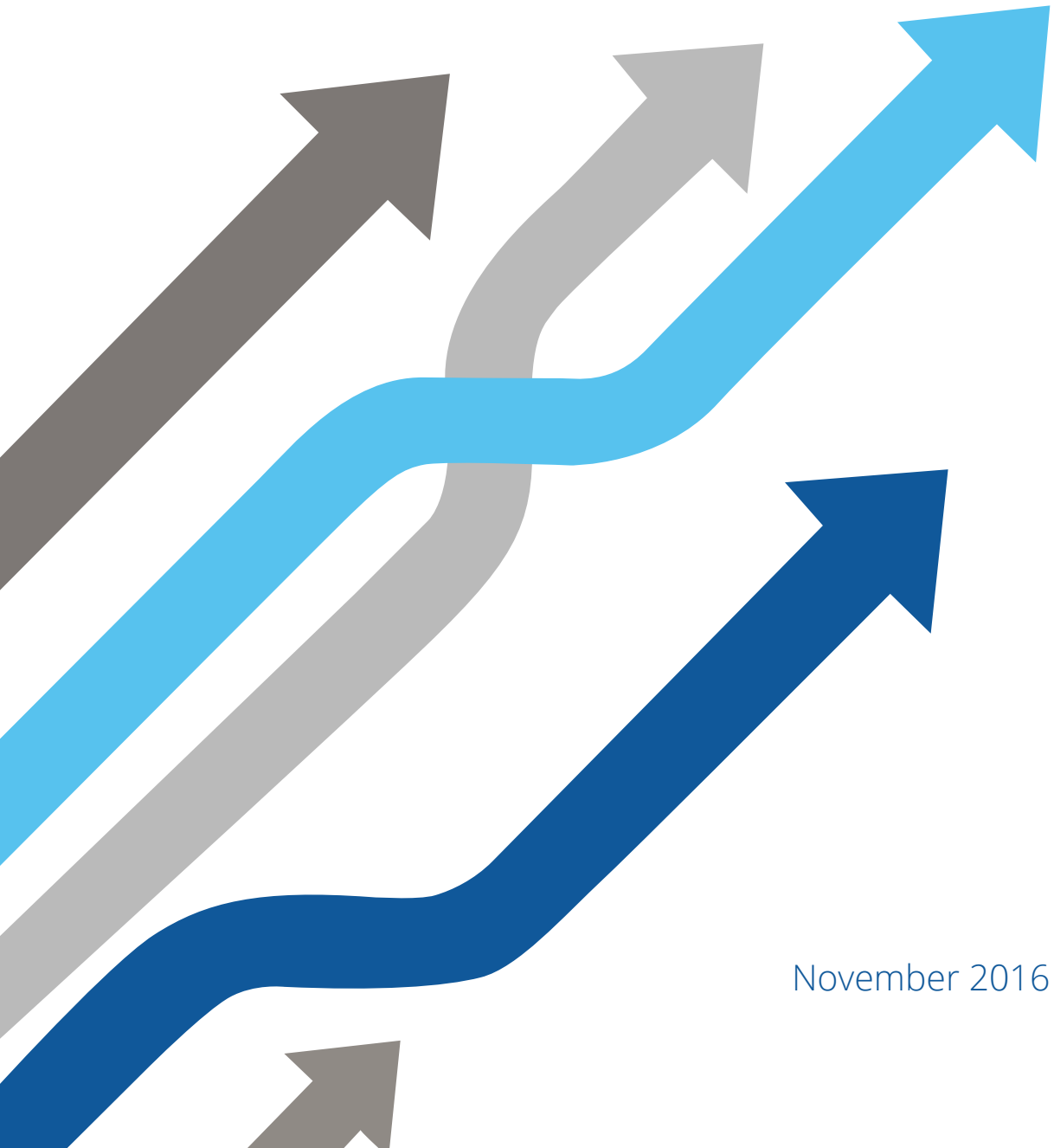
Business
OMBUDSMAN
Council

SYSTEMIC REPORT

CHALLENGES AND PROBLEMS IN THE SPHERE OF COMPETITION PROTECTION AND OVERSIGHT



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1 FOREWORD

Strong competition environment is one of the cornerstones of an effective economy. Thus, in order to foster inflow of investment needed for sustainable growth, Ukraine needs to ensure existence of the strong competition law and policy. The importance of this issue is acknowledged, among others, in the EU-Ukraine Association Agreement[1] and through continuing process of adoption of the National Competition Development Programme[2] (hereinafter – the **"NCDP"**).

The foregoing factors represent favorable context for implementing reforms aimed at making Ukrainian economy to be more competitive and market-oriented, where enhancing (and, where necessary, untapping) institutional capacity of the Anti-Monopoly Committee of Ukraine (hereinafter – the **"AMCU"**) constitutes a key cross-cutting element of such a complex endevour.

Yet, the Business Ombudsman Council (hereinafter – the **"Council"**) receives periodic complaints challenging manner in which the AMCU (and/or its' territorial divisions) exercise its' powers. Although the number of such complaints is not large in comparison with other spheres where we regularly record occurrence of business malpractice (such as administering business taxes or abuses at the part of law enforcement authorities or bodies of sub-national governance), by no means we underestimate the importance of resolving existing challenges and problems in the field of competition in Ukraine.[3]

Hence, in this report the Council discusses systemic problems and challenges in the sphere of competition protection and oversight (hereinafter – the **"Report"**). The Report focuses on specific issues in selected areas of competition law and policy relevant to the Council's mandate to contribute to the transparency of the activities of state authorities, reduction of corruption and to prevent unfair treatment of business.[4] From that perspective the scope of this Report is inherently narrower[5] than comprehensive studies of the competition law and policy in Ukraine that are being currently conducted (or contemplated to be) by OECD and the World Bank.[6]

1 See Competition related extracts from the Association Agreement between the European Union and its Member States, on the one part, and Ukraine, of the other part. OJ L 161, 29 May 2014, p. 3-2137. Available at http://ec.europa.eu/competition/international/bilateral/ukraine_eu_2014.pdf (hereinafter - the "EU-Ukraine Association Agreement" or, where the reference to the part of the EU-Ukraine Association Agreement containing provisions on the Deep and Comprehensive Free Trade Agreement, is more relevant - the "DCFTA", as the case may be).

2 See in Ukrainian at http://zakon0.rada.gov.ua/rada/show/690-2012-%D1%80#n9.

3 Among other things, it is evidenced by a rather low ranking Ukraine currently occupies in the World Economic Forum's Global Competitiveness Index comparing 140 countries. In particular, for "intensity of local competition" Ukraine is ranked 99th; for "extent of market dominance" – 98th; and for "effectiveness of anti-monopoly policy" – 136th in the world. See at http://www3.weforum.org/docs/gcr/2015-2016/UKR.pdf.

4 See, generally, the Resolution of the Cabinet of Ministers of Ukraine No. 691, dated 26 November 2014, as amended "On Establishment of the Business Ombudsman Council".

5 Hence, such competition related topics as protection of consumer's rights, pricing (including parallel pricing and tariffs), as well as various industry-specific issues (covered elsewhere in the Report, if applicable) fell beyond the scope of the Report.

6 As at the time of this Report OECD was reportedly revising both its' country study "Ukraine – Peer Review of Competition Law and Policy", prepared in 2008 as well as the "Voluntary Peer Review of the Competition Law and Policy of Ukraine", prepared by UNCTAD in 2013. During fall 2016, the World Bank visited Ukraine with the Scoping Mission aimed at facilitating preparation of the program dedicated to the development of competition in the country.

Hence, the primary objective of this Report is to enhance the overall quality of competition environment in Ukraine by introducing further legislative changes, improving the AMCU's exercise of its' administrative and procedural discretion along with competition advocacy function to be based, inter alia, on strengthened cooperation between the AMCU and other state authorities as well as business.

We commence by focusing at **the current state of the AMCU's institutional capacity**, where we recommend to:

1) ensure that its' annual plans clearly specifies the main priority areas for the forthcoming year, including, if applicable, markets to be studied;
2) adopt legislative changes aimed at unleashing the AMCU's existing capacity by improving its' organizational structure and equipping it with sufficient operational resources; and
3) intensify the AMCU's advocacy activities.

While discussing **the lack of sufficient cooperation between the AMCU and other state authorities**, we focuse on the need to:

1) promptly adopt the National Competition Development Program;
2) accelerate working relationships between the AMCU and the state authorities (with the emphasis on sectoral regulators) by expanding the practice of executing memorandum on partnership; and
3) ensure that not only the AMCU itself but also other relevant authorities play active role in eliminating factors impeding ability of the national competition authority to effectively exercise powers vested to it in connection with anti-trust clearance of privatization transactions.

The Report continues with comprehensive analysis of the AMCU's core operational functions comprising investigation, decision-making and enforcement.

*As for **the AMCU's authority to grant consents on concentration,** it is proposed:*

1) to ensure that consideration of consent on concerted actions due to execution of non-competition agreement is conducted on the basis of simplified procedure, provided that receipt of concentration consent is already carried out on the basis of simplified procedure; and

2) to ensure clear identification of parties liable for failure to notify about concentration. It would allow determining party responsible for committing concentration without seeking AMCU's prior consent, provided that the latter is necessary.

*As for **the AMCU's function to investigate cases on abuse of monopolistic (dominant) position,** it is recommended to:*

1) set clear deadlines for consideration (investigation) of such cases; and

2) expressly provide that if an applicant were to withdraw its' application in a case on abuse of monopolistic (dominant) position, this shall not constitute the substantial ground for the AMCU to exercise its' procedural discretion to terminate consideration of a case.

The AMCU's internal decision-making procedure is proposed to be adjusted to ensure that when rendering an initial decision on its' merits falls under the authority of the AMCU's Board of Commissioners, the adoption of such a decision shall require majority of the AMCU's composition established by law (i.e., 5 persons), save for the Commissioner who investigated the case. The latter, nonetheless, should remain to be involved into decision-making process by being entitled to present results of investigation during the respective procedural hearing.

As for ***the AMCU's enforcement function***, our main recommendation is to enable judicial challenge of the amount of fine imposed by the AMCU body, subject to existence of the Methodology for calculating the amount of fine for breach of competition laws, adopted in the form of legislative act, whose application is mandatory for both the AMCU and the bodies of judicial power.

As far as **access to information** is concerned, the Council proposes:

1) to introduce electronic database that would enable applicants to retrieve general information about the current status of consideration of requests/applications lodged with the AMCU, which is not confidential in nature.
2) to set maximum time limits for (a) responding with further explanations and/or clarifications requested by the AMCU; and (b) lodging objections by the parties that disagree with the AMCU's interim procedural decisions in cases on mergers/ concerted actions.
3) to establish specific/maximum time limits for the AMCU's consideration of requests on access to the case materials lodged by the parties; and
4) to expressly enable interested parties to lodge requests with the AMCU to seek initiation of hearing on concentrations/concerted actions, with such requests being subject to the AMCU's mandatory consideration and provision of grounded answer within reasonable time limits.

In order to make the existing **leniency regime** more inclusive, the Council recommends reducing fines for parties other than the first one to file.

As for the area of **non-judicial challenging result of public procurements**, the Council's main recommendations are:

1) to enable complaining bidder or any other participant of the appeal procedure to submit additional documents related to the merits of the complaint; and
2) to ensure admissibility of evidence lodged with the Ukrainian courts in the form of electronic documents.

Last but not least, the Report concentrates on the **forthcoming legal framework on the state aid**, set to become effective in the middle of 2017. Having acknowledged the importance of effective dialogue between public authorities and business to discuss the existing and prospective policy choices in this field, the Council primarily recommends:

1) to continue enhancing awareness amongst state and municipal authorities and business about the substance of the forthcoming legal framework on state aid and the general implications stemming therefrom;
2) to maintain active dialogue with both providers and beneficiaries of state aid to discuss existing and contemplated policy choices in the field;
3) to ensure availability and quality of pending secondary legislation; and
4) to promptly start inventory of state aid measures subject to availability of the relevant and properly tested material base (hardware and software).

The Report is based on extensive desk-based research and a fact-finding held by the Council. The desk-based research covered a review of the competition legislation, decisions of the AMCU, actions taken by other government agencies as well as international and domestic legal texts on competition law and policy.

The analytical part of this Report is based on complaints received by the Council and illustrated in the Report, proposals made by market participants, discussions with leading local and international expert organizations, review of relevant literature, and the Council's own conclusions. The Council has also used information publicly available on the web sites of relevant public authorities.

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While working on the Report the Council received valuable assistance from the Anti-Monopoly Commiittee of Ukraine, the Delegation of the European Union to Ukraine and the EU Twinning project "Strengthening Institutional Capacity of the AMCU to conduct market studies and effectively enforce competition law in accordance with EU standards".

2 CHALLENGES AND PROBLEMS

2.1. Institutional capacity of the AMCU

The Problem

Within last years Ukraine has made considerable efforts aimed at bringing its' competition law in accordance with the best international standards in the field. Much, however, remains to be done to ensure country's compliance with its' obligations under the DCFTA[7]. Moreover, as the AMCU's ability to perform its' regulatory tasks is dependent upon existence of efficient institutional structure supported by sufficient financing and operational resources, competition policy cannot succeed only by aligning national legislation with international standards. Legislative achievements may, therefore, be compromised by a slow pace of the AMCU's institutional transformation. As pointed out in a relevant international publication:

"The comparison of Ukraine's competition law with international best practices demonstrates that Ukraine's statutory framework does not require drastic changes. However, much remains to be done in order to create the preconditions for the modernisation of the AMCU into a truly independent and powerful competition authority that would not only punish infringements or control prices, but would also help to establish an effective competitive environment and ensure competition in markets in Ukraine."[8]

The following summarizes the Council's understanding of the scope of this challenge followed by the respective recommendations.

[7] See, in particular, Chapter 10 (Competition) of Title IV of the EU-Ukraine Association Agreement.

[8] See, in particular, para. 88 of the UNCTAD Voluntary Peer Review of the Competition Law and Policy of Ukraine in 2013 (UNCTAD//CLP/2013/3 (OVERVIEW) available at http://unctad.org/en/PublicationsLibrary/ditcclp2013d3_overview_en.pdf.

Indeed, to create a strong competitive environment in Ukraine, **the AMCU should act in adherence with a comprehensive strategy for the development of competition**. Although the AMCU annually issues lengthy summary reports[9], it is effectively unclear how the priorities of its' activities are set for each forthcoming year. In the Council's view, however, adoption of an annual plan, setting forth such strategical priorities, would improve the overall awareness and predictability as well as help business to understand which markets will be studied in the coming year. As pointed out in the authoritative source on this matter:

"The competition authorities can give publicity to their priority setting in different ways. Some authorities publish their overall policy or general strategic planning for the next year(s) in which they highlight the competition areas on which they intend to focus their activities in the near future. Authorities may also opt to give publicity to more targeted priorities in order to give a signal to certain market actors and to induce compliance with competition rules."[10]

Efficient institutional structure, supported by sufficient operational resources, is also essential precondition for the AMCU's ability to ensure successful implementation of competition reform in a short time. Even though the AMCU is becoming more visible as pro-competition agency, it appears that its' operational capacities remain to be scarce. Hence, to properly utilize existing resources, it appears that the manner in which the AMCU exercises its' authority should be primarily focused on investigation of the most serious infringements and anti-competitive practices as well as the most risky mergers.

The Council observes that such an approach has recently been employed once with the recent increase of concentration thresholds[11]. Nonetheless, it ought to be followed by further legislative and institutional changes, to be supported by reallocation of existing professional resources to ensure that the former has actually became a continuous trend.

The Council is also aware of selected instances when, due to the lack of adequate data storage capacities, the AMCU's staff is prompted to perform hand-operated searches to retrieve information sought, for instance, by former applicants. Thus, such applicants might have been provided with the requested information in somewhat untimely manner. Largely this is caused by the fact that the AMCU would benefit from both sufficient number of staff and existence of internal unified storage system.

It is well-known that a modern competition agency must do more than just simply enforce competition laws. Accordingly, strong competition advocacy (i.e. elaboration and implementation of state competition policy) should become one of the key functions for the

[9] See, for instance, the Reports for 2014 and 2015 available at http://www.amc.gov.ua/amku/doccatalog/document?id=110270&schema=main and http://www.amc.gov.ua/amku/doccatalog/document?id=122547&schema=main accordingly.

[10] See ECN Recommendation on the Power to Set Priorities at page 4, available at http://ec.europa.eu/competition/ecn/documents.html.

[11] As of 18 May 2016 the Law of Ukraine "On Protection of Economic Competition", No. 2210-III, dated 11 January 2001, as amended (hereinafter – the "Economic Competition Law") has been amended to introduce new (increased) turnover/total assets' volume thresholds determining the need to seek receipt of the concentration consent from the AMCU.

AMCU as it aspires to both attain competition policy objectives and ensure better law enforcement[12].

Areas calling for competition advocacy are numerous and the respective efforts may take different forms[13].In particular, the AMCU, while preventing occurrence of anti-competitive practices, should perform and publicize reviews of both effective and perspective legislation, including review of existing restraints on competition. Other efforts include outreach activities to enhance the overall level of awareness of business. Needless to say, such steps are particularly important as the AMCU plays a vital role in the context of ongoing privatization and liberalization of state owned/ regulated markets.

Moreover, the AMCU should use market studies as an instrument of competition advocacy aimed at bringing the attention of the business to the structure and business practices at the relevant market [14].The Council supports the view that stakeholder involvement can help identify urgent issues and avoid serious errors or misinterpretations of evidentiary base near the completion of market studies[15].Hence, if the AMCU were to publish information on competition areas on which its' activities wil be focused in the near future, it would enable its' market study team to solicit stakeholder input[16].

The Council's Recommendations

To make sure that the AMCU's existing institutional capacity is properly utulized, the Council recommends as follows:

1) To make sure that the AMCU's e that annual plans, prepared by the AMCU, clearly specify (i) the main priority areas of the AMCU's activities for the forthcoming year; and, where relevant, (ii) markets that will be subjected to comprehensive studies. It is thought that, if employed, such practice would enhance the AMCU's credibility as the national competition authority and would facilitate involvement of wider array of stakeholders into cooperation process.

2) To adopt legislative amendments aimed at unleashing the AMCU's existing institutional capacity.

   It is thought that such amendments would strengthen the AMCU's ability to use well-balanced and effective law enforcement tools

[12] See the UNCTAD Voluntary Peer Review of the Competition Law and Policy of Ukraine in 2013 (UNCTAD//CLP/2013/3

[13] See, in particular, OECD Publication "Competition Advocacy: Challenges for Developing Countries" (2004), at page 3 available at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/32033710.pdf.

[14] See TWINNING PROJECT FICHE "Strengthening institutional capacities of the Antimonopoly Committee of Ukraine to conduct market studies and effectively enforce competition law in accordance with EU standards", at page 11 available at http://www.bmwi.de/Dateien/BMWi/PDF/Twinning/twinning-project-fiche-strengthening-institutional-capacities-of-the-antimonopoly-committee-of-ukraine.

[15] See OECD Market Studies (DAF/COMP(2008)34) (2008), at page 66 available at http://www.oecd.org/regreform/sectors/41721965.pdf.

[16] See MARKET STUDIES GOOD PRACTICE HANDBOOK, prepared by ICN ADVOCACY WORKING GROUP (Revised handbook presented at the 15th Annual Conference of the ICN, Singapore, April 2016), at page 9 available at http://www.internationalcompetitionnetwork.org/uploads/library/doc907.pdf.

to be employed with the focus at the most serious infringements of the competition law, control of concentrations (or other market deficiencies and/or trade-distorting practices[17]) that substantially restrict competition.

3) The AMCU's advocacy activities has to be broadened by (i) strengthening cooperation with other government bodies; and (ii) improving existing practice of issuing practical recommendations based on the prior market studies performed by the AMCU.

2.2. The AMCU's co-operation with other state authorities

The Problem

Lack of coordination and interaction between the AMCU and the state bodies vested with authorities directly or impliedly affecting state of competition in the country (such as sectoral regulators, the Ministry of Economic Development and Trade of Ukraine, etc.), including, *inter alia*, **deficit of information exchange** is known to be a long-standing problem[18].

The Council observes that the main constraint for intensifying such cooperation is **the absence of officially adopted strategic plan for the reform and development of competition**. While the latter is being elaborated under the framework of the NCDP Concept for 2014–2024, the NCDP itself was adopted by the Cabinet of Ministers of Ukraine (hereinafter – the "**CMU**") but has not yet been lodged with the Verkhovna Rada[19]. Therefore, it is hoped that, once adopted, this programme would streamline the ongoing efforts focused at achieving strategic objectives of competition reform in Ukraine.

The Council also faced instances when certain **state bodies were reluctant to assert the authority by attempting to shift the responsibility to other bodies**. Yet, in order to develop pro-competition environment, not only the AMCU but also other state authorities shall be actively involved. In particular, to attain common goals, sectoral ministries should help with establishing conditions for effective competition in the industries also falling within the scope of the AMCU's general competence. Among other things, this can be achieved by coordinating their decision-making process with the AMCU based on an effective exchange of the respective information.

For instance, the AMCU recently signed the Memorandum with the National Commission for State Regulation in the Energy and Utilities (hereinafter - the "**NCSRE**")[20]. This document is aimed at demonstrating joint institutional vision and intention of the signatories to build a pro-competition environment at the Ukrainian energy market. Hence, in addition to what falls

[17] To the extent it relates to Ukraine's obligations under the DCFTA.

[18] This statement do not extend to issues related to cooperation with law enforcement bodies and courts that are part of continuing reforms intended to establish a modern judicial and law enforcement system.

[19] See in Ukrainian at http://www.kmu.gov.ua/control/publish/article?art_id=246616724.

[20] See in Ukrainian at http://www.amc.gov.ua/amku/doccatalog/document?id=130142&schema=main.

under the prerogative of primary legislation[21], it appears that the practice of the AMCU entering into partnership memorandum is worth being expanded to other key regulators and/or state bodies.

The Council also observed that, due to the lack of effective institutional cooperation, the business might be suffering from certain **specific problems while participating** in the process of privatization. In particular, some businesses allege that the State Property Fund of Ukraine (hereinafter – the "**SPF**") might provide inaccurate or incomplete information about the potential target. Recently amended Procedure of Notifying the AMCU for Prior Approval of Concentration of Undertakings states that each party is liable for accuracy of information such party has prepared[22]. Yet, it is worrysome that if the SPF were to refuse signing the application together with potential bidders, the direct applicant (i.e., potential buyers) could be held liable for accuracy and sufficiency of information. This point is crucial, as, from the formal standpoint, it is a bidder/potential buyer rather than the SPF (especially when the respective antitrust clearance application lacks latter's signature) that bears responsibility for the accuracy of information submitted with the AMCU[23].

Last but not least, there is a problem with **ensuring necessary level of uniform interpretation of applicable legislation** by the different authorities involved. Indeed, some complaints lodged with the Council depict situations when businesses were suffering from negative implications caused by conflicting and/or ambiguous interpretation of applicable legislation. Although the AMCU might not deny the existence of the problem (provided that supremacy of competition law is observed), the practical attempts to solve it has been quite sporadic and lack systemic approach. As such, respective improvements have so far been triggered primarily by the conditionalities foreseen, among others, in the DCFTA and the Energy Charter Treaty.

These problems can be illustrated by the following cases from the Council's practice:

[21] Pursuant to Article 20 of Law of Ukraine "On the Antimonopoly Committee of Ukraine", No. 3659-XII, dated 26 November 1993, as amended (hereinafter – the "**AMCU Law**") the AMCU and its' territorial offices shall cooperate with the bodies of state power, bodies of local self-governance and bodies of administrative and commercial management in the areas of development of competition and demonopolization of the economy.

[22] See Item 18 of the Chapter X of AMCU Resolution "On Procedure for Notification of the Antimonopoly Committee of Ukraine for Prior Approval of Concentration of Undertakings" No. 33-p, dated 19 February 2002 (hereinafter – the "Procedure of Notifying the AMCU for Prior Approval of Concentration of Undertakings").

[23] Article 50 Items 14 and 15 of the Competition Protection Law specifies the type of infringement; while Article 52, para 1 states that the AMCU can impose fine on economic entities but not on other state authorities.

CASE No. 1. Lack of Consistent Interpretation of Legislation

The Council received a complaint from a commercial bank (the "**Complainant**") challenging abuse of the AMCU's right to request certain information to prove infringements of public procurement legislation allegedly committed by the Complainant's clients. In course of investigation, the AMCU requested the Complainant to disclose information not only about its' clients (in particular, date of transaction, debit/credit amount of funds, ID number, details on the counterparty, purpose of payment, etc.) but also about third party contractual partners of the Complainant's clients.

Pursuant to competition law, the AMCU is unconditionally entitled to request unlimited scope of information[24]. Banking legislation also contains general rule that information on legal entities and individuals, which constitutes banking secrecy, shall be disclosed by banks to the AMCU[25]. However, as far as disclosure of information on third parties is concerned, provisions governing banking secrecy contain special rule, that such a disclosure is subject to the valid court ruling or consent of such a third-party[26]. As the latter requirement was not met, the bank limited the scope of information it disclosed to the AMCU.[27]

The Complainant's approach is evidently affirmed by the National Bank of Ukraine (hereinafter – the "**NBU**") claiming that information about third party clients of other banks can be disclosed subject to a court decision or a consent of such third parties. Otherwise, the Complainant could have been subjected to penalties for breach of banking secrecy legislation.

On the other hand, the AMCU maintains that its' activity should be governed exclusively by competition legislation[28]. As a result, as the fine for submission of incomplete information was eventually imposed by the AMCU, **the ambiguity between competition and banking secrecy legislation was, *de facto*, interpreted against the Complainant.**

In these circumstances, as the AMCU apparently does not have specific methodology for administering banking secreacy information, the Complainant is concerned that such information might inadvertently end up in the hands of its' competitors (or other third parties) or otherwise trigger negative implications for the Complainant's own clients.

[24] See Article 22-1 of the Law of Ukraine "On Antimonopoly Committee of Ukraine", No. 3659-XII, dated 26 November 1993, as amended (hereinafter – the "AMCU Law").

[25] See Article 62, para 1, item 3 of Law of Ukraine "On Banks and Banking Activity", No. 2121-III, dated 7 December 2000, as amended (hereinafter – the "**Banking Law**").

[26] See Article 62, para 1 of the Banking Law.

[27] See Article 62, para. 4 of the Banking Law.

[28] According to Article 19 of the AMCU Law "in the course of consideration of applications and cases of coordinated actions and concentration, violation of the legislation on protection of economic competition...making orders and decisions under the applications and cases, as well as exercise of other powers in the field of control over observance of the legislation on protection of economic competition and control over the coordinated actions and concentration the AMCU ... shall be governed only by the legislation on protection of economic competition."

CASE No. 2. Lack of Interaction between the AMCU and the Sectoral Regulators

The complainant challenges inactivity of the NCSRE, the SPF and the AMCU. In particular, the complainant challenged alleged failure to assign status of the natural monopoly to several legal entities (hereinafter – the "**Potential Monopolists**"). The complainant applied to the AMCU to include the Potential Monopolists into the Consolidated Natural Monopolies List, arguing that they are the only companies providing certain transportation services and in the past they used to be included into the consolidated list for a long time.

The AMCU informed the Council that since 1994 the AMCU administers the List of Entities Occupying Monopolistic Market Position (subsequently - the List of Subjects of Natural monopolies)[29].

At the same time, since January 2013 the AMCU is no longer vested with the authority to exclude or include certain entities to/from registers of the subjects of natural monopolies. This function was transferred to the NCSRE; and in the other spheres where subjects of natural monopolies operate – to the national commissions for regulation of the respective natural monopolies[30]. Accordingly, as the Potential Monopolists provided transportation services in question, such function should haven been fulfilled by either NCSRE or the Ministry of Infrastructure of Ukraine. However, it is not directly foreseen in the law.

Having investigated the matter, the Council recommended ensuring proper state regulation of the activity of the respective subjects of natural monopolies in compliance with the principles of such regulation and tasks vested with the national commissions for regulation of natural monopolies.

Besides, should such necessity arise, the Council recommended drafting amendments to the Law of Ukraine "On Natural Monopolies" to ensure proper (i.e., more precise) definition and regulation of the transportation services in question.

[29] According to Article 4 of the Law of Ukraine "On Natural Monopolies", No.1682, dated 20 April 2000, as amended (hereinafter – the "Natural Monopolies' Law") state regulation of the subjects of natural monopolies activity in the spheres set forth in Article 5 of the Law, shall be carried out by the national commissions for regulation of natural monopolies, which are created and operating according to the Law. State control over compliance with legislation on the protection of economic competition in the spheres of natural monopolies shall be carried out by the AMCU according to its' authority. According to Article 5, para. 1 of the Natural Monopolies' Law, activity in the sphere of transportation of other substances by pipeline transport, including transit, shall be regarded as the area of activity of natural monopolies, controlled and regulated by the state.

[30] According to Article 5, para. 2 of the Natural Monopolies' Law, consolidated list of the subjects of natural monopolies is conducted by the AMCU under the registers of the subjects of natural monopolies in the sphere of housing and utilities services, formed by the national commission for regulation of public utilities and in the other spheres where the subjects of natural monopolies act – by national commissions for regulation of natural monopolies in relevant sphere or by the executive authorities performing the function of such regulation before the creation of the commissions.

The Council's Recommendations

Based on the foregoing, the Council recommends as follows:

1) To develop a roadmap aimed at implementing the NCDP Concept for 2014–2024 by the ministries and other state bodies. To attain this goal, the adjusted NCDP shall be adopted by the Verkhovna Rada to ensure that the governmental decisions are consistent with the State competition policy.

2) To accelerate working relations between the AMCU and the state authorities (with the focus on sectoral regulators) by expanding the practice of entering into respective cooperation agreements/memorandums on competition-related issues.

3) In order to facilitate effective exercise of powers vested with the AMCU in connection with anti-trust clearance of privatization transactions, ensure that not only the AMCU itself but also other authorities should play active role in eliminating some of the existing impediments. Hence, the Council recommends as follows:

a) To specify the exact scope of duties to be borne by each institution involved into privatisation process (for instance, the SPF, sectoral regulators, etc.).

b) To introduce transparent procedure for the exchange of information between the AMCU and the relevant bodies (including the SPF, the regulators managing the state enterprise, bidders, etc.) for the purpose of the AMCU's transaction clearance. If such an approach were to be employed (for instance, between the AMCU and the SPF), this would help addressing allegation of the business that the SPF might provide inaccurate or incomplete information about the potential target.

2.3. The AMCU's Administrative and Procedural Discretion

The Problem

As national competition authority, the AMCU's core operational functions comprise investigation, decision-making and enforcement. To ensure fulfillment of these fuctions the AMCU is vested with rather broad discretionary powers.

Such broad discretion is particularly descriptive of the AMCU's authority to consider applications and cases on breach of competition laws, carry out investigations thereunder, consider applications and cases on granting consents, issue conclusions (or preliminary conclusions) regarding concerted actions, concentration, carry out respective studies pursuant to such applications and cases, etc.[31]

Hence, the following comprises analysis of certain problem faced by business due to the manner, in which the AMCU exercises its' broad procedural powers at the following operational phases: (i) consideration of applications lodged to receive concentration consents; (ii) consideration (investigation) of applications and cases on abuse of monopolistic (dominant) position; (iii) AMCU's internal decision-making procedure; as well as (iv) AMCU's exercise of its' enforcement authority.

2.3.1. Consideration of applications lodged to receive concentration consents

The Problem

The recent simplification of the procedure for lodging applications to receive permit on concentration was welcomed by business. Pursuant to the new rules, the scope of documents and information to be lodged by applicants has been considerably shortened[32]. Nonetheless, the Council suggests addressing selected important issues, namely (i) receipt of consent on concerted actions due to the execution of the non-competition agreement; and (ii) indetification of undertakings that shall be held liable for failure to inform about concentration.

[31] See Article 7 of the AMCU Law.

[32] See amendments to the Procedure of Notifying the AMCU for Prior Approval of Concentration of Undertakings that became effective on 19 August 2016. The amendments were introduced under Competition Protection Law dated 26 January 2016. The Law not only increased the thresholds but also introduced both the simplified procedure of lodging the applications and opportunity to hold preliminary consultations with the AMCU.

a) Non-competition agreements

Pursuant to recent legislative changes, undertakings are entitled to lodge an application with the AMCU seeking receipt of concentration consent by employing simplified procedure[33]. Hence, the undertakings are released from the need to collect substantial quantity of documents. It is worth noting, however, that the procedure for receipt of consent in case of concerted actions, in its' turn, is far more complex and lengthier than the procedure to be followed while seeking receipt of consent on concentration.

Nonetheless, in course of concentration undertakings are sometimes employing such concerted actions mechanism as a so-called "non-competition agreement". The execution of such an agreement is subject to the AMCU's prior approval if it is aimed at coordinating competition behavior between the undertakings (i.e., signatories to such an agreement)[34]. Hence, it is not uncommon that concentration may, in practice, require receipt of two simultaneous permits.

Currently Ukrainian legislation do not foresee any special simplified procedure for receipt of consent in case of concerted actions within the framework of transaction whereby consent on concentration is being (or has already been) received. As such, the parties to the non-competition agreement are nonetheless forced to prove the substance of positive social effect stemming from their decision not to compete (effectively comprising the substance of the concerted actions), which, in itself, is rather complex task.

Hence, to properly proceed with the anti-trust clearance of such transaction, the businesses are anyway forced to collect the complete set of documentation[35]. To address this problem, it is worth consider amending competition laws by providing that applications lodged to receive consents in case of concerted actions, which is being filed together with applications on concentration within the framework of a one single transaction, shall be considered on the basis of a short list of documents, provided that the simplified procedure for receipt of consent on concentration is already employed.

In the Council's view, such an approach corresponds to one of the basis EU principles on control over economic concentrations, stating that a decision declaring a concentration compatible shall be deemed as extending to other restrictions that may relate to the particular concentration and are necessary for its' implementation[36].

[33] Chapter VII Item 2 of the Procedure of Notifying the AMCU for Approval of Concerted Practices of Undertakings.

[34] See AMCU Resolution "On the Procedure for Filing Applications with the AMC for Obtaining its Approval of Concerted Practices of Undertakings" No. 27-p., dated 12 February 2002, as amended (hereinafter – the "Procedure of Notifying the AMCU for Approval of Concerted Practices of Undertakings").

[35] See item 6.10.6. of the Procedure of Notifying the AMCU for Approval of Concerted Practices of Undertakings.

[36] See Article 8 Council Regulation (EC) No.139/2004, dated 20 January 2004, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:en:PDF.

b) Liability for concentration committed without AMCU's prior approval

Under the general rule, committing concentration without securing the AMCU's prior approval (provided that receipt of such approval is required) constitutes breach of competition laws[37].

However, even though legislation stipulates, generally, that undertakings could be penalized for such an ommission, it does not specify whether liability shall be borne by all or selected participants of concentration[38]. Yet, having analyzed certain provisions of the Competition Protection Law[39], it appears that it is actually the undertaking that is acquiring control/purchases controlling stake (rather than other participants of concentration) that would, most likely, be held liable for its' failure to notify the AMCU accordingly.

Nonetheless, the legislation lacks provision, which would expressly identify the party, which should be held liable for committing concentration without securing AMCU's prior consent, if the latter is required by law.

Therefore, in the Council's view, to avoid conflicting interpretations and abuses, the issue of liability shall be clearly and unequivivocally addressed in the legislation by clearly specifying participants of concentration that shall be held liable for breach of competition laws.

Council's Recommendations

1) To amend the Procedure of Notifying the AMCU for Prior Approval of Concentration of Undertakings to ensure that consideration of consent on concerted actions due to execution of non-competition agreement is conducted on the basis of simplified procedure, provided that receipt of concentration consent is already carried out on the basis of simplified procedure. Among other things, it would allow narrowing down the scope of information necessary for the AMCU to conduct impact analysis in such a scenario.

2) To amend Article 52, para. 2, part 2 of the Competition Protection Law to ensure clear identification of parties liable for failure to notify about concentration. It would allow determining party responsible for committing concentration without seeking the AMCU's prior consent, provided that the latter is necessary.

[37] See Article 50, para. 1, item 12 of the Competition Protection Law.

[38] Ibid, Article 51.

[39] Ibid, Articles 23 and 26.

2.3.2. Consideration (investigation) of applications and cases on abuse of monopolistic (dominant) position

The Problem

One of administrative procedures in the sphere of protection of economic competition is the procedure for determining monopolistic (dominant) market position of an undertaking. Its' exercise might trigger supervision of an activity of such an undertaking-monopolist at the respective market of goods, works and services.

Although monopolistic (dominant) position, as such, is not prohibited in Ukraine, pursuant to the general rule, abuse of such position constitutes breach of competition laws and is prohibited regardless object, grounds or consequences[40].

Even though the AMCU is vested with sufficient discretionary powers, the Council notes that **consideration of cases on abuse of monopolistic (dominant) position might last several months or even years[41]**.

CASE No. 3. Abuse of Dominant Position by a Natural Monopoly

As at the date of this Report, the Council was investigating complaint challenging inactivity of employees of Poltava Oblast Territorial Division of the AMCU (hereinafter - the "**Oblast Division**"). In particular, the Complainant argued that the Oblast Division was providing formal responses in response to it's numerous requests to address violations of economic competition at the part of the PJSC "Poltavaoblenergo", comprising abuse of monopolistic market position by establishing the amount of fee for use of networks to adjust joint hanging.

Following consideration of numerous petitions lodged by the Complainant, on 2 September 2016 the AMCU launched case No. 01-02-50/46-2016 regarding breach of competition laws at the part of PJSC "Poltavaoblenergo". The case was launched following numerous requests lodged by the complainant with the AMCU since March 2016.

To avoid groundless delays with consideration of this case and ensure its' efficient consideration, the Council is monitoring development of this case.

[40] See, generally, Chapter II of the Competition Protection Law.

[41] For instance, Decision of Administrative Panel No.24, dated 15 July 2016 in the Case No. 02-06/07-2015 on breach of competition laws and imposition of penalty was rendered following consideration of application dated 19 May 2014. See, in more details at http://www.amc.gov.ua/amku/doccatalog/document?id=82553&schema=sum.

As a rule, cases on possible abuse of monopolistic (dominant) position are rather complex and, hence, often require complex economic studies[42]. Yet, in the Council's view, the AMCU shall, where it is objectively feasible, aspire narrowing the overall length of time spend while conducting such studies and adopting final decision on existence of breach of competition laws and, eventually, imposition of penalties.

As for the relevant international practice, the Council observed that while the laws in some jurisdictions do not foresee any time limit for the proceedings, in others the overall duration is set while, in a small number of jurisdictions, the specific time limits for the different steps of the procedure are fixed. In some jurisdictions, there are specific time limits for certain periods of the procedures, which are fixed by the competition laws or an internal rule[43].

As for Ukraine, the need to ensure prompt exercise of the AMCU's authority is also proved by cases in the Council's consideration, when undertaking, occupying monopolistic (dominant) market position, while being aware of an existence of complaint lodged against it, was attempting to threaten the applicant. As a result, the latter may be forced to withdraw its' application, which may subsequently be perceived by the AMCU as a sufficient ground to stop consideration of a case.

One of the possible ways to improve the situation could be to enhance transparency of each stage when the case on abuse of monopolistic (dominant) position is being considered (investigated). This could be achieved, for instance, by introducing the practice of publishing resolutions on launching the case – i.e., to the extent they fall under the category of a so-called "act of application of law"[44].

[42] For instance, the Methodology for Determining Monopolistic (Dominant) Market Position of Undertakings in the Market, approved by the Resolution of the AMCU, No.49-p, dated 5 March 2002 (hereinafter – the "Monopolistic Market Position Methodology") sets forth broad scope of issues that are subject for studies (for instance, determining objects for analysis aimed at ascertaining monopolistic (dominant) position; preparation of the list of goods (works, services) in whose respect a given undertaking's monopolistic (dominant) position is to be ascertained; calculation of market share occupied by an undertaking, etc.

[43] See, for instance, Greece, Spain, Lithuania and the Netherlands. In particular, in Spain, the competition authority has 12 months from the formal opening of the procedure until the submission to the Council of the proposed decision. The Council then has 6 additional months to adopt the final decision, the maximum length being therefore of 18 months after the notification of the starting of procedures to the parties. In Lithuania, the competition authority has 5 months for investigations, which are extendable each time it is deemed necessary by 3 months. In practice, cases take an average of 17-19 months. In Poland, the competition authority has 30 days (60 days in complex cases) for carrying out explanatory proceedings and 5 months for antimonopoly proceedings. These deadlines may be extended (e.g., where the competition authority requires more time to gather information from undertakings). In Latvia and Slovenia, there is a general period of 2 years for the adoption of a decision. See Decision-Making Powers Report by ECN WORKING GROUP COOPERATION ISSUES AND DUE PROCESS (2012), at page 57 available at http://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf.

[44] At present, pursuant to the Monopolistic Market Position Methodology, only decisions in particular cases are due to published in paper media or disseminated in an electronic form.

The Council's Recommendations

To facilitate efficient protection of businesses suffering from abuses committed by undertakings occupying monopolistic (dominant) market position, the Council recommends as follows:

1) To set clear deadlines for consideration (investigation) of cases on abuse of monopolistic (dominant) market position by introducing respective amendments into Chapter VII of the Competition Protection Law and/or Chapter VII of the Rules of Consideration of Applications and Cases on Violation of Legislation on Economic Competition, approved by the Resolution of the AMCU No. 5, dated 19 April 1994 (hereinafter – the **"Rules of Consideration of Applications on Violation of Competition Legislation"**).

2) To expressly provide that if an applicant were to withdraw its' application in a case on abuse of monopolistic (dominant) position, this shall not constitute the substantial ground for the AMCU to exercise its' procedural discretion to terminate consideration of a case. Hence, the respective amendments are proposed to be introduced to the Rules of Consideration of Applications on Violation of Competition Legislation. In the Council's view, it should allow minimizing the risk of possible pressure inflicted on an applicant by an undertakings occupying monopolistic (dominant) market position in whose relation the respective case has been launched.

2.3.3. The AMCU's internal decision-making procedure

The Problem

To the extent issues pertaining to the AMCU's investigatory function has already been discussed above (please see Section 2.3.2), the following concentrates on selected aspects of the AMCU's internal decision-making design[45], which has drawn particular attention lately as, among other things, the AMCU's authority has been broadened to include state aid[46].

While investigation is carried out by a respective professional team headed by the AMCU Commissioner in charge of the particular field, the decision-making function is exercised by the AMCU Board of Commissioners, which, as a collegial body, renders decisions by conducting periodic meetings[47].

Some commentators criticize selected elements of the foregoing model. In particular, it is argued that the appearance of bias might be stemming from the fact that the AMCU Commissioner, who was responsible for investigation, might be attempting to influence the substance of the final decision on the case[48].

The Council is thus inclined to support elements attributable to a so-called "non-unitary" approach, when investigative and decision-making activities are separated functionally, although they are handled by one single administrative institution. The investigation is normally carried out by investigation services and the final decision is adopted by a board of this administrative institution.

In this regard, it appears that the collegial nature of decision-making process at the AMCU Board of Commissioners is well-suited to ensure objective examination of evidence and qualification of possible breaches. Besides, to the extent investigative and decision-making functions are split between different AMCU's divisions, it decreases the risk that, having exhausted its' investigatory resources, the AMCU would be inclined to conclude that the breach has indeed occurred to justify such expenses incurred[49].

Nonetheless, the design of the foregoing "non-unitary" structure merits further improvement.

[45] There are three basic institutional models: (i) the monist administrative model (where a single administrative authority investigates cases and takes enforcement decisions), (ii) the dualist administrative model (where investigation and decision-making are divided between two bodies) and (iii) the judicial model (where the competition authority investigates the case and the court adopts the decision). For more details, see Decision-Making Powers Report, dated 31 October 2012, issued by ECN Working Group Cooperation Issues and Due Process available at http://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf.

[46] See Article 8 of the Law of Ukraine "On State Aid", No. 1555-VII, dated 1 June 2014 (hereinafter – the "State Aid Law").

[47] See Article 12[1] of Competition Protection Law.

[48] We note, generally, that pursuant to such alternative approach authorities of the AMCU are likely to be limited only to investigatory function, so that decision-making function to adjudicate violations of competition legislation is vested with judiciary only. Under such scenario, the competition authority acts as a prosecutor, bringing the cases before a court, which has the decision-making and/or fining powers.

[49] The risk of confirmation bias whereby an authority having invested a large amount of resources to bring a case against a firm or a set of firms has a natural tendency to legitimize its past efforts by finding the investigated firms in violation of the competition law. For more details, please see Frederic Jenny "The institutional design of Competition Authorities: Debates and Trends" (2016), at pages 23-24 available at https://polcms.secure.europarl.europa.eu/cmsdata/upload/e557fdce-07bc-44f5-8a8d-8cad9081803b/Frederic%20Jenny%20The%20institutional%20design%20of%20Competition%20Authorities.pdf.

In particular, the Council is mindful that the AMCU Commissioners, who have not participated in the investigation, may not know or understand the implications and/or results stemming from prior investigatory actions. Indeed, even if such decision-makers read the investigatory file, they may not necessarily have as intimate knowledge or understanding of the case as those who might have spent months meticulously investigating it.

Hence, in the Council's view, it is not advisable to completely shield the AMCU Commissioner who was responsible for investigation of a particular case from participation in the decision-making phase.

Accordingly, the Council supports the approach to organization of the AMCU's internal decision-making procedure (evidently advocated by respectable segments of professional public)[50], whereby all decisions are to be jointly taken by all members of the AMCU Board of Commissioners, save for the AMCU Commissioner investigating the case who, while being ineligible to vote, shall nonetheless be entitled to report the outcomes of the case at the respective hearing.

The Council's Recommendation

1) To adjust the AMCU's internal decision-making procedure to ensure that when rendering an initial decision on its' merits falls under the authority of the AMCU's Board of Commissioners, the adoption of such a decision shall require majority of the AMCU's composition established by law (i.e., 5 persons), save for the Commissioner who investigated the case. The latter, nonetheless, should remain to be involved into decision-making process by being entitled to present results of investigation during the respective procedural hearing.

   It appears that the foregoing effect can be achieved by (i) amending Article 121 of the AMCU Law to incorporate thereunder approach that is already employed in para. 12 of the same Article while setting forth the rules for the revision of previously adopted decisions; as well as by (ii) amending primary[51] and AMCU's secondary legislation accordingly.

[50] See in more details http://uba.ua/documents/Draft_Law_re_Due_Process_1.pdf and http://uba.ua/documents/UBA_The_Institutional_Design_of_AMC.pdf.

[51] For instance, the Competition Protection Law, the Natural Monopolies Law.

2.3.4. The AMCU's enforcement authority

Although within last two years the AMCU has implemented several positive initiatives aimed at facilitating compliance with competition laws, the following briefly summarizes key issues that, in the Council's view, still merit attention.

a) Methodology for determining amount of fines

The Problem

Lack of methodology for determining amount of fine in the form of binding legislative instrument, is the traditional object of criticism in the sphere of enforcement of competition laws in Ukraine. For instance, one of the recent OECD publications pointed out that the absence of such methodology triggers risks of corruption[52].

At the same time, it is thought that existence of such methodology would ensure transparency and predictability of law enforcement[53], assist with achieving necessary level of legal clarity[54] and perform the function of special and general prevention.

In this regard, the EU-Ukraine Association Agreement foresees the obligation of competition authority to approve and publish the document explaining principles for calculation of fines imposed for breach of competition laws[55].

In September 2015, the AMCU for the first time explained approaches employed for determining amount of fines imposed for the breach of competition laws, by adopting respective recommended explanations, which, however, have not acquired the status of a binding legislative act (hereinafter – the "**Recommended Explanations**")[56].

[52] See Report "On Anti-Corruption Reforms in Ukraine. Round 3 Monitoring of the Istanbul Anti-Corruption Action Plan", page 182, adopted at the ACN meeting on 24 March 2015 at the OECD Meeting in Paris (https://www.oecd.org/daf/anti-bribery/Ukraine-Round-3-Monitoring-Report-ENG.pdf)

[53] ECA Working Group on Sanctions Pecuniary sanctions imposed on undertakings for infringements of antitrust law Principles for convergence (May, 2008), at page 2 at available http://www.autoritedelaconcurrence.fr/doc/eca_principles_uk.pdf

[54] Francesca Ammassari. Guidelines On The Method Of Setting Fines For Infringements Of Competition Rules: Key Issues (2014), at page 231 available at http://iar.agcm.it/article/viewFile/11065/10258

[55] See Chapter IV, Article 255, para. 5 of the EU-Ukraine Association Agreement.

[56] Meanwhile, the Recommended Explanations were revised several times and currently exist in the wording dated 9 August 2016, as amended on 20 September 2016.

Yet, the business periodically contends that officially published decisions of the AMCU not always contain direct reference to the Recommended Explanations and/or that such decisions not always explain in sufficient details the manner in which the methodology of calculation has been applied.

The Council is mindful of the existence of the Draft Law of Ukraine No. 2431 (hereinafter – the "**Draft Law No. 2431**"), which has been adopted in the first reading in November 2015, currently existing in the wording prepared for repetitive second reading. The Draft Law No.2431 foresees, inter alia, adoption of the "Methodology for calculating amount of fines by the AMCU bodies for breach of competition laws" (hereinafter – "**Methodology for calculating the amount of fines**") and contains respective legislative substantiation of its' application.

The Council's Recommendations

In light of the foregoing, the Council recommends as follows:

1) The AMCU, prior to the adoption of the Methodology for calculating the amount of fines, to carry out monitoring of application of the existing Recommended Explanations and regularly (at least once per quarter) publicize information about its' practical application.

2) To adopt the Draft Law No. 2431 in so far as it envisages existence of the Methodology for calculating amount of fines as binding legislative act.

[57] For instance, in 2015 while considering the case on abuse on monopolistic position at the part of LLC "Lukoil Aviation Ukraine" the original amount of fine was approximately UAH 18 million for two infringements. Yet pursuant to the text of the respective decision, the AMCU, by taking into account approaches specified in the Recommended Explanations, decreased the base amount of fine on 20% and on 50% by virtue of mitigating circumstances (see http://www.amc.gov.ua/amku/doccatalog/document?id=116845&schema=main). On the other hand, in 2016 following investigation of non-competitive concerted actions between pharmaceutical company "Alcon" and distributors, the AMCU fined infringers for the aggregate amount of UAH 1.6 million, although have not specifically acknowledged that it employed the Recommended Explanations (see http://www.amc.gov.ua/amku/control/main/uk/publish/article/129489).

[58] See at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54479.

[59] The current wording of the Draft Law No. 2431 prepared for the repetitive second reading foresees that the Methodology for calculating amount of fine shall be approved by the Resolution of the AMCU.

[60] See amendments to Articles 52 and 60 of the Competition Protection Law and to Article 21 of the Competition Protection Law proposed by the Draft Law No. 2431.

b) The possibility to challenge amount of fine in court

The Problem

Another topic traditionally debated in Ukraine is introducing possibility to go to court to challenge not only the fact of infringement of competition laws, as such, but also amount of fine imposed for committing such an infringement.

The supporters of such an approach refer to the best international practice[61], whereas opponents argue that it could narrow down the AMCU's inherent authority and refer to the shortage of well-trained judges in the competition law sphere.

As for the relevant EU practice on this matter, it is based on the general premise that court's adjudicative authority shall not be restricted[62]. In practice it means that as a result of judicial review the fine imposed by the national competition authority can be revoked in total or its' amount can be decreased or increased. Hence, the exercise of authority by a judicial body comprises both review of the existence of infringement as well as the amount of the fine imposed[63]. Notably, the methodology employed to calculate the amount of fine employed by national competition authorities are also mandatory for courts.

As a result, efficiency of a universal approach/methodology employed by both competition authority and court is proved by the practice of judicial review in the EU. In particular, in 90% of cases the amount of fines imposed by the European Commission has been left intact by the court[64].

[61] In the majority of national jurisdictions, the review courts may either increase or reduce the level of fines (e.g., Austria, Belgium, Bulgaria, Germany, Denmark, Estonia, Greece, Finland, Hungary, Lithuania, Latvia, Poland, the UK). However, in some jurisdictions the principle of prohibition of "reformatio in peius" applies, thus not allowing courts to impose more severe fines than those applied by competition authorities (e.g. Spain, Estonia, Latvia, the Netherlands etc.). See Decision-Making Powers Report by ECN WORKING GROUP COOPERATION ISSUES AND DUE PROCESS (2012), at page 24 available at http://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf.

[62] See Article 261 of the Treaty on the Functioning of the European Union and Article 31 of Council Regulation (EC) No 1/2003, dated 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Additionally, Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms envisage obligation for a fair and public hearing ... by an independent and impartial tribunal established by law and effective remedy.[63] Див. детальніше за посиланням http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf; http://www.eurointegration.com.ua/rus/articles/2015/07/2/7035469/view_print/

[63] See Competition Policy Implementation Working Group - Sub group 3. Competition and the Judiciary. 2nd. Phase – Case Studies. 6th. ICN Annual Conference (2007), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc372.pdf and "The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR" by Wouter P.J. Wils, Issue 1, pp. 5–29, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1492736.

[64] See in more details at: http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf; http://www.eurointegration.com.ua/rus/articles/2015/07/2/7035469/view_print/

As for Ukraine, Article 225 of the EU-Ukraine Association Agreement obliges Ukraine to create and implement transparent and non-discriminatory procedure for challenging decisions of the AMCU in courts based on right of defence and principles of procedural fairness[65].

The text of the Draft Law No. 2431 adopted in the first reading (already mentioned in the Section 2.3.4 (a) above) contemplated the opportunity not only challenge the fact of committed infringement but also amount of fine in case the AMCU bodies breached Methodology for calculating the amount of fines[66].

However, the authority of the commercial court to change the amount of fine imposed by the AMCU body has been removed from the text of the Draft Law No. 2431 prepared for the repetitive second reading. Thus, if the Draft Law No. 2431 were to be adopted in the wording that existed at the time of this Report, the court, following judicial review of the decision of the AMCU body, will not be entitled to change the amount of fine.

The Council's Recommendation

In light of the requirements set out in the EU-Ukraine Association Agreement[67] the Council recommends as follows:

To amend the Competition Protection Law to enable judicial challenge of the amount of fine imposed by the AMCU body, subject to existence of the Methodology for calculating the amount of fine for breach of competition laws, adopted in the form of legislative act, whose application is mandatory for both the AMCU and the bodies of judicial power.

[65] See Article 255 in Chapter 10 ("Competition") of the Title IV of the EU- Ukraine Association Agreement.

[66] It was contemplated that while considering application lodged by the undertaking to seek invalidation of the decision of the AMCU body in so far as it related to imposition of fine and/or imposing obligation remove consequences of the committed infringement of competition laws, the competent commercial court would apply, inter alia, the Methodology for calculating the amount of fines.

[67] See Article 256 in Chapter 10 ("Competition") of the Title IV of the EU- Ukraine Association Agreement.

c) Information outreach

The Problem

Pursuant to the general rule, the AMCU is entitled to issue recommendations that are subject to mandatory review by the state authorities, bodies of the self-governance and subjects of business activity[68]. From the substantial standpoint, the recommendations could be aimed at terminating actions or inactions containing signs of infringement of competition laws as well as removal of grounds and incentives for committing such infringements.

The Council observed that in course of the last two years the AMCU has considerably intensified its' efforts in this direction by issuing regular recommendations in the form of letters[69].

Nonetheless, the AMCU's recommendations are individual in nature and are not always disclosed in the timely manner.

The Council's Recommendation

In the Council's view, it is advisable to implement the practice of periodic aggregation and publication of the main substantial content of individual recommendations issued by the AMCU in the form of non-binding informational letters. Such an approach, if employed, would allow the AMCU to share its' approaches to interpreting and enforcing competition laws to the wide circle of interested parties; which, among other things, corresponds to the substance of recommendation issued to the AMCU by UNCTAD in 2013[70].

[68] See Article 7, para. 1, item 14 of the AMCU Law.

[69] See Article 46 of the Competition Protection Law.

[70] See similar recommendation contained in the Report "Voluntary Peer Review of Competition Law and Policy: Ukraine", page 22, carried out by UNCTAD in 2013.

2.4. Access to information

The Problem

Efficient exchange of information between the AMCU and business is crucial for both efficiency and transparency of the former's activity[71]. Indeed, the will to ensure access to non-confidential information submitted during investigations of infringements and in merger cases is foreseen in the text of the Coalition Agreement[72].

Important step in this direction was made at the beginning of 2016, when the AMCU's decisions on concentration, concerted actions, as well as on the results of consideration of cases on violation of antimonopoly legislation started to be disclosed at the AMCU's official website[73].

Nonetheless, the Council is aware that businesses continue arguing that the AMCU could still do better when it comes to granting access to various types of information[74]. Hence, the following concentrates on selected aspects of the AMCU's activity, related to the access to information, that, in the Council's view, still merit further revision.

2.4.1. Status of various filings lodged with the AMCU

The Problem

It appears that the only way for businesses to be able to ascertain the status of consideration of application and requests lodged with the AMCU is by engaging into direct personal contact with the responsible member of the AMCU's staff. The process is, therefore, susceptible to be time-consuming.

Hence, the Council is aware that many businesses would welcome if the AMCU would introduce online software enabling applicants (or their representatives) to check the status of various filings lodged with the AMCU. If employed, the existence of such collaborative tool would not only help enhancing transparency and enabling quick verification of the case status but also would correspond to the practices already employed by reputable national competition authorities[75].

[71] See Information Exchanges Between Competitors under Competition Law (DAF/COMP(2010)37) of 11-Jul-2011 available at www.oecd.org/competition/cartels/48379006.pdf.

[72] See Section 2.1.1 of the Coalition Agreement.

[73] See Law of Ukraine "On Introducing Changes to Certain Legislative Acts of Ukraine on Ensuring Transparency of Activity of Antimonopoly Committee of Ukraine", No. 782-VIII, dated 12 November 2015.

[74] Pursuant to the general rule, set forth in Article 40 of the Competition Protection Law, a person is entitled to be acquainted with the materials of competition case.

[75] For instance, the decision search fool of the Belgian Competition Authorities and UK Competition and Market Authority accordingly http://www.belgiancompetition.be/en/decisions; https://www.gov.uk/cma-cases?keywords=&case_state%5B%5D=open&closed_date%5Bfrom%5D=&closed_date%5Bto%5D=

The Council's Recommendations

To introduce electronic database that would enable applicants to retrieve general information about the current status of consideration of requests/applications lodged with the AMCU, which is not confidential in nature.

2.4.2. Access to the materials of competition cases

The Problem

The Council is aware that in some applicant's view it might be difficult to promptly obtain access to the materials of the competition case[76]. Another seemingly common problem is one's inability to get access to the deliverables prepared by various third parties.

Hence, in the Council's view, to maintain the balance between confidentiality and access to information, the scope of one's right to seek and receive access to the materials of competition case[77], should be expressly stipulated in the law.

The Council noticed that the AMCU might grant parties with time (i.e., typically 10 days) for filling objections/requests for clarifications[78]. However, such time limit will, most likely, not be sufficient if the merits of the case are complex (which is not uncommon) or information is due to be retrieved across several jurisdictions.

The Council also observed that time limits for the AMCU's consideration of requests on access to the case materials lodged by the parties is not specified in the legislation.

Yet, according to the EU practice examined by the Council, addressees should be given a reasonable time limit to reply to the request, taking into account both length and complexity of the request and requirements of the investigation. In general, in the EU this time limit will be at least two weeks from the receipt of the request. If from the outset, it is considered that a longer period is required, the time limit to reply to the request will be set accordingly[79].

The Council also noted that although the authority to initiate and conduct hearings on concentrations/concerted actions is vested with the AMCU, the legislation lacks specific provision, which would enable applicants to lodge request with the AMCU to seek initiation of such hearing. Due to such procedural gap, applicants are effectively unable to provide explanations and clarifications, which may be important for proper consideration of the application/cases on mergers/concerted actions.

[76] Access to the file is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defence. See, Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004 available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005XC1222(03)

[77] Article 40 of the Competition Protection Law.

[78] As the law does not foresee a specific time limit, ultimate determination of what constitutes a reasonable term is left with the AMCU's discretion.

[79] See, para. 38 of Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU (2011/C 308/06) available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011XC1020(02).

[80] See Article 231 of the AMCU Law.

The Council's Recommendations

To improve existing procedure of granting interested parties access to information, the Council recommends as follows:

1) To amend Article 40 of the Competition Protection Law in order to:

a) set maximum time limits for (i) responding with further explanations and/or clarifications requested by the AMCU; and (ii) lodging objections by the parties that disagree with the AMCU's interim procedural decisions in cases on mergers/ concerted actions;

b) establish specific/maximum time limits for the AMCU's consideration of requests on access to the case materials lodged by the parties;

c) expressly enable interested parties to lodge requests with the AMCU to seek initiation of hearing on concentrations/concerted actions, with such requests being subject to the AMCU's mandatory consideration and provision of grounded answer within reasonable time limits.

2.5. Leniency regime

The Problem

Investigation and prosecution of cartels is one of the core functions of any competition authority. Indeed, over the last decade, competition agencies around the world have been rigorously detecting, investigating and prosecuting hard-core cartels[81].

As for Ukraine, although domestic legislation does not employ such term as "cartel", Articles 5-11 of the Competition Protection Law comprise legal framework with respect to "unlawful concerted actions", which is the notion essentially identical to "cartels".

Cartels are hard to detect. If detected, however, it can be difficult to prove. Yet, it is known that cartelists are often not friends and usually there is no trust among them[82]. Therefore, one advantage of leniency regulation is to spread uncertainty among the members of a cartel that every moment there is the potential danger that one of the cartelists applies for leniency.

Hence, it is not uncommon that for the AMCU it might be better to encourage the infringer to voluntary disclose the information. However, the infringer might not necessarily always be inclined to do so due to the absence of

[81] As stated in OECD's Executive Summary of the Discussion on the Use of Markers in Leniency Programs, dated 16 December 2014 "...hard-core cartels are universally recognized as the most serious violations of competition law and as such are the main enforcement priority of many competition authorities". For more details please refer to Executive Summary of Working Party No. 3 on Co-operation and Enforcement, dated 29 May 2015 (DAF/COMP/WP3/M(2014)3/ANN3/FINAL) available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/M(2014)3/ANN3/FINAL&doclanguage=en

[82] Ibid. As cartels generally operate in secrecy, it complicates their detection and successful prosecution. To overcome this difficulty, most jurisdictions around the world, including all 34 OECD member countries, have adopted leniency programs, which offer cartelists a lenient treatment in prosecution in exchange for cooperation with the investigation.

sufficiently inclusive leniency program in Ukraine.

In particular, although the Competition Protection Law provides for a leniency programme intended to facilitate detection of unlawful concerted actions, only the first undertaking that lodged the respective application with the AMCU is eligible for immunity from a penalty granted by leniency[83]. In other words, Ukrainian leniency regime does not allow any subsequent member of cartel to qualify for immunity from liability. Hence, such an approach implies a high risk for the reporting party to admit a certain infringement without knowing if cooperation with the competition authority under the framework of leniency program is (still) possible.

Notably, the cooperation with the AMCU implies that the existence and the content of the application cannot be disclosed to any other cartel member[84]. Thus, the Council observed that even if the latter did not take active steps to coerce other undertakings to participate in the cartel, as the matter of the Ukrainian law, it is nonetheless not entitled to benefit from immunity unless it ended up being the first one to lodge the disclosure application with the AMCU.

The Council's Recommendation

The Council recommends reducing fines for parties other than the first one to file, thus making the existing leniency regime more inclusive. As pointed out in OECD's recent publication, while referring to the ongoing trend characterizing jurisdictions with more advanced leniency regime:

"... jurisdictions that operate leniency programmes recognize the benefits of rewarding not only the first-in applicant who denounces the cartel but also subsequent applicants who provide useful corroboration or new evidence"[85].

To achieve this, the Liability Exemption Regulation should be amended to enable the undertakings that do not qualify for immunity to benefit from a reduction of fines, provided that (i) they provide evidence that represents "significant added value" to that already in the AMCU's possession; and (ii) have terminated their participation in the unlawful concerted action.

As for the former criteria, evidence should be considered to be of a "significant added value" when it reinforces the AMCU's ability to prove the infringement. Accordingly, the first entity

[83] See Article 6, para 5 of the Competition Protection Law. The AMCU rewards only the first-in applicant with immunity, foreseen under the Regulation "On Submission of Applications to the Antimonopoly Committee of Ukraine on the Exemption from Liability for a Breach of Legislation on Economic Competition under Article 50, para. 1 of the Law of Ukraine "On Protecting Economic Competition", approved by the AMCU Resolution, No. 399-p, dated 25 June 2012 (hereinafter – the "Liability Exemption Regulation"), available at http://www.amc.gov.ua/amku/control/main/uk/publish/article/120499.

[84] See para. 2.16 of the Liability Exemption Regulation.

[85] See OECD Publication "Leniency for Subsequent Applicants" (DAF/COMP(2012)25) at page 5 available at http://www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf

to meet these conditions might be granted 30 to 50% reduction, the second - 20 to 30% and subsequent companies - up to 20%.

Notably, the foregoing approach reflects one of OECD's specific recommendations related to Ukraine made back in 2012[86]. Besides, the idea of more inclusive leniency regime was endorsed by the European Commission[87] and is effectively followed not only in selected EU jurisdictions (e.g., Hungary, Latvia, Lithuania, Poland, Spain) but also in Japan, Mexico etc.[88]

2.6. Public procurement

It is common legislative practice to enable participants of public procurements to challenge results thereunder prior to seeking judicial protection.

Since 2010 it is the AMCU that is vested with the authority to act as a pre-trial body for consideration of complaints lodged by individuals and legal entities to challenge outcomes of the state procurement procedures[89].

Complaints with respect to public procurements meeting certain thresholds are considered by the Permanent Administrative Panel ("Колегія") for Consideration of Complaints on Violation of Legislation in the Sphere of Public Procurements, established under the auspices of the AMCU[91].

It is worth noting that in comparison with the legal framework that was in effect until July 2016, the procedure of appeal with the AMCU of the decisions, actions and inactivity of customers in public procurement undergone certain progressive improvements. In particular, (i) complaint shall now be submitted in electronic form; (ii) for the period of appeal consideration, the public procurement procedure shall be automatically suspended; and (iii) the complainants received free access to the proposals of competitors, etc[92].

Nonetheless, the Council suggest addressing several important issues, namely (i) the procedural right to present additional evidence and/or submit new documents; and (ii) admissibility of electronic documents.

86 Ibid, at page 149.

87 See Training Materials on Leniency of the European Commission at http://ec.europa.eu/competition/cartels/leniency/leniency.html

88 See, generally, European Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (2006/C 298/11), available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006XC1208(04).

89 See the Law of Ukraine "On Carrying out State Procurements", No. 2289-VI, dated 1 June 2010, as amended.

90 Public procurement procedures are required to be carried out in electronic procurement system (See Article 12, para 2 of the Law of Ukraine "On Public Procurements", No.922-VIII, dated 25 December 2015, as amended (hereinafter - the "Public Procurements Law")), provided that one of the following thresholds is met: (i) the purchase of goods or services equals or exceeds UAH 200,000, and purchase of works – UAH 1,500,000; or (ii) the purchase of goods or services in separate spheres of business activity (i.e. gas production, transportation and storage, heating and water supply, etc.) equals or exceeds UAH 1,000,000, and purchase of works – UAH 5,000,000 (See Article 2, para 1 of the Law of Ukraine "On Public Procurements").

91 The Panel was established by the Resolution of the AMCU, No.6-рп., dated 5 April 2015 (See http://www.amc.gov.ua/amku/control/main/uk/publish/article/123942).

92 See, generally, the Public Procurements Law.

2.6.1. Right to present additional evidence/submit new documents

The Problem

Under the general rule, the complaint is lodged with the AMCU in the form of electronic document submitted via electronic procurement system. The complaint is accompanied by documents and materials in electronic form evidencing breach of the procurement procedure or unlawful nature of a consumer's actions or inactions[93].

In course of the complaint's consideration, the need to file additional documents may arise. However, the opportunity to present such new documents is not expressly envisaged by law (contrary to expert opinions that may be lodged by a consumer or subject of challenge and which are due to be added to the materials of the case[94]).

Hence, there is a risk that submission of additional documents by complaining bidder or any other participant of the appeal procedure could be substantially restricted or even not allowed.

2.6.2. Use of electronic procurement system

The Problem

It is since 2005 that electronic documents are formally acknowledged in Ukraine as admissible evidence in administrative process[95]. Nevertheless, the Council observes that the Ukrainian courts are often demonstrating that they are not prepared to accept evidence in electronic form in case the lawsuit is filed[96].

While this might be perceived as a general problem, in the context of public procurement it considerably frustrates use of data stored at electronic procurement system for bidding process and consideration of complaints.

93 See Article 18, para. 1 of the Public Procurements Law.

94 See Article 18, para 10 of the Public Procurements Law.

95 See Article 79, para 1 of the Administrative Procedural Code of Ukraine, No. 2747-IV, dated 6 July 2005, as amended.

96 Usually the court continues suggesting to the parties purporting to submit evidence in the form of electronic documents to present their "visual" paper copy, certified pursuant to requirements set forth in the "Procedure for Certifying Availability of Electronic Document (Electronic Data) At Certain Moment in Time", approved by the Resolution of the CMU No. 680, dated 26 May 2004, as amended.

The Council's Recommendations

In light of the foregoing, the Council recommends as follows:

1) To amend Article 18, para 10 of the Law of Ukraine "On Public Procurements" to enable complaining bidder or any other participant of the appeal procedure to submit additional documents related to the merits of the complaint.

2) Whereas public procurement procedures and non-judicial appeal procedure are documented in electronic form, - to ensure admissibility of evidence lodged with the Ukrainian courts in the form of electronic documents by either:

a) amending Article 79, para 1 of the Administrative Procedural Code of Ukraine and relevant regulations governing circulation of electronic documents[97] accordingly; or by

b) amending Article 12, para 3 of the Law of Ukraine "On Public Procurements" along with relevant provisions of the Administrative Procedural Code of Ukraine on evidences[98], to provide administrative courts with the right to access electronic procurement system.

[97] See, generally, Law of Ukraine "On Electronic Documents and Circulation of Electronic Documents No.851-IV, dated 22 May 2003, as amended; Law of Ukraine "On Electronic Digital Signature", No. 8 52-IV, dated 22 May 2003, as amended; and Procedure for Certifying Availability of Electronic Document (Electronic Data) At Certain Moment in Time", approved by the Resolution of the CMU No. 680, dated 26 May 2004, as amended.

[98] See Chapter 6 of the Administrative Procedural Code of Ukraine, No. 2747-IV, dated 6 July 2005, as amended.

2.7. State Aid

The Law of Ukraine "On State Aid to Undertakings", No. 1555-VII, dated 1 June 2014 (hereinafter – the "State Aid Law") identifies the AMCU as the "authorized body"[99] for the system of state aid that is due to become operational in mid-2017[100].

Although the AMCU is very visible while disseminating knowledge about the key provisions of the State Aid Law[101], the notion of state aid remains to be quite new in Ukraine. Therefore, to make the forthcoming state aid system fully operational, adoption of an extensive body of secondary legislation will be required (not least to ensure compliance with the DCFTA)[102].

Hence, the following briefly analyses current level of awareness about state aid, status of work with adoption of secondary legislation and launching of the State Aid Register from the standpoint of Ukraine's obligations under the DCFTA.

2.7.1. Awareness about State Aid

The Problem

The State Aid Law contains rather complex language while setting forth criteria of admissibility of certain categories of state aid, procedures for determining their compatibility with the principles of free competition and monitoring of state aid, etc. Yet, incorrect and/or incomplete understanding and application of these provisions may trigger quite serious consequences for businesses, including suspension or even recovery of inadmissible state aid[103].

There is a risk, however, that aid beneficiaries might not always recognize the importance of quality professional advice. Besides, state and local self-governance bodies might not always be prepared to properly fulfil their role of aid providers as contemplated under the law[104].

Therefore, it is important to ensure that certain pre-emptive strategy is pursued by the AMCU aimed at mitigating possible adverse effect of the foregoing risks at the time when state

[99] See Article 8 of the State Aid Law.

[100] See, in particular, para 1 of Transitional Provisions of the State Aid Law.

[101] The Council noticed that the AMCU arranged several events (e.g., conferences, trainings etc.) specifically devoted to the state aid in Ukraine. For instance, on 27 May 2016 International State Aid Conference: "A New Approach to State Aid to Undertakings in Ukraine - Doing More with Less" was held in Kyiv. Additionally, the AMCU launched a separate section on its' official webpage where one can find short introduction to the general principles of state aid. Besides, the AMCU has recently published the first book on the state aid in Ukraine.

[102] See, in particular, Articles 262 to 267 of the DCFTA.

[103] See Article 14 of the State Aid Law, vesting the AMCU with authority to recover inadmissible state aid.

[104] The notion of "state aid providers" comprises state bodies, local self-governance bodies, bodies of administrative and commercial management and control, including legal entities acting on their behalf, authorized to control the state or local resources and initiate and / or provide state aid (See Article 1 of the State Aid Law).

aid system would become operational. In this regard, the Council welcomes that the AMCU introduced special section on its' official website devoted specifically to state aid[105] and set up several working groups (with the involvement of business community) tasked to elaborate, inter alia, criteria of admissibility of certain categories of state aid (i.e., for certain branches of economy, small and medium business, regional development, etc.)[106].

Besides, to deliver an efficient competition advisory function and disseminating knowledge about state aid, the AMCU should be equipped with sufficient staff and technical resources. During fact-finding mission at the AMCU, the Council ascertained that currently the state aid department is composed of 5 professionals. Yet, it appears that in order to cope with anticipated workload, once the new system becomes operational, the team might require up to 70 professionals[107].

The Council's Recommendations

In light of the foregoing, the Council recommends the AMCU as follows:

1) To continue enhancing awareness amongst state and municipal authorities[108] and business about the substance of the forthcoming legal framework on state aid and the general implications stemming therefrom.

2) To maintain active dialogue with both providers and beneficiaries of state aid to discuss existing and contemplated policy choices in the field. It appears that this would not only help balancing up the interests of all stakeholders but might also be beneficial for ensuring compliance with the DCFTA.[109]

[105] See in Ukrainian http://www.amc.gov.ua/amku/control/main/uk/publish/article/120893

[106] As identified in the course of fact-finding mission at the AMCU. See in Ukrainian http://www.amc.gov.ua/amku/control/main/uk/publish/article/128200

[107] As identified in "Current situation and outlook of State Aid in Ukraine" presentation, prepared by the AMCU.

[108] It is worth noting that the AMCU approved schedule of training and studies specifically developed for different state aid providers. See http://www.amc.gov.ua/amku/doccatalog/document?id=120944&schema=main

[109] See, generally, Articles 262-267 of the DCFTA.

2.7.2. State of Secondary Legislation

The Problem

According to the State Aid Law, the CMU has to adopt a vast body of secondary legislation to further specify, inter alia, the criteria of admissibility of certain categories of state aid;[110] procedures for recovery, suspension or withdrawal of state aid, etc. Notably, adoption of such secondary legislation is primarily required under the DCFTA[111]. Hence, to the extent it represents a substantial portion of the EU competition law, the manner in which it is being adopted has to take into account peculiarities of the Ukrainian legal system.

The Council observed that the AMCU has already made major contributions to ensure smooth introduction of the state aid system. In particular, in the course of fact-finding mission it was identified that 7 acts of secondary legislation in the sphere of state aid were approved, 127 drafts of legislative acts were assessed from the standpoint of existing legal framework on state aid and 12 recommendations on state aid were issued[112]. Nonetheless, it is evident that the outstanding workload with drafting secondary legislation remains to be quite significant.

The Council's recommendations

In light of the foregoing, the Council recommends as follows:

1) To ensure that pending secondary legislation is both available and adequate from both procedural and substantial standpoint. In particular, to ensure compliance with Article 6 of the State Aid Law, the CMU shall adopt:

a) Resolutions on provision of state aid in specific areas (i.e., regional development; support of small and medium business development; employees professional development; reorganization and restructuring of undertakings; development of certain branches of economy, etc.);

b) Methodology for calculating amount of state aid; and

c) Procedure for illicit state aid's recovery.

2) Once the new system of state aid becomes effective, it might be appropriate for the AMCU to consider performing an additional gap analysis to identify outstanding issues, whose resolution could still require adoption of respective secondary legislation.

[110] For instance, as at the date of this Report the AMCU has reportedly prepared draft criteria of admissibility of certain categories of state aid due be approved and adopted by the CMU (i.e., as foreseen in Article 6, para. 2, items 4, 6-7 of the State Aid Law).

[111] See Article 267 of the DCFTA stating that "Ukraine shall in particular adopt national state aid legislation ... within three years of the entry into force of this Agreement".

[112] See "Current situation and outlook of State Aid in Ukraine" presentation, prepared by the AMCU.

2.7.3. State Aid Register

The Problem

The AMCU is responsible for administering and ensuring access to the State Aid Register[113]. The register is to be established following completion of state aid monitoring stage to be based on information about existing state aid received by the AMCU from the respective providers[114].

In particular, aid providers shall furnish with the AMCU information about existing state aid, its' purpose, forms, sources, beneficiaries as well as their respective proportional shares in the total state aid granted during the preceding financial year under the framework of the respective state aid program. Accordingly, the AMCU specifies requirements for the submission of information on existing state aid[115]. All these data is supposed to be kept and updated at the National State Aid Register.

It appears, however, that the data about state aid in the AMCU's possession might be rather scarce[116].

The Council is concerned that inadequate volume and quality of information received from aid providers could jeopardize the AMCU's ability to properly analyze and assess the scope, number and compatibility of such measures with the free competition etc.

Thus, the Council emphasizes that successful resolution of this issue is critical for the AMCU's capacity to act as an efficient authorized body in the sphere of state aid.

[113] See Article 8 of the State Aid Law.

[114] See para 10 of the Procedure on Maintenance and Access to State Aid Register, approved by the Regulation of the AMCU, No.43-pII, dated 28 December 2015 (hereinafter – the "Procedure on Maintenance and Access to State Aid Register").

[115] See Article 16 of the Procedure on Maintenance and Access to State Aid Register.

[116] As acknowledged in the relatively recent report:

"The fragmented information about state support measures in Ukraine creates a certain constraint for the establishment of a functioning state aid monitoring and control system at the national level".

See, in particular, "Harmonization of Public Procurement System in Ukraine with EU Standards" Study in State Support to Undertakings in Ukraine (2015), at page 19 available at http://www.amc.gov.ua/amku/doccatalog/document?id=120933&schema=main.

The Council's recommendations

1) To improve both scope and quality of information due to be received from aid providers the AMCU is recommended to intensify its' advocacy activities aimed at clarifying existing procedure for notifying AMCU about state aid, including, inter alia, by disseminating respective reporting templates.

2) To promptly start inventory of state aid measures[117] subject to availability of the relevant and properly tested material base (hardware and software)[118].

[117] Pursuant to Article 267 of the DCFTA, Ukraine " ... shall establish, within five years of the entry into force of this Agreement, a comprehensive inventory of aid schemes instituted before the establishment of the authority ..."

[118] See "Current situation and outlook of State Aid in Ukraine" presentation, prepared by the AMCU.

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