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The Use of Structural Presumptions in Antitrust – Note by Ukraine

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1. General overview

1. The Antimonopoly Committee of Ukraine (hereinafter - the AMCU, the Committee) uses structural presumptions in its enforcement both in the framework of merger control and in determining the dominant position of an undertaking in the relevant markets.
2. The application of structural presumptions helps to allocate the resources of the competition authority more efficiently, especially in issues that do not threaten competition or the possibility of risk of harm to competition is minimal, especially in the current conditions in Ukraine, when the structure of markets is constantly changing.
3. At the same time, the AMCU supports the approach of using structural presumptions as indicators (red flags) for a further more in-depth investigation of competition risks in case the relevant thresholds for such presumptions are exceeded. At the same time, it is important to ensure that the parties have the opportunity to rebut the presumption of illegality.

2. Experience in the application of structural presumptions in the case of determination of dominant position and abuse of dominant position in the markets of telecommunication services (mobile telephone services)

4. In 2020, due to complaints and applications from citizens regarding unreasonable and unjustified increases in tariffs for mobile communication services by Ukrainian mobile operators, the Committee took state control measures to identify violations of the legislation on the protection of economic competition in the field of telecommunications (mobile telephone services) (hereinafter - the Measures).
5. In the course of the Measures, the Committee identified signs of violation provided for in part one of Article 13, clause 2 of Article 50 of the [Law of Ukraine 'On Protection of Economic Competition'](#) in the actions of company "Kyivstar" (one of the biggest Ukrainian mobile operator), which consisted of unreasonable and economically unjustified increase in the cost of tariff plans, in the form of abuse of monopoly (dominant) position in the market of mobile communication services by committing actions that led to the infringement of consumer interests that would not have been possible in the conditions of significant competition in the market, and the case was initiated.
6. Thus, the subject of the case was the actions of Kyivstar Private Joint Stock Company, which consisted of an unreasonable and economically unjustified increase in the cost of tariff plans.

2.1. Structural presumptions for determining dominant position in the relevant market

7. The following structural presumptions, in particular, served as grounds for initiating the study, which was later transferred to the case:
 1. **high market share.** The share of PrJSC Kyivstar in the market of mobile communication services (hereinafter - Services) at the end of 2020 was more than

49 per cent, which indicated that it had signs of a dominant position in the Services market.

2. **Consistency (stability) of market share over time.** According to the information available to the Committee at the beginning of the investigation, Kyivstar's market share has been consistently high over the past few years.
 3. **the degree of market concentration.** In addition to PrJSC Kyivstar, the main participants in the Services market were PrJSC VF Ukraine (with a market share of 36.33%) and LLC Lifecell (with a market share of 14.12%). Thus, the market for services was highly concentrated.
 4. **barriers to entry.** There are obvious administrative and regulatory barriers to entry. According to part one of Article 39 of the Law of Ukraine 'On Telecommunications', telecommunications operators, in particular, are obliged to carry out activities in the field of telecommunications in accordance with the law, subject to inclusion in the register of operators, telecommunications providers, and in cases specified by law, also in the presence of appropriate permission.
8. In accordance with the Committee's Methodology (guidelines) for determining the monopoly (dominant) position of undertakings in the market¹:
- a monopoly (dominant) position of an undertaking (undertakings) is recognised when the market share of one undertaking exceeds 35 per cent, unless it has proved that:*
- *has competitor(s) on the market;*
 - *is exposed to significant competition due to the absence of limited access opportunities for other undertakings to purchase raw materials and supplies and sell goods, absence of barriers to entry of other undertakings, absence of privileges or other circumstances.*
9. At the same time, in accordance with clause 10.3 of Methodology, undertakings are not subject to significant competition if, due to their market power, they have the ability to prevent, eliminate or restrict competition, in particular, to limit the competitiveness of other undertakings or to infringe the interests of other undertakings or consumers.
10. Thus, the existence of a significant influence on the market may indicate market power of market participants.
11. Signs of market power include, in particular:
- the ability of an undertaking to raise prices for goods and maintain them at a level that exceeds the level determined by competition in the market;
 - the ability to limit the volume of sales by creating a shortage in the market;
 - the ability of a market participant to limit resources (creating barriers) to entry for other potential competitors;
 - the ability to determine the terms and conditions of the sale of goods.
12. A high level of market concentration is also considered as an additional sign of market power.

¹ The Methodology for Determining the Monopoly (Dominant) Position of Undertakings in the Market, approved by the Order of the Antimonopoly Committee of Ukraine No. 49-p as of 5 March 2002, details the provisions of the Law on Protection of Economic Competition

2.2. Kyivstar's rebuttal of certain structural presumptions and facts established by the Committee in the framework of the determination of dominant position (market power)

13. Having established the structural presumptions regarding Kyivstar's dominant position on the Services market, the burden of proof then shifted dynamically from the Committee to Kyivstar and vice versa.

14. In order to determine the presence/absence of market power of Kyivstar, the Committee received and analysed the information obtained during implementation of the Measures and consideration of this case, as well as information from other open sources.

15. As a result, the following was established.

a) the ability of Kyivstar PrJSC to increase the cost of tariff plans for the Services and maintain them at a level that exceeds the level determined by competition in the market.

16. The Committee reviewed the mechanism of formation of the cost of the Service (cost price) and found that Kyivstar PrJSC set tariffs for the Services independently, considering the current market prices, tariffs and demand. In case of increase in the cost of tariff plans for the Services of Kyivstar PrJSC, the consumer (subscriber) had the right to refuse the changes to the tariff plan, its content, and cost proposed by the operator in the form of the opportunity offered by the Company to choose any other tariff plan available for connection at the time of introduction of the said changes free of charge, and in case of refusal to receive the Services at the changed tariff, the subscriber could terminate the relationship with the Company early.

17. In other words, even in the event of an increase in the cost of tariff plans for Kyivstar Services, the consumer could choose another tariff plan or another mobile operator. The Committee did not establish any facts that would indicate that the consumer could not refuse the changes to the tariff plan, its content, or cost proposed by the Company.

18. In this regard, Kyivstar PrJSC was not able to increase the cost of tariff plans for the Services and maintain them at a level higher than the level determined by competition in the Services market.

b) as for the ability of Kyivstar PrJSC to limit the volume of Services, creating a deficit in the market, should be noted the following.

19. On 1 May 2019, Ukraine introduced a service for transferring subscribers' numbers.

20. It is worth noting that the majority of subscribers who exercised their right to transfer their number chose the operator of the Services with the smallest share in the market surveyed - Lifecell LLC.

21. Thus, even if Kyivstar restricts the provision of the Services or the consumer is not satisfied with the terms or cost of the tariff plan, the consumer will be able to choose the terms or operator that will meet all his/her needs. The ability of consumers (subscribers) to choose the operator that will provide them with the Services is one of the most important signs of positive competition.

22. The above is also evidenced by changes in the shares of market participants in the Services market over a certain period by the number of subscribers, which are signs of active competition in the market.

23. 23. As a result of such competition, none of the market participants can limit the volume of sales - any restriction will be compensated by competitors, therefore, the probability of a deficit in the market is minimal.

c) as for the ability of Kyivstar PrJSC to limit resources (creating barriers to entry) for other potential competitors, the following should be noted.

24. According to the information provided by the telecommunications regulator (NCEC) tariffs for telecommunications services are set by operators and telecommunications providers independently, except as provided for in part two of Article 66 of the Law of Ukraine 'On Telecommunications'.

25. According to the information provided by the telecommunications regulator (NCEC), tariffs for telecommunications services are set by operators and telecommunications providers independently, except as provided for in part two of Article 66 of the Law of Ukraine 'On Telecommunications'.

26. At the same time, Article 67 of the Law of Ukraine 'On Telecommunications' establishes the principles of tariff regulation, which include, in particular, basing tariff calculations on the cost of these services with due regard for profit.

27. In addition, sub-clause 34 of clause 39 of the Rules provides, inter alia, for the obligation of telecommunications operators to calculate tariffs based on the cost of services with due regard for profit.

28. Since the NCEC is the body that controls the activities of the market participants in the Services market, such a market is controlled. Therefore, the establishment of certain barriers does not depend on market participants.

d) the ability of Kyivstar PrJSC to determine the terms and conditions of the Services

29. In the period from January 2020 to December 2020 (inclusive), all market participants offered the Services in a comprehensive manner. In particular, most of the Services were sold in packages, with operators determining the size of the tariff package components independently, taking into account the needs of the consumer profile of different categories of consumers.

30. As a result, based on the above, Kyivstar PrJSC forms a particular tariff plan that it offers to the consumer (subscriber). If a particular tariff plan is not suitable for a consumer (subscriber), such consumer has the opportunity to refuse the operator's services and choose alternative services from a competitor.

31. Based on the above information, it can be concluded that the basic tariff plans are similar in content, but not identical. Irrelevant indicators of the tariff plans make it impossible to compare them correctly. Therefore, each characteristic of the tariff plan can have a decisive impact on the consumer's choice. At the same time, the cost of tariff plans is not a decisive factor in choosing an operator, as it does not make a significant difference.

32. Therefore, neither Kyivstar nor other mobile operators are able to solely determine the terms and conditions of the Services provided to consumers.

33. In view of the above, Kyivstar PrJSC cannot ignore the behaviour of VF Ukraine PrJSC and Lifecell LLC in the investigated market when determining the terms of sale of goods and setting tariffs for the Services.

34. Thus, having received information on the rebuttal of the structural presumptions, the AMCU conducted an in-depth analysis of the market and the position of the market participants.

35. As a result, the AMCU found that the existing circumstances did not allow Kyivstar PrJSC to:

- restrict competition, foreclose other participants from the Services market by monopolising the radio frequency resource;
- **impose unfavourable conditions on the provision of services to consumers;**
- reduce or limit the provision of Services, as competitors are able to quickly compensate for the resulting deficit.

36. Since consumers can choose any operator of the Services that will meet their needs, the Committee had no reason to believe that any operator had signs of sufficient market power in the Services market.

37. Given this, Kyivstar was exposed to significant competition and could not prevent, eliminate or restrict competition in the market for the provision of the Service, in particular, to restrict the competitiveness of other undertakings or to infringe the interests of other undertakings or consumers.

38. It is also important to note the vital cooperation of the AMCU with the regulator in the field of telecommunications in obtaining specific information on the structure of the mobile market. In particular, the regulator provided information on the number of active telecommunication identification cards of the mobile communication network for 2020, on a quarterly basis. The corresponding quarterly dynamics of 2020 indicators showed that the shares of market participants were changing dynamically, with an increase in the share of Lifecell LLC and a partial loss of subscribers by Kyivstar PrJSC and VF Ukraine PrJSC. These dynamics were also confirmed by data from mobile operators.

39. The constant redistribution of market shares between market participants also indicated active competition in the Services market.

40. The telecommunications regulator also provided information on the shares of telecommunications operators' revenues from the provision of Services on a quarterly basis for 2020. The relevant data reflected the general situation with the revenues of mobile operators and confirmed their shares in the market under study.

41. Although the Services Market is indeed highly concentrated, it shows positive signs of competition, including:

- significant investments by each of the operators to expand their networks and improve the quality of the Services;
- constant competition between operators for radio frequency resources;
- intensive development and implementation of innovative technologies by the operators;
- significant expenditures by operators on advertising and marketing;
- migration of a significant part of subscribers between operators;

42. Therefore, there is constant competition in the Services market between a limited number of undertakings.

43. Part two of Article 12 of the Law of Ukraine 'On Protection of Economic Competition' stipulates that a monopoly (dominant) position in the market of goods is considered to be the position of an undertaking whose share in the market of goods exceeds 35 per cent, unless it proves that it is subject to significant competition.

44. Taking into account the above, Kyivstar PrJSC in the period from January 2020 to December 2020 (inclusive) was subject to significant competition in the market of mobile communication services, and therefore the provisions of part two of Article 12 of the Law of Ukraine ‘On Protection of Economic Competition’ cannot be applied.

45. In essence, in the course of the proceedings, the existence of market power and, accordingly, a dominant position of Kyivstar in the relevant market was rebutted. As a result, the case was closed in February 2024.

46. This example demonstrates the importance of ensuring that undertakings can rebut structural presumptions and conduct further in-depth analysis in such situations to avoid making an erroneous decision. At the same time, cooperation with the relevant telecommunications regulator was vital to establish the market structure and the state of competition in the market.

3. Conclusions

47. Based on the AMCU's practice, structural presumptions are a fairly effective tool in terms of predictability of its application, saving limited resources of the competition authority and the opportunity for undertakings to rebut the presumptions expressed by the AMCU. At the same time, the use of this tool should also provide a high degree of ensuring the an adversarial process and the right to be heard, as well as active cooperation with the regulators in the relevant markets.

48. We support the middle-ground approach expressed in the Background Note² as the most rational and reasonable, in our opinion, given the main goal of the competition authority - to ensure effective protection of economic competition in the relevant markets. Since the speed of decision-making should not really reduce its effectiveness, the scope of structural presumptions (quantitative and qualitative composition of indicators) should be determined on a case-by-case basis to balance over- and under-enforcement.

² THE USE OF STRUCTURAL PRESUMPTIONS IN ANTITRUST
https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/11/the-use-of-structural-presumptions-in-antitrust_27777e33/3b8c6885-en.pdf