

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Treatment of legally privileged information in competition proceedings – Note by
Ukraine****26 November 2018**

This document reproduces a written contribution from Ukraine submitted for Item 2 of the 128th Working Party 3 meeting on 26 November 2018.

More documents related to this discussion can be found at
www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm

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Ukraine

1. Under Article 1 of the Law of Ukraine "On the Antimonopoly Committee of Ukraine" (hereinafter the AMCU Law), the Antimonopoly Committee of Ukraine (hereinafter the AMCU) is a special status state authority responsible for protection of competition in entrepreneurial activity.
2. In accordance with Article 3 of the Law, the main tasks of the AMCU are to participate in the formation and implementation of competition policy, in particular:
 1. implementation of state control over compliance with legislation on the protection of economic competition on the basis of equality of economic entities before the law and the priority of consumer rights, prevention, detection and termination of violations of legislation on the protection of economic competition;
 2. control over mergers, coordinated actions of business entities and compliance with the requirements of economic competition protection laws during the regulation of prices (tariffs) for goods produced (sold) by natural monopolists;
 3. promotion of fair competition;
 4. methodological support for the application of economic competition protection laws;
 5. control over the creation of a competitive environment and protection of competition in the field of public procurement;
 6. monitoring of state aid to economic entities and monitoring the admissibility of such aid for competition.

1. AMCU requests for obtaining restricted information

3. In accordance with Article 7 (1) of the AMCU Law, in the field of control over compliance with legislation on the protection of economic competition, the AMCU has the authority to consider and investigate complaints and cases of infringements of economic competition protection laws; in doing so, as well as in conducting inspections and in other cases provided for by law, AMCU has the authority to require information (including limited access information) from economic entities, associations, state and municipal authorities, bodies of administrative and economic management and control, their officials and officers, other individuals and legal entities.
4. The AMCU authority to request information, is one of the primary AMCU tools to fulfill its tasks in the field of protection of economic competition, including investigations of infringement cases and control of mergers.
5. The AMCU procedure for requesting information is provided in Articles 22 and 22-1 of the AMCU Law.
6. In particular, Article 22 of the AMCU Law stipulates that the requests of the AMCU, the Chairman of the AMCU regional office, the requirements of their authorized employees, its regional offices within their competence shall be complied with within the time limits specified therein. The aforementioned corresponds to the provisions of Article

22-1 (1) of the AMCU Law which provides that the addressees of the AMCU information requests are obliged to submit documents, objects or other mediums of information, explanations, other information, including with restricted access and bank secrecy, necessary for the AMCU performance of its tasks.

7. Such an extensive authority of the AMCU in requesting restricted information is conditioned by the AMCU special status in the state executory system, including the AMCU role in shaping the competition policy.

8. At the same time, the Law provides safeguards for non-disclosure of information with restricted access and bank secrecy received by the AMCU.

9. In particular, under Article 22¹ (3)-(4) of the AMCU Law, restricted information received by the AMCU and its regional offices in the course of exercising their powers shall be used solely for the purpose of ensuring the fulfillment of the AMCU tasks specified by the economic competition protection laws and is not subject to disclosure. Such information may be provided to the investigating authorities and the court in accordance with the law.

10. As a matter of law, AMCU officers as well as officers of the AMCU regional offices bear legal liability for unauthorized disclosure of commercial secrets.

11. In accordance with Article 31 (6) of the Law of Ukraine "On Protection of Economic Competition" (hereinafter LPEC), decisions passed as a result of consideration of complaints, cases of concerted actions or merger, shall be published on the official AMCU website within 10 working days from the day of their adoption, except for the information that is defined as the information with restricted access. Information with restricted access should be excluded or otherwise altered to ensure its sufficient protection and, on the other hand, sufficient transparency regarding the reasoning of the decision taken by the Committee.

12. Thus, the current legislation of Ukraine not only provides for broad powers of the AMCU in requesting and receiving information, including with restricted access, but also sets up guarantees of its security and non-disclosure.

2. Regarding the Committee's official information

13. In accordance with Article 6 of the Law of Ukraine "On Access to Public Information", official information is public information with restricted access.

14. The list of the information for official use of AMCU only was approved by the AMCU order dated November 16, 2011 No. 687-p (as amended by the AMCU order of January 13, 2015, No. 1-pn) (hereinafter – the List).

15. Paragraph 1 of the List information which is classified as official includes, in particular, documented information that was created or received by the AMCU or its regional offices in process of investigation of complaints (cases) on merger, concerted actions, other infringements of economic competition protection laws, the disclosure of which could be detrimental to the interests of the state, case participants, or would prevent further proceedings of the case; information contained in the documents which constitute internal AMCU correspondence and which relate to the decision-making process and preceding public discussion and/or decision-making. An important feature of documents

that contain official (service) information is that they precede a public discussion and/or decision making (that is, such information has not yet become public).

16. Restrictions on access to the official information are also related to the interests of national security, reputation protection and the rights of others, in order to prevent the disclosure of information received by the AMCU in a "confidential" mode, since disclosure of such information may seriously harm those interests, and a harm caused by the disclosure of such information would override the public interest in its disclosure.

17. Consequently, upon receiving a request for disclosure of official information the AMCU does not provide such information as a matter of law, as otherwise it will not be able to ensure objective and comprehensive investigation of cases and adequate protection of competition.

3. AMCU handling of attorney's requests

18. Article 131-2 of the Constitution of Ukraine guarantees the independence of the attorneys.

19. This is in line with the provisions of Article 5 of the Law of Ukraine "On attorneys and attorney's activities", according to which the attorneys are independent of state authorities, local self-government bodies, their officials. The state creates proper conditions for the activity of the attorney and ensures adherence to the guarantees of attorney.

20. Under Article 20 (1) of the Law of Ukraine "On attorneys and attorney's activities" in rendering his services the attorney has the right to take any actions not prohibited by law, rules of lawyer's ethics and the legal assistance agreement, in particular, to send attorney's requests, including for obtaining copies of documents, to state and municipal authorities, their officials and officers, institutions, organizations, public associations, as well as individuals (with the consent of such individuals). On the other hand, attorney's requests cannot seek legal consultations and explanations of the laws (Article 24 of the Law).

21. State and municipal authorities, their officials and officers, heads of enterprises, institutions, organizations, and public associations upon receiving an attorney's request shall provide the requested information, copies of documents, except for the classified information and copies of documents containing classified information, within 5 working days.

22. If the attorneys' request relates to provision of a significant amount of information or the massive search for information, the deadline for answering the attorney's request may be extended to 20 working days, provided the justification for such extension is notified to the attorney within 5 working days from the day when the attorney's request was received.

23. When reviewing the attorney's requests, the AMCU provides the requested information, copies of documents (with exception of confidential or official information) within the existing deadlines.

4. AMCU information request to attorneys

24. Applicable laws expressly prohibit the review, disclosure, requesting or seizure of documents related to the attorney's practice.

25. While no express provisions to that effect can be found in the economic competition protection laws, having regard to Article 131-2 of the Constitution of Ukraine on the independence of attorneys, as well as to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 04 November 1950) and its interpretation in the European Court of Human Rights case law (for example, *Michaud v. France* (application no. 12323/11), judgement of 06 December 2012), the AMCU has no right to request the disclosure of the privileged attorney-client information.

26. In the process of **merger control**, the AMCU is guided by the following rules defined by the legislation on the protection of economic competition:

27. First of all, the materials used by the AMCU in the process of monitoring mergers are perceived as containing restricted information if:

- a person providing information as restricted information (incl. confidential information) clearly indicates which information has limited access (including which particular documents or parts of documents contain information of restricted access);
- an application contains a list of documents and information attached to the application, indicating which documents or information contain information with restricted access;
- all documents attached to the application should be filed in a sealed envelope marked with "Contains restricted information";
- on each page containing the restricted information at the top right corner there should be: "Contains restricted information";
- the information that the applicant considers to be restricted information must be indicated in any way chosen by the applicant.

28. In doing so, the Applicant must provide the justification for classifying information indicating why it should not be disclosed or otherwise made public. Information which related to commercial secrets, shall be submitted separately from the confidential information.

29. Secondly, the restricted information received by the Committee in the process of merger control, is used by the Committee solely for the purpose of processing of applications/cases, as defined by the economic competition protection laws, and is not subject to disclosure, except for the following cases: providing information to law enforcement bodies and court in accordance with the law; non-compliance with the requirements set out in part two of Article 6 of the Law of Ukraine "On Access to Public Information"; other cases specified in the laws.

30. The AMCU should hold consultation with the applicants who submitted information as restricted access information (including confidential information) for the purpose of identification of the grounds for classifying such information and the possibility of declassifying it and setting a deadline for submission of non-confidential version of documents, with the confidential information being excluded or otherwise modified, which ensures that it is sufficiently protected and/or ascertains the harm that may be caused to the person by the disclosure of such information.

31. Restricted information is not subject to disclosure and shall be used and stored according to the Laws of Ukraine "On Information", "On Access to Public Information" and "On Protection of Personal Data".

32. The applicant (his representative) and the state commissioner (or on his/her behalf members of the Committee) may hold consultations on the contents of the disclosable information.

33. Mode of access of persons involved in the case to restricted information is determined in accordance with the legislation of Ukraine, in particular by the Laws of Ukraine "On Antimonopoly Committee of Ukraine", "On Information", "On Access to Public information» and «On protection of personal data».

34. In the process of practical application of the said rules, handling of confidential information when considering merger applications is as follows:

4.1. At the stage of consideration of merger applications

35. Upon AMCU receipt of a merger application, an appointed AMCU officer checks the materials of the application, in particular, for the availability of confidential information and the justification for the closure of such information.

36. Further there is the process of the Committee's approval of the amount of information that the applicant has defined as confidential.

37. In most cases, applicants submit a separate document to the application (petition for non-disclosure of confidential information) which indicates the information or documents they define as confidential and provide justification for closing the information.

38. In cases where the applicant identifies information as confidential, which cannot be classified as such because, in particular, it is generally available (for example, information posted in the media) or describes the actions to which the Committee issues permission,

39. The state commissioner who is appointed to review the application dismisses the petition of the applicants concerning the confidentiality of such information.

4.2. At the stage of publication of the taken decisions.

40. There are cases when applicants apply to the AMCU for closure of information to the onset of a certain occasion (the completion of merger), since the prior disclosure of such information may have certain commercial risks for the applicants.

41. In addition, at the time of publication of the relevant decisions of the Committee, the applicants may also request the Committee to restrict access to certain information in a decision that contains commercial secrecy.

42. At the same time, according to the Law of Ukraine "On Protection of Personal Data", the AMCU shall restrict access to the information on individuals, which is deemed non-disclosable personal data.

5. AMCU cooperation with the competent authorities of other states

43. Under Article 22-2 of the AMCU Law of Ukraine, the AMCU, on the basis of international treaties ratified by the Ukrainian Parliament cooperates with the competent authorities of other states, in particular through the exchange of information.

44. The Committee may provide to the competent authorities of other states and receive information from them, including classified information, if only:

1. the information will be used by the competition authority solely for the performance of tasks assigned to it in accordance with the applicable laws;
2. the relevant competition authority will ensure such access to information that would not lead to the disclosure of information for other purposes or its disclosure otherwise, including through unauthorized access.

45. The only existing ratified international treaty of Ukraine in the field of regulation of competition policy, on the basis of which the AMCU may exchange information with foreign competition authorities is the Agreement for the implementation of a coordinated antimonopoly policy of January 25, 2000 (ratified by the Law of Ukraine of 16 January 2003) (hereinafter - the Agreement). However, the provisions of the Treaty regarding the exchange of confidential information have not been operative, as there are no appropriate systems for the protection of such information. At present, concluding bilateral treaties with the respective states is being considered.

46. The AMCU is a party to international agreements (mostly memorandums of understanding between competition agencies) which involve provisions regulating the exchange of information and documents (protection of potentially privileged information as well). Such provisions are usually included in separate articles or even sections of the agreements and may indicate that the exchange of information between authorities that is not of a confidential nature may be implemented with regard to improving the legislation and practice of investigating cases of violations in the field of competition.

47. As of today AMCU in the field of competition has the following bilateral cooperation agreements with competition authorities of other countries:

1. the **Czech Republic** (Treaty of Cooperation between the AMCU and Office for the Protection of Competition of Czech Republic) – signed on December 19, 1994;
2. the **Republic of Belarus** (Treaty of Cooperation between the AMCU and Ministry of Antimonopoly Regulation and Trade of the Republic of Belarus) – signed on February 18, 1997;
3. the **Republic of Lithuania** (Treaty of Cooperation between the AMCU and the Competition Council of the Republic of Lithuania) – signed on February 18, 1997;
4. **Poland** (Treaty of Cooperation between the AMCU and Polish Office of Competition and Consumer Protection) – signed on June 5, 1997 (was amended on December 17, 2007);
5. **Latvia** (Treaty of Cooperation between the AMCU and the Competition Council of Latvia) – signed on April 29, 2005;
6. **Hungary** (Treaty of Cooperation between the AMCU and Hungarian Competition Authority) – signed on January 27, 2006;

7. the **Slovak Republic** (Memorandum of Cooperation in the field of economic competition protection between the AMCU and the Antimonopoly Office of the Slovak Republic) – signed on March 30, 2007;
 8. **Bulgaria** (Memorandum of Cooperation in the field of economic competition protection between the AMCU and the Commission on Protection of Competition of Bulgaria) – signed on December 12, 2007;
 9. **Austria** (Memorandum of cooperation in the field of economic competition protection between the AMCU and the Austrian Competition Authority) – signed on October 22, 2009;
 10. **Romania** (Memorandum of Cooperation between the AMCU and the Competition Council of Romania) – signed on November 18, 2010;
 11. **Switzerland** (Memorandum of Cooperation in the field of competition policy between the AMCU and the Competition Commission of Switzerland) – signed on September 8, 2011;
 12. **Turkey** (Memorandum of Cooperation in the field of competition policy between the AMCU and the Office of the Turkish Competition Authority) – signed on October 9, 2013;
 13. **Republic of Moldova** (Memorandum of Cooperation in the field of competition policy between the Antimonopoly Committee of Ukraine and the Competition Council of the Republic of Moldova) – signed on June 30, 2016;
 14. **Republic of Georgia** (Memorandum for Cooperation in the field of competition policy between the Antimonopoly Committee of Ukraine and the Competition Agency of Georgia) – signed on September 28, 2018.
48. In addition, in process of investigation of competition infringement cases, AMCU may need information from competition authorities of other countries. When sending international information requests the AMCU pays particular attention to the importance of non-disclosure of confidential information of the parties in the case (as for example, the name(s) of the economic entities are removed, being replaced by the first character of their names, etc.).
49. The AMCU also frequently submits its own as well as reviews other countries' OECD-GVH RCC Informal Requests for Information, with all due attention being paid to protection of confidentiality.