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Interim Measures in Antitrust Investigations – Note by Ukraine

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More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations.htm>

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1. Introduction.

1. 1. For the AMCU the issue of effective responding to changes in the markets became especially relevant during the imposition of martial law and seems to be even more challenging in the postwar period.
2. Today, it is important for the AMCU to achieve a result, related to the settlement of the conflict in the markets, in the shortest time possible and with optimal costs.
3. Thus, the AMCU plans to make active use (depending on the legal and factual grounds) of two preventive tools to prevent irreparable damage to the competition:
 1. to take interim measures (according to Ukrainian competition law, these are preliminary decisions) or
 2. to provide binding recommendations to the undertakings.
4. So far, the AMCU was very cautious in using such a tool as an interim decision, in particular in cases on abuse of a dominant position, as well as in cases on protection against unfair competition. Instead, the AMCU uses such legal instruments as recommendations more confidently.

2. The Ukrainian framework for interim measures

5. Pursuant to Article 47 of the Law of Ukraine on Protection of Economic Competition (hereinafter - the Law), the AMCU has the authority to make an interim decision in a process of consideration of a case on an application submitted by the undertaking.
6. That is, the interim decision can be applied by the AMCU:
 - only on the initiative of the applicant;
 - in the framework of an already opened case on violation of the legislation on protection of economic competition.
7. At the same time, the AMCU does not need a court decision to apply interim measures. Along with this, the AMCU does not have the authority to apply interim measures on its own initiative. Such a will of the legislator may be related to the unwillingness to impose on the AMCU the risks of liability for harm brought to the defendant, because in case the applicant exists, such liability can be imposed on him, as provided for in the Law¹.
8. The interim decision is based on a statement of the undertaking regarding the need to take measures to prevent negative and irreparable consequences for it and other undertakings. Thus, the applicant can justify the need to prevent consequences for other market participants as well, thereby confirming the public interest in these measures.

¹ part three of Article 47 of the Law

3. Standards for the application of interim measures

9. An important condition for the application of the interim decision *must be to prove the irreversibility and impossibility of recovering the consequences of the violation* of the law in view of the damage caused to the applicant.

10. The burden of proving such damage and the link between certain actions and irreparable consequences rests with the undertaking that initiates such an interim decision. At the same time, the AMCU must assess the arguments and evidence provided in the application, and if they are convincing and the irreparable consequences of the violation are proven, the AMCU may make an interim decision.

11. In practice, the negative nature of the consequences is complicated to prove, so the applicant must clearly demonstrate why the consequences of the defendant's actions are irreparable. Moreover, when assessing the evidence for the interim decision, the AMCU considers whether the occurrence of negative consequences for the applicant is related to the defendant's actions in the infringement case, which became the basis for deciding to initiate proceedings at the request of the undertaking. The need to establish a causal link follows from the very word "consequences" used in the law, instead of, for example, the term "damage/harm" (the term "effect" implies causation).

12. In fact, the current Law of Ukraine on Protection of Economic Competition is designed in such a way that currently the AMCU focuses more on assessing the occurrence of irreparable damage not to competition in general, but to separate undertakings. However, as mentioned earlier, the applicant is not limited to referring only to the negative consequences for himself - the statement on an interim decision can also be justified as harm brought to other undertakings. This design does not only take into account the potential harm to end users.

13. Interim decision, if it does not specify a shorter period, shall cease to be valid from the date of receipt by the defendant of the decision on the merits, based on the results of the case.

14. In case of a failure to comply with the interim decision, the Law provides for the imposition of a fine of up to ten percent of the income of the undertaking for the previous fiscal year.

4. The types of interim measures (e.g. positive injunctions and cease-and-desist orders)

15. An interim decision may be made on:

- prohibition for a person (a defendant), whose actions show signs of violation, to perform certain actions, including those related to blocking the equities;
- obligatory performance of certain actions, if the urgent performance of these actions is necessary based on the legal rights and interests of other persons.

16. That is, the AMCU may make an interim decision in the framework of a case, according to which it may prohibit the defendant to commit not only those actions that directly contain signs of violation of competition law, but also those actions related to the circumstances resulting from the violation. For example, if, as a result of a merger carried out without the permission of the AMCU, the competition (actual or potential) in the relevant market has been significantly restricted, the AMCU may decide to block equities in the account of the undertaking, if such a measure in a particular case can actually prevent negative consequences for other market participants.

17. The obligation to take certain actions relates specifically to the need to restore competition in a market that has undergone negative changes as a result of violation or elimination of certain consequences of violation of the law.

5. Guarantees on ensuring the rights for protection

18. An interim decision can be appealed:

- To the court or
- To the AMCU's body of the highest level.

19. That is, interim decisions can be made not only by the central office of the AMCU, but also by regional offices of the AMCU. Accordingly, interim decisions made by regional offices of the AMCU can be appealed to the AMCU headquarters in Kyiv. In some cases, such a procedure for reviewing the grounds for the application of interim decisions is faster for the defendant than consideration in court. This is sometimes due to the fact that regional offices apply a lower standard of proof, and the AMCU head office corrects shortcomings in law enforcement by regional offices.

20. Acceptance by the court for consideration the application for invalidation of the interim decision does not suspend its execution. At the same time, the law provides the court with the “last word” on whether or not to stop interim measures. Thus, if there are sufficient grounds, the Economic court may suspend the interim decision of the Antimonopoly Committee of Ukraine.

21. Taking into account the “urgency” of interim measures, the Law provides for a rather short period for appealing against the interim decision (compared to a decision on the merits) - only 15 days from the date of its receipt. This period cannot be resumed.

22. According to the law, the applicant who applied to the AMCU for such measures is responsible for the incorrect interim decision. The AMCU will, in fact, suffer rather a reputational damage. There is also a risk of declining confidence in law enforcement, which will be carried out by the AMCU in the future.

23. If the fact of the defendant's violation of competition law is not proven in the framework of the case, and accordingly, the decision is not made, - the defendant has the right to apply to the court with a claim against the undertaking for damages caused by the interim decision of the AMCU.

24. Thus, the undertaking must clearly understand the consequences of applying for interim measures and carefully determine what actions the defendant must take or refrain from in order to prevent negative and irreparable consequences from violation of the competition law for the applicant.

6. Examples of interim decisions

6.1. The case of refusal to supply/provide services

25. Sumy Regional Office of the AMCU initiated a case on the grounds of violation of the legislation on protection of economic competition by Metal-Soyuz Plus LLC (hereinafter - the Defendant). The violation consisted in the refusal to provide services for the use of railway access tracks to two undertakings - Sumyvtormet OJSC and Sumyvtormetal LLC (hereinafter - the Applicants).

26. In the course of the proceedings it was established that the Defendant owned railway access tracks adjacent to the public railway tracks.

27. To ensure their activities, the Applicants have no other way to send goods by rail but by using the access railway tracks owned by Metal-Soyuz Plus LLC. According to the results of the analysis of letters received from the undertakings, it was found that cargo is sent to contractors over long distances, so its supply by road is impractical, meaning it will cause significant costs and, ultimately, may make these goods uncompetitive for the sale in the market. Such cargo as scrap metal is not suitable for road transport because it is a bulk cargo and it requires only vehicles of high capacity and carrying capacity.

28. Thus, in the sense of Article 12 of the Law of Ukraine “On Protection of Economic Competition” Metal-Union Plus LLC had the signs of an undertaking that has a monopoly position in the market of services for the use of railway access tracks within its railway tracks. Despite numerous requests from the Applicants to the Defendant for permission to pass and stop loading and unloading wagons on its access railway track, Metal-Soyuz Plus LLC (the Defendant) stated that it was impossible to grant permission without any justification. Later, the Defendant's access to the access roads, in general, was blocked by the Defendant's truck and the exit gate, which made it impossible for the locomotive to pass for shunting operations and to remove the wagons loaded with the Applicants' scrap metal.

29. According to Part 3 of Article 13 of the Law of Ukraine “On Protection of Economic Competition” abuse of monopoly (dominant) position in the market, in particular, a refusal to provide services for the use of railway access tracks (services for the passage of wagons) is prohibited. Therefore, by interim decision, Sumy Regional Office of the AMCU decided to prohibit Metal-Soyuz Plus LLC to refuse to provide the railway access tracks services.

30. The need for the adoption of an interim decision laid in the fact that as a result of the above-mentioned actions of the Defendant at the relevant railway station (office) an extremely critical situation occurred due to the accumulation of 510 tons of scrap metal, which could lead to irreparable consequences in the form of termination of the Applicants' activities (market exit), dismissal of staff members, non-fulfillment of contractual obligations and distortion of competition in related markets.

6.2. The case of misleading consumers in the pharmaceutical market

31. In the course of consideration of the application of OMNIFARMA KYIV LLC (hereinafter - the Applicant), the Kharkiv Regional Office of the AMCU initiated proceedings on the grounds of violation of the legislation on protection against unfair competition by ZDRAVOPHARM LLC (hereinafter - the Defendant).

32. As it became known in the course of consideration of the case, since July 2017 in the pharmaceutical market of Ukraine a dietary supplement under the designation “WHITE COAL – ZDRAVOPHARM” was sold, using a designation similar to the trademark under which the medicine “WHITE COAL” produced by OMNIPHARMA KYIV LLC is sold. The medicine is intended for the treatment of acute intestinal diseases.

33. The Applicant justified the need to apply the interim decision by the fact that in addition to financial and reputational losses for the Applicant, there will also be negative consequences for consumers. Thus, the similarity of the labels on the dietary packaging and on the packaging of the medicinal product may be detrimental to consumers who will be misled regarding the therapeutic effect of the use of dietary supplements.

34. In addition, the Applicant stated in his application that the retail sales of “WHITE COAL” had significantly decreased (by approximately 20%). Instead, the volume of retail

sales of dietary supplements under the label “WHITE COAL - ZDRAVOPHARM” had increased several times.

35. Kharkiv Regional Office of the AMCU in its interim decision:

- Prohibited ZDRAVOPHARM LLC to sell “WHITE COAL – ZDRAVOPHARM” dietary supplement (including under supply (distribution) or commission agreements), including end users;
- Ordered ZDRAVOPHARM LLC to take comprehensive measures within 15 days from the date of receipt of the decision to stop the circulation of the dietary supplement “WHITE COAL – ZDRAVOPHARM” by third parties.

7. Conclusions on two cases

36. Based on the results of both cases, decisions were made on the merits. Thereby the violation was confirmed. Interim decisions were made within a month from the initiation of the cases. In the instant case, it should be noted that at such an early stage of the investigation, the Regional Offices of the AMCU had limited evidence of possible violations. Currently, it remains the main obstacle to more active use of interim measures. In addition, the question of protection of public or private interest remains in any case, given the possibility of applying interim measures only at the request of the applicants.

8. Regarding the improvement of the application of interim measures

37. As mentioned above, today the AMCU has the right to apply interim decision only at the request of the applicant. This, in turn, makes the AMCU somewhat dependent on receiving the corresponding application. As it was noted, interim decisions make it virtually impossible to protect end consumers, which may be relevant in some cases of monopoly abuse. Moreover, in cases of anti-competitive concerted actions, such statements are not to be expected at all.

38. Therefore, the AMCU is considering the expediency of initiation of amendments to the legislation in this sphere. This issue is currently being discussed at the expert level.

9. Application of the AMCU recommendations as a preventive tool

39. The AMCU recommendations are a very effective tool in the law enforcement practice of the AMCU. In fact, such a tool is used before the proceedings are instituted or in the early stages of an investigation in cases where the market behavior of the undertaking, although showing signs of infringement, has not yet caused significant harm to the public or individuals.

40. The use of such tool saves public resources and effectively stops violations (of course, if the defendant agrees with the recommendations and voluntarily undertakes the corresponding obligations). The main purpose of the recommendations is to protect the public interest for effective competition in the market, although some of them may be provided to protect the private interest as well.

41. As the recommendations, as mentioned, are a preventive legal instrument to prevent significant negative effects on competition (in the form of distortion or restriction of competition), non-compliance with the Law on notification of consideration of

recommendations and/or disagreement with the recommendations will mean the mandatory opening of the case and the start of the investigation, and as a result - a prosecution.

42. Examples of effective and preventive use are the provision of recommendations to:

- maintenance companies to have adequate access to the infrastructure of certain dwellings in order to provide undertakings (operators, providers) with telecommunication services to the residents and tenants of these dwellings².
- Prozorro Sale State Enterprise to refrain from applying additional conditions (obligations), which by their nature are not directly related to the provision of Prozorro Sale State Enterprise access to the operators of authorized electronic platforms to the Prozorro Sale Electronic Trading System.

43. Interim measures and recommendations are not identical tools, but have a common goal - to prevent negative consequences and irreparable damage to competition.

10. Conclusions

44. Currently, it is important for the AMCU to possess the full range of legal instruments which make it possible to quickly and legally resolve legal conflicts in the markets.

45. Therefore, more active application of interim measures may be, on the one hand – a challenge for the AMCU, and on the other hand – an opportunity to effectively influence rapid changes in markets, and the establishment of new markets, especially in the digital sphere.

46. At the same time, in some cases, the application of interim measures may be perceived in society as excessive interference in the economic activities of undertakings. Therefore, the AMCU also plans to use such a preventive tool as recommendations in some cases. Thus, if undertakings agree with the provided recommendations, in fact, voluntarily pledge respective commitments to stop violating competition law (until irreparable damage occurs) - the AMCU will be able to effectively resolve the market situation with the consumption of fewer resources.

47. The development of the institute of interim measures should be advocated by disseminating information about the possibility of using such a tool among businesses (potential applicants). In addition, the possibility of amending the legislation should be discussed so that the AMCU has the opportunity to make interim decisions on its own initiative, for example, to protect the interests of end consumers in cases on monopoly abuse.

² Recommendations of the Kyiv AMCU Office as of March 19, 2019 No. 60/5-rk/k