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JUDICIAL PERSPECTIVES ON COMPETITION LAW

Contribution from Ukraine

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Judicial Perspectives on Competition Law

-- Ukraine* --

1. Evidentiary Matters in Competition Cases before Courts

1. Quite often the lack of economic expertise on the part of judges creates obstacles to the effective enforcement of competition law, especially in complex matters involving economic analysis as one of the principal tools of proving theory of harm (*e.g.*, tacit collusions; abuse of dominance, etc.).

2. So far, courts' approach to such matters varies from full upholding of the AMCU conclusions without deeply examining it, on the one hand, to invalidating the AMCU decision due to the lack of evidence (and sometimes setting a standard of proof on the unrealistic level), on the other. All in all, such matters have been dealt with by the courts on a case by case basis.

3. In principle, courts are free to appoint expert examination of economic matters. On the other hand, the courts themselves have developed a rather restrictive interpretation of law that the AMCU is the only authority which can make conclusions with regard to a number of economic matters, such as market definition, abuse of dominance, etc., and the courts are not in the position to re-examine such matters (including through appointing independent experts), but are to make sure that in doing so AMCU follows its own methodologies (which have been approved by the Ministry of Justice and are binding). When occasionally some courts do refer economic issues to independent experts, very often experts refuse to deal with the referred issues due to the lack of competence.

4. At the same time, increasingly more often high ranking judges, at least in private conversations, admit that this approach is to be changed, as difficulty of the matters becomes excessive for judges to deal with and suggests the need for reexamination of the AMCU conclusions by court-appointed experts.

5. Most often, courts simply follow jurisprudence of the cassation court and the Supreme Court in similar cases (such jurisprudence is readily available). In matters which are not similar to any other cases, courts tend to approach matters on a case by case basis.

6. Sometimes, the burden of proof in certain matters (e.g., tacit collusion, abuse of dominance) is rather high requiring AMCU to rebut the existence of any other factors which could plausibly explain parallel behavior of respondents in the market (*e.g.*, synchronous price increases) or to establish (through economic modelling) that should have significant competition existed in a non-competitive market, prices or other conditions would have been radically different.

7. Companies seeking to invalidate AMCU decisions very often rely in the court on expert reports which show results different from AMCU conclusions. So far, the courts have been reluctant to use such alternative reports as evidence in the case (also due to a high probability of a bias of such experts paid by the party) or to re-examine AMCU conclusions by appointing independent experts. However, sooner or later, such court-

* This contribution was written by the Antimonopoly Committee of Ukraine (AMCU).

appointed experts will be involved, primarily in most complex cases based on sound economic analysis which judges are usually unqualified to examine and review.

8. Practically, standards of review of decisions by competition agencies vary depending on the level of expertise of courts. While judges in the courts of first instance, especially those who started focusing on competition law only recently, generally tend to accept conclusions of the AMCU without questioning them much, the judges in higher level courts who have years of experience are much more likely to thoroughly examine AMCU decisions and require AMCU to present consistent body of evidence and demonstrate observance of principal procedural rules; otherwise the decision is likely to be invalidated.

2. Interactions between Courts and Competition Authorities

9. As for the examples of occasions and projects when the competition authority sought to engage with the judiciary – in the past, AMCU as a competition agency had regular practical workshops with commercial court judges who dealt with competition matters; such workshops were held by some third party international organization and focused on such topics as implementation of the EC acquis in practice of the AMCU and courts; handling of confidential information (also in leniency cases), etc.

10. Recently, AMCU suggested to the Higher Commercial Court (the cassation court, practically the highest instance court routinely dealing with competition matters) arranging a joint training to be held by an international institution which would involve foreign experts in competition law, economic analysis and EC *acquis*.

11. Potentially, the interaction between courts and competition agencies could raise concerns regarding the separation of powers, but never has so far. Normally, courts refuse to interfere into AMCU discretionary powers to define markets, establish infringements, impose fines, and review AMCU decisions only from the standpoint of consistency and relevancy of evidence. Any exceptions (when undue interference takes place, *e.g.*, when the court establishes abuse of dominance in the absence of any conclusions of the AMCU) are immediately identified by the AMCU and put for discussion with the judiciary.

12. Since about 2 years ago, cooperation between competition agencies and courts to improve competition law enforcement and awareness has not been appropriate: there are very rare joint events (primarily annual 1 day conferences), and no joint trainings. Currently, the AMCU is working on having such a training be arranged and funded, possibly under the auspices of the National School of Judiciary. The idea is not AMCU 'teaching' or 'mentoring' judges or *vice versa*, but having an independent international party to coach both AMCU and judiciary with regard to competition law and economic analysis in law (see *above*).

13. There are several annual professional conferences where both AMCU and judiciary are present (e.g., the Annual Competition Forum which is held in spring each year). However, more such events, with special focus on competition, are needed, as interaction during general conferences is usually very limited and time constrained.

14. There should be a chapter on competition law, at least in professional training for commercial courts' judges. However, the AMCU has not been engaged into such trainings in any capacity.

3. Experiences and Lessons Regarding the Use of Specialised and Generalist Courts

15. In Ukraine, competition matters are handled by commercial courts with the Higher Commercial Court being the highest instance body (not counting the Supreme Court which is charged with fixing inconsistencies of jurisprudence of lower instance courts, but very rarely allows for review ('grants *certiorari*') and deals with competition matters.

16. In the past, due to inconsistency between the Economic Competition Protection Act and Administrative Procedure Code, administrative courts occasionally asserted jurisdiction and took up competition cases, which led to 'forum shopping' by companies seeking to invalidate the negative AMCU decision and to creation of two parallel bodies of jurisprudence, often controversial, in commercial and administrative courts. However, this practice has been condemned by the Supreme Court which finally ruled that competition cases fall within jurisdiction of commercial.

17. Currently, Ukraine is in process of judiciary reform, when the Higher Commercial Court is to be abolished, but instead the Commercial Law Chamber is to be created at the level of the Supreme Court; key judges from the Higher Commercial Court who dealt with competition matters have been already promoted to the Supreme Court justices. New procedural codes are to be introduced. Under the new pattern, general competition matters will remain in jurisdiction of commercial courts; unfair competition cases involving intellectual property will be handled by the specialized intellectual property court (yet to be created), while public procurement cases (where AMCU is the authority dealing with complaints) are to be heard by administrative courts.

18. Complexity of competition cases suggests specialization of judges as a condition of high quality judgments. Currently, due to significant experience, commercial courts are best placed to deal with competition cases. An idea of creating a specialized judicial body which would focus on competition (and also, probably, intellectual property) issues was discussed, especially in view of the upcoming judiciary reform, and AMCU was one of its supporters; however, this concept was eventually not upheld.

19. Ideally, AMCU would prefer to have if not separate judicial authority but at least judges who would specialize on competition cases, being able to examine soundness of AMCU evidence and to understand economic theory behind the decisions.

20. Private disputes may be handled by commercial courts, especially, if the AMCU decision (on which private claims are based) has already withstood scrutiny. Notably, no private competition law claims independently of the AMCU decisions have been successful so far in Ukraine.

21. The advantages of judicial specialization can be reduced by appeals' mechanisms to generalist courts. In Ukraine, traditionally there have been judges specializing in competition law cases at the level of 1st instance courts (especially in Kyiv) as well as at the cassation court (the Higher Commercial Court); at the same time, competition law specialization has been much less pronounced at the 2nd instance courts (appellate courts). Due to this, at the level of appeal, very often the judges would not go into much detail but would rather uphold the decision of the court of 1st instance; or vice versa, reverse the 1st instance court judgment, but without proper reasoning.