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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Consumer data rights and competition – Note by Ukraine

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This document reproduces a written contribution from Ukraine submitted for Item 3 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm>

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Ukraine

1. The Law of Ukraine “On Personal Data Protection” regulates legal relations concerning protection and processing of personal data. It is aimed at the protection of fundamental rights and freedoms of a person and citizen, in particular, the right to non-interference with privacy in connection with the processing of personal data operates in Ukraine. According to it, personal data is information, or a set of information about an individual that is identified or can be accurately defined is determined. (i.e., individualized consumer data).

2. Availability of individualized consumer information is a necessary element of the organization of economic activities of certain types, which in particular involves the establishment and periodic renewal of direct contractual relations between the supplier of goods (services) and the client. After all, the availability of such information may decrease transaction costs for customer search. The importance of personal data as a source of strengthening of market position is more critical in cases where the number of consumers in the market is limited, and contracts with them have a long-term character. In such circumstances, the business entity that previously received personal information about consumers and used it to conclude long-term agreements with them may prevent the conduction of business activities of competitors in the relevant market (the phenomenon of "demand closure" in the relevant market).

3. Thus, the companies providing services of centralized electricity/heat/water/gas supply, to receive payment for the provided services must have comprehensive individual data about consumers. Thereof: addresses, type and volume of services they use, the availability of benefits on payment, subsidies and compensations etc. If the operator of the relevant network changes, the new operator cannot start business activity unless it receives access to the appropriate customers database.

4. Currently, the main factor that prevents business entities from competing for access to consumer information is the ability to grant a secret commercial status to relevant information. The business entity determines the composition and amount of data that constitutes a commercial secret following the Law.

5. In situations where certain information, in particular consumer information, acquires commercial secret status, the restriction of access to it is protected under Article 16, 17, 18 and 19 of the Law of Ukraine "On Protection against Unfair Competition".

- Thus, Article 16 of the abovementioned Law prohibits an illegal collection of commercial secret information
- Article 17 - prohibits secret commercial disclosure
- Article 18 - prohibits inclination to disclose a commercial secret
- Article 19 - prevents misuse of a commercial secret.

6. The commission of these actions entails a penalty of up to five percent of the revenue of the economic entity for the reporting year preceding the year in which the penalty is imposed.

7. Ukrainian legislation also provides mechanism for the protection of confidential information about economic entities and their customers, which are used by the bodies of the Antimonopoly Committee of Ukraine (hereinafter – AMCU).

8. According to part two of Article 22-1 of the Law "On the Antimonopoly Committee of Ukraine", restricted information obtained by the AMCU, its regional offices in the process of implementation of their powers is used by them solely to ensure the fulfillment of the tasks defined by the legislation on protection of economic competition. It is not subject to disclosure and promulgation except in situations provided for by Law.

9. Employees of the AMCU and its regional offices are bearing the responsibility for disclosure of commercial secret defined by the Law.

10. As mentioned above, individualized consumer data is a necessary element for the organization of certain types of economic activities. The lack of access to such information makes it impossible to conduct relevant business activities and acts as a barrier to entry into the relevant markets. Today, however, there have been numerous instances of attempts by economic entities to conduct illegal obtainment of the personal databases.

Case study 1

11. In 2018, the AMCU received statements on violation of the legislation on protection of economic competition by the Ukrtransgaz PJSC from 16 business entities supplying natural gas to the public (hereinafter - the Complainants).

12. Until 01.01.2020, Ukrtransgaz PJSC carried out activities on natural gas transportation through transmission pipelines, was a gas transmission system operator (hereinafter – GTS Operator), and had signs of a monopoly (dominant) position in the specified market.

13. Within the meaning of Article 1 of the Law of Ukraine "On Protection of Economic Competition" Ukrtransgaz PJSC is connected with the Naftogaz of Ukraine NJSC by a relationship of control and is a part of the Naftogaz Group.

14. Naftogaz of Ukraine NJSC carries out natural gas supply activities and is a competitor of the Applicants.

15. According to the legislation, the natural gas supplier must draw up an and apply to the GTS Operator for the volumes of natural gas that will be submitted and extracted by them from the gas transmission system for the needs of its consumers (hereinafter - nomination).

16. The nomination forms are approved by Ukrtransgaz PJSC. At the same time, the accepted types of the monthly nomination/renomination of the customer of natural gas transportation services stipulated by Ukrtransgaz PJSC. It provided for the need to fill in personal data of consumers, in particular personal data of household consumers (surname, first name, patronymic, address of residence, personal tax number etc.). Such requirements of the GTS Operator did not comply with the provisions of the Gas Transmission System Code¹. The current legislation provides for the identification of natural gas consumers exclusively by the Energy Identification Code.

17. According to the results of these applications, by the order of the State Commissioner, AMCU started investigation of the case of violation of the legislation on protection of economic competition.

¹ Code of the gas transportation system, approved by the resolution of the National Commission for State Regulation of Energy and Utilities No. 2493, dated September 30, 2015, registered with the Ministry of Justice of Ukraine No. 1378/27823 on November 11, 2015.

18. In the course of the investigation, the AMCU found that the nomination/renomination forms indicating personal data of household consumers were confidential information of suppliers whose disclosure contained competitive risks to their business activities. Also, the disclosure of this information could have been used by economic entities operating in the field of natural gas supply and connected with Ukrtransgaz PJSC by a relationship of control, in particular by Naftogaz of Ukraine NJSC to remove the Applicants from the natural gas supply market.

19. It should be mentioned that household consumers consume more than 40% of the total natural gas intake in Ukraine. Therefore, the access of Naftogaz of Ukraine NJSC to the personal data of the Applicants' household customers could have a significant impact on the competition in the natural gas market.

20. In view of the abovementioned, the Applicants submitted monthly nominations to GTS Operator without specifying personal data of household consumers, which were subsequently rejected by the GTS Operator.

21. According to the Applicants, in case of disagreement of the nominations for a specific reporting month, the Applicants, as suppliers of natural gas, would have to resolve the created monthly imbalance² at their own expense, which could lead to damage to the Applicants amounted up to UAH 800 million.

22. To suppress actions containing signs of violation of legislation on the protection of economic competition, the AMCU provided Ukrtransgaz PJSC Recommendations, namely: to terminate actions holding signs of violation of the Law on the protection of economic competition by bringing the form of monthly nomination/renaming of the customer of transportation services and applications to it in accordance with the requirements of applicable Law.

23. Based on the results of consideration of the Recommendations, Ukrtransgaz PJSC has announced that it adopted the new version of monthly nomination forms. The columns of the form containing personal data of consumers were removed, and field of notes added, on which the natural gas market entity, together with the nomination/renomination have the right to provide additional data for identification of the customers by the GTS Operator if necessary.

24. In 2019 the AMCU decided that Recommendations were deemed completed and proceedings were closed.

Case study 2

25. As another example of enforcement case in which privacy and data protection have been considered could be mentioned the case No. 92/32-p-02-02-18 on which the decision of Interim Administrative Board of the Antimonopoly Committee of Ukraine dated December 13, 2018, No 30-p/TK was made.³

² In accordance with paragraph 5 of section 1, Chapter I of the Gas Transmission System Code (in the version valid until 01.08.2018): unbalance – the difference between the volumes of natural gas submitted by the customer of transportation services for transportation at the point of entry, and extracted by the customer of transportation services from the gas transmission system at exit point, which is determined by the allocation procedure.

³ <http://www.amc.gov.ua/amku/doccatalog/document?id=146643&schema=main>

26. Based on results of the case, the actions of Ergon-Electric LLC, in the form of illegal use of a commercial secret of TVK Vector VS LLC were recognized as a violation of Article 19 of the Law of Ukraine "On protection against unfair competition".

27. Ergon-Electric LLC used in its business activities information without permission that constitutes a commercial secret of its competitor TVK Vector VS LLC namely:

- information on the full list of suppliers and customers (buyers) with contact details of their representatives and contracts concluded with them, the volume of purchase and sale of electrical products (distribution, control and measuring equipment, busbars, etc.);
- purchase and sale prices for such products (including information on the size in trade margins and discounts for the purchase of products).

28. Information constituting a commercial secret of TVK Vector-VS LLC was obtained by Ergon-Electric LLC through its founders, who were previously in labour relations with TVK Vector VS LLC, had access to information constituting a trade secret and signed obligations to maintain commercial secrets, in particular, undertook a duty not to use such information to engage in any activity that may harm TVK Vector VS LLC in relation to competitive activities for three years after dismissal.

29. Nevertheless, before their release, the abovementioned persons illegally copied information that constituted a commercial secret of TVK Vector VS LLC, which was then used to plan and carry out business activities of Ergon-Electric LLC, created by these persons as a competitor of the Applicant.

30. Further increase of the role of consumer data due to digitalization of the economy, pushed by the COVID-19 pandemic, requires even more attention from the competition authorities in terms of asymmetric information, barrier to entry, personalized prices etc.