

Unclassified

English - Or. English

4 June 2024

Directorate for Financial and Enterprise Affairs  
**COMPETITION COMMITTEE**

## Annual Report on Competition Policy Developments in Ukraine

-- 2023 --

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

JT03545145

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## *Ukraine*

### **1. Changes to competition laws and policies, proposed or adopted**

#### **1.1. Summary of new legal provisions of competition law and related legislation**

1. The Law No. 3295 as of 09.08.2023 implements the first stage of the reform of Ukrainian competition law. In particular, it implements a number of OECD Recommendations (hereinafter - the Recommendations), including:

- Provision of more resources to the AMCU by increasing the salaries of its employees (clause 5.1.1 “Ensure the autonomy of the AMCU and provide adequate resources to enable the AMCU to maintain high standards of performance in fulfilling its mission. Enable greater flexibility in the use of resources of the central and territorial offices” of the Recommendations);
- Expanding the AMCU's investigative powers by enshrining in law a detailed procedure for conducting inspections of undertakings, evidence that may be seized, and cooperation between the AMCU and law enforcement agencies within such inspections (clauses 5.1.2, 5.2.1 “Expanding the AMCU's Investigative Powers” and “Improving Cooperation with Other Law Enforcement Agencies of Ukraine” of the Recommendations);
- Improvement of the leniency procedure for the undertakings, for committing a violation in the form of anticompetitive concerted actions (clause 5.1.2 “Review of the leniency program and introduction of reduced fines for parties that are not the first to submit information” of the Recommendations);
- Prevention of fine evasion by introducing joint and several liability of undertakings (clause 5.1.2 “Prevention of fine evasion” of the Recommendations);
- Granting the AMCU the right to issue orders for the enforcement of the AMCU's decisions, including the imposition of a fine (clause 5.1.2 “Introduction of direct enforcement for the AMCU's decisions” of the Recommendations);

#### **1.2. Other relevant measures, including new guidelines**

2. Pursuant to the provisions of the Law of Ukraine as of August 09, 2023 No. 3295-IX the Antimonopoly Committee of Ukraine has adopted the following key bylaws:

- Regulation on the Procedure for Consideration of Applications and Cases on Concentration of Undertakings, approved by the Order of the Antimonopoly Committee of Ukraine as of February 19, 2002 No. 33-p (as amended by the Order of the Antimonopoly Committee of Ukraine as of December 07, 2023 No. 20-пп) registered at the Ministry of Justice of Ukraine on March 21, 2002 under No. 284/6572;
- Order of the Antimonopoly Committee of Ukraine as of 23.11. 2023 No. 17-пп "On Approval of the Procedure for Maintaining and Access to the State Register of Undertakings Bringing to Liability for Committing a Violation Provided for in Clause 4 of Part Two of Article 6, Clause 1 of Article 50 of the Law of Ukraine "On Protection of Economic Competition", in the form of committing anticompetitive concerted actions related to the distortion of the results of trades,

auctions, competitions, tenders", registered at the Ministry of Justice of Ukraine on 27.12.2023 under No. 2259/41315;

- Order of the Antimonopoly Committee of Ukraine as of 30.11.2023 No. 18-рп "On Approval of the Procedure for Settlement in Cases of Anti-Competitive Concerted Actions and Abuse of Monopoly (Dominant) Position in the Market", registered at the Ministry of Justice of Ukraine on 27.12.2023 under No. 2260/41316;
- Order of the Antimonopoly Committee of Ukraine as of 30.11.2023 No. 19-рп "On Approval of the Procedure for Exemption from Liability for Violation of Legislation on Protection of Economic Competition in the Form of Anti-Competitive Concerted Actions", (**leniency**) registered at the Ministry of Justice of Ukraine on 02.01.2024 under No. 2/41347;
- Order of the Antimonopoly Committee of Ukraine as of 07.12.2023 No. 21-рп "On Approval of the Procedure for Conducting Inspections of Undertakings, Associations, Authorities, Local Self-Government Bodies, Administrative and Economic Management and Control Bodies by the Antimonopoly Committee of Ukraine, its Territorial Branches", registered at the Ministry of Justice of Ukraine on 01.02.2024 under No. 3/41348;
- Order of the AMCU as of 14.12.2023 No. 22-рп "On Approval of the Procedure for Determining the Amount of a Fine Imposed for Violation of Legislation on Protection of Economic Competition", Registered at the Ministry of Justice of Ukraine on 25.01.2024 under No. 123/41468

### 1.3. Government proposals for new legislation

3. In 2022, in order to improve (including simplify) the mechanism for attracting private investment using the public-private partnership mechanism to accelerate the restoration of war-damaged facilities, a group of members of parliament developed a relevant draft law (Reg. No. 7508).

4. However, despite a number of positive aspects of the draft law, it also contained certain discriminatory provisions against non-residents that would complicate their participation in the relevant public-private partnership.

5. Thus, the draft law provided for amendments to the current Law of Ukraine "On Public-Private Partnership", including the list of persons who may be determined as candidates for participation in the tender for the selection of a private partner, while allowing only resident legal entities to participate in such tenders.

6. Taking into account the above, to ensure equal (non-discriminatory) participation of both resident and non-resident legal entities in all stages of the tender for the selection of a private partner, the Committee proposed to amend the mentioned draft law in this part, specifying that non-resident legal entities may also be candidates<sup>1</sup>.

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<sup>1</sup> The draft law is currently being considered by the parliament.

## 2. Enforcement of competition laws and policies

### 2.1. Action against anticompetitive practices, including agreements and abuses of dominant positions

#### 2.1.1. Summary of activities of:

##### *Competition authorities;*

7. Total number of **infringement** decisions taken by the AMCU in cartel cases: 290 decisions (all of these decisions concern anticompetitive concerted actions of undertakings in the form of distortion of bidding results during participation in tenders/biddings/auctions/procurements).

8. In accordance with the two-digit NAICS classification:

- Construction – 103
- Trade \* – 83
- Manufacturing – 20
- Other Services (except Public Administration) - 17
- Utilities – 16
- Administrative and Support and Waste Management and Remediation Services – 11
- Transportation and Warehousing – 10
- Real Estate and Rental and Leasing – 10
- Agriculture, Forestry, Fishing and Hunting – 8
- Information – 4
- Mining, Quarrying, and Oil and Gas Extraction – 3
- Arts, Entertainment, and Recreation – 3
- Accommodation and Food Services – 2

9. Total number of other final decisions **excluding** infringement decisions: 31 decisions on closing the proceedings.

10. Total number of **infringement** decisions taken by the AMCU in abuse of dominant position cases: 80 decisions.

11. According to the two-digit NAICS classification:

- Utilities – 53
- Professional, Scientific, and Technical Services – 14
- Administrative and Support and Waste Management and Remediation Services – 5
- Other Services (except Public Administration) – 3 (Funeral Services)
- Transportation and Warehousing – 3
- Agriculture, Forestry, Fishing and Hunting – 1
- Health Care and Social Assistance – 1

12. Total number of other final decisions **excluding** infringement decisions: 19 decisions, including:

- 17 decisions to close the proceedings due to failure to prove a violation;
- 2 decisions to close the proceedings due to the implementation of recommendations.

13. Number of formal investigations launched: In 2023, 55 cases were initiated at the request of the authorities / submission of law enforcement agencies and 248 cases were initiated by the AMCU.

14. Total amount of monetary fines the AMCU: **UAH 1,762,165,974.00 (USD 46,397,208)**

*Courts;*

**Table 1.**

Year	Number of AMCUs decisions upheld by the court*	Number of AMCUs decisions canceled by the court*
2023	33	0

Note: Final decisions of the courts.

### ***2.1.2. Description of significant cases, including those with international implications.***

## **3. Regarding the position of Supreme Court of Ukraine in abuse case.**

15. The AMCU's Territorial Office issued Decision No. 54/14-p/п/к on violation of the legislation on protection of economic competition by the joint-stock company "Krivorozhskaya heating plant" in the form of abuse of monopoly position in the heat supply market.

16. During the case consideration, the Office found out that the joint-stock company "Krivorozhskaya heating plant", after changing (decrease) the price of natural gas during the heating period 2019-2020, did not recalculate the amount of charges for heat energy to the categories of consumers "budgetary institutions", "other consumers (except for the household)" for the period December 2019 - April 2020, although there were both economic and legal grounds for this. In particular, these issues were settled by the Resolution of the Cabinet of Ministers of Ukraine as of 24. 12.2019 No. 1082 "Some issues of calculation (determination) of payment for heat energy and district heating services, centralized hot water supply for consumers in connection with changes in the price of natural gas" and the Rules for the use of heat energy, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1198 as of 03.10.2007.

17. The basis for changing the amount of charges for the consumed heat energy is the condition when the price of natural gas (excluding changes in tariffs for natural gas transportation and distribution services, supplier's trade markup (margin)) purchased by the heat supply organization in the relevant month of the heating season is lower than the price of natural gas (excluding changes in tariffs for natural gas transportation and distribution services, supplier's trade margin), which is taken into account in the structure of heat energy

tariffs established by the authorized bodies. (paragraph 2 of clause 47 of Resolution No. 1198).

18. Thus, using a discriminatory approach to different categories of consumers, JSC "Krivorozhskaya heating plant" did not recalculate the amount of charges for heat energy in the period December 2019 - April 2020 for such categories of consumers as "budgetary institutions", "other consumers (except for the population)" due to the change in the price of natural gas for the Company during the heating period 2019-2020.

19. The Office recognized such inaction as a violation of the law and obliged it to cease violating the legislation on protection of economic competition within two months.

20. [On June 20, 2023, the Supreme Court of Ukraine in case No. 904/2888/22](#) upheld the decision of the Commercial Court of Dnipropetrovska oblast and the decision of the Central Economic Court of Appeal on the claim of the JSC "Krivorozhskaya heating plant" to invalidate and cancel the decision of the South-Eastern Interregional Territorial Office of the Antimonopoly Committee of Ukraine No. 54/14-p/к.

21. The Supreme Court of Ukraine ruled that "...there is no competition between the Company as an undertaking that occupied a monopoly (dominant) position in the heat supply market and consumers, since the plaintiff sells heat energy to consumers who, accordingly, carry out activities for the purchase of the relevant product and are not competitors to each other. At the same time, the circumstances established in the AMCU's Decision indicate abuse of monopoly (dominant) position by infringing on the interests of consumers, which would be impossible for the plaintiff if there was competition in the market."

22. Thus, since the AMCU, by virtue of the provisions of the Law and the Law of Ukraine "On the Antimonopoly Committee of Ukraine", bases its activities, in particular, on the principle of protecting competition on the basis of equality of individuals and legal entities before the law and the priority of consumer rights, the decision was made in the manner, in the order, within the limits and in accordance with the powers defined by the Law.

#### **4. Regarding the Recommendations of the AMCU to SOE “Prozorro.Sale” in the field of access to the electronic trading system.**

23. In 2023, the AMCU analyzed the negative impact of the actions of the state-owned enterprise “Prozorro.Sale” (after 09.03.2023, “Prozorro.Sale” Joint Stock Company) on competition in the market for providing operators with access to the electronic trading system (ETS) for conducting auctions/biddings in the areas specified by law.

24. JSC “Prozorro.Sale” has been designated as the administrator of the ETS at the regulatory level in many areas of asset sales (sale of state-owned property, small-scale privatization, lease of state and municipal property, etc.). About 40 operators are connected to the “Prozorro.Sale`s” ETS, and more than 594 thousand auctions for the sale of many types of property have been held there.

25. Based on the results of the investigation, the AMCU recognized that from 01.04.2019 to 31.12.2022, “Prozorro.Sale” JSC held a monopoly (dominant) position in the national market for the provision of the specified service. At the same time, the AMCU closed the proceedings in the case initiated on the grounds of abuse of monopoly (dominant) position by the company in connection with the condition of granting access to operators to the “Prozorro.Sale`s” ETS by accepting additional, namely marketing, conditions that by their nature do not directly relate to the subject matter of agreements on

granting access to operators to the “Prozorro.Sale” ETS, which may lead to infringement of the interests of operators in the market and would be impossible in the conditions of significant competition in the market.

26. Thus, the company excluded all marketing conditions from the ETS access agreements during the case consideration, and also eliminated the causes and conditions that contributed to the violation in accordance with the AMCU's recommendations. Regarding the amount of payment for access to the ETS by operators, the AMCU, based on the results of the analysis of the ratio of income and expenses of “Prozorro.Sale” JSC, did not find that the latter had set it at an economically unreasonable level that could lead to infringement of the interests of operators, which would be impossible in the conditions of significant competition in the market.

27. In view of this, the proceedings initiated on the grounds of abuse of monopoly (dominant) position were closed in this part on the grounds of failure to prove the violation.

## 4.1. Mergers and acquisitions

### 4.1.1. Statistics on number, size<sup>2</sup> and type of mergers notified and/or controlled under competition laws;

*Total number of merger notifications: 564 units*

- Number of Phase One clearances or expiration of waiting period (i.e., no remedies): 299 units.
- Number of Phase One clearances with remedies: 0 units
- Number of Phase Two clearances or expiration of waiting period after an in-depth investigation (i.e., no remedies): 13 units
- Number of Phase Two clearances with remedies: 6 units
- Number of Phase One or Phase Two-prohibitions: 0 units
- Number of withdrawn notifications by the merging parties: 252 withdrawn notifications<sup>3</sup>.

### 4.1.2. Summary of significant cases.

*Regarding structural obligations in a merger case.*

28. In 2023, two concentration cases were considered, which constitute a single transaction. The Antimonopoly Committee of Ukraine granted permits to AI PAVE Dutchco I B.V. (ADVENT Group) to acquire control over companies operating in the markets of retail measurement marketing services for non-food products and marketing services for the separation of consumer groups.

29. In Ukraine, this is a foreign company, GFKUkraine.

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<sup>2</sup> Information in this context is not collected.

<sup>3</sup> Since the analytical reporting forms only provide information on withdrawn applications without specifying the reasons for such withdrawal, it is not possible to provide information on the number of notifications withdrawn by the merging parties.

30. The ADVENT Group, in turn, is represented in Ukraine by Nielsen Media Ukraine LLC, which conducts marketing research for consumer goods and individual marketing research.

31. As part of the case, we found that these types of research are separate markets, each of which requires significant investment and time, and therefore there is no market overlap between the parties to the concentration.

32. At the same time, consumer group segregation services (where all purchases of individual households are tracked), which are provided in Ukraine exclusively by GFK Ukraine, are consumed by the same consumers as consumer research services - and therefore, if the merger were to be approved, would be provided exclusively by the ADVENT Group.

33. Thus, the Committee sees a conglomerate effect in this case, as the Group will always have a significant advantage over potential competitors in the form of providing comprehensive services on more favorable terms.

34. Given the high barrier to entry, such possible negative effects do not have any countervailing factors.

35. In such circumstances, the Committee conditioned the clearance on structural obligations, namely: GFK SE must sell to an independent third party the assets in Ukraine that allow it to conduct business in the field of market research of certain consumer groups and provide the AMC with the relevant confirmation within a year.

## 5. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

36. In accordance with part four of Article 20 of the Law of Ukraine "On the Antimonopoly Committee of Ukraine", government authorities, local self-government bodies, administrative and economic management and control bodies are obliged to coordinate with the Antimonopoly Committee of Ukraine and its territorial offices draft regulatory legal acts and other decisions that may affect competition, in particular, the establishment of undertakings, establishment and change of rules of their behavior in the market, or those that may lead to the prevention, elimination, restriction of competition.

37. In addition, the bodies of the Antimonopoly Committee of Ukraine have the right to provide recommendations to government authorities, local governments, administrative and economic management and control bodies, undertakings, associations regarding the termination of actions that contain signs of violation of the legislation on protection of economic competition, elimination of the causes of such violations and conditions that facilitate them, and, if the violation is terminated, to take measures to eliminate the consequences of such violations (Article 46 of the Law).

Example:

38. In order to implement measures aimed at preventing violations of the legislation on the protection of economic competition, the AMCU provided recommendations to the National Energy and Utilities Regulatory Commission (hereinafter - NEURC) to exclude financial institutions from the List of banks that have not fulfilled their obligations under bank guarantees.

39. The AMCU found that the provisions of Resolution No. 332 (as amended by Resolution No. 524) stipulate that the transmission system operator, PrJSC "Ukrenergo" (Transmission system operator, hereinafter - TSO) (as the settlement administrator), shall

refuse to accept a bank guarantee from the party responsible for the balance sheet if the financial institution that issued it is included in the list of banks that have failed to fulfil their obligations under bank guarantees published on the TSO's website (the “List”).

40. However, no separate procedure has been approved that provides for the conditions for excluding financial institutions from the List in case of full fulfilment of financial obligations to the TSO.

41. There is no regulatory procedure that provides for the conditions for excluding financial institutions from the List in case of full fulfilment of financial obligations to the TSO:

- deprives the banks included in the List of the opportunity to operate in the electricity market by providing a bank guarantee as financial security under contracts for the settlement of electricity imbalances;
- may lead to restriction and distortion of competition in the electricity market.

42. Taking into account the above-mentioned, the AMCU provided the NEURC with recommendations on taking measures related to the regulation of the procedure for excluding financial institutions from the list of banks that have not fulfilled their obligations published on the TSO's website.

43. Following the consideration of the recommendations, the NEURC informed that PrJSC “Ukrenergo” had developed amendments to the Market Rules approved by the NEURC Resolution No. 307 as of 14.03.2018, in terms of the specifics of providing financial guarantees by banking institutions and determining the grounds for excluding institutions from the List.

## 6. Resources of competition authorities

### 6.1. Resources overall (current numbers and change over previous year):

#### 6.1.1. Annual budget (in your currency and USD):

- 2022 - UAH 296,697,200.00 (NBU exchange rate as of 12/21/2022 - 36.56) USD 8,115,350.11
- 2023 - UAH 255,974,100.00 (NBU exchange rate as of 12/29/2023 - 37.98) USD 6,739,707.74

#### 6.1.2. Number of employees (person-years):

44. The AMCU staff:

- economists 75 persons;
- lawyers 103 persons;
- other professionals 10 persons;
- support staff 74 people (Human Resources Division, Department of Document Management and Organizational Work, Information Technology Division, Regional Policy Section, European Integration and International Cooperation Section, Financial Planning, Accounting and Reporting Division, Internal Audit Sector, Chief Specialist for Classified Work, Corruption Prevention and Detection Sector);

- all staff in total 255 people.

#### **6.1.3. Territorial Offices staff:**

- -economists 101 persons;
- lawyers 91 persons;
- other professionals 17 persons;
- support staff 53 persons;
- all staff in total 262 people.

### **6.2. Human resources (person-years) applied to:**

#### **6.2.1. The AMCU staff:**

- Enforcement against anticompetitive practices – 103 persons;
- Merger review and enforcement – 14 persons;
- Advocacy efforts – the relevant information can't be extracted.

#### **6.2.2. Territorial Offices staff:**

- Enforcement against anticompetitive practices – 179 persons;
- Merger review and enforcement – 0 persons;
- Advocacy efforts – the relevant information can't be extracted.

### **6.3. Period covered by the above information:**

- 01.01.2023 – 31.12.2023.

## **7. Summaries of or references to new reports and studies on competition policy issues**

### **7.1. Regarding market study of the national market of chicken eggs in the shell.**

45. In 2023 the AMCU presented a market study - Report on the results of the study of the national market of chicken eggs in the shell 2016 – 2020.

46. The purpose of the study was, in particular, to determine the state of the competitive environment in the market, assess it and make proposals for measures aimed at developing competition, ensuring control over compliance with legislation on the protection of economic competition and identifying situations that may indicate inefficient market functioning..

47. Based on the results of the market study, the AMCU came to the following conclusions:

- **Market structure:** The main market players were identified as large agricultural holdings such as Avangard, Ovostar Union, and Inter-Agrosystems. They control a significant share of egg production and sales in Ukraine.

- **Market concentration:** The study found that during 2016-2019 no undertaking operating in the market of primary sale of shell eggs held a monopoly (dominant) position.

48. In 2020, there were structural changes in the primary sales market for chicken eggs. In 2020, Avangard Group's share in the primary sales market of shell eggs increased to 39.9%. The above was preceded by violations of the legislation on protection of economic competition by Avangard Group in the form of acquiring control over assets without obtaining the appropriate clearances from the Committee's bodies, which were necessary.

49. **Violation of the law:** During the investigation, the Committee found signs of violation of the legislation on protection of economic competition in the actions of undertakings - members of Avangard Group, consisting in the acquisition of the right to use (lease / sublease) assets in the form of a single property complex that provide / may provide the opportunity to carry out economic activities for the production of shell eggs without obtaining the appropriate clearance from the Committee's bodies, which is necessary. The total number of identified violations amounted to 18.

50. **Conclusion:** During the study, the Committee found no other signs of violation of the legislation on protection of economic competition in the timeframe of 2018-2020.

51. At the same time, at the end of 2022, the Committee launched an investigation into the increase in prices for shell eggs in September-October 2022. Since these actions are beyond the period of market research, such actions will be analyzed for signs of violation of the legislation on protection of economic competition in a separate study.

## 7.2. Regarding the AMCU's control measures in the banking and agency services markets.

52. Also, in 2023 the AMCU took measures to monitor compliance with the legislation on the protection of economic competition in the banking and agency services markets in connection with the AMCU's identification of a number of legislative and regulatory acts that impose administrative restrictions on banks that do not have a state share and are not systemically important banks<sup>4</sup> in access to certain banking and agency services.

53. Thus, in accordance with certain laws and regulations, only public sector banks<sup>5</sup> and/or systemically important banks service accounts opened for, inter alia, settlement and cash transactions with the Pension Fund of Ukraine, payment of housing allowances to internally displaced persons, housing subsidies and benefits for housing and utility services, accounts of gas distribution system operators and their subdivisions, and provide agency services in the preparation of state guarantees on a portfolio basis.

54. At the same time, there were more than 60 banks operating in the banking services market, making it a competitive market that allowed consumers (legal entities and individuals) to choose a bank to receive the services they needed on terms that were acceptable to them, and allowed banks to compete, including in terms of the price of services, level of service, etc.

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<sup>4</sup> Systemically important banks are banks that are determined annually by the National Bank of Ukraine, whose activities affect the stability of the banking system and require enhanced control over their operations.

<sup>5</sup> Public sector banks are defined as banks in which the state holds more than 75% of the authorized capital.

55. The number of public sector banks was 5, and the number of systemically important banks was 15 (including public sector banks).

56. Thus, the adoption of legislative and regulatory acts that grant public sector banks and/or systemically important banks exclusive powers to service certain areas of business may result in the provision of advantages to such banks that would put them in a privileged position relative to other competing banks and infringe on the rights of individuals and legal entities to choose a banking institution to receive relevant banking and agency services on terms and conditions acceptable to them.

57. At the same time, there are no regulations that provide for a competitive mechanism for selecting banks to provide banking and/or agency services in areas that are exclusively served by public sector banks or systemically important banks.

58. Taking into account the above-mentioned, in order to eliminate negative consequences for competition in certain segments of the banking and agency services market, the AMCU proposed that the Cabinet of Ministers of Ukraine instruct the concerned central executive authorities to eliminate the mentioned discriminative provisions.

59. Changes that the AMCU proposed to the government will significantly improve the competition in the banking sphere and will ensure the compliance with the competitive neutrality principle.