

Unclassified**English - Or. English**

24 November 2018

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION LAW AND STATE-OWNED ENTERPRISES – Contribution
from Ukraine****- Session V -****30 November 2018**

This contribution is submitted by the Ukraine under Session V 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/csos.

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

JT03440405

Competition Law and State-Owned Enterprises

- Contribution from Ukraine -

1. Introduction

1. According to the Ukrainian Law on Protection of Economic Competition a general definition of an undertaking also covers state-owned enterprises (hereinafter –SOEs) which means that SOEs fall within the scope of competition law to the same degree as private entities.
2. This contribution reviews the experience of the Antimonopoly Committee of Ukraine (hereinafter – AMCU) in cases involving SOEs in merger control and antitrust investigations.

2. Merger control

3. AMCU considered the application of the Ministry seeking permission for the reorganization of SOEs of maritime transport through the allocation of assets in the form of integral property complexes (port infrastructure objects, other assets, rights and obligations related thereto, and creation of a state enterprise A as a result of the spin-off.
4. The purpose of the concentration was to streamline the system for collection and distribution of port fees, the distribution of administrative functions for the safety of navigation and the economic activities of state enterprises of maritime transport.
5. As a result of the concentration, the newly created state enterprise A founded by the Ministry, would receive the right to use assets in the form of integral property complexes of SOEs of maritime transport, which are intended to perform administrative functions for the collection of port fees.
6. Consequently, participants in this concentration - SOEs of maritime transport were considered by AMCU as business entities that were competitors, notwithstanding the fact that they were under the general management of the same ministry.
7. In 2006, AMCU forbade the creation of the State Concern, since such a concentration might have led to monopolization in the national market of sea and river ports (berths) for cargo handling.
8. Participants of the State Concern were 20 maritime trade ports, which are SOEs that are part of the management of the Ministry of Transport.
9. Handing down a negative decision the AMCU took into consideration the following:
 - The purpose of the State Concern would be to coordinate and centralize the economic activity of the enterprises that are part thereof, to ensure the proper conditions for their functioning, to develop physical infrastructure of the participants, with the centralization of the functions of scientific and technical and

industrial development, investment, financial, foreign economic and innovation activities;

- According to the draft Concern charter, the State Concern would function as a single economic entity;
 - The merger of all commercial sea ports within the Concern, which will develop, approve and implement general schemes, strategic plans, feasibility studies for development, reconstruction, modernization and technical re-equipment of sea merchant ports etc., would eliminate competition between sea trading ports;
 - As a result of the formation of the State Concern, the structure of the market would undergo significant changes: a significant part of the market will belong to the State Concern in the form of commercial sea ports, and the rest of the market would be include a large number of other economic entities having an incomparably small share in the market and being incapable of competing with the state owned sea ports;
10. The total share of sea merchant ports in the market of services of sea and river ports (berths) for the handling of cargoes exceeded 35 percent.
11. AMCU considered a merger clearance application of the city council seeking approval of a transaction of merging 11 municipal enterprises into a municipal utility company.
12. AMCU established that merging of 11 enterprises into the utility company would effectively discontinue their activities. 11 communal enterprises belonged to the communal property of the city, subordinated to the housing department and the distribution of residential areas, but at the same time were separate legal entities with independent balance sheets.
13. AMCU did not find the above enterprises as linked to any other economic entities.
14. As a result, the declared concentrations were not deemed as negatively affecting competition in the local (city) market of services for maintenance of buildings and adjacent territories, as the applicants were granted permission.

3. Anticompetitive conduct

15. Recently, AMCU passed a decision in a case of dominance abuse by a SOE. ‘Artemsil’ state enterprise (a major national manufacturer of salt with a market share ranging from 75% to 83% depending on a type of product) was found to have abused its dominance by arbitrarily applying different prices to equivalent sale contracts and created barriers to market access by refusing to conclude agreements with potential buyers without any reasonable justification.

16. Another dominance abuse case involving a SOE is pending before the AMCU. Ukrspirt, a state 100% monopoly for manufacturing spirit (rectified ethanol) is alleged of having abused its dominance by maintaining discriminatory prices and applying arbitrary discounts to the buyers with no objective justification. A statement of objections in the case is expected to be released in December, 2018.