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## **Global Forum on Competition**

### **INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES**

**Contribution from Ukraine**

-- Session III --

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## **THE INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGN TO PRACTICE**

**-- Ukraine --**

***What are the main problems that exist in your jurisdiction in terms of legal and actual independence of your competition authority?***

1. Ukrainian legislation provides for a high level of legal guarantees of the independence of the Antimonopoly Committee of Ukraine as a body of state protection of business competition. According to Article 1 of the Law "On the Antimonopoly Committee of Ukraine" the Committee is a state body with special status whose activity is aiming at assurance of state protection of competition in the sphere of business and public procurements. The special Committee's status is enshrined in Article 24 of the Law "On Central Executive Bodies". According to it, the Committee is a central executive body with special status. The Committee is subject to general provisions, governing the activities of the executive bodies, only in the part when the Constitution and laws of Ukraine do not define other features of organization and procedure of their activities. At that, the Constitution of Ukraine establishes the procedure for appointment and dismissal of the Chairman, the law of Ukraine "On Antimonopoly Committee of Ukraine" establishes the procedure for the formation of the Committee, controllability and accountability of the Committee, bases of relations between the Committee and other public authorities, including the Cabinet of Ministers of Ukraine and Verkhovna Rada of Ukraine.

2. The inconsistency of the norms on the procedure for appointment and dismissal of the Chairman contained in the Constitution of Ukraine and the Law "On Antimonopoly Committee of Ukraine" is a certain legal issue. They are associated with amendments in the Constitution which reflected the transition from a parliamentary-presidential system to a presidential-parliamentary one and again to a parliamentary-presidential one: Constitutional provision corresponds to parliamentary-presidential model (the Committee's Chairman is appointed and dismissed by Parliament according to the Prime Minister's recommendation), while the mechanism inherent presidential-parliamentary model remains in the law (the Chairman of the Committee shall be appointed by the President of Ukraine by the consent of Parliament). However, in practice this collision does not cause any problems, since according to the power hierarchy of norms the Constitutional norm is valid. In addition, the draft amendments to the law "On Antimonopoly Committee of Ukraine" has been prepared and submitted to parliament which must eliminate this collision.

3. The main problem that could adversely affect the independence of the Antimonopoly Committee today is the establishment of the size of its funding by the Cabinet of Ministers of Ukraine on the basis of the proposals of the Ministry of Finance.

4. Due to the civil service system reform in Ukraine, which envisages, in particular, the division of powers of the political management of the state body's activities and the administrative management of its apparatus activities, a question raises about the scope of authority, the procedure for the appointment and dismissal of the official of the Committee who will carry out the management of civil service in the Committee's apparatus. The relevant proposals were formulated by the Committee and brought to the attention of the Members of Parliament.

***What are the most important legal or structural characteristics that help to isolate your authority from political pressure?***

5. The most important legal guarantees of the independence of the Antimonopoly Committee of Ukraine include:

- establishment of the procedure for appointment of the Committee's Chairman in the Constitution of Ukraine; due to the presence of this norm, the Committee cannot be eliminated as an independent public authority without amending the Constitution;
- consolidation of the controllability of the Committee to the President of Ukraine and accountability to the Parliament in the law "On the Antimonopoly Committee of Ukraine";
- consolidation of the special procedure for the appointment of members of the Committee in the law "On Antimonopoly Committee of Ukraine";
- consolidation of an exhaustive list of grounds for dismissal of the Chairman of the Committee in the law "On the Antimonopoly Committee of Ukraine";
- consolidation of the principle of independence of the Committee's bodies from the state authorities, local governments and their officials as well as political parties and other public associations or their bodies in the sphere of control over compliance with legislation on economic competition protection in the law "On the Antimonopoly Committee of Ukraine";
- consolidation of prohibition of interference by public authorities, local governments and their officials as well as political parties and other public associations or their bodies to the activities of the Committee except as determined by the laws of Ukraine in the law "On the Antimonopoly Committee of Ukraine";

***Has your jurisdiction experienced any legal or structural reforms to strengthen the independence of competition authority? If so, how did you manage to include it to the agenda of the government? What are the main features of the reform? What are the main advantages you expect from this reform?***

6. The system of legal guarantees of the independence of the Committee was established mainly in 1993 - 2003. In recent years, there has been no legal or structural reforms related to strengthening the independence of the Committee.

7. In 2011 - 2012, the Committee expressed its objection to the proposal to introduce mandatory approval of the appointment of heads of the Committee's regional offices by the heads of regional executive bodies based on the decree of the President of Ukraine. Taking into account that the regional offices consider significant percentage of all cases of violations of legislation on economic competition protection, the introduction of such a procedure would significantly limit the autonomy of the Committee's regional offices. The argument of the Committee was also that regional offices are involved in control over compliance with legislation on economic competition protection including regional state executive bodies, therefore, essentially it was proposed to introduce the consent of the head of body under control upon the appointment of a head of a controlling body. The Committee's arguments were taken into account, the procedure for appointment of heads of its regional offices (except for the Chairman of the Committee) remained unchanged.

***What is the structure of your competition authority: board or single commissioner? Do you think there is a link between the structure of the agency and its degree of independence?***

8. The Antimonopoly Committee of Ukraine is collegial body which shall be established to include the Chairman and eight State Commissioners. As the rule, it is more difficult to influence the collegial body rather than the sole leader in order to make any politically motivated decisions.

***Who decides what the budget of the agency should be? How is your agency funded? What are the sources of the funding? Has there been a change in terms of its funding over time?***

9. The financing of the Antimonopoly Committee of Ukraine is carried out at the expense of the state budget. Amount of allocations from the state budget for the maintenance of the Committee is established as a separate line in the state budget by Parliament every year. Finances received as a result of the payment of duties on the submission of applications for giving consent to concerted practices and concentration of the economic entities and provision of findings is included in incomes of the special fund of the state budget to finance the activities of the Committee. The Committee submits proposals for funding requirements to the Ministry of Finance. Taking into consideration these proposals, the Ministry of Finance prepares a draft law on the state budget of Ukraine that shall be approved by the Cabinet of Ministers of Ukraine and submitted to the Verkhovna Rada of Ukraine. In 2015-2016 years financing of the Committee in absolute hryvnia terms slightly increased compared to 2014, but taking into account the inflation in dollar terms it decreased:

Year	Budget allocations for the maintenance of the Committee's bodies	
	mln. UAH	mln. \$**
2013	71994,2	9,007
2014	50161,4	4,146
2015	62636,4	3,972
2016	65810,7*	2,869

\* Provided by the Law of Ukraine "On the State Budget of Ukraine for 2016".

\*\* At the rate as of the date of adoption of the law on state budget of Ukraine for relevant year.

***Do you have decision-making autonomy? Should the government be allowed to supervise or give strategic guidance to your competition authority?***

10. The Law of Ukraine "On the Antimonopoly Committee of Ukraine" envisages the considering complaints and cases arising in connection with violation of the legislation on protection of economic competition and holding investigations into these complaints and cases, adopting orders and decisions on them, verifying and revising decisions on cases as the exclusive powers of the Antimonopoly Committee of Ukraine. The performance of these powers by other public authorities is not allowed.

11. According to the same Law, as already mentioned above, bodies and officials of the Committee are governed only by law on protection of economic competition and are independent from public authorities, including the Cabinet of Ministers of Ukraine during the consideration of complaints and cases on concerted actions, concentration, violation of legislation on protection of economic competition and decision-making on them.

12. However, the Law envisages that the Committee interacts with the Cabinet of Ministers of Ukraine during the development and implementation of programs on economic development of Ukraine, develops and submits to the Cabinet of Ministers of Ukraine draft of acts related to priorities and spheres of competition policy for a specified period, summarizes and analyzes information on their implementation, provides suggestions on the acts of the Government.

***Can the government decide which cases, market studies etc. the agency should and should not investigate? Can the government overrule a decision of your agency? Can this happen only under specific circumstances (e.g. on public interest grounds) or is it a general power?***

13. No. The Cabinet of Ministers of Ukraine has no authority to give instructions to the Committee to take certain steps in the process of monitoring the legislation on protection of economic competition compliance. However, the government appeals to the Committee on possible non-compliance with the legislation on protection of economic competition in the markets conducted by relevant entities. Nevertheless, the Committee makes the final decision on the existence of signs of violations of legislation on protection of economic competition and on the measures to be taken in accordance with law.

14. Executive bodies, including the Cabinet of Ministers of Ukraine and the President of Ukraine have no authority to change or repeal the Committee's decisions that was taken by the Committee when exercising control over compliance with the legislation on protection of economic competition.

15. However, in case the Committee takes a decision on prohibition of concerted actions or concentration of undertakings due to the fact that they lead to monopolization of commodity markets or significant restriction of competition in these markets, the Cabinet of Ministers of Ukraine may take a decision on authorizing such concerted actions or concentration if a positive effect on the public interest of it prevails negative consequences of competition restriction. But this does not repeal the preliminary decision of the Committee.

16. Control over the legality and validity of the Committee's decisions is performed by courts to which any decision of the Committee may be appealed. The courts may decide on changing, repealing or considering decisions of bodies of the Committee as invalid in case of:

- the incomplete investigation of circumstances which are of importance to the case;
- such unproved circumstances that are of importance to the case and that are considered as established;
- the incompatibility of the decision conclusions with the case circumstances;
- the violation of or the incorrect application of norms of material or procedural law.