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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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Global Forum on Competition

CARTEL CASE STUDIES

Case submitted by Ukraine

-- Session III --

This case is submitted by Ukraine in view of its discussion in GFC Sub-Session 3 on Thursday 9 February 2006 (from 9:15 am).

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DESCRIPTION OF THE CASE № 28-26.13/88-03

1. Summary

1. The bodies of the Antimonopoly Committee of Ukraine (AMCU) conduct weekly monitoring of retail prices of petroleum and diesel fuel in the regions. It was found during this monitoring that during a period of about one year the prices of fuel in Dnipropetrovs'k had considerably exceeded prices in all other areas. It became a matter of close attention for the Committee. It was found during the Committee's research that about 15 economic entities operated on the Dnipropetrovs'k market, and that the highest market shares belonged to two economic entities, LTD A and LTD B.

2. After a careful analysis of the contractual relationship between these two operators, the Committee came to the conclusion that they operated concertedly, resulting in a monopolisation of the petroleum retail trading market. In addition, an analysis of their economic activity led to the conclusion that these two economic entities abused their dominant position through the establishment of monopolistic high prices. These conclusions of the Committee were based on economic analysis and on indirect evidence.

3. The decision of the Committee has been appealed during the past two years in courts of different instances. The decision of the Higher Economic Court acknowledged the legitimacy of the decision of the Committee.

2. Legal and factual context

4. In accordance with Parts 1 – 4, Article 12 of the Law of Ukraine "On the Protection of Economic Competition":

- An economic entity occupies a monopolistic (dominant) position on a commodity market, if:
 - there is no competitor on this market;
 - there exist high barriers to entry, such as limited possibilities of access for other economic entities to necessary raw materials, or the presence of privileges or other circumstances favouring the incumbent.
- A monopolistic (dominant) position is defined as the position of an economic entity with a commodity market share exceeding 35 percent, unless the entity proves that it is subject to significant competition.
- An economic entity can also be considered dominant if its market share is 35 percent or less but it is not exposed to substantial competition in the relevant market, in particular as a result of the comparatively small size of its competitors.
- It is considered that two or more economic entities together occupy a monopolistic (dominant) position on a product market if there is no competition between them in a market or together they face insignificant competition.

2.1 Relevant markets

5. Retail trading of low-octane and high-antiknock petroleum within Dnipropetrovs'k city borders.

2.2 Relevant law which is broken

6. Articles 6 and 13 of the Law of Ukraine, "On the Protection of Economic Competition."

2.3 Basic Facts

7. LTD A and LTD B are competitors on the markets of retail trading of high-antiknock and low-octane petroleum on the territory of Dnipropetrovs'k. In 2002 their combined market share on these two markets was approximately 47 and 50 percent, respectively.

8. For a substantial period of time, the prices for oil products established by the above-mentioned economic entities exceeded the price levels in other regions of Ukraine. In particular, LTD A and LTD B raised prices for oil products by taking advantage of a crisis situation that occurred at the beginning of June 2002. At that time, Russia increased the duty for exported oil from 9,2\$ to 20,4\$ per ton and also took advantage of other objective factors, which caused an increase in prices for all oil products throughout the territory of Ukraine. At the same time, beginning in June 2002, the price level in the Dnipropetrovs'k region and in Dnipropetrovs'k city exceeded the price level elsewhere in Ukraine and in neighbouring regions.

2.4 Relevant facts found by the Committee

2.4.1 Co-operative agreement in the oil products markets

9. The filling stations through which LTD A and LTD B were selling petroleum operated under the trademark of «TNK». These enterprises licenced the use of this brand from the enterprises «TD» and «TNK-Ukraine».

10. Further, the parties signed a formal agreement providing for the following: LTD A and LTD B each sold plastic cards to customers entitling them to purchase a specific amount of fuel at a price established at the time of the purchase of the card. (This arrangement was considered advantageous for the customer because fuel prices were rising quickly at the time.) The fuel could be purchased at the filling stations of both enterprises. Because the agreement effectively provided for the parties to sell one another's fuel, it also provided for the parties to monitor each others sales periodically.

2.4.2 Exchange of information on setting the prices, and documents confirming the simultaneity of prices changes

11. The implementation of this agreement gave to these economic entities the opportunity to monitor the activities of one another, allowing them to predict volumes of production and sale of oil products, the prices at which they would be sold, one another's business strategies, and so forth. It was apparent from the results of the Committee's monitoring of their retail prices and by the fact, noted below, that prices became more competitive following the Committee's decision in this case, that LTD A and LTD B took advantage of these opportunities. The Committee's investigation determined that the filling stations of LTD A and LTD B typically set identical retail prices for light oil products almost simultaneously (within one hour). Thus, the filling stations operated by these two entities had identical and synchronous prices for light oil products during the period 2001 – 2003.

2.4.3 *Other proof of concerted action*

12. The anticompetitive character of the concerted actions between LTD A and LTD B was confirmed by the following:

- LTD A and LTD B, upon the request of the Dnipropetrovs'k regional territorial branch of the Committee, could not provide any economic or market-based explanations of their pricing behaviour.
- The two enterprises had different purchasing prices for petroleum, but maintained identical selling prices.
- There were interlocking positions occupied by officials in the two enterprises: for example, the director of LTD B A.M. Taranets' took up a position in LTD A as Chief of the Department of Exploitation and of the building of this filling station;
- Under the agreement described above, each entity was effectively selling fuel belonging to the other. Periodically, each enterprise would pay the other for the amount of its fuel that the other sold. This arrangement required that the enterprises periodically "control" one another, or verify that the sums paid corresponded to the actual volumes of fuel sold. Inspections carried out by the Committee confirmed that these verifications had occurred.

13. Also, officials of other economic entities operating in the relevant market stated in responses to questions and protocols from the Committee that their prices of the relevant oil products were based on the prices of LTD B and LTD A.

3. Decision of the Committee

14. The simultaneous competitive behaviour of these economic entities resulted in the elimination of competition between them. This resulted in the monopolisation of the markets of retail trading of low-octane and high-antiknock petroleum in Dnipropetrovs'k.

15. LTD A and LTD B accepted the Committee decision regarding the violation of the competition law. After their acceptance, these agreements were terminated. Within a year from their acceptance of the decision, LTD A and LTD B sold almost all of the filling stations that they owned to other economic entities and exited this market. As a result, since 2003 the markets of retail trading of petroleum in Dnipropetrovs'k have been competitive. Moreover, the retail prices of petroleum correspond to those elsewhere in Ukraine.

4. Decision of the Court

16. By decision of the Economic Court of Kyev, the decision of the Committee of October 14, 2003 № 345-p was ruled to be invalid. In the opinion of the Court, the Committee did not prove the concerted anticompetitive conduct that allegedly resulted in limitation of competition on the market. This decision, however, was abolished by the Kyev Economic Court of Appeal. The Appeal Court's decision was motivated by the fact that the Court of the First Instance did not investigate properly and comprehensively the facts established by the Committee showing co-ordination of conduct by LTD B and LTD A. A Higher Economic Court concluded that there was an absence of grounds satisfying the appeal of LTD B and LTD A. The decree of the Kyev Appeal Court of Ukraine made no changes to the Higher Economic Court's decision, and the appeals of LTD B and LTD A to the Supreme Court of Ukraine were denied. This decision was final, and the decision of the Committee of October 14, 2003 № 345-p came into force.

5. Description of remedies

5.1 Measures

17. By decision of the Committee of October 14, 2003 № 345-p, the actions of LTD A and LTD B were acknowledged as a violation of the competition law and these enterprises were placed under the following obligations:

- Regarding anticompetitive concerted actions: to suspend their agreement of 01.07.01 № 01-08/np and to resume competitive behaviour.
- Regarding abuse of dominant position: to establish their prices for petroleum solely on the basis of competition on the market.

5.2 Fines

18. By decision of the Committee of October 14, 2003 № 345-p, LTD A and LTD B together were fined the sum about 80 million UAH for these violations.

6. Final resolution of the case

19. The violations were halted; competition on the market is restored. LTD A and LTD B have not yet paid their fines, however. That issue is still contested in the courts.