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Annual Report on Competition Policy Developments in Ukraine

-- 2021 --

This report is submitted by Ukraine to the Competition Committee FOR INFORMATION.

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Ukraine

1. General information

1.1. Budget for competition law and policy in Euro (exchange rate on December 31)

(NB: If possible, exclude budget for other functions of the agency, such as consumer protection, public procurement, sector regulation).

1. UAH 311,42 million or EUR 10,1 million¹
2. The budget includes public procurement appeal review function and state aid monitoring and control function.

1.2. Total number of staff in the agency on December 31 (including the board members).

3. The actual number of employees in the AMCU bodies is 593, thereof:
 - In regional offices – 288;
 - In the central office – 305.

1.3. Total number of staff working on competition as of 31 December

(Without board members, administrative staff or staff involved in other functions of the agency, such as consumer protection, public procurement, sector regulation)

4. No statistics available.

2. Cartels and other anti-competitive agreements

2.1. Total number of final decisions taken by the competition authority

(or judgment by a relevant court, if “competition authority” is not applicable because the competition authority does not take decisions in your jurisdiction).

5. 196 unit – number of final decisions.²

2.1.1. Number of final decisions reported in question 2.1. per industry³

6. The types of economic activities were divided according to the National Classifier of Ukraine «Classification of Economic Activities» (KVED – 2010) which came into force on January 1, 2012, approved by the order of the State Inspectorate of Ukraine for Consumer Rights Protection No. 45 as of October 11th, 2010⁴.

¹ The euro exchange rate as of December 31, 2021 – 30,9226 UAH

² Unlike in previous years, the number represents the amount of total decisions made by the AMCU, instead of the amount of total violations terminated.

³ Industry classification used. Please note that the total number of industries might be higher than the total number of decisions in question 2.1., as one decision might relate to multiple industries.)

⁴ Unlike in previous years, the number represents the amount of total decisions made by the AMCU, instead of the amount of total violations terminated.

- Construction and construction materials – 51
- Agro-industrial complex – 24
- Transport – 14
- Healthcare, medicines and medical devices – 9
- Communication and telecommunications – 8
- Fuel and energy complex – 7
- Utilities – 4
- Industry – 4
- Forest household, processing and sale of wood – 4
- Financial and insurance activities – 2
- Other markets – 69.

2.1.2. Number of final decisions that relate to "bid-rigging" (also referred to as collusive tendering).

7. Out of the total number of final decisions reported in Question 2.1.
8. 193 unit - number of final decisions⁵

2.1.3. Number of final decisions on vertical agreements

9. Out of the total number of final decisions in Question 2.1. (NB: The term “vertical” refers to the fact that firms are active in different levels of the supply chain. Examples can be selective distribution arrangement or resale price restrictions.)
10. No information available.
11. Anticompetitive concerted actions include as horizontal cartels as vertical. AMCU doesn’t have separation of these concerted activity.

2.1.4. Number of cases in which settlements or plea bargain were used

12. Out of the total number of final decisions in Question 2.1. (NB: For the purposes of this questionnaire, if settlements or plea bargains were reached with multiple parties in the same case/decision concerning the same cartel, they should be considered to be one, even if there are different decisions for other cartel participants.)
13. The negotiated/consensual procedure for settling cases is not applicable according to the law.

2.1.5. Number of cases in which commitment procedures or other types of negotiated/consensual procedure for settling cases were used

14. Out of the total number of final decisions in Question 2.1. (NB: For the purposes of this questionnaire, if commitment procedures or other type of negotiated/consensual procedures were used with multiple parties in the same case/decision concerning the same cartel, they should be considered to be one, even if there are different decisions for other

⁵ Unlike in previous years, the number represents the amount of total decisions made by the AMCU, instead of the amount of total violations terminated.

cartel participants. Commitment decisions or consent decrees/orders refer to early termination procedures where authorities accept remedies or commitments proposed by the investigated parties to address the initial concerns identified by the authority in an antitrust proceeding. If accepted, the commitments are binding on the party who submitted them and no competition infringement is established.)

15. Not applicable according to the law.

Total leniency applications received by the competition authority (including here only requests for leniency, so excluding settlement requests).

16. 0 units.

2.2. Number of ex-officio investigations launched by the competition authority (number of separate cases, not the number of companies involved), not including investigations following a leniency application received by the competition authority.

17. 438 units.

2.3. Number of cases in which a dawn raid was carried out, if applicable (number of separate cases, not the number of companies involved or dawn raids⁶ carried out).

18. 0 units.

2.4. Total amount of monetary fines (criminal and civil) imposed by the competition authority or by a court (excluding appeals)

19. UAH 6 309 772 926.1 or EUR 204 050 530,2.⁷

2.5. Number of companies fined by the competition authority or by a court.

20. No statistics available.

2.6. Number of cases in which fines on individuals were imposed by the competition authority or by a court, excluding appeals.

21. Not applicable according to the law.

2.7. Number of cases in which imprisonment was imposed by the competition authority or by a court, excluding appeals

22. Not applicable according to the law.

⁶ A dawn raid refers to an unannounced inspection of one or more businesses, or individuals involved in an investigation, carried out to obtain evidence for the investigation.

⁷ The euro exchange rate as of December 31, 2021 – 30,9226 UAH

3. Abuse of dominance / unilateral conduct

3.1. Number of decisions taken by the competition authority

23. 53 units – number of decisions.⁸

3.1.1. Number of final decisions reported in question 3.1. per industry

24. The types of economic activities were divided according to the National Classifier of Ukraine «Classification of Economic Activities» (KVED – 2010) which came into force on January 1, 2012, approved by the order of the State Inspectorate of Ukraine for Consumer Rights Protection No 45 dated 11.10.2010⁹.

- Administrative services (archival institutions, etc.) – 20
- Utilities – 17
- Fuel and energy complex – 5
- Transport – 3
- Agro-industrial complex – 3
- Land management and real estate services – 2
- Financial and insurance activities – 1
- Industry – 1
- Tourism and entertainment – 1

3.1.2. Number of cases in which settlements or plea bargain procedures for settling infringement cases were used.

25. The negotiated/consensual procedure for settling cases is not applicable according to the law.

3.1.3. Number of cases in which commitment procedures or other types of negotiated/consensual procedures were used. Out of the total number of decisions in Question 3.1. (Commitment decisions or consent decrees/orders refer to early termination procedures where authorities accept remedies or commitments proposed by the investigated parties to address the initial concerns identified by the authority in an antitrust proceeding. If accepted, the commitments are binding on the party who submitted them and no competition infringement is established.)

26. There are no statistics available.

⁸ Unlike in previous years, the number represents the amount of total decisions made by the AMCU, instead of the amount of total violations terminated.

⁹ Unlike in previous years, the number represents the amount of total decisions made by the AMCU, instead of the amount of total violations terminated.

3.2. Number of ex-officio investigations launched by the competition authority
(number of separate cases, not the number of companies involved)

27. 72 units.

3.3. Number of cases in which a dawn raid was carried out, if applicable (number of separate cases, not the number of companies involved).

28. 1 unit.

3.4. Total amount of monetary fines (criminal and civil) imposed by the competition authority or by a court, in local currency.

29. UAH 445 866 915 or EUR 14 418 804.¹⁰

3.5. Number of companies fined by the competition authority or by a court.

30. No statistics available.

4. Mergers and acquisitions

4.1. Total number of merger notifications.

31. 845 units.

4.2. Number of Phase One (or single phase, subject to the system in place) clearances or expiration of waiting period (i.e., no remedies).

32. 578 units.

4.3. Number of Phase One (or single phase, subject to the system in place) clearances with remedies.

33. Is not applicable according to the law.

4.4. Number of Phase Two clearances or expiration of waiting period after an in-depth investigation (i.e., no remedies).

34. 14 units.

4.5. Number of Phase Two clearances with remedies

35. 2 units.

4.6. Number of Phase One or Phase Two prohibitions (or trials)

36. 0 units.

¹⁰ The Euro exchange rate as of December 31, 2021 – 30,9226 UAH

4.7. Number of withdrawn notifications by the merging parties in Phase Two

37. 2 units.

5. Advocacy

38. NB: Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition (ICN).

5.1. Number of market studies concluded

39. Market studies refer to reports/inquiries that involve an in-depth assessment of market structures or competitive conditions in a given sector. Usually, the analysis is used to identify restraints to competition, which are not limited to behaviours prohibited by competition laws. Market studies can be initiated as part of an investigation, but should not focus on the analysis of the conduct being investigated.

40. 5 (non-including regional offices)

5.1.1. Main cases

1. Market study of the national school bus market.

Brief description

41. The market study was conducted by the Committee on own initiative due to a large number of appeals from undertakings regarding possible violations of the legislation on protection of economic competition during public procurement of school buses.

42. The Committee established that by the content of activities at different levels of turnover goods, the following groups of entities can be distinguished undertakings:

- national producers and importers that carry out primary sale of school buses to dealers, distributors and intermediaries;
- business entities (dealers, distributors and intermediaries) that carry out retail sales of school buses to public procurement customers (the last buyer)

Results of the market study

43. 1) The Committee identified the following main school buses producers:

- JSC "Cherkasy Bus";
- Chernihiv Automobile Factory LLC;
- SE "ASZ №1" of JSC "AK "Bogdan Motors";
- Auto-Holding Production Association LLC.

44. It was also established Auto-Holding Production Association LLC carried out the production of school buses brands AC-P-4234 "Mriya" and KrASZP14SB1 by re-equipping vehicles - provided for this purpose buses of the brand PAZ-4234-04

manufactured by «Pavlovsky factory» LLC. The Committee found out that starting from 28.04.2017 «Pavlovsky factory» LLC is included in the list of legal entities to which restrictive measures (sanctions) are applied, so the Committee informed the Security Service of Ukraine about the facts revealed during the study.

45. According to the results of the analysis of public procurement of school buses, which was carried out in the period from 2017 to October 2019, it was found that customers set discriminatory requirements for some technical parameters in the technical specifications for the subject of procurement not provided for by DSTU 7013:2009 (national standard of Ukraine).

46. Thus, based on the results of the study, the Committee approved the Report on the results of the study and provided the Ministry of Education and Science with mandatory recommendations dated 01.06.2021 No.16-рк:

- to take measures to develop methodological recommendations on the issues specified in these recommendations,
- to inform local self-government bodies and executive authorities in the field of education to prevent the establishment of requirements in the technical specification for the subject of procurement that are not provided for by national standards of Ukraine, during public procurement of school buses.

2. Market study of turnouts for railway lines.

Brief description

47. Market study of turnouts for public railway lines was initiated with the aim of studying the market, competitive environment and position of JSC "Dnepropetrovsky turnout factory" on it.

Results of the market study

48. The Committee also studied the sphere of sales of goods produced by JSC "Dnepropetrovsky turnout factory", which can be divided into levels, each of which has its own group of consumers:

- the first level - undertakings engaged in transportation by rail and purchase railway turnouts directly from JSC "Dnepropetrovsky turnout factory";
- the second level - undertakings that purchase turnouts in JSC "Dnepropetrovsky turnout factory" and carry out their further implementation.

49. Given that the management of the transportation process in internal and international traffic is carried out centrally and belongs to the exclusive competence of JSC "Ukrzaliznytsia", the main end consumer of turnouts for public railway tracks in Ukraine are JSC "Ukrzaliznytsia" and its branches.

50. The following barriers to entering the market have been established:

- The need to attract significant amounts of capital investment to launch the production process;
- Administrative barriers: collection of anti-dumping duties for goods from and to the Russian Federation, the need to obtain a certificate of conformity, mandatory passing acceptance tests and obtaining recommendations for delivery to the production of the relevant products.

51. Based on the results of the study, the Committee approved the Report on the results of the study in which JSC "Dnipropetrovskiy turnout factory" was recognized as occupying a monopoly (dominant) position in the national market of turnouts for public railways in the period from 01.01.2016 to 30.06.2018 with a market share of 100% (AMCU Order No. 15-pp dated 19.08.2021).

52. This order is appealed in court and is pending in the court of first instance. By the decision of the Economic Court of Kyiv dated 22.11.2021, proceedings were opened in court case No. 910/17390/21. The decision in court case No. 910/17390/21 has not been adopted.

5.2. Number of formal advocacy opinions issued to governments, regulators, legislators, etc., including testimonies and amicus curiae.

53. Formal advocacy opinions refer to opinions that provide input to policymakers by evaluating the competition impact of a given policy measure and making recommendations to help mitigate negative effects.

54. 487 units

5.2.1. Main cases

Brief description

55. According to the information received by the Antimonopoly Committee of Ukraine in the course of control measures from the operators of authorized electronic platforms (hereinafter - the Operators) and SE "Prozorro.Sale", the following was established:

56. SE "ProZorro.Sale" has repeatedly increased the amount of payment for the development of the Electronic Trading System (hereinafter - ETS). The company justified this by the fact that the relevant fee is the only source of income, and therefore, due to the insufficiency of funds received to ensure the functioning and development of the ETS, it was forced to initiate an increase in the amount of the fee for the development of the ETS. Thus, the respective increase in the amount of the fee is justified mainly by the unprofitable nature of the activity.

57. SE "ProZorro.Sale" established additional namely marketing, obligations in the Agreement on the provision of access to the ETS, which by their nature do not directly relate to the subject matter of the Agreement on the use of the ETS, but are additional burdens, the failure to fulfill which is the basis for termination of the Agreement by SE "ProZorro.Sale" unilaterally.

Conclusion

58. Since SE "ProZorro.Sale" is determined by the resolutions of the Cabinet of Ministers of Ukraine to be responsible for ensuring the functioning of the electronic trading system, which is used to conduct electronic auctions in certain areas, it has signs of a monopoly (dominant) position in the relevant markets.

59. Therefore, the above actions of SE Prozorro.Sale may contain signs of violation of the legislation on protection of economic competition in the form of abuse of monopoly (dominant) position in the market.

Recommendations:

60. Ensure the formation of fees for the development of the electronic trading system ProZorro.Sales on the basis of economically justified calculations.
61. When concluding agreements on Operators' access to the ETS ProZorro.Sales, refrain from additional conditions (obligations) that are not directly related to the subject matter of the agreement.

5.3. Number of advocacy events organised by the competition authority (e.g. workshops, training, campaigns, events for consumers, companies, ministries), including events held virtually and do not include events where a member of staff from the authority was solely invited as a guest/speaker.

62. 121 units

6. Main cases

6.1. Decision of the AMCU as of December 21th, 2021 No. 694-p

Defendants: A group of undertakings consisting of: “INTERSTARCH UKRAINE” LLC, “DNIPROVSKY STARCH AND MOLASSES PLANT” PJSC, “INTERKORN” PJSC

6.1.1. Brief description

63. The AMCU established that in 2018 – 2020 the Group of Defendants was the only producer of molasses in the territory of Ukraine, and also had market power, which was manifested in its ability to establish its conditions for the sale of goods in the domestic market, maintain an opaque and unsystematic pricing policy with its own counterparties, carry out policy aimed at maintaining its own monopoly position. This led, in particular, to the Defendant establishing various conditions in molasses supply contracts with buyers without objectively justified reasons.

6.1.2. Committed violation

64. Violations provided for in Part 1 and Clause 2 of Part 2 of Article 13 and Clause 2 of Article 50 of the Law of Ukraine “On the Protection of Economic Competition”, in the form of abuse of a monopoly (dominant) position on the national market of primary sale of corn starch molasses and glucose syrups, which consisted of:

- unjustified price increases for corn starch molasses and glucose syrups during April – June 2018, February – March 2019 and October 2020, which would have been impossible in the existence of significant competition on the market;
- establishing during 2018 – 2020 different conditions to equivalent agreements with buyers of corn starch molasses and glucose syrups without justified reasons.

65. Total fine imposed – UAH 283,6 million

6.2. Decision of the AMCU as of December 29th, 2021 No. 723-p

66. Defendant: JSC “DNIPROAZOT”

6.2.1. Brief description

67. JSC “Dniproazot” stopped the production of liquid chlorine during the period from 18.06.2018 to 19.07.2018 and stopped the sale of liquid chlorine from 01.07.2018 to 19.07.2018, provided that there were no alternative sources of purchase of this product on the market, which, in turn, could lead to the infringement of the interests of water supply and sewage enterprises (water canals), which would be impossible under the conditions of the existence of significant competition on the market.

6.2.2. Committed violation

68. Violation provided for in Part 1 of Article 13 and Clause 2 of Article 50 of the Law of Ukraine “On the Protection of Economic Competition”.

69. Total fine imposed – UAH 80,11 million

6.3. Decision of the AMCU as of December 31th, 2021 No. 771-p

70. Defendants: JSC “State Savings Bank of Ukraine” (hereinafter - JSC “Oschadbank”)

6.3.1. Brief description

71. JSC “Oschadbank”, as the only participating bank of the project “Municipal Card “Kyyanyna Card”, independently established the procedure and conditions for opening and maintaining card accounts within the specified project, which consisted in the mandatory connection of the SMS notification service as a condition for obtaining a municipal card “Kyyanyna card” and during registration in the remote banking service system (Web/Mobile-banking (Oschad 24/7).

6.3.2. Committed violation

72. Violation for in the Part 1 of Article 13 and Clause 2 of Article 50 of the Law of Ukraine “On the Protection of Economic Competition”, in the form of abuse of the monopoly (dominant) position on the market of services for maintaining card accounts of owners of municipal cards “Kyyanyna card” by committing actions by a business entity that occupies a monopoly (dominant) position on the market, which may lead to the infringement of the interests of consumers, which would be impossible under the conditions of the existence of significant competition on the market.

73. Total fine imposed – UAH 503,552

6.4. Decision of the AMCU dated March 30th, 2021 No. 178-p

74. Defendants: Production and Trading Company “AVIAS” LLC, “AVIAS TRADING HOUSE” LLC, “PROM GARANT PLUS” LLC, “ALLIANCE EVOLUTION” LLC, “UKRTATNAFTA” PJSC and 169 gas station operators

6.4.1. Brief description

75. The defendants created and supported a system of contractual relations that ensured the sale of light oil products, mainly produced by PJSC “Ukratnafta” in all regions of Ukraine using the “AVIAS” card system, which led to the observance of a common approach to pricing and common conditions for the sale of goods.

6.4.2. Committed violation

76. The violation is provided for in Clause 4 of the second part of Article 6 and Clause 1 of Article 50 of the Law of Ukraine “On the Protection of Economic Competition”, in the form of anticompetitive concerted actions related to the distortion of the results of tenders.

77. Total fine imposed – over UAH 4 billion