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**INTERACTIONS BETWEEN COMPETITION AUTHORITIES AND SECTOR REGULATORS –
Contribution from Ukraine**

- Session III -

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This contribution is submitted by Ukraine under Session III of the Global Forum on Competition to be held on 1-2 December 2022.

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

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Interactions between Competition Authorities and Sector Regulators

- Contribution from Ukraine -

1. General overview

1. Among the components necessary for the effective functioning of the economy of any state, we believe that the following are important: firstly, the state policy aimed at developing competition and sectors of the economy, at stimulating and encouraging the emergence of new players in the markets. Secondly, capable institutional regulators responsible for certain areas of economic development. Thirdly, cooperation between a strong and capable competition authority with an effective enforcement mechanism and regulators responsible for the development of competition in the relevant sectors.

2. Activities of regulators in Ukraine and enforcement of the AMCU

2. The AMCU was one of the initiators and driving force behind the creation of sectoral regulators. As a result, Ukraine has national commissions in such areas as communications and informatization, energy and utilities, securities and stock market.

3. At the same time, despite all the efforts of the AMCU, the commission in the field of transport has not yet been established. Today, **the functions of the transport regulator are performed by the Ministry of Infrastructure of Ukraine**, which is obliged by law to promote competition and not to commit any illegal actions that may have a negative impact on competition. At the same time, the Ministry itself has become the main object of allegations of violations of competition law.

2.1. Cases against the Ministry of Infrastructure.

2.1.1. In the market of pilotage services

4. Thus, in 2021, the Committee completed consideration of the case on the inaction of the Ministry of Infrastructure, which led to the prevention of competition in the pilotage services market. It was interesting that the Ministry of Infrastructure, contrary to the requirements of the legislation in the maritime sphere, did not amend its regulations governing the pilotage of ships.

5. It would seem that this is solely a failure to comply with the requirements of the legislation in the maritime sphere, but its consequence is the discrimination of economic entities by the form of ownership and the provision of benefits to the state enterprise, the governing body of which is this ministry. And such actions of the Ministry of Infrastructure are already qualified as anti-competitive actions of the authority. In fact, the Ministry of Infrastructure created advantages for its ward enterprise, which distorted competition in the relevant market.

2.1.2. In the market of rent of state real estate

6. In May 2021, the Committee completed the consideration of the case on anticompetitive actions of the Ministry of Infrastructure and the Regional Office of the SPFU (State property fund of Ukraine) in Odesa and Mykolaiv regions in the market of rent of state real estate in the Mykolaiv seaport, initiated at the request of a stevedoring company.

7. The anticompetitive actions were as follows:

- during the extension of the rent agreement for state property on the territory of Mykolaiv seaport for one of the stevedoring companies, an economically unreasonable rent rate was established in comparison with competitors.

8. As a result of such anti-competitive actions of the authorities, for one stevedoring company was created unfavorable working conditions compared to others operating in this port.

9. By the decision of the Committee dated 27.05.2021 No. 302-r, the anti-competitive actions of the Ministry of Infrastructure and the Regional Office of the SPFU in Odesa and Mykolaiv regions to create unfavorable operating conditions for one of the stevedoring companies compared to competitors, as well as the conclusion of agreements that led to restriction of competition, were recognized as a violation of the legislation on the protection of economic competition, and it was obliged to stop the violation.

2.1.3. In the field of air navigation services for aircraft

10. In 2021, the Committee completed the consideration of the case on anticompetitive actions of the Ministry of Infrastructure of Ukraine, which approved Order No. 415 dated 04.06.2019 "On Establishing Fees for Air Navigation Services for Aircraft in the Airspace of Ukraine", the provisions of which put Boryspil Airport in a privileged position compared to other airports in Ukraine.

11. During the consideration of the case, the Committee provided the Ministry of Infrastructure with recommendations dated 12.12.2019 No. 68-рк, which obliged to amend this order, eliminating discriminatory conditions for granting certain business entities benefits or other advantages that put them in a privileged position compared to competitors.

12. Pursuant to the recommendations, in 2020, the Ministry of Infrastructure developed a new order dated 17.05.2021 No. 258, which established two rates for air navigation services on the approach and in the airfield area: separately for the two competing airports of the Kyiv "air hub": Boryspil and Zhulyany airports and for other airports.

13. Thus, the Ministry of Infrastructure has implemented the recommendations of the Committee, and on 07.10.2021 the Committee adopted decision No. 550-r to close the proceedings in connection with the implementation of the recommendations.

2.2. Ways to eliminate systemic problems of development and protection of competition in transport markets.

14. The development of competition in certain markets, such as transport, requires appropriate regulation of the activities of market participants through constant monitoring, analysis and forecasting of the state of development of these markets, imposing certain obligations on entities operating in monopolized markets (with significant market power) or mitigating or canceling obligations when the market becomes competitive.

15. The functions of the regulator are precisely to determine the feasibility and methods of regulation, to ensure stable and non-discriminatory regulation, primarily in the field of tariff policy, to form equal relations between natural monopolies and consumers of their services, to ensure the development of competition in related markets.

16. The above examples of law enforcement in the sphere of transport once again emphasize the importance of establishing a national commission for transport regulation and the need to separate the functions of management and regulation between the two authorities.

17. We believe that the creation of an independent regulator would eliminate the prerequisites for possible violations of the Ministry of Infrastructure. The Committee, for its part, was involved in

the work on the draft Law of Ukraine "On the National Commission for State Regulation of Transport" and proposed to harmonize this draft, in particular, in terms of the functions of the regulator regarding the state regulation of tariffs (fees, charges) and supervision of access to infrastructure with the Law of Ukraine "On Natural Monopolies".

18. Some positive developments towards the creation of another regulator have already taken place. In January 2022, the draft law on amendments to the Law of Ukraine "On Transport", which provides for the establishment of the National Commission for State Regulation of Transport (NCRT), was submitted to the Verkhovna Rada of Ukraine by the Cabinet of Ministers of Ukraine and agreed by the Committee.

19. Therefore, the AMCU will continue to make efforts to complete the establishment of an independent regulator in the field of transport.

3. Interaction with regulators through the mechanism of approval of their regulations that may affect competition

20. Under competition law, the AMCU is vested with broad powers to promote competition at all levels of government. The most important is the fourth part of Article 20, which was added to the Law of Ukraine "On the AMCU" in 2003 in order to exercise control over the state authorities and later also over the regulators.

21. According to the fourth part of Article 20, "all governmental authorities, local self-government bodies, administrative and economic management and control bodies" are obliged to coordinate with the Antimonopoly Committee of Ukraine "draft regulatory legal acts and other decisions that may affect competition". This requirement applies to any body whose actions "may lead to the prevention, elimination, restriction or distortion of competition in the relevant markets".

3.1. Interaction with the regulator in the field of securities circulation and stock market

22. The Committee did not approve the draft decision of the National Securities and Stock Market Commission "On Approval of the Regulation on the Register of Appraisers Who Can Conduct Independent Appraisal in Cases Established by the Legislation on Securities and Joint Stock Companies" (hereinafter - the draft Decision) within the powers of approval of draft regulatory legal acts and their assessment for the impact on competition.

23. This position of the Committee was substantiated by the following.

24. The draft Decision provided for the introduction of the Register of appraisers who can conduct independent appraisal in cases established by the legislation on securities and joint stock companies, which will contain information on professional appraisal activities.

25. The legal basis for the valuation of property, property rights and professional valuation activities in Ukraine, its state and public regulation, ensuring the creation of a system of independent property valuation in order to protect the legitimate interests of the state and other subjects of legal relations in matters of valuation of property, property rights and the use of its results is determined by the Law of Ukraine "On the valuation of property, property rights and professional valuation activities in Ukraine" (hereinafter - the Law on Property Valuation).

26. The provisions of the draft Decision contained additional requirements for valuation entities that can conduct independent valuation in cases established by the legislation on securities and joint stock companies, which are not consistent with the provisions of the Law on Property Valuation and could lead to restriction of competition, in particular:

- the presence of valid European/international certificates;
- the presence of at least three appraisers in the staff of the appraisal entity;
- the requirement of mandatory membership of the appraiser in a self-regulatory organization of appraisers (hereinafter - SROA);
- the need to submit completed property valuation reports to the expert council of the SROA for review before submitting them to the customer;
- limiting the number of persons who can review the property valuation report.

27. Fulfilment of these requirements by appraisers as a precondition for inclusion in the Register could lead to the establishment of prohibitions and restrictions on the independence of appraisers not provided for by the laws of Ukraine, create additional administrative, organizational and economic barriers, which could have a negative impact on competition.

28. As part of the coordination of positions, the AMCU held a number of informal meetings with the National Securities and Stock Market Commission, the State Property Fund of Ukraine, participants in the property valuation market and their professional associations on the issue of the presence of provisions in the draft Decision, the implementation of which may lead to negative consequences in competition.

29. The results of the meeting showed the presence of a number of problematic issues that need to be resolved and the impossibility of approving the draft Decision in the proposed version.

30. The National Securities and Stock Market Commission did not adopt the Decision "On Approval of the Regulation on the Register of Appraisers Who Can Conduct Independent Appraisal in Cases Established by the Legislation on Securities and Joint Stock Companies".

3.2. Interaction with the regulator in the energy sector

31. In order to determine a transparent, effective and understandable mechanism for financing the UA-1 sub-account - by including these costs in the tariff for dispatch (operational and technological) control services and improving the algorithm for calculating the fee for auxiliary services, the National Energy and Utilities Regulatory Commission adopted Resolution No. 715 dated 23.04.2021, which amended the Market Rules.

32. As a result of the NERC's draft Resolution "On Approval of Amendments to the Market Rules", which was submitted to the Committee for approval, the Committee has repeatedly provided the Regulator with comments and suggestions for improving certain provisions of the said regulatory act, which, in the Committee's opinion, could have a negative impact on competition in the electricity market.

33. Thus, the Committee drew attention to the fact that the proposed changes regarding the inclusion of the electricity imbalance fee in the tariff of the transmission system operator for dispatch (operational and technical) control services under certain conditions may lead to an increase in the TSO (Transmission System Operator) tariff, which in turn may lead to an increase in the tariffs of Distribution System Operators, universal service providers, and, accordingly, the final tariffs for consumers.

34. During the finalization of the Amendments to the Market Rules, the NERC took into account the comments and suggestions of the AMCU and market participants, which ultimately led to the improvement of the mechanism for providing dispatch commands for loading and unloading out of range, which are provided to the TSO for the need to comply with the limits of operational security and maintain balance in the power system to resolve system constraints.

35. In addition, the approval of amendments to the Market Rules led to the improvement of the mechanism for financing the UA-1 sub-account, which allowed to optimize the costs of the

transmission system operator related to the procurement of auxiliary services in the electricity market and minimize the financial burden on market participants, in particular, on electricity suppliers and universal service providers.

3.3. On possible ways to encourage regulators to interact with the AMCU

36. The AMCU makes a lot of efforts to advocate for competition in various sectors of the economy. At the same time, in our opinion, the AMCU is still the main body in the field of competition protection, and the development of competition in the sectors is the prerogative of the relevant regulators.

37. Among the various options to increase the interest of regulators in the development of competition, we would like to return to the OECD recommendation of 2008, which remains relevant today, namely to consider the issue of establishing administrative liability for officials of regulators (public authorities) responsible for the actions of these regulators (authorities) for violation of part four of Article 20 of the Law of Ukraine "On the AMCU" (failure to coordinate with the AMCU draft regulatory legal acts affecting competition).

38. It is the personal responsibility of the heads of the respective regulators that would help to avoid the adoption of acts by the regulators, which subsequently had negative consequences for competition in the respective markets.

4. Memoranda of cooperation signed with regulators

39. In order to improve the exchange of information, develop common approaches to market research and enforcement, the AMCU has concluded memoranda of cooperation with a number of regulators.

4.1. Memorandum of cooperation with the National Securities and Stock Market Commission.

40. The purpose of signing the document was to establish closer bilateral cooperation, focused exchange of information for the implementation of operational actions on state control over the compliance with the legislation on protection of economic competition and for state regulation of the securities market.

41. As part of the implementation of the Memorandum, the AMCU and the Commission worked together to develop common approaches, mechanisms, recommendations in the field of economic competition development, in the development and functioning of the securities and derivatives market, mutually attracted specialists to assist in the consideration and resolution of issues within the competence of the agencies, etc.

42. Establishment of cooperation between the Committee and the Commission as a result contributed to the improvement of regulation and response to market processes that had signs of illegal manipulation and prevention of fair competition.

4.2. Memorandum with the energy regulator (NERC)

43. The need to develop such a document arose, in particular, in connection with the reform of the electricity, natural gas, heat, water supply and sewerage markets and the need to ensure unified and coordinated approaches to monitoring compliance with the legislation by business entities operating in these markets and in the relevant areas during the transition period.

44. Establishing a clearer division of powers between the AMCU and the Regulator in the energy sector contributed to the further effective resolution of issues and helped citizens and business entities to understand in which cases and to which body to apply to restore their rights.

45. The signing of the Memorandum resulted in:

- strengthening cooperation between the Committee and the NERC in the relevant markets;
- prompt interaction, especially when considering the most urgent issues raised by consumers in their appeals to the Committee and the Commission;
- mutual exchange of information on problematic issues in the markets of electricity, natural gas and in the areas of heat supply, water supply and sewerage for the possibility of promptly taking measures, within the competence, to resolve them;
- holding joint meetings and other events to discuss and resolve issues of common interest;
- preparation of joint proposals to the Verkhovna Rada of Ukraine, the President of Ukraine, the Prime Minister of Ukraine, the Cabinet of Ministers of Ukraine on possible ways to resolve problematic issues related to the functioning of the electricity, natural gas and heat supply, water supply and sewerage markets.

4.3. Prospects for updating the above memoranda.

46. Given the changes that have taken place in the recent period both in relation to the structure of the markets, changes in the regulation of energy markets and securities markets, the AMCU is considering updating the relevant memorandums to take into account current realities and the ability to respond quickly to the challenges currently facing the AMCU and regulators.

5. Conclusions

47. In general, the AMCU's activities as a competition advocate continue to be positively perceived by the regulators, and the AMCU's recommendations are seen as reflecting a correct understanding of the relevant regulatory context, even if the regulator does not agree with the AMCU's position. This, in turn, is the result of the AMCU's efforts to hold various consultations with regulators to explain its position.

48. Therefore, despite certain differences in views on market development between the AMCU and regulators from time to time, we believe that cooperation between the AMCU and regulators is an inevitable fact. We believe that without cooperation between the competition authority and the regulators it is impossible to develop effective competition in the relevant sectors of the economy.

49. Moreover, as the experience of the AMCU's law enforcement in the transport markets shows, it is critically important to establish independent regulators and empower them to carry out ex ante regulation of the markets. This, in turn, will free up additional resources of the competition authority and allow it to focus on the protection of competition in the markets.

50. In this case, and provided close cooperation between the competition authority and regulators, both business and the state, and of course, consumers will benefit from this.