

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

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Working Party No. 3 on Co-operation and Enforcement

The standard of review by courts in competition cases – Note by Ukraine

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This document reproduces a written contribution from Ukraine submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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Ukraine

1. The Antimonopoly Committee of Ukraine (AMCU) is a Ukrainian national competition authority with the special status (which is set forth in the Constitution of Ukraine) and was established in order to ensure state protection of economic competition between undertakings and in the area of public procurement.
2. AMCU exercises its powers under the Constitution of Ukraine, the Laws of Ukraine “On the Antimonopoly Committee of Ukraine” (AMCU Law), “On Protection of Economic Competition” (LPEC), “On Protection against Unfair Competition” (LPAUF), “On State Aid to Economic Entities” (State Aid Law) and other relevant laws and regulations.
3. The AMCU has the powers of administrative body that detects infringements of the competition laws, conducts investigations of such infringements, adopts decisions imposing fines on violators and, if necessary, obliges them to terminate such violations.

1. Adoption of the AMCU decisions

4. Persons involved in antitrust cases (respondents, third parties) have a procedural right of being heard during consideration of the case directly by the AMCU. Based on the results of investigation and the available evidence, AMCU prepares a statement of objections (SoO) in the case. The SoO addresses circumstances of case and preliminary findings as to qualification of the respondent’s actions as an infringement of competition laws (or the absence of such an infringement). The SoO is notified to all the participants in the case who are invited to submit their comments and objections the findings. The submission also consist the materials of the relevant case in order to provide the participants with information on of the case materials (with the restricted information excluded).
5. Before notification of the SoO to the parties, all case files are classified, with the restricted access status ("for internal use only") in order to ensure a complete, objective and comprehensive investigation of the case and prevent any third party interference.
6. Upon receiving of parties comments and objections to the SoO, AMCU analyses such comments/objections and, if necessary, extends the period of investigation in order to collect additional evidence, verify all circumstances relevant to the case. Additionally, the parties may present their explanations and objections at the oral hearings held at the AMCU. Following consideration of the parties’ comments/objections, the AMCU findings may vary from reaffirmation of legal qualification of the respondent’s actions as a competition law infringement to termination of the case due to the lack of evidence.
7. If, despite the parties’ objections, the AMCU proceeds to establish the fact of competition infringement, the AMCU decision shall delineate the reasons for rejection of the objections (*the "Objections and their refutation" section of a template AMCU decision*).
8. Thus, in establishing the fact of the competition infringement, AMCU is open to comments and objections of the case participants and always justifies their rejection, as a reflection of the adversarial approach to investigation of the case.
9. Following the results of the case investigation, AMCU may pass a decision on:
 - establishment of the fact of a competition law infringement;

- termination of a competition law infringement;
- imposition of an obligation on a state or municipal public authority, an administrative agency to withdraw or amend its decision or to exit an agreement that were found by AMCU to be anticompetitive;
- a monopoly (dominant) position of an undertaking in the market;
- the compulsory structural division of a dominant undertaking;
- the imposition of a fine;
- the securities freezing;
- the elimination or mitigation of the negative effects on competition resulting from a competition law infringement by concerted practices or mergers of undertakings;
- withdrawal of authorization for concerted practices;
- closing the case.

2. Challenging AMCU decisions in courts

10. Should the respondent or other case participant disagree with the AMCU final decision, it may seek to annul the decision fully or in part in the [economic](#) court within 2 months from the date of the receipt of the full text of the decision in question. This 2-month period is not subject to extension; a failure to file an annulment claim within the 2-month period results in unconditional expiration of the right to challenge the decision.

2.1. Grounds for annulment of AMCU decisions

11. AMCU decisions are presumed to be valid unless annulled by the court. Execution of the AMCU decision may be suspended for the period of consideration by the court of the annulment claim.

12. AMCU decisions may be annulled on the following exhaustive grounds:

- incomplete investigation of material circumstances of the case;
- failure to prove material circumstances of the case, which were deemed proven in the decision;
- incompatibility of the decision findings with the case circumstances;
- violation or erroneous application of substantive or procedural rules of law (violation of procedural rules being the ground for annulment of the decision only if it resulted in adoption of an erroneous decision).

13. No AMCU decision has been annulled due to violation or incorrect application of procedural rules in recent years.

14. Available court practice suggests that the courts generally support the AMCU findings and in most cases dismiss annulment claims (although, with some notable exceptions).

2.2. Annulable AMCU acts and court jurisdiction

15. While the law expressly mentions decisions and resolutions of the AMCU as annulable, recommendations and other AMCU actions (e.g., refusal to initiate a case, refusal for appoint an expert examination in a case, involvement of evidence from law enforcement bodies, information requests, submission of the SoO) are also in practice challenged in the courts and sought to be annulled.

16. Such annulment claims are based on the Constitution of Ukraine which guarantees the right to seek court protection and the right of access to justice for everyone. The courts accept such claims and only upon initiation of the proceedings consider whether the claim is admissible (whether the rights and interests of the claimant were affected by the challenged AMCU actions). While in many cases the courts close the proceedings, the very fact of filing such a claim in the court may hinder due handling of the case and adoption of the decision by AMCU.

17. Moreover, the Ukrainian law is not clear as to the jurisdiction of the courts over such claims. The previous procedural legislation (effective until December 2017) provided that commercial courts had jurisdiction in cases where AMCU decisions and resolutions were challenged or in cases where AMCU sought to enforce its decision on imposition of a fine or comply with the imposed obligations. The new procedural legislation expanded the jurisdiction of economic courts to *all cases in disputes related to protection of economic competition, restriction of monopolism in economic activities, protection against unfair competition*, challenging decisions of the AMCU and *to all the cases initiated by the AMCU bodies on issues within their competence and powers*. The overly general language of this provision resulted in discrepancies in its practical application. As a result, jurisdiction in cases involving the AMCU has been occasionally assumed by administrative courts which do not have relevant experience and level of professional knowledge in the field of competition law. It is expected that issues of jurisdiction in competition related disputes will be resolved in the nearest future by the Grand Chamber of the Supreme Court.

2.3. Involvement of expert examination in annulment proceedings

18. In accordance with the established judicial practice which has developed since at least 2003, courts shall not re-examine AMCU findings on issues related by law to the exclusive AMCU competence (most notably, market definition, determination of the monopoly (dominant) market position), also by appointment of an expert examination.

19. New procedural codes of Ukraine (adopted in 2017) grant the parties a right to provide the court with expert opinions on issues which require special expertise in a non-legal sphere.

20. A court on its own initiative or at the request of one of the case participants has the right to appoint a forensic expert examination if:

- special knowledge is required in a non-legal sphere, without which it is impossible to establish or clarify the relevant circumstances to the case;
- neither of the parties to a case has provided the court with an expert opinion on the issues raised;
- the expert opinion provided by the parties raises reasonable doubts regarding their accuracy;

- at the request of a party to a case if the party is unable to provide an expert opinion within the period of time allocated for submission of evidence (due to reasons deemed by the court as justifiable, in particular due to inability to obtain data necessary for completion of expert examination).
21. Although appointment of forensic expert examination by a court in proceedings to which AMCU is a party has not been a common practice, such examinations are now commissioned increasingly more often.
22. For instance, in three related court cases on annulment of the AMCU decision regarding concerted practices among gas stations operators, the court ordered an economic expert examination in order to verify the correlation analysis carried out by the AMCU, which was used to prove the nearly identical prices set by the offenders. The courts insisted on the re-examination of the AMCU's economic calculations for them being obviously beyond court's competence and powers.
23. As an expert examinations in Ukraine lasts on average for at least half a year, commissioning of the forensic expert examination significantly delays judicial review of the AMCU's decisions and their execution by the offenders.

2.4. Judicial review of the amount of the AMCU fines

24. The AMCU bodies enjoy wide discretion to independently determine the amount of fines to be imposed, taking into account all relevant circumstances of the case, but within the limits established by law for the respective infringement.
25. Ukrainian laws do not expressly bar courts from revising (reducing) the amount of fines imposed by the AMCU bodies. However, in a well-established case law the cassation court has ruled on numerous occasions that if the amount of the fine was set by AMCU within the limits established by law, the courts have no ground to question the validity of the fine imposed; courts are not competent to reduce the amount of such fines and/or penalties or to release offenders from paying the fine.
26. In 2019, the Ukrainian Parliament considered a draft law that aimed at authorising the courts to revise and reduce the amount of fines imposed by the AMCU bodies; however, this draft law was not supported by the members of Parliament and was rejected.

2.5. Judicial review of obligations imposed by the AMCU

27. Following the results of investigation in a case, the AMCU may impose obligations on a respondent with the purpose of termination of the competition infringement. In doing so, AMCU tended to specify the exact actions to be undertaken by the respondent in order to terminate the infringement.
28. However, the Cassation court in a number of decisions disagreed with AMCU and noted that while being competent to order termination of competition infringements, AMCU has no legal powers to order undertakings how to pursue their business activities, and therefore respondents shall have a right to independently determine how they would terminate the infringement.
29. In turn, respondents often complain that the lack of specific AMCU instructions on termination of infringements causes difficulties in understanding which specific actions (or omissions) shall be taken in order to comply with the AMCU decision. This, in turn, leads

to disputes between respondents and the AMCU as to sufficiency of their actions to terminate the infringement.

2.6. Time limits of judicial review and procedural delays

30. Usually, the annulment proceedings regarding AMCU decisions (including the cassation court, the court of the highest instance) last in courts for at least a year. However, the process is often considerably delayed due to a significant caseload of the Ukrainian courts and other intervening circumstances outside of control of the parties or the court.

31. At the same time, delays in proceedings may also occur due to deliberate actions of an offender aimed at avoiding liability (e.g. when the offender exercises its procedural rights with a sole purpose of hindering the proceeding). Such actions also cause delays in execution of the AMCU decisions. This situation poses a serious problem for the AMCU.

32. For example, after a court passes its final decision to levy an AMCU fine and/or a penalty, and/or to oblige a party to comply with an obligation to terminate the infringement, the offender submits all complaints possible under the law at the stage of the enforcement of the court decision. When a court starts to deal with one of those complaints, the offender moves to suspend its consideration until completion of consideration of yet another complaint. If the court, in such circumstances, decides to suspend proceedings, and AMCU challenges suspension in the appellate court, the offender submits another complaint requesting the appellate court to suspend consideration of the AMCU appeal.

33. In other cases, upon the final decision of the cassation court dismissing the annulment claim, the offender's shareholders apply to the court for a re-examination of the case on the grounds that it affected their rights and legitimate interests.

34. All such actions constitute serious abuses of procedural rights and are capable of considerably delay court proceedings and execution of AMCU and court decisions. Unfortunately, Ukrainian judges (who are supposed to prevent such abuses) are often hesitant to tackle such abusive actions: no court decisions sanctioning such type of actions as an abuse of procedural rights are available so far.

2.7. Case law summary

35. As of today, the AMCU is guided by the resolution of the Plenum of the Higher Economic Court of Ukraine (HECU) "On some issues of application of competition laws" (dated December 26th, 2011). However, as a result of the 2017 judicial reform, the HECU was dissolved and substituted by the Supreme Court. Supreme Court opinions are binding for all courts as a matter of law. As a result, judges increasingly more often refuse to follow clarifications set forth in the 2011 HECU resolution. The Supreme Court itself while relying on provisions of the 2011 HECU resolution, abstains from expressly citing it.

36. Thus, comprehensive clarifications of application of competition law by the Supreme Court are awaited.

37. However, the Supreme Court is unlikely to produce such clarifications in the nearest future due to its significant caseload and the priority of interpretation of other relevant enforcement issues that emerged after the adoption of new procedural codes in 2017.

38. Therefore, the AMCU and Ukrainian courts are currently guided by interpretation given by the Supreme Court in individual competition related disputes, to be followed in cases with similar circumstances.