

Unclassified

English - Or. English

14 June 2022

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Integrating Consumer Behaviour Insights in Competition Enforcement – Note by Ukraine

24 June 2022

This document reproduces a written contribution from Ukraine submitted for Item 9 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/behavioural-insights-in-competition-enforcement.htm>

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03497708

Ukraine

1. General overview

1. The Antimonopoly Committee of Ukraine (hereinafter – the AMCU) fairly actively uses information on consumer behavior in cases on protection of economic competition, specifically in the framework of cooperation with the Consumer Protection Service¹, public organizations for consumer protection.
2. Particular attention was paid to consumer behavior in merger cases, where the results of consumer surveys actually changed the standpoint of the AMCU towards market definition given the non-interchangeability of goods from the consumer's point of view. Additionally, an actual consumers' standpoint rather than an expected one was important in cases on abuse of monopoly (dominant) position and on protection against unfair competition.

2. Examples of law enforcement taking into account consumer behavior

2.1. Case on merger in the market for providing online trading platforms services.

3. In 2018, the AMCU adopted a decision to grant permission for a merger of online supermarket “Rozetka” and a group of companies “EVO”².
4. As a result of the abovementioned merger, Rozetka Group, which is one of the largest online retailers in Ukraine, acquired the following marketplaces: Prom.ua, Bigl.ua, Shafa.ua, Crafta.ua, Kabanchik.net, Zakupki.prom.ua, Satu.kz.
5. In the process of consideration of the case, the AMCU found that the merger occurs in the market for the services of the promotion of goods (works, services) on the Internet through online platforms.
6. During the consideration of the case, the AMCU decided to interview (except for the participants of e-commerce markets)
 - consumers of online trading platforms services;
 - experts who may possess information (including statistical) in the field of provision of online trading platforms services.
7. Thus, the AMCU announced on its official website and in its Facebook group that the merger case consideration had been initiated and published a survey for consumers (customers/buyers) (hereinafter – end consumers) who make purchases online, including through online trading platforms.

¹ State Service of Ukraine on Food Safety and Consumer Protection

² <https://amcu.gov.ua/npas/rishennya-466-r-vid-13092018>

8. In addition, another survey was sent to the e-mails of consumers³ (third party sellers) (hereinafter - direct consumers) who sell their own goods/services/works through online trading platforms.

9. Within the market concerned, the applicants carry out economic activities for the provision of online trading platforms services. In the framework of consideration of these merger cases, the market concerned was the national market for the provision of services for the promotion of goods (works, services) on the Internet through online platforms (Internet platforms) (hereinafter - the Market).

10. In defining the product market boundaries, the possibility of expanding the boundaries of the market, for example, by including other activities in the market, specifically online stores activities, the opinion of consumers was also taken into account, in particular in terms of interchangeability of services.

11. Thus, in the framework of the survey of consumers, the alternatives to online trading platforms of the merger participants were established, in particular, through the use of such a service as Google Shopping, and the use of social networks.

12. With regard to social networks, according to the information received in the framework of a case, some users do perceive social networks only as entertainment, a place to communicate and an aggregator of interesting content, as opposed to trading platforms that people use solely with the aim to find and buy goods;

- Some individuals do not perceive social networks as a sales tool, and therefore as a competitor for the parties to the merger, yet social networks users do buy goods and services through social networks as well. This is evidenced by the results of the survey showing 40-45 percent of online buyers in Ukraine who used social networks (Facebook, Vk.com, Instagram) to buy goods online, and the presence of numerous specialized groups on Facebook as well as Instagram accounts, targeted exclusively for the sale of goods and services, and the audience of many stores exceeds 100,000 subscribers;

13. Thus, with regard to the consumer survey, it was found that most other online services (classifieds, global/international platforms, social networks, Google Shopping) can be considered as competitors for the parties to the merger in the Market. However, most e-commerce market participants in recent years have combined several different formats and there are no clear and concise boundaries that would allow to distinguish with high reliability a marketplace, an online store, a bulletin board and other similar services.

14. In addition, it was found that the end consumer-buyer has the opportunity to switch to any alternative online platform within a few seconds. If the buyer is not satisfied with the goods or services provided on a particular marketplace, he easily switches to other marketplaces, aggregators or sites of online stores created by traditional (offline) stores. In addition, the end user does not have any costs related to switching to another online trading platform.

15. Thus, the results of the consumer survey were crucial for defining the boundaries of the Market, the nature of consumer behavior, and indicated a competition between different marketplaces, aggregators and online store sites. Taking into account the

³ Given that online trading platforms are "multilateral" platforms, they bring together two different but interconnected groups of consumers (except for advertisers) - third-party sellers who sell their own goods/services/works through online trading platforms, and buyers who purchase these goods/services/works of third-party sellers through online trading platforms.

abovementioned facts and the results of the survey, the AMCU granted a respective merger permit.

2.2. Case on concerted actions regarding the HNB (HeatNot-Burn) products

16. In 2021, the AMCU considered a case on concerted actions, which laid in a distribution agreement and other related agreements (including the supply and logistics services provision agreement) concluded by Philip Morris Products S.A. and KT&G Corporation.

17. For a detailed consideration of the respective application, Phase II was opened, in the framework of which the information on consumer behavior was obtained through:

- an online survey published on the official website of the AMCU and on the official page of the AMCU on Facebook,
- a survey conducted by the Northern Regional Office of the AMCU on behalf of the AMCU Chairman in 10 commercial enterprises (5 of them - in large commercial enterprises (supermarkets) and 5 - near separate retail outlets (kiosks)).

18. In order to enable undertakings and consumers to express their opinions regarding the planned concerted actions, on the official website of the AMCU and on its official Facebook page an announcement was made concerning the consideration of a case on concerted actions in the form of concluding a Distribution Agreement between PMI and KT&G, as well as related agreements.

19. In order to define the product market boundaries in which HNB (HeatNot-Burn) products are traded, the AMCU analyzed the interchangeability of these products with other products that have features of the same (similar, equivalent) product (product group) or belonging to one product group for sellers (suppliers, manufacturers), buyers (consumers, users).

20. For the study, the market for wholesale trade of products of alternative nicotine delivery systems (hereinafter - ANDS) (consumables and electronic devices to them) was determined as a product market concerned in the framework of the announced concerted actions.

21. In addition, the AMCU had to conduct an additional study on the need for market segmentation of ANDS, in particular the HNB (HeatNot-Burn) and e-cigarettes.

2.2.1. The results of consumers' surveys

22. According to the results of surveys of consumers of ANDS products (provided by ANDS market participants and conducted by the AMCU), it was found that the share of HNB consumers in the total volume of ANDS consumers has changed significantly in recent years.

23. A significant part of consumers of tobacco products for smoking and e-cigarettes has switched to the use of HNB in recent years, which may indicate that the consumer does not consider these categories as a same product. The information received indicates that the HNB market is way less competitive than the e-cigarette market.

24. According to a study conducted in the framework of a consideration of the case on concerted actions, the AMCU, in particular, determined which types and brands of ANDS the consumers prefer, whether HNB and e-cigarettes are interchangeable for consumers and how sensitive the consumers are towards the price changes on ANDS products.

25. The results of such survey are provided in the fig. 8-10 (below).

Figure 1. Opinion of ANDS consumers on the interchangeability of HNB and e- cigarettes

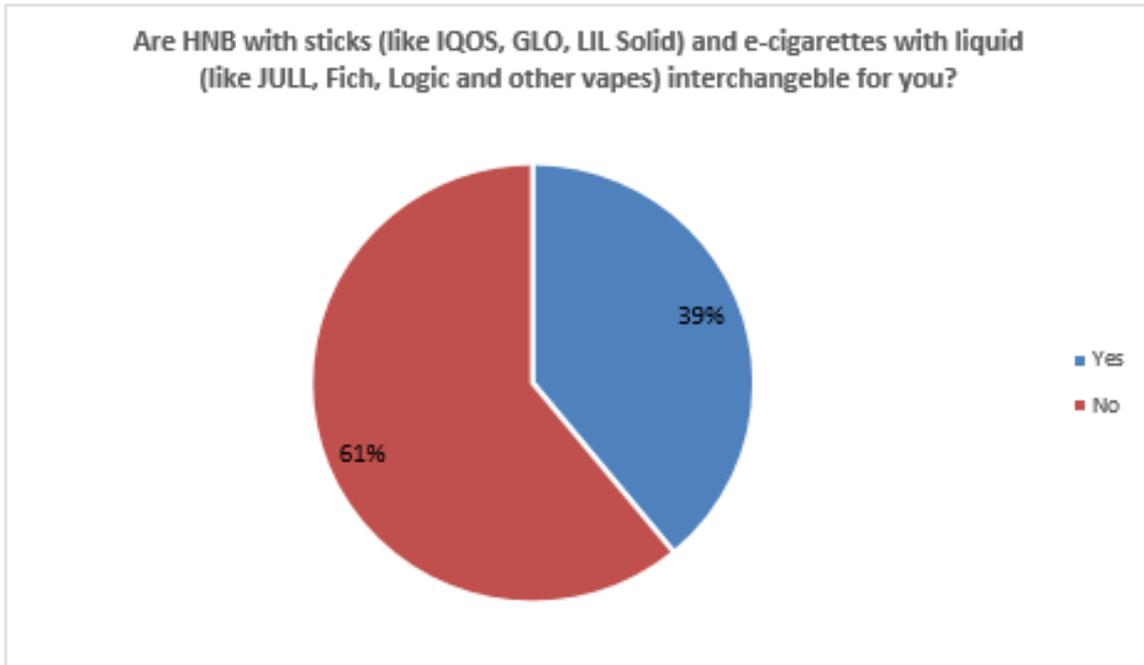


Figure 2. Distribution of consumers among different types of tobacco and/or nicotine-containing products

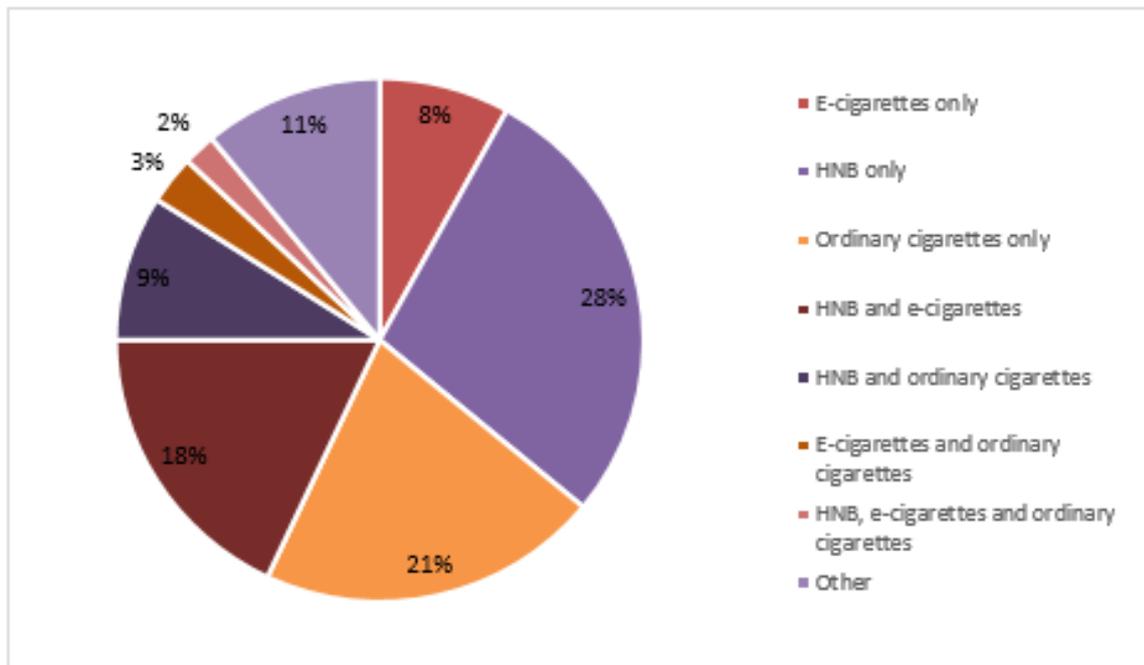
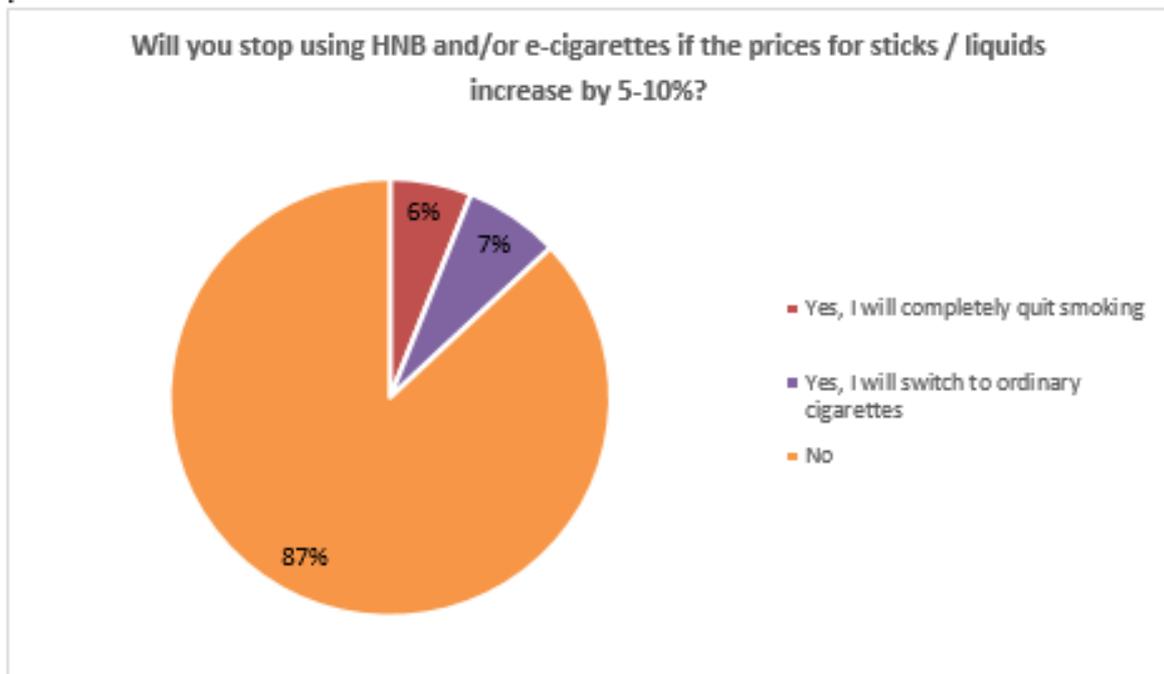


Figure 3. Consumer sensitivity towards the price increase by 5 - 10%



26. As can be seen from the diagrams shown in Fig. 8 - 9, for the majority of consumers e-cigarettes and HNB are not interchangeable, and the fact that a significant part of consumers (42%) combine the use of HNB with other products for smoking and/or steaming indicates that the consumer does not identify these product categories as the same. The diagram shown in Fig. 10, demonstrates the fact that for the majority of consumers the price increase of one product by 5 - 10% will not force them to switch to the consumption of another product, and therefore, these product categories are not interchangeable for the consumer.

27. In view of the above, the AMCU concluded that the wholesale of HNB (including the heating devices) and e-cigarettes (including consumables for them) should be considered as separate segments of the wholesale market of ANDS.

28. This conclusion was based on the fact that, in addition to different technical characteristics and a significant difference in price, the majority of consumers (61% of respondents) considers such products as non-interchangeable (see Fig. 8). The fact that 20% of consumers use both e-cigarettes and HNB (see Fig. 9) shows that these products are different for them and meet different needs.

29. Thus, the consumer behavior was defining in determining the interchangeability and, accordingly, determining the product market (segments) boundaries.

2.2.2. The lessons learned

30. Within the framework of the conducted consumer behavior study, the development of unified approaches to the consumer survey procedure and the development of a respective methodology that would help increase the transparency and trust of market participants towards the survey results remain relevant for the AMCU.

31. In terms of additional experience within the framework of surveys, the AMCU plans to take into account the sociological methods of conducting surveys in more details in

order to obtain more objective results (in this part, the AMCU does not have enough practical experience).

2.3. Cases on spreading the information that misleads the consumer

32. Currently, the AMCU has developed a practice of using and evaluating consumers' behavior in cases on protection against unfair competition (the AMCU is a responsible body for considering such cases, which sometimes are greatly related to the understanding of consumers' behavior).

33. Especially in the categories of cases related to the ways of spreading the information (its design, framing), the actual behavior of consumers and its assessment by the AMCU has significant evidential influence during the decision-making process of the AMCU, as well as in courts in case of appeal against the respective decision of the AMCU.

34. When conducting investigations in these categories of cases, usually the conditions occur, when additional evidence needs to be obtained, in particular:

- the information spread contains a certain subtext that affects the consumer at the associative level, which may be perceived ambiguously and affect the intention of the consumer to purchase or sell goods, works, services of the undertaking;
- the information spread in the chosen way of its provision or concealment of certain facts or vagueness of wording is false, inaccurate or incomplete;

35. One of the important pieces of evidence in such cases is consumer surveys, which allow to analyze the existence of unfair influence of companies on a consumer.

2.3.1. An example of a case on misleading the consumer in the field of the Internet.

36. In 2021, the AMCU adopted a decision recognizing the actions of the telecommunications operator lifecell LLC as those breaching the Article 15-1 of the Law of Ukraine «On Protection against Unfair Competition», specifically spreading of false, incomplete and inaccurate information about leadership in providing certain services. The defendant particularly spread in the advertisement the following statement: "Join the leader of the new generation of the Internet! The best 4.5G coverage" (hereinafter - the Statement), justifying it by claiming the possession of leadership in the amount of spectrum in the bands 2600 MHz and 1800 MHz per subscriber (hereinafter – The Disclaimer).

37. During the consideration of the case, the Regional Offices of the AMCU conducted surveys of consumers of mobile communications services in the respective regions (by means of personal interviews) regarding their understanding of the Statement with the Disclaimer, spread in the advertisement (a questionnaire was provided with a photocopy of the respective advertisement of the Company, questions and answer options).

38. According to the information received from the Regional Offices of the AMCU, when asked concerning the understanding of the statement "JOIN THE LEADER OF THE NEW GENERATION OF THE INTERNET! THE BEST 4.5G COVERAGE", the vast majority of consumers (more than 57%) answered that they understood that lifecell LLC is the leader of the new generation of the Internet in all technical parameters, compared to other mobile operators, and not that that the Defendant is the leader only in one of the parameters (in the largest amount of spectrum per subscriber). Only 15.4% of consumers understood the advertisement correctly. Also, 18.4% of consumers answered that the Statement with the Disclaimer appears to be completely incomprehensible and didn't give a clear answer.

39. Having analyzed all the evidence in this case, including the results of consumer surveys, the AMCU found that the leadership in the amount of spectrum per subscriber does not indicate the expectations the consumer has towards the leader of the fourth generation of the Internet, which is the way the Defendant calls itself in the Statement.

40. The AMCU decided that the information provided by lifecell LLC in the Statement was false as a result of the chosen way of its presentation and could mislead consumers. A fine was imposed on the violator as well as it was ordered to stop spreading information in a way that misleads the consumer.

41. This category of cases clearly reflects how vulnerable the consumer is to the way the information is presented. And some companies are trying to use the framing bias to increase the number of their customers in a non-competitive way.

3. Cooperation with the Consumer Protection Service

42. The AMCU works closely with the State Service of Ukraine on Food Safety and Consumer Protection (Consumer Protection Service). Moreover, a Memorandum of Cooperation was signed between the two bodies.

43. According to paragraph 1.3. of the Memorandum, the parties recognize the need to improve the mechanisms of cooperation. Therefore, further in the text of the Memorandum the issues for which each of the two bodies is responsible are outlined. Of course, this is a non-regulatory document (there are respective laws for this), but it clarifies the emphasis in the work of the AMCU and the Consumer Protection Service, the direction of their joined efforts concerning the protection of consumers and elimination of potential duplication of responsibilities.

44. One of the main tasks of the AMCU is to participate in the development and implementation of competition policy in terms of exercising state control over compliance with legislation on protection against unfair competition on the basis of equality of undertakings before the law and the priority of consumer rights⁴.

45. Thus, before the start of consumer protection, the AMCU should check whether the violation concerns the actions "in competition". After all, Article 1 of the Law on Protection against Unfair Competition clearly defines: unfair competition is precisely actions in competition that are contrary to trade and other fair practices in economic activity. Therefore, when it comes to, for example, spreading of misleading information, it is necessary to establish whether the respective facts are related to the relationship in competition.

46. The next important step is to establish a causal link between the spread of misleading information and the gain of a competitive advantage by the undertaking that spreads such information. In practice, such actions in a non-competitive way affect the consumer's choice to purchase goods (services) of the undertaking that spreads false information.

47. That is, in order to apply competition law, it is necessary to assess how the actions of a potential defendant affect competition. If there is no such influence, all other violations of consumer rights should not be considered by the AMCU. For example, there are cases on a discrepancy between the information on the packaging and the composition of the product, but there is no evidence of gaining a competitive advantage.

⁴ According to Article 3 of the Law of Ukraine "On the Antimonopoly Committee of Ukraine".

3.1. Positive practice of cooperation between the AMCU and the Consumer Protection Service

48. In the framework of monitoring the compliance with competition law in the food markets, the AMCU worked closely with the State Service of Ukraine on Food Safety and Consumer Protection (Consumer Protection Service), which is responsible for food quality control as well.

49. The AMCU has repeatedly studied the markets for butter, spreads and mixtures of vegetable fats, during which it found a number of violations of competition law in the process of product labeling.

50. According to the AMCU, a number of producers of spreads and mixtures of vegetable fats designed the packaging of the spread in such a way that the consumer bought the spread instead of butter (image, font size, inconsistency in the composition of the product).

51. According to the law, butter is a traditional dairy product, which may not contain fats and proteins of non-dairy origin. If non-dairy fat is present, such products can no longer be called "butter", which means that such undertakings spread misleading information.

52. Stimulating consumer interest by spreading false information concerning the composition, consumer properties, characteristics, name of the product may provide undue advantages in the market and put an unfair producer in a more favorable position compared to other undertakings that operate in the market and do not spread false information concerning their products.

53. In addition, gaining the mentioned advantages in competition with other butter producers may lead to illicit profits, as the cost of vegetable fats is lower than the cost of milk fats and, consequently, the addition of vegetable fats to products reduces its cost.

54. In essence, in this case the unfair participants took advantage of the design (framing) prejudice. The consumer did not carefully study the packaging, but relied on individual design elements that allowed him to make a quick decision to purchase the product.

55. In 2020, based on the information provided by the Consumer Protection Service concerning the violations of production standards by producers, the AMCU made a number of decisions against producers of «non-butter».

56. Currently, cooperation with the Consumer Protection Service continues in other areas, and research materials of the Consumer Protection Service, including on consumer behavior, continue to form the basis of evidence in some cases of the AMCU.

57. At the same time, the effect of such cooperation is felt by a wide range of consumers. And businesses are trying to be more careful about dissemination of information about their products.

58. It is important that the consumer is properly informed so as to be able to make a conscious choice.

4. Conclusion

59. Today, the role of consumers and understanding of their behavior are of the key pieces of evidence in the law enforcement of the AMCU. Based on the results of the survey, the AMCU more confidently defines the market boundaries in both the mergers cases and

the cases on abuse of monopoly (dominant) position, proves the interchangeability of a product and can assess the actual (rather than theoretical) market situation from a consumer perspective.

60. In our opinion, a fairly effective measure for counteracting consumer bias is to more actively inform the consumer about certain market trends (marketing moves). In fact, it is harder for suppliers to manipulate informed consumers. Therefore, the AMCU publishes warning information on its website, interacts with public organizations in terms of providing information about possible unfair influences on consumer choice.

61. The development of unified approaches to consumer surveys (methodologies) for the analysis of behavioral information remains relevant. Therefore, one of the priority areas of work of the AMCU for 2022 was the development and implementation of Methodological Recommendations (Guidelines) for conducting consumer surveys.

62. Therefore, the AMCU plans to continue to study the actual behavior of consumers, the factors influencing their choice, etc. in the framework of law enforcement. At the same time, the most important when taking into account the behavior of consumers in law enforcement - to avoid rolling on concerns about the consumer only, forgetting the need to assess the effects on the market in order to protect competition. Because it is due to the presence of competition in the market that the consumer will receive benefits, become more informed and make more conscious choices.