

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****INVESTIGATIVE POWERS IN PRACTICE - Contribution from the Ukraine****- Session IV -****30 November 2018**

This contribution is submitted by the Ukraine for the Breakout Session 1: *Unannounced Inspections in the Digital Age*, the Breakout Session 2: *Requests for Information – Limits and Effectiveness* and the Breakout Session 3: *Due Process in relation to Evidence Gathering* under Session IV of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/invpw.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

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Investigative Powers in Practice

Breakout Session 1: Unannounced Inspections in the Digital Age

Breakout Session 2: Requests for Information – Limits and Effectiveness

Breakout Session 3: Due Process in relation to Evidence Gathering

- Contribution from the Ukraine –

1. Breakout Session 1 “Unannounced Inspections in the Digital Age”

1. Carrying out unscheduled on-site inspections of business entities regarding their participation in a cartel is conducted in accordance with the Regulations approved by the Antimonopoly Committee of Ukraine.
2. For inspection, Commission consisting of not less than two experts of the Committee is formed. In particular, the Commission has the following powers: during the inspection of the verification object, to have unrestricted access to storage sites, including documents, computers of the object of inspection, magnetic carriers, etc., to receive copies of such information, documents and other materials required for the inspection.
3. The main information important for investigating the actions of the cartel, the Committee tries to assemble on the very first day of such an inspection. In particular, on the first day of inspection, commission members copy information from the computers of the object of inspection. At the same time, based on the economic competition protection legislation, members of the Commission also have access to information with restricted access.
4. According to the national legislation on the protection of information, the restricted information also includes personal information and confidential data.
5. In addition, in the case of notification by the employees of the object of the inspection of the availability of personal information or confidential data among the information from which the members of the Commission received a copy, the carriers with such information are subsequently stored separately, and access to them is limited to a number of people.
6. Typically, prior to the start of the inspection, measures are taken to establish possible places for storing information, the scheme of access to the object of inspection is examined, information about the possible persons of the object of inspection involved in the activity of the cartel, and their work places are determined. Therefore, on the first day of inspection, members of the Commission will first of all take steps to obtain access to pre-determined and foreseen schemes of location of computers and other information carriers.

7. It should be noted that the information is not processed by the Committee's employees at the place of inspection (in the premises of the Object of Inspection), but is sent to the Committee, where it is then processed and analyzed.

8. During the inspections, the employees who carry them out face with the problems of accessing electronic information carriers:

- Access to remote servers. At present, it is becoming common practice to store information in cloud storage or remote servers. In this case, information can be stored entirely and partially on servers physically located in other jurisdictions. For example, during one of the inspections, the Verification Commission was confronted with the fact that only workstations were located at the checking site, and all information was stored and processed remotely. The object of the verification refused to provide access to remote information referring to a technical failure and termination of communication with the server. At the same time, non-granting of access to places of storage of information and the information itself is a violation of the economic competition protection legislation and entails a fine of up to 1% of the annual income of the entity. However, there are cases where such liability before the law does not stop the officials of the object of inspection from creating obstacles in obtaining information.
- One of the problems that takes place at present and concerns the copying of information from electronic media is unauthorized interference in operation of electrical networks, when the actual supply of electricity to the object of inspection and the access to information stored by the computer equipment, is much more complicated.
- A part of electronic information or all information about the activity of the cartel may be stored in portable devices that are not located at the object of inspection, but are in the personal possession of managers or, for example, in their vehicles. Access to personal property of individuals within the framework of investigations of violations of the economic competition protection legislation is not currently regulated. The same restrictions apply to personal electronic devices.
- There is definitely a necessity to invest in specialized IT specialists and software for successful inspections – this issue is relevant and needs to be addressed. The success of inspections directly depends, among other things, on the availability of IT experts, relevant software and computer equipment in the Commission. Hence, the Commission during the inspection needs to solve the problem not only for copying information, but also for overcoming protection of information, searching for encrypted and hidden information carriers, restoring deleted information, restoring physically damaged media, properly documenting received information, working with large volumes of data in short deadlines. Execution of such tasks requires appropriate professional skills and knowledge on the one hand and specialized equipment on the other. Generally, the Commission includes employees who are lawyers or economists and not IT professionals.

9. Regarding the specifics of the AMCU's investigation of conspiracies in oil products markets in the current state of information, in view of the development of information technologies, the implementation of anticompetitive concerted actions on the market can take place by coordinating and agreeing market participants on their behavior using electronic and mobile communication tools (correspondence by e-mail, exchange of short

text messages, etc.) and contact (informal meetings, etc.) without the conclusion of formal agreements, contracts.

10. At present, the Committee is collecting and analyzing evidence in the case on the grounds that major players in the retail market of petroleum products have committed violations of the economic competition protection legislation provided for in clause 1 of Article 50, paragraph 1, and in the third part of Article 6 of the Law of Ukraine “On Economic Competition Protection” in the form of committing anticompetitive concerted actions, the corresponding investigation was initiated in conjunction with the simultaneous change (increase/decrease) and the establishment of the retail prices for the sale of high-octane gasoline and diesel fuel at the same level in 2017 at the information boards of the stationary filling stations operating under the brands WOG and OKKO.

11. Business entities that are defendants in the case, as well as economic entities that are related to the defendants by the control relationship, are members of the Association “Naftogaz Association of Ukraine” (hereinafter - the Association).

12. The Association was able to directly coordinate the behavior of the Association’s members, in particular, regarding the level of retail prices set on the information boards of stationary filling stations, in order to gather evidence of the existence of a conspiracy in the market, an off-site non-scheduled inspection of the Association was initiated by the AMCU. Such coordination could be carried out by official electronic and mobile communication services without formal agreements, contracts.

13. In connection with the said, for the purpose of gathering evidence in the case, an off-site non-scheduled inspection of the Association was started by the AMCU.

14. In accordance with the plan for conducting an inspection of the Association, during the inspection, it was necessary to gather in the Association all actual data that makes it possible to determine whether or not there was a breach of the economic competition protection legislation, including materials of correspondence (incoming and outgoing letters, applications, appeals, complaints, etc.) of Association with business entities and state authorities.

15. In accordance with paragraph 33.3 of the Regulation on the procedure for conducting inspections, members of the Verification Commission have the right to demand the necessary documents and other information, including those with restricted access, to be a commercial secrecy in connection with the exercise of their powers.

16. Article 1 of the Law of Ukraine “On Economic Competition Protection” stipulates that information is data in any form and stored on any carrier (including correspondence, books, notices, illustrations (maps, charts, drawings, diagrams, etc.), photographs, video, sound recordings, computer system databases, or full or partial reproduction of their elements), explanations of persons and any other public announcements or documented information.

17. Thus, the data placed on official computers and mobile phones is information in the sense of Article 1 of the Law of Ukraine “On Economic Competition Protection”.

18. In accordance with paragraph 45 of the Regulation on the procedure for conducting inspections to ensure compliance with the economic competition protection legislation, members of the commission have the right to have unrestricted access to information storage sites, including computers of the object of inspection, magnetic carriers, etc., to receive copies of such information.

19. During the inspection, members of the Commission required to grant access to the information on the official computer of the Association's President. At the same time, access was denied on the grounds that the information contained in the computer was personal information.
20. The Commission requested the Association President to remove from the official computer files that contain or may contain personal information in the presence of a member of the Verification Commission for which a negative response was received.
21. At 05:00 pm, the President of the Association has switched on the official computer and not reacting to the objections of the members of the Verification Commission, committed deletion of files. At the same time, members of the Verification Commission were not given the possibility to verify which files (personal or service) were removed. After such actions, the president's computer of the Association was shut off at 05:17 pm.
22. In connection with the aforementioned, the Commission compiled a protocol dated January 30, 2018 on the creation of obstacles in the conduct of inspections. The said protocol was signed by the President of the Association with the following explanation: "Access cannot be provided for technical reasons".
23. According to the explanations of the President of the Association, fixed in the protocol dated 5 February 2018, the technical reason that made it impossible for the members of the Verification Commission to access the official computer was the fact that it was impossible to switch on the specified computer.
24. At the same time, according to the explanations of the President of the Association, which are fixed in the protocol dated 5 February 2018, there are no documents that could confirm the existence of technical reasons that led to the impossibility of providing access to the members of the verification commission to the official computer.
25. At the same time, according to the Association's submission to the Committee on April 27, 2018, an official computer, which was not granted access to the members of the Verification Commission, is not on the balance of the Association, which, in the opinion of the Association, is evidenced by the turnover statement, and is the property of the president of the Association. Therefore, in the opinion of the Association, the specified computer is not intended for use for official purposes.
26. The said information has not been communicated to the members of the Verification Commission by the President of the Association, either during the announcement by the Verification Commission of the verbal request for access to the official computer, nor during the provision of oral explanations recorded in the protocol of 5 February 2018 or during Objection to the Verification Certificate.
27. In addition, according to the "Turnover balance sheet information", the fixed assets, including means of computer equipment, include 2 personal computers, 3 laptops, 4 system units, 5 monitors.
28. During the inspection, the verification team members were not able to access the service computer in order to find out the relevant details of the system unit and the monitor of the specified computer.
29. At the same time, neither the Association nor its President had been provided with documents confirming that the said computer is a private property of the President of the Association.

30. Failure to provide members of the Commission with access to information contained on the official computer has created obstacles to the conduct of the inspection.

31. In connection with the aforementioned, by the decision of the Antimonopoly Committee of Ukraine, the Association “Naftogaz Association of Ukraine” was accused for committing a violation stipulated by clause 16 of Article 50 of the Law of Ukraine “On Economic Competition Protection” in the form of creating obstacles for AMCU’s employees in conducting inspections, seizure of property, documents, items or other information carriers.

32. The Association was fined for the said violation.

2. Breakout Session 2 “Requests for Information – Limits and Effectiveness”

33. During the formation of requests, the Committee is guided by the availability of information indicating violations of the economic competition protection legislation. Usually, the reasons for sending a request can be:

- Application of the entity on committing a violation by other entities. In this case, a request for information is sent on the basis of the facts stated in the application.
- On Committee’s own initiative, with the aim of clarifying certain facts necessary for the control of compliance with economic competition protection legislation.
- On the basis of the facts presented in the submission of law enforcement agencies that, in the course of their activities, signs of violation of the law that fall within the competence of the Committee were found.

34. The Committee takes into account the information received in order to formulate the request, as well as the information obtained during the consideration of previous cases, any other information received from various sources (on the Internet, mass media, etc.), information on the results of the visit of open events, round tables, surveys, as well as information obtained during the selection of explanations, including during inspections, etc.

35. In accordance with the legislation of Ukraine, the Committee has the right to require from business entities, associations, authorities, local authorities, bodies of administrative and management and control, their officials and employees, other natural and legal persons, any information that relates to the subject of research including those with restricted access.

36. In this connection, such a request from the Committee on the provision of information is called a requirement. Requirements for providing information are mandatory for execution within certain time limits.

37. In practice, the Committee had the case of a refusal by an entity to respond to a request, substantiating it with the fact that the requested information is confidential. However, in accordance with the legislation, the entity, other legal entities, their structural subdivisions, branches, representative offices, their officials and employees, individuals are obliged, upon request of the Committee, to submit documents, objects, explanations, other information, including those with restricted access and banking secrecy, necessary for the execution of tasks of the Committee provided for economic competition protection legislation.

38. In case of access to restricted information (including confidential information), the entity is obliged to indicate which information has limited access, including which

documents or parts of the documents contain restricted information and provide justification for referring information to restricted information.

39. Proceeding from this, the Committee imposed sanctions under the law, namely fined for failure to provide information.

40. The legislation of Ukraine provides for sanctions for non-submission of information within a specified period, submission of information in incomplete amount upon request of the Committee in the time period established by it or submission of inaccurate information to the Committee.

41. The said violation entails responsibility in the form of imposing a fine in the amount of up to one percent of the income (revenue) of the entity from the sale of products (goods, works, services) for the last reporting year preceding the year in which the fine is imposed.

42. The Committee is constantly checking the response given by the business entities to the request and in this regard the Committee often finds the above violations.

43. When studying the response, the Committee compares other facts received during the investigation from this entity, information received from other entities or compares with information from a previously performed inspection or selection of oral explanations that may serve to verify the reliability of the data.

44. Also, the questions themselves in request are formed taking into account the need to verify the authenticity of the information provided. Comparison of previously obtained facts with the received information is a burdensome process, as it takes a lot of time to check certain data, which entails delaying the investigation of the case.

45. The Committee does not assess intentions regarding the submission of incorrect information, as in its requests, the Committee necessarily warns about the liability provided for by the legislation for the said violations.

46. In its requests, the Committee always states that the answer should be given on each numbered question. And also in case of requesting information in electronic form, it determines in what format information should be provided.

47. An entity may submit aggregated information on a separate question in the form of a table with relevant explanations. However, the information provided should be exhaustive and understandable.

48. Based on the practice, business entities are trying to provide all available information upon request.

49. In the case of electronic submission, there are instances where information is provided in a format other than that requested by the Committee or in a format not supported by the commonly used software available in the Committee.

50. In practice, the Committee was faced with problematic issues regarding the impossibility of reviewing the information provided, because the information was provided in the software format that was owned by the entity and was developed specifically for its activities. The issue was resolved when business entity provided the Committee on a royalty-free basis with the relevant software for dealing with information for the period of the investigation.

51. Based on the above, we believe that for the effective work of the Committee, it is necessary to invest in specialized IT specialists and software, which would facilitate the collection and analysis of information necessary to identify and terminate violations.

52. It should be noted that the powers of the Committee when considering cases of concentration or violations of the economic competition protection legislation are practically identical and reflected in Articles 30 and 35 of the Law on Economic Competition Protection. In accordance with these norms, the Committee has the right to request documents/information, expert opinions, explanations of persons, other information, which is evidence in cases; receive an explanation of the persons involved in the case, or any persons at their request or on their own initiative. Such Committee's powers and the mechanisms for their implementation are reflected in Articles 43, 44 and 45 of the Law on Economic Competition Protection.

53. During consideration of cases, the Committee prepares and sends to business entities involved in the case requests for information in the form of a letter stating the list of questions necessary for the consideration of the case. Such requests may also be sent to:

- Market participants (who are not involved in the case as parties) at which concentration or violation occurs;
- Associations of market participants and/or government agencies, etc.

54. At the request of the Committee, the entities to which the request was submitted, provide a written response, and at the time of providing a large amount of information, such entities provide the requested information in electronic form. The information provided to the Committee electronically does not require specialized software (available in word, excel, pdf format).

55. It is also worth noting that the law gave the AMCU not only the powers to collect evidence, but also effective mechanisms for the exercise of these powers. In particular, Part 1 of Art. 22-1 of the AMCU Law provides for the duty of persons, upon request of the Committee, to file documents, objects, explanations, and other information (including those with restricted access and banking secrecy). At the same time, failure to submit to the Committee information, incomplete submission of information or inaccurate information constitutes separate components of violations of the legislation on the protection of economic competition (Clause 13-15, Part 1, Article 50 of the Law "On Protection of Economic Competition"), for which the Committee is entitled to impose significant fines.

56. As regards the disclosure of information contained in the case file and which the provider identified as "confidential", such disclosure activities of the Committee are governed by the provisions of the Criminal Procedure Code of Ukraine.

57. Thus, according to Clause 4 of Part 1 of Art. 162 of the Criminal Procedure Code of Ukraine, confidential information, including commercial secrecy (contained in documents) is protected by law. Hence, access to documents and other information holders (containing secrecy, protected by law) is carried out in the manner prescribed by the legislation of Ukraine.

3. Breakout Session 3 "Due Process in relation to Evidence Gathering"

58. The case of violation of the economic competition protection legislation begins with the adoption of the order on the beginning of the case and ends with the decision in the case.

59. According to the results of consideration of cases of violation of the economic competition protection legislation by the Committee, decisions are made, in particular, on the recognition of the commission of the violation and the imposition of a fine.

60. At the same time, an order of the Committee is issued regarding the conduct of inspections of business entities.

61. It should be noted that defendants in cases from time to time challenge the procedural actions of the Committee, in particular, the order to begin the consideration of the case or conduct of an inspection.

62. At present, during appeals of the relevant procedural documents or certain procedural actions of the Committee, the courts agreed with the Committee's position and rejected the claims of the defendants.

63. Therefore, in 2011, the Supreme Economic Court of Ukraine (SECU) ruled in one of the cases:

64. "The reference of the complainant to the absence of any features of violation of competition law in his actions is not taken into account, since this data is subject to investigation and evaluation in the course of consideration by the AMCU of the relevant case of violation of competition law. With regard to the violation of the commercial reputation of Lustdorf LLC, these circumstances must be brought to light outside this dispute. It should be noted that the necessary sign of such a violation is the dissemination of information. The disclosure of certain information to a person to whom they relate cannot be recognized as the dissemination of information".

65. Thus, the claims were rejected by the court.

66. As a rule, sufficiency, reasonableness and admissibility of evidence are considered by the courts at the stage of appeal of a decision on the recognition of a violation by an entity and imposing a fine.

67. Thus, in another decision, the Plenum of the SECU ruled:

68. "As for the non-compliance by the AMCU with other procedural rules in reviewing cases of violations of competition law or in conducting a review of compliance by a business entity with competition law, as a result a commercial court might recognize corresponding decision as invalid only in cases where the violation made it impossible or substantially complicated the clarification of the actual circumstances relevant for the adoption of a decision by the Committee. For example, violation of the right of the person involved in the case to submit evidence, petitions, oral and written explanations (objections), proposals.

69. If the violation by the AMCU of procedural rules in the consideration of a case concerning the violation of competition law did not lead to the adoption of an incorrect per se decision on the case, then the economic court has no grounds for the recognition of the contested decision as invalid."

70. In accordance with the economic competition protection legislation, defendants get the right to examine the case file after receiving a submission with preliminary findings in the case. The submission of the preliminary findings in the case contains, in particular, the qualification of the violation and the evidence, confirming the commission of the violation.

71. If the materials of the case contain restricted information or information that may harm the interests of other persons, such materials are not provided to the defendant for examination, even if they directly prove the violation committed by this defendant.

72. However, such materials are brought to the court at request during the appeal of the decision of the Committee.

73. In this case, such materials are filed separately from the main materials of the case, in particular, such materials may be presented to the judge for examination without providing the corresponding copies, unless otherwise provided by a court order. In turn, the members of the Committee who accompany the case in court, together with the materials containing the confidential information, file a petition for a closed trial.

74. In the course of consideration of cases of violation of the economic competition protection legislation and cases of concentration of business entities the Committee in case of the need for additional study of the circumstances of the case and/or in-depth study of the consequences of the actions of the parties to the case involved commodity markets, collects information/evidence/expert conclusions for further decision making in a case.