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The Role of Competition Policy in Promoting Economic Recovery – Note by Ukraine

2 December 2020

This document reproduces a written contribution from Ukraine submitted for Item 2 of the 134th OECD Competition Committee meeting on 1-3 December 2020.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/promoting-economic-recovery.htm>

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Ukraine

1. Introduction

1. This year the whole world faced a crisis caused by Covid-19. It's affected almost all dimensions of life, including the state of the economy of different countries, and consequently, the state of competition in their markets. Ukraine is not an exception, and therefore on March 11, 2020, by Resolution¹ № 211, the Cabinet of Ministers of Ukraine established quarantine throughout Ukraine in order to prevent the spread of COVID-19 coronavirus in Ukraine.

2. This contribution will focus on the first and second stages of the crisis (emergency and re-alignment), as the stages during which the Antimonopoly Committee of Ukraine (hereinafter - AMCU) took the most measures to protect economic competition in the context of the crisis caused by Covid-19. The last part of this contribution will reflect on the possible role of the competition authority in the recovery phase, based on the lessons learned after the first two phases.

3. Risks of abuse of monopoly position as well as other violations of competition law began to grow rapidly from the first days of quarantine in Ukraine. The threat of the disease spreading in Ukraine has caused concern and panic among the consumers, which has led to mass purchases, in particular, of basic necessities, while creating significant demand and rising prices for these products in Ukrainian commercial networks. Under such conditions, in an extremely short time the balance of supply and demand for certain categories of goods was shifted, demand began to significantly prevail.

2. Advocacy

4. One of the main measures taken by the AMCU during the Covid-19 crisis was advocacy in the form of recommendations for economic entities. Among the AMCU's tasks, defined by the legislation², there is an implementation of the state control of compliance with Law on protection of the economic competition on the principles of competition neutrality of undertakings before the law and priority of the rights of consumers as well as the prevention, identification and the termination of violations of the Law on protection of the economic competition. Therefore, it is important to note that the AMCU did not take unusual measures and acted within its legal field. At the same time, the number of recommendations themselves has grown rapidly, as their purpose is to prevent violations of competition law.

5. Recognizing the potential negative impact of the crisis on the economic situation of consumers, which was reflected in rising prices for consumer goods and pharmaceuticals, the AMCU and its regional offices on March 16, 2020 began short-term daily monitoring of food prices in commercial networks.

6. As a part of this monitoring, having information on the largest food commercial networks in different regions of Ukraine, the AMCU, through its regional offices, provided

¹ Resolution № 211 of the Cabinet of Ministers of Ukraine is available at: <https://zakon.rada.gov.ua/laws/show/211-2020-%D0%BF#Text>

² The Law on Antimonopoly Committee of Ukraine available at: <https://zakon.rada.gov.ua/laws/show/3659-12#Text>

mandatory recommendations to 16 economic entities from different regions of Ukraine (the biggest national retail networks such as ATB, Silpo, Varus as well as smaller regional based networks). The content of these recommendations did not differ much, although they contained several clarifications relating to specific types of goods, such as: to refrain from taking action to set retail prices that exceed the economically reasonable level, in particular for food with long shelf life, cereals and cereals with high level of vitamins, including fresh vegetables and fruits.

7. In addition to the recommendations, companies are informed about the responsibility in the case of a violation of competition law by the AMCU, that served as an effective prevention of competition law violations. Thus, almost all (except those discussed below) food market participants informed the AMCU about the consideration of given recommendations and decreased the prices for mentioned goods during the period of Covid-19 crisis. Moreover, the margin for some goods were fixed on the minimum level.

8. The pharmaceutical market was the next socially important one AMCU provided the mandatory recommendations to. In the comprehensive market study made by AMCU in 2016, the exchange rate fluctuation was defined as one of the most important factors influencing the cost of medicines for consumers in Ukraine due to the high share of import. So in April 2020 AMCU provided recommendations to domestic manufacturers and importers of medicines (26 entities), domestic distributors (7 entities) and pharmacy chains (20 economic entities), implied: *«to refrain from any actions that may contain signs of violation of the legislation on protection of economic competition, in particular, but not exclusively, given in these recommendations, which will lead to higher prices of imported goods, and domestic goods (in terms of the impact on the price of the import component in production), at a rate that outpaces the growth of foreign exchange rates»*. The accent in the recommendations was made on the following: an increase of the price of imported medicines that would overrun the currency rate increase (if any) would have the signs of violation of the Law on protection of the economic competition of Ukraine. The expected result of such measures was aimed to that almost all of these entities would refrain from violations.

9. At the same time AMCU addressed the unfair competition issues³ raised during the pandemic crisis. The mandatory recommendations were issued:

- To 25 pharma companies and 7 major national media companies: to refrain from advertising of medicines, the content of which relates to the treatment and / or prevention of COVID-19, without proper justification.
- To 7 producers of antiseptics who used not grounded statements in their labels which may affect customer choice and competition.
- To Air Carriers: to stop selling early booking flight tickets without proper explanation of the quarantine restrictions and ticket return conditions.

10. To sum up, advocacy in the context of the crisis has proved to be a very effective tool for preventing violations of competition law. Almost all economic entities which received mandatory recommendations refrained from violating them. At the very beginning of the crisis, the two most important markets for the society were identified, after which the AMCU temporarily monitored prices to early response to the emerging issues and also monitored the stock of highly demanded goods in these markets. The main factors influencing prices were also identified, which made it possible to provide preventive

³ Law of Ukraine on protection from unfair competition is available at: <https://zakon.rada.gov.ua/laws/show/236/96-%D0%B2%D1%80#Text>

recommendations that set clear boundaries for regulating the cost of products for end consumers. In our opinion, such measures have shown good results and therefore may be extensively used by the AMCU as a rapid tool of the soft law in the force-majeure situations.

3. Enforcement

11. Despite the positive outcome of advocacy efforts, some businesses still violated competition law during the crisis. As a result of the establishment of quarantine restrictions in Kyiv and Kyiv region, the demand for long-term food has grown significantly. Due to this, the largest commercial networks in the region have rapidly raised prices for these products. According to the AMCU, at that time there were no objective factors that could lead to a sharp rise in prices for these groups of goods except the increased demand. Such circumstances led the AMCU to initiate proceedings on the ground of committing by food market participants in Kyiv and Kyiv region the violation of the Law of Ukraine "On Protection of Economic Competition"⁴ in the form of concerted actions in the market, which have led or may lead to the prevention, elimination or restriction of competition if the analysis of the situation on the product market denies the existence of objective reasons for such actions.

12. During the consideration of the case the AMCU provided mandatory recommendations which implied: from the date they received this recommendation to take measures to improve the level of competition by:

- - revision of the conditions for attracting suppliers of products to increase the range of potential suppliers in order to prevent artificial shortages of goods (within 10 calendar days);
- - revision of the terms of contracts for the supply of goods concluded by grocery chains in terms of reducing the period of deferred payment to suppliers for goods supplied, with suppliers under existing contracts, and establishing similar conditions with potential suppliers of food, for period of quarantine or restrictive measures imposed by the Cabinet Ministers of Ukraine (within 10 calendar days);
- - revision of the level of trade margin on food articles included in the consumer basket⁵ for the period of quarantine or restrictive measures established by the Cabinet of Ministers of Ukraine (within 1 calendar day in order to prevent the excessive prices.

13. In pursuance of these recommendations, businesses that sell consumer goods through food commercial networks have informed the AMCU that for the period of quarantine or restrictive measures imposed by the Cabinet of Ministers of Ukraine, they have revised down the level of trade surcharge (margin) on foodstuffs included in the consumer basket. In addition, the above entities, in order to ensure uninterrupted supply of goods to stores in the current deficit, revised the terms of a number of contracts for the supply of goods in terms of reducing the period of deferred payment to suppliers for goods by reducing payment, prepayment or payment upon receipt of goods. At the same time, the

⁴ Law of Ukraine on Protection of the economic competition is available at: <https://zakon.rada.gov.ua/laws/show/2210-14#Text>

⁵ Resolution № 780 from 11 of October 2016 of the Cabinet of Ministers of Ukraine is available at: <https://zakon.rada.gov.ua/laws/show/780-2016-%D0%BF#Text>

case is currently being considered, but if the evidence of violation of competition law by these entities are detected, they will face a fine of up to 10% of their annual financial turnover.

14. The enforcement was executed on the Law on protection from unfair competition. In spring, considering the panic mood and demand for a preventive drugs, a few producers launched an advertising campaign where it was mentioned that their drugs are effective on prevention and cure of COVID-19. As it was found by AMCU, these statements were not grounded according to the current legislation. Therefore, decisions against 3 producers of the drugs and medical services were adopted; the total fine amounted to 133 T USD.

15. Thus, during the first phase of the crisis, the AMCU was able to restrain companies from getting the maximum margin on a crisis demand and yet prevent the peak prices for socially important categories of goods through competition law enforcement. This quick reaction on the beginning of pandemic allowed government to have enough time to introduce another measures to prevent crisis impact.

4. The role of AMCU at the recovery phase

16. Ukraine is currently experiencing a so-called "second wave" of the pandemic, which is why too early to talk about specific actions taken by the government to overcome the effects of the crisis on a recovery stage. Despite this, we can already talk today about cornerstones, on which the role of the AMCU should be based during this phase in the future.

17. Firstly, AMCU is interested in maintaining and promoting a competition culture in the country. Therefore, having information about its situation in Ukraine after the crisis, especially in the context of the most important fields of economy for society, the AMCU would continue to use soft law in this regard.

18. Secondly, as part of economic recovery policy, the AMCU provided the Cabinet of Ministers with the draft of new criteria for state aid to economic entities most affected by the COVID-19 taking into consideration the EU practice. In addition to supporting these companies, such actions will help to avoid the potential reduction of the number of the competitors in certain markets.

19. Finally, during the recovery phase, the AMCU is developing a compliance risks map based on information on the behavior of economic entities during the crisis and the effectiveness of measures taken to prevent and punish violations of competition law, which will then be used as a basis for the next crisis.

20. Hence we believe that AMCU played a timely and important role in softening and prevention the negative outcome of crisis on competition and consumers at initial stages of pandemic.