8. Under the APIL, a decision of a public authority to deny full access to information or a failure to provide such access is appealable to the head of the authority in question, or a higher authority, if applicable, or to the Human Rights Commissioner (Ombudsman), or to a court.

9. At the same time, the AMCU Law provides safeguards for non-disclosure of information with restricted access and bank secrecy received by the AMCU.

10. In particular, under Article 22<sup>1</sup> (3)-(4) of the AMCU Law, restricted information received by the AMCU and its regional offices in the course of exercising their powers shall be used solely for the purpose of ensuring the fulfillment of the AMCU tasks specified by the economic competition protection laws and is not subject to disclosure. Such information may be provided to the investigating authorities and the court in accordance with the law.

11. As a matter of law, the AMCU officers bear legal liability (administrative and criminal) for unauthorized disclosure of commercial secrets.

12. In accordance with Article 31 (6) of the LPEC, the AMCU decisions in antitrust cases are published on the official AMCU website within 10 working days as of the day of their adoption, except for the information with restricted access which shall be excluded or otherwise altered to ensure its sufficient protection and, on the other hand, sufficient transparency regarding the reasoning of the decision.

## 2. Protection of confidential information

13. The Law "On Information" (Article 21 (1)-(2)) divides all types of restricted access information into confidential, strictly confidential and internal official information. At the same time, under APIA restricted access information includes 1) *secret information* (i.e. legally classified information disclosure of which is capable of damaging persons, society, or the state); and 2) information for *internal official use* only (which was received or created by a government agency in course of its activities and precedes adoption of a decision in a case); 3) *confidential information* (information possessed, used and managed by private persons that may be disclosed at their discretion and according to their conditions); confidential information includes, inter alia, commercial (trade) secrets (i.e., information of commercial value which is not in public domain or readily available to persons who usually deal with this type of information, and with regard to which adequate measures were taken to protect its secrecy).

14. A separate law protects personal data.

15. The AMCU treats as that for internal official use only any documented information that was created or received by the AMCU or its regional offices in process of investigation of merger applications and cases; antitrust complaints (cases), the disclosure of which is potentially detrimental to the interests of the state, case participants, or would prevent further proceedings of the case; information contained in the documents which constitute internal AMCU correspondence and which relate to the decision-making process and precede public discussion and/or passing a decision.

16. Restrictions on access to the official information are also related to the interests of national security, reputation protection and the rights of others, in order to prevent the disclosure of information received by the AMCU in a "confidential" mode, since disclosure of such information may seriously harm those interests, and a harm caused by the disclosure of such information would override the public interest in its disclosure.

17. Consequently, upon receiving a request for disclosure of internal official use information AMCU denies access to such information as a matter of law, as otherwise it will not be able to ensure objective and comprehensive investigation of cases and adequate protection of competition.

18. Government agencies and other possessors of confidential information may handle this information strongly within the scope of their authority, under strict procedures specified in law and upon consent of persons who provided it, unless otherwise provided by law.

19. Information which has no restricted access as a matter of law is defined as confidential by a person (except for government agencies) who created or purchased such information capable of affecting his/her professional, business, production, banking, commercial, and other interests.

20. When a person provides the AMCU with information which he/she defines as confidential, the AMCU is guided by a specific procedure. Information is treated (and protected) as confidential if:

- a person who provided confidential information clearly indicates which specific information (which particular documents or parts of documents) is confidential;
- a person's application contains a list of attachments indicating which documents or information are confidential;
- all confidential documents attached to the application shall be provided in a sealed envelope marked with "Confidential information";
- each page which contains confidential information shall have a clear mark in the top right corner: "Contains confidential information";
- information that the person believes to be confidential must be clearly indicated to be conspicuous;
- information which related to commercial secrets shall be submitted separately from other confidential information.

21. Beyond that, the person in question shall provide justification for classifying information.

22. Any restricted access information received by the AMCU is used solely for the purpose of processing of applications/cases and is not subject to disclosure, unless otherwise expressly provided by law (providing information to law enforcement bodies or court).

23. The AMCU should hold consultation with the applicants who submitted information as restricted access information (including confidential information) for the purpose of identification of the grounds for classifying such information and the possibility of declassifying it and setting a deadline for submission of non-confidential version of documents, with the confidential information being excluded or otherwise modified, which ensures that it is sufficiently protected and/or ascertains the harm that may be caused to the person by the disclosure of such information.

24. Specifically, the law stipulates that AMCU officers shall keep strictly confidential any information about leniency applicants.

25. Under Article 22<sup>2</sup> of the AMCU Law of Ukraine, the AMCU, on the basis of international treaties ratified by the Ukrainian Parliament cooperates with the competent authorities of other states, in particular through the exchange of information.

26. AMCU may provide foreign competition authorities with restricted access information and receive such information from them if:

1. such information is used by the competition authority solely for the performance of its tasks as specified by laws;
2. a competition authority can ensure such access to information that would prevent disclosure of information for other purposes or its disclosure otherwise, including through unauthorized access.

27. The only existing ratified international treaty of Ukraine in the field of regulation of competition policy, on the basis of which the AMCU may exchange information with foreign competition authorities is the Agreement for the implementation of a coordinated antimonopoly policy of January 25, 2000 (ratified by the Law of Ukraine of 16 January 2003) (hereinafter - the Agreement). However, the provisions of the Treaty regarding the exchange of confidential information are not practically operative, as there are no appropriate systems for the protection of such information. At present, concluding bilateral treaties with the respective states is being considered.