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Private Enforcement of Competition Law – Note by Ukraine

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More documentation related to this discussion can be found at: oe.cd/peocl.

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Ukraine

1. Introduction

1. This contribution examines Ukrainian practice regarding compensation for damages following a finding of a violation by the Antimonopoly Committee of Ukraine (hereinafter – the Committee, AMCU). In the cases discussed, the Committee's decisions made it possible to determine which payments had been unlawfully imposed. During the consideration of the claims, the courts determined whether a specific plaintiff had paid the relevant amounts and the extent of the losses the plaintiff suffered as a result of the violation.

2. In the case concerning additional fees for servicing low-traffic freight stations charged by JSC "Ukrzaliznytsia," the courts looked into, among other things, whether the plaintiff had passed on the costs it incurred to the buyers of its products. Cases involving fees set by the municipal enterprise "Kyivtransparkservice" for winners of electronic auctions demonstrate how various plaintiffs used the findings of a single investigation by the Committee to substantiate claims under their own contracts.

2. The Legal Framework for Compensation for Damages in Ukraine

3. Article 55 of the Law of Ukraine "On Protection of Economic Competition" does not specify a fixed amount of damages or a percentage of the transaction value that could be considered an overpayment. For infringements listed in Article 55(2), the rule on double compensation applies. To determine the award, the court first determines whether a specific plaintiff has suffered damages as a result of the violation and what the amount of those damages is. The amount of damages determined based on the evidence is subject to doubling.

4. The possibility of double compensation does not eliminate the need to prove the damage to a specific plaintiff, its extent, and the causal link to the violation. In the cases discussed below, the decisions of the Committee's bodies and the results of their judicial review formed the basis for substantiating the claims, and the courts examined the financial consequences for each victim separately.

5. The Committee identifies and stops violations, applies the legal measures of liability, and establishes the facts that may be used in subsequent lawsuits filed by the victims. The court determines whether there are grounds for compensation to a specific plaintiff and the amount to be awarded in their favor. The fine imposed by the Committee is paid into the state budget and does not replace compensation to the victim.

6. As part of the reform of competition law, the leniency program has already been improved, and special conditions for compensation of damages have been established for its participants. Pursuant to Article 55(3) of the Law of Ukraine "On the Protection of Economic Competition," an undertaking that receives full immunity from liability under Article 52[1](3) of this Law shall compensate for damages only to its direct customers or suppliers, and to other injured parties – only if compensation cannot be obtained from other undertakings – the defendants in the same case concerning a violation of competition law. Thus, full exemption from a fine does not eliminate the obligation to compensate for damages, but provides for special conditions for its implementation. These conditions do not automatically apply to participants who receive only a reduction in the fine.

7. Further reform of competition law in Ukraine includes, in particular, the review of Draft Law No. 12440 of January 26, 2025, regarding the activities of the Antimonopoly Committee of Ukraine. To promote the development of private enforcement, it is reasonable to address three issues separately: victims' access to evidence, the protection of applications filed under the leniency program, and the possibility of jointly considering claims by individuals who have suffered harm from a single violation.

3. Low-traffic freight stations: proving individual damages

8. By Decision No. 470-p of August 6, 2020, the Committee found that JSC "Ukrzaliznytsia" had abused its monopoly position by designating a number of freight stations as low-traffic, introducing an additional service at these stations for the delivery and pickup of railcars, and setting the price for that service. The Committee concluded that these actions resulted in the infringement of the interests of other undertakings or consumers, which would not have been possible under conditions of significant competition. JSC "Ukrzaliznytsia" was fined and ordered to stop the violation.

9. Tsunami LLC paid JSC Ukrzaliznytsia 1,404,121.67 UAH for an additional service involving the delivery and pickup of railcars at stations classified as low-traffic. The company determined the amount of damages incurred as the total amount of payments for this service and, pursuant to Article 55 of the Law, requested that UAH 2,808,243.34 be recovered from JSC "Ukrzaliznytsia."[1]

10. During the initial proceedings, the courts of first and appellate instance granted the claim. In a ruling dated March 16, 2023, the Supreme Court revoked these decisions and remanded the case for a new trial, noting, in particular, the need to determine whether the plaintiff had included the costs of the disputed service in the price of goods or services sold to third parties. Thus, in addition to confirming payment, the question arose as to whether additional costs might have been passed on to the purchasers of the plaintiff's products.

11. Upon reconsideration, the court of first instance dismissed the claim, finding that it had not been proven that the disputed expenses had not been reimbursed to the plaintiff by the purchasers of its products. The Court of Appeals reversed this decision. Taking into account the terms of purchase and delivery of raw materials for the plaintiff's own processing, as well as the documents evidencing payment for the disputed service, it recognized the relevant payments as losses incurred by the plaintiff.

12. In its ruling dated September 24, 2024, the Supreme Court upheld the Court of Appeals' ruling. Tsunami LLC was awarded 2,808,243.34 UAH – double the amount of damages established in the case. The final outcome was based on the violation identified by the Committee and the courts' assessment of the evidence regarding the specific plaintiff's property losses.

13. This case demonstrates that the issue of passing-on of costs may also arise in connection with an unlawful payment whose amount is supported by documentary evidence. The two rounds of court proceedings underscore the need to clearly distinguish between the facts established by the Committee's decision and issues that require additional evidence regarding the transactions and losses of a specific victim.

[1] *Supreme Court Rulings of March 16, 2023, and September 24, 2024, in Case No. 910/147/22*

4. "Kyivtransparkservice": One Decision – A Series of Claims from Victims

14. A further example comes from the claims following the decision of the Committee's Temporary Administrative Board No. 75-р/тк dated July 15, 2021, regarding the municipal enterprise "Kyivtransparkservice." The Committee found that requiring the winners of electronic auctions to pay a one-time fee for the right to enter into a contract for the operation of a parking lot, a security deposit, as well as fines for refusing to enter into the contract or sign the parking lot acceptance and transfer certificate, constituted an abuse of a monopoly position. The legality of the Committee's decision was confirmed during a judicial review, which concluded with a ruling by the Supreme Court on December 22, 2022.

15. "Kyiv Social and Investment Technologies" LLC, which made one-time payments for the right to enter into two contracts, filed a claim against the municipal enterprise "Kyivtransparkservice." The total amount of these payments was 101,270.40 UAH. Citing the violation established by the Committee and Article 55 of the Law of Ukraine "On the Protection of Economic Competition," the company requested compensation for damages in double the amount – 202,540.80 UAH.

16. In Case No. 910/2408/24, the court relied on the Committee's findings regarding the nature of the disputed payment and examined the circumstances surrounding its payment by the specific plaintiff. In particular, the court took into account the fact that this payment was unrelated to the preparation or conduct of auctions. The court recognized the amounts paid as damages resulting from the established violation. By a decision of the Kyiv Commercial Court dated September 12, 2024, the claim was satisfied and 202,540.80 UAH was awarded. By a ruling of the Northern Commercial Court of Appeals dated January 31, 2025, this decision was upheld.

17. This claim was one of a series of claims filed by undertakings seeking compensation for damages caused by the imposition of such fees. The Committee's decision served as a common basis for substantiating the claims of various affected parties. At the same time, in each dispute, it was necessary to link the established violation to the claimant's specific transactions and to confirm the amount of its losses.

18. The large number of claims related to a single violation also raises the issue of organizing legal protection. Therefore, it is reasonable to explore the possibilities of joint consideration of related claims and mechanisms for collective protection using a common body of evidence. Collective (group) claims are precisely what is needed to ensure the joint and effective protection of the rights of a significant number of individuals who have suffered from identical violations committed by the same undertaking.

5. Using the Results of the Investigation to Prove Harm

19. In the cases mentioned above, the nature of the unlawful payments and the circumstances surrounding their payment were key to proving harm. A clear definition in the Committee's decisions of the transactions involved in the violation, the duration of the violation, and the mechanism by which the additional costs arose helps the victim to link the established conduct to their own losses and to determine what additional evidence is necessary.

20. One area for improvement could be to more fully reflect in the Committee's decisions the economic data and calculations obtained during the investigation and suitable for further assessment of the harm. Depending on the nature of the violation, this may include the amounts of unlawfully charged fees, the volumes of relevant transactions, price

differences, or the results of comparisons of the terms of purchase of products in different periods or in comparable markets. Specifying the data sources, calculation methods, and the scope of application of the results obtained will help victims and courts use this analysis in specific disputes.

21. This approach can be particularly useful in cases where the harm is not limited to a single unlawful payment. For example, determining the overpayment resulting from a price-fixing agreement may require comparing the actual price with the price that would have prevailed in the absence of the violation. The Committee's analysis of prices, competitive conditions, and other factors can serve as the basis for such a comparison. At the same time, assessing the impact of the violation on the market does not automatically determine the losses of each purchaser: it is necessary to take into account the terms of their transactions, the causal link, and the possible passing on of the overpayment to subsequent purchasers.

22. The scope of the economic analysis must be consistent with the objectives of the investigation, the available data, and the resources at hand. First and foremost, this concerns the suitability of the evidence already collected and the calculations already performed for use by victims and the courts. Determining individual damages should not be a mandatory requirement for the completion of every investigation.

23. The implementation of this approach also depends on access to evidence that may be in the possession of the defendant, other market participants, or the Committee. Non-confidential versions of decisions should make it possible to understand the mechanism of the violation and the substance of the economic analysis conducted. To use additional materials in court proceedings, it is important to have clear rules governing the request for, disclosure of, and protection of information with restricted access.

6. The Committee's Interaction with the Courts and Feedback

24. A practical step toward improvement could be for courts to systematically inform the Committee about the initiation of proceedings in claims for damages based on the decisions of its bodies, as well as about the outcomes of such proceedings. Sufficient information could include the case number and court decisions. This would facilitate monitoring the subsequent use of the Committee's findings and the provision of assistance at the court's request.

25. Summarizing this information would make it possible to determine what circumstances and calculations the courts use, what evidence is lacking, and what difficulties recur in various lawsuits. This experience could be taken into account when preparing the Committee's future decisions, their non-confidential versions, and methodological materials.

26. It would also be beneficial to consider establishing clearer procedural regulations for the Committee's expert assistance at the court's request in the role of "amicus curiae." This could include explaining the reasoning behind a decision, providing materials in accordance with established procedures, and clarifying economic calculations. Specifically, this concerns the selection of comparable periods or markets, the impact of other factors on prices, and the limits on the use of available data for assessing overpayments.

27. Notification of a legal dispute should not imply that the Committee is required to participate in every case. Its involvement must be commensurate with the issues raised by the court, its established authority, and its available resources. The court retains its

independence in evaluating evidence and determining the amount of compensation, and the parties must be given the opportunity to review the explanations and materials provided and to raise their objections in compliance with data protection requirements.

28. Educational activities also remain important. The Committee already has experience in professional dialogue with the judicial community, particularly during conferences on the application of competition law. Future exchanges should focus on issues that arise in compensation cases: the use of evidence from investigations, the assessment of economic calculations, and the proof of individual harm, including the possible passing on of costs.

7. Conclusions

29. The cases described above confirm that the Committee's decisions may serve as a basis for awarding compensation; however, the mere fact that a violation has been established does not establish the loss suffered by an individual plaintiff. In the case of Tsunami LLC, the key factor was determining the financial consequences of the payments for the specific plaintiff, including the possible passing on of costs. This underscores the need for predictable approaches to the burden of proof: which circumstances are confirmed by the Committee's decision and what additional evidence the victim must provide.

30. Claims against the municipal enterprise "Kyivtransparkservice" show that a single investigation can provide the evidentiary basis for the claims of multiple injured parties. Further development should ensure the effective use of shared findings regarding violations and reduce the costs of individual claims. Developing mechanisms for collective protection is particularly appropriate for small claims, while preserving the ability to verify that each victim belongs to the relevant group of individuals and to determine the amount of compensation due to them.

31. Both examples involve unlawfully imposed payments. In cases where it is necessary to determine overpayments resulting from a price-fixing agreement, proving the case may require a more complex economic analysis. Therefore, a practical priority is ensuring that the data and calculations collected by the Committee are suitable for subsequent use in court, with clear indication of their sources, methods, and limitations. At the same time, assessing the losses of a specific plaintiff remains the responsibility of the court.

32. To improve this practice, courts could systematically inform the Committee of the outcomes of damages claims based on its decisions, including which claims were granted, what evidence was lacking, and which issues led to a reconsideration. Summarizing these results would make it possible to set priorities for methodological work, professional exchanges with judges, and potential procedural changes based on the specific challenges faced by victims. The further development of private enforcement of competition law in Ukraine should build on this experience so that the Committee's decisions help victims obtain compensation and the evidence gathered can be effectively used in court.