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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by Ukraine --

16-18 June 2015

This document reproduces a written contribution from Ukraine submitted for Item 9 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.

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UKRAINE

1. The Ukrainian legislation prohibits anticompetitive concerted actions of the authorities, local governments, which lead or may lead to restrictions of competition. In particular, establishing discriminatory conditions for undertakings are considered to be such actions.

2. For example, Chernivtsy Regional Office of the Committee stopped anticompetitive actions of Glyboka Rayon Council which established, without having objectively justified reasons for this, different property lease rates for economic entities with the same type of activity. As a result of the actions of the Rayon Council, unlawful advantages were created for municipal drugstores in the form of reduced rates for the lease of municipal property compared with their competitors – commercial (private) drugstores.

3. Zakarpattia regional territorial office of the Antimonopoly Committee of Ukraine obliged Vynohradiv Municipal Council to take actions aimed at the prevention of infringements of the legislation on the protection of economic competition. As the division found, Vynohradiv Municipal Council adopted a decision on the setting of different percent rates of rental payments for the use of a land lots of the same designated purpose for economic entities operating in the same market, i.e. being competitors. Such actions of the Municipal Council constitute the infringements of the legislation on the protection of economic competition resulting in the creation for some economic entities of discriminative conditions of activity compared with ones' competitors.

1. What does competitive neutrality mean to you? Is competitive neutrality a useful or necessary goal for competition? Is it an objective of your competition authority?

4. Current legislation on protection of economic competition provides equal approaches to economic entities of different ownership forms, as to private and to collective and state.

5. The presence of state ownership is not an obstacle in the application of penalties to economic entity and not a reason to give certain preferences, privileges etc.

2. In your experience, what type of State measures can distort the playing field?

6. As of today in Ukraine a certain system of state regulation of agricultural markets has been developed. It contains elements of all areas of regulation: market access, prices, production output and sales, quality.

7. Regulation of access to agricultural markets has relatively limited application. Licensing regime in Ukraine, which is the basic mean of regulating entry to the markets, according to Article 9 of the Law of Ukraine "On licensing of certain activities" applies to the same activities in the agricultural sector: the production of veterinary medicines and drugs, wholesale, retail of veterinary medicine and drugs; pesticides and agrochemicals trade (only plant growth regulators); cultivation of plants containing narcotic drugs, veterinary practice; sale of breeding (genetic) resources, genetic examination of origin and anomalies of animals; fumigation (disinfection) of regulated objects that move across the state border of Ukraine and quarantine zones.

8. Articles 81 and 82 of the Land Code of Ukraine also set limits on ownership of agricultural land to foreign citizens, stateless persons, foreign legal entities and joint ventures established with foreign businesses and individuals.

9. The specific mechanism of state regulation was in the markets for sugar and sugar beet. According to the Law of Ukraine "On State Regulation of Production and Sale of Sugar" quotas for sugar production were introduced and establishment of minimum prices for sugar beet and sugar was provided.

10. The analysis shows that during the first five years of minimum prices (2000-2004) there was some real growth in sugar prices. It should be noted that later this mechanism led to the situation that the production and sale of sugar beets in the whole country became unprofitable.

11. The enshrined in the law differentiation of purchase prices for roots for different categories of beet supplier fell short of expectations as unequal terms of payment for sugar beet to agricultural undertakings and private farms has arisen.

12. For these reasons, these restrictions affect the possibility of entry of new undertakings to the markets of the agricultural sector to which they apply.

3. Do you think that State-controlled or supported firms enjoy advantages or disadvantages (e.g. higher labour costs due to public status of their employees)?

13. In the agricultural sector a large part of economic entities is influenced by the state. However, their economic efficiency is low.

14. In particular, this is confirmed by recently published data from the Ministry of Agrarian Policy and Food, which showed that among 571 state enterprises subordinated to the Ministry of Agrarian Policy and Food of Ukraine only 20 percent are profitable. Currently, the mentioned authority initiates privatization of nearly 250 agricultural enterprises.

4. How the fines to State-owned companies are being computed, or what is the appropriate method for computing the "group turnover" in case of State-owned enterprises?

15. According to the legislation the participants of concentrations (concerted actions) are economic entities, fines shall be imposed on defendants - economic entities.

16. Economic entity denoting a legal entity regardless of its administrative and legal form and its ownership form or an individual performing activities associated with manufacture, sale and purchase of commodities, other economic activities, including those associated with exercising supervision over other legal entity or an individual; group of the economic entities if one or several of them exercise supervision over the other. Economic entities shall also include state agencies, bodies of local self-government, as well as administrative and control bodies performing activities associated with manufacture, sale and procurement of commodities or other economic activities. The economic activities shall not include activities performed by individual purchasing consumer goods for ultimate consumption.

17. Since public authorities act only as managing bodies over property or corporate rights of undertakings, so they are not economic entities, according to Article 1 of the Law, and are not parties of the concentration.

18. Thus, the calculation of turnover of state enterprises shall be performed in respect of the undertaking and companies under its control.

5. Are three State-controlled companies responding to different Ministries considered as a single economic entity when calculating market shares in a merger control context?

19. The Committee considered the applications on affiliation of:

- Zhytomyr state-owned experimental prosthetic and orthopedic enterprise (Zhytomyr) and State enterprise "Kyiv plant "Impulse" (Kyiv) to Kyiv state-owned experimental prosthetic and orthopedic enterprise (Kyiv);
- Mykolaiv State experimental prosthetic and orthopedic enterprise (Mykolaiv) to Odesa state experimental prosthetic and orthopedic enterprise (Odesa);
- Ternopil state experimental prosthetic and orthopedic enterprise (Ternopil) to Lviv state experimental enterprise of means of transportation and prosthetics (Lviv);
- Khmelnytskyi state experimental prosthetic and orthopedic enterprise (m. Khmelnytskyi) to Vinnitsya state experimental prosthetic and orthopedic enterprise (m. Vinnitsya).

20. Despite the fact that these state enterprises were accountable to one ministry, as economic entities they operated separately from each other.

21. Thus, these entities were considered by the Committee as separate, independent from each other legal entities, and in evaluating the impact of the concentration on commodity markets of Ukraine the total share of participants of the concentration in the relevant markets was calculated.

22. Consequently, practice of the Committee shows that accountable to one or various ministries state-controlled companies shall be determined as separate, independent economic entities.

6. Have you used competition law remedies to ensure competitive neutrality such as structural separation and privatisation?

23. The decision-making on privatization is not the responsibility of the Antimonopoly Committee of Ukraine.

24. According to Article 48 of the Law of Ukraine "On Protection of Economic Competition" Bodies of the Antimonopoly Committee of Ukraine, proceeding from the results of the consideration of cases on violations of the laws on protection of economic competition, shall take decisions, in particular on compulsory split-up of an economic entity which occupies a monopoly (dominant) position on the market, or elimination of consequences of violations of the laws on protection of economic competition; in particular, to eliminate or mitigate the negative effect produced by economic entities' concerted practices and/or concentration on competition;

7. Types of remedies when the government has already negotiated or 'sealed' the deal.

25. According to Article 33 of the Law of Ukraine "On Protection of Economic Competition" in case when the Antimonopoly Committee of Ukraine takes a decision to prohibit concerted practices or concentration, the persons defined by Part 1 of Article 26 of the present Law may submit an application for authorising the concerted practices or the concentration on the basis of Part 3 of Article 10 or Part 2 of Article 25 of the present Law to the Cabinet of Ministers of Ukraine.

26. The Cabinet of Ministers of Ukraine shall take a motivated decision on authorising the concerted practices, the concentration or on the refusal to authorise them.

27. If a decision of the Cabinet of Ministers of Ukraine on authorising concerted practices, concentration is no longer valid or is repealed in accordance with an established procedure, bodies of

the Antimonopoly Committee of Ukraine shall take a decision on taking measures to restore the original state or on taking other measures to eliminate or ease a negative impact of the concerted practices, the concentration on competition.

28. In 2014 the Committee received statements and appeals from banking institutions and their professional associations concerning termination of operating agreements by budget organizations with banks on servicing under payroll programs in connection with the transition to the service in specified area to one of the state banks.

29. The information in the appeals indicates that some central government bodies and local authorities, citing the orders of the Government, sent letters to its territorial bodies, structural units, subordinated enterprises, institutions and organizations that are tasked to switch servicing under payroll programs to one of the state banks.

30. Given the fact that the majority of transactions with payment cards under the payroll programs are banking transactions with cash, thus:

- ATM networks of state banks are less extensive compared with other banks among authorized to provide payment of wages to employees of budgetary institutions (only 8 percent of the total number of ATMs of Ukrainian banks);
- These banks are not united in ATM networks, such as "ATMoSfera", "Radius";
- The Committee has no information on (intention of) expansion of state banks ATM networks, including JSC "Public Savings Bank of Ukraine"
- Transfer of payroll programs of budget organizations to state banks could lead to infringement of the interests of cardholders of such banks, which would be impossible under the conditions of existence of significant competition on the market.

31. At the same time, according to the Order of the Ministry of Finance of Ukraine from 24.09.2010 № 1086 "On approval of the procedure of holding a competitive tender on defining authorized banks of Ukraine, which should perform payment of wages to employees of budgetary institutions" the Ministry of Finance determined more than 60 banks, including state banks, as such that meet the requirements set for them by law, and that, accordingly, can make payments of the salaries to employees of budgetary institutions.

32. Thus, according to the Committee, providing state banks with exclusive power to service payroll programs of budget institutions may lead to restrictions of competition in that segment of the banking market.

33. Considering the above, the Committee appealed to the Cabinet of Ministers of Ukraine with the caveat concerning the availability of opportunities of state-owned banks to provide services under payroll programs of budgetary institutions at the appropriate level, and to prevent the commission of violations of legislation on protection of economic competition in the mentioned market.