



Introduction

Ukraine is situated between the Black Sea and the Sea of Azov, and neighbours Russia, Belarus, Poland, Slovakia, Hungary, Moldova and Romania.

At the end of the 18th century most of the territory of Ukraine fell under the control of the Russian Empire. Following the breakup of tsarist Russia in 1917, the country enjoyed a short period of self-governance before becoming a part of the Soviet Union in 1922. Ukraine declared its independence from the Soviet Union in 1991.

The first president of independent Ukraine was Leonid Kravchuk, who focused on strengthening the country's sovereignty and developing diplomatic relations with the West. One of his achievements was the sale of Ukraine's nuclear weapons in exchange of significant compensatory payments from both Russia and the US¹.

Kravchuk's successor was Leonid Kuchma, elected in 1994. Although Kuchma accepted an IMF-backed economic stabilization program, tensions between the Parliament and the President hampered market reforms. Kuchma's scandal-ridden second term (1999-2004) featured backsliding on democracy and strengthened the role of oligarchs in politics.

The election of the opposition leader Viktor Yushchenko in December 2004 led to greater political openness. However many conflicts with his former political allies emerged during his presidency, and hopes for faster economic progress fell short of expectations. Although Yushchenko ran for re-election in 2010, he only received around 5% of the vote.

The election of the fourth president, Viktor Yanukovich, was considered by many a major step back. His first two years of office were marked by the political and criminal prosecution of the previous administration and opposition leaders. Levels of corruption reached new heights and government-affiliated business groups dominated the economy. This had a negative impact on competition and the level playing field in Ukraine. Indeed, many

PROFILE

Population:	45.59 million***
GDP (Current US\$):	176.3 billion***
Per Capita Income: (Current US\$)	3,500 (Atlas method)*** 6,428 (at PPP.)***
Surface Area:	603.7 thousand sq. km
Life Expectancy:	71 years**
Literacy (%):	99.8 (of ages 15 and above)**
HDI Rank:	78***

Sources:

- World Development Indicators Database, World Bank, 2011.
 - Human Development Report Statistics, UNDP, 2012.
- (**) for the year 2011
(***) for the year 2012

international observers are very concerned about the business environment and, in particular, the problem of corporate raiding.

Ukrainian political leaders have frequently expressed their aspiration for closer ties with (and potential integration into) the European Union. However, Ukraine's chances of full-fledged membership are still rather distant. Recent political developments and the deterioration of media freedom have significantly reduced the investment attractiveness of the country and even led to the threat of political and economic EU sanctions in 2012.

Economic Trends

In 1991 Ukraine abandoned central planning and started market reforms. The country's main challenge has been to privatize state-owned enterprises and diversify away from its traditional industries, such as steel, chemicals, shipbuilding, coal, machine-tools, etc., into more service-oriented sectors of the economy.

However, success has been gradual at best. More than 20 years after the start of the market transition, a significant proportion of the country's output is still produced by the heavy manufacturing industry and mining. The

❖ This paper has been written in June 2012.

privatization of state-owned enterprises has been slow. As of 2012 many companies and their assets are still controlled by the government.

Ukraine's GDP ranks well below that of its central European neighbours and Russia. In 2010 GDP per capita, calculated at purchasing power parity, was estimated at US\$6,175 – nearly one third of Poland (US\$17,451) and more than twice lower than that of Russia (US\$14,561).

Competition Legislation

Ukraine inherited a highly concentrated industry structure. The obvious reforms were deregulation and liberalisation. However, the introduction of an effective policy designed to police newly competitive markets was rather tardy. It was not until the early 2000s, almost 10 years after gaining its independence, that specific competition legislation was developed.

The act "On the Protection of Economic Competition" was adopted in January 2001 (hereafter – the Competition Act). This is a core legislative document that covers the entire scope of competition-related issues. It outlines the main types of competition infringements and the key stages of antitrust proceedings. The document also provides rough indications for the level of fines that can be imposed for breach of competition rules.

Competition legislation also includes other acts, such as "On the Protection Against Unfair Competition" (7 June 1996), "On Natural Monopolies" (20 April 2000), as well as chapter 3 of the Commercial Code of Ukraine (1 January 2004). The provisions of these acts are further elaborated in the regulations and rules approved by the executive branch of the government (the Cabinet of Ministers of Ukraine) and the competition regulator – the Antimonopoly Committee of Ukraine (hereafter – AMC).

In addition to the above legal acts the AMC issues various regulatory and explanatory notices that have become an essential part of competition enforcement. Key documents in this area include:

- A general Guide on the AMC investigation procedures.² This document sets out the AMC statutory powers and explains the way in which the authority conducts investigations into suspected competition law infringements.
- AMC Regulations on conducting compliance inspections.³ This document outlines the procedure for planned and unplanned (not notified) inspections of undertakings.
- Merger regulations.⁴ These regulations summarize the requirements for filing merger applications in Ukraine. Proposed mergers will be approved by the AMC if they do not create monopoly or substantially lessen competition. The conditions for single (or collective) dominance are linked to market share thresholds and, as such, are well-defined (see the section on dominance

below). However, there is no clear test for 'substantive lessening of competition', which, for instance, would be analogous to the one used in the European Union. Also the merger regulations do not distinguish between horizontal and non-horizontal mergers.⁵ For further examples see Box 1 below.

Box 1: Merger control

In September 2011 the AMC approved a US\$13.6 bln acquisition of Nycomed A/S by Takeda Pharmaceutical Company Limited, subject to behavioural remedies. To mitigate a possible negative impact of the merger, the AMC ordered the participants not to set economically unreasonable prices for drugs, and not to create entry barriers to the Ukrainian pharmaceuticals market. Precise conditions for what constitutes "unreasonable price" or a barrier to entry were not specified. The remedies are expected to apply for 3 years.

The fact that the AMC did not clear the transaction unconditionally suggests that the authority believed the merger would result in certain restriction of competition. What is interesting, is that these potential problems were addressed using behavioural as opposed to structural remedies. By contrast, in other jurisdictions (e.g. in the European Union) structural remedies are generally preferred over behavioural ones. This is because behavioural remedies generally do not deal directly with competition concerns arising from horizontal overlaps and tend to be difficult to monitor. For these reasons, structural remedies, such as divestiture commitments, are generally considered to be the most effective way of resolving competition problems resulting from both horizontal and vertical mergers. Yet, since the date of its creation in 1993, the AMC has almost never requested structural remedies from the merging parties.

- Concerted actions regulations and corresponding block exemptions.⁶ These regulations explain the procedure that undertakings need to follow if they apply for the AMC approval of concerted actions (see also the section on concerted practices below).
- Market definition guidelines.⁷ In 2002 the AMC adopted the "Methodology for defining a dominant position". This document outlines the principles of delineating product and geographic markets in competition investigations. It also sets out some basic types of economic analyses and introduces key economic terminology, such as "market size", "market shares", etc. In this respect the document is similar to the European Commission's "Notice on the definition of relevant market for the purposes of Community competition law".⁸

Most competition inquiries in Ukraine relate to the allegations of abuse of dominance, concerted actions and

unfair competition practices. For instance, more than 80% of all infringements found by the AMC in 2011 fall into one of these three categories (see Table-1). These most common types of infringements are considered in more detail below together with the corresponding legal standards of proof and fines that the AMC can impose in such cases.

	Number of cases	Percent
Abuse of dominance	1,936	43
Anticompetitive actions of state-owned enterprises or government bodies	994	22
Anticompetitive actions of private and commercial undertakings	346	8
Unfair competition	451	10
Other infringements	761	17
Total infringements found	4,488	100
Total cases considered*	5051	

Source: AMC annual report 2011
**Related to the above areas only and does not contain 756 merger cases considered by the AMC in 2011.*

Single and collective dominance

According to Article 12 of the Competition Act, a dominant position is presumed if the undertaking's market share exceeds 35%. Two or more undertakings may be presumed to hold a collectively dominant position when the combined market share of the three largest undertakings exceeds 50%, or the combined market share of the five largest undertakings exceeds 70% of the market.

Thus, the AMC heavily relies on market share thresholds to define a dominant position. This is in contrast with the European approach, where a market share is seen as an important factor but insufficient, on its own, to determine whether an undertaking is dominant (or collectively dominant with other undertakings).

Undertakings with high market shares can submit evidence that they are not dominant, because they face significant competition. The standards of proof, however, are quite vague and to date there have been no public records of companies that had significant market shares but were also able to prove to the AMC that they did not have market power because they were subject to effective competition. Notably, the courts sometimes do recognize that potential

competition may constrain the pricing behaviour even of those firms that have a relatively high market share, see Box 2 below.

Box 2: Dominance and abuse of dominant position

In 2011 the AMC claimed the behavior of the chemical producer DniproAzot to be in breach of Article 13 of the Competition Act. According to the AMC, the company charged excessive prices for sodium hypochlorite when it raised them, following an increase in its own costs of production. The AMC found that the increase in prices was disproportionate to the alleged cost increase and was accompanied by a manifold increase of the company's profits. As a result, DniproAzot was fined US\$12.5 mln.

The company appealed the decision and in November 2011 the Kyiv Economic Court of Appeal quashed the competition authority's decision and annulled the fine in full. The Court questioned the narrow product and geographical market definition in this case (i.e. sales of sodium hypochlorite in Ukraine) and argued that the AMC failed to demonstrate the fact of dominance.

Notably, the Court pointed out that DniproAzot was subject to *potential* competition because there were two other companies in Ukraine that had all the necessary equipment for the production of sodium hypochlorite, despite the fact that these two companies exited the market in 2008. However, the mere possibility of their re-entry, in the Court's view, was sufficient to stop DniproAzot from exercising market power.⁹

Abuse of dominant position

Alleged abuse of dominance is the most common type of competition inquiry considered by the AMC. Of the total of 4,488 infringements found by the authority in 2011, 1,936 cases (or 43%) fell into this category. Such a high figure is in sharp contrast with the number of similar cases investigated by the European competition authorities. One explanation for this can be that a significant proportion of those cases in Ukraine is merely a consequence of various commercial disputes and originates from complains.

Many different types of commercial conduct can potentially be seen as abusive. For instance, the following constitutes an infringement of Article 13 of the Competition Act:

- limiting production to create an artificial shortage on the market;
- setting excessively high or unjustified low prices;
- refusal to supply;
- creating barriers to entry;
- price discrimination;
- foreclosing competition (forcing exit or preventing entry to the market).

Concerted actions

Anti-competitive agreements and concerted practices constitute the second largest category of AMC inquiries. In 2011 the authority dealt with 1,340 such cases, of which about 75% related to infringements by state-owned enterprises or various branches of the government, and only 25% infringements were made by private and commercial undertakings.

The following concerted practices usually constitute an infringement of Article 6 of the Competition Act:

- fixing of purchase or sale prices or any other trading conditions (price fixing);
- sharing the markets or sources of supply;
- bid rigging.

The AMC can grant exemptions for concerted practices if the participants can prove that these practices encourage manufacturing, technological or economic progress or the growth of small and medium-sized enterprises, and that they do not lead to a substantial restriction of competition. The Ukrainian government can also in some exceptional cases authorize concerted practices (even if those have not been approved by the AMC). Though, this can only happen provided the participants are able to demonstrate that positive effects of these practices outweigh their possible negative impact on competition.

Generally, as long as business practices are not per se prohibited, they may be exempted by the AMC. For horizontal practices (i.e. between direct competitors) the exemptions may be granted if the combined market share of undertakings involved is less than 15%; the threshold for vertical practices is set at 20%. In some cases, the decision about exemptions is linked to the turnover thresholds or certain areas of business, e.g. joint scientific research. Undertakings do not need the AMC approval if their aggregate market share is below 5% within the relevant market. For more information on concerted practices see Box 3 below.

Unfair competition

About 10% of the infringements found by the AMC relate to unfair competition. According to the act “On the Protection Against Unfair Competition” many types of conduct can be qualified as such. A (non-exhaustive) list of these practices is provided in Article 1 of the act. Some of the most common are as follows:

- unlawful use of signs (e.g. trademarks) or goods of another producer;
- copying the look of the goods;
- comparative and misleading advertising;
- discrediting competitors.

Notably, the provisions of this act apply very widely. For instance, even those types of conduct that are not covered in this document but are found to contradict the established “fair” business practices can be seen as infringements. However, the courts are likely to challenge the AMC decisions, unless the competition authority clearly shows that the “fair” practices in question do exist, and that the actual behaviour of undertakings appreciably deviates from them. For more information on appeals against AMC decisions see Box 4.

Fines for competition infringements

Depending on the type and gravity of the infringement, the AMC can levy various turnover fines on undertakings. The fines are assessed with respect to the undertakings’ worldwide turnover in the fiscal year that precedes the year in which they were imposed. Currently the levels of fines for major types of abuses are as follows:

- up to 10% for concerted actions (cartels), abuse of dominant position, or failure to comply with AMC regulations or decisions;
- up to 5% for completing a merger without proper notification to the AMC, or unfair competition;
- up to 1% in case of failure to provide information, provision of incomplete or false information to the AMC, hindrance of AMC staff in the course of inspections and investigations.

Box 3: Cartels and other anticompetitive practices

In 2011 the AMC fined 3 major fuel station networks (Shell, Wog and OKKO brands) US\$20 bln for the alleged price-fixing conspiracy in the retail market for motor fuel. According to the AMC, the undertakings simultaneously increased prices for high-octane gasoline and kept it at the same level between December 2010 and beginning of January 2011.

Based on the collected evidence and market analysis, the AMC found no objective factors for that price increase. In particular, the AMC claimed that the fuel stations differed significantly in terms of their costs and economics (they purchased fuel at different wholesale prices) and volumes of available fuel.

Similar “cartels” were also found by the AMC in the farming and food sectors, e.g. bread products, buckwheat production, etc. The significant number of such “cartel” cases can be explained, in part, by the peculiarities of the Ukrainian competition legislation. According to the Competition Act, any parallel behaviour can, in principle, qualify as anticompetitive concerted practice, as long as the parties fail to demonstrate that there were *objective* factors (such as corresponding increases in costs) explaining the parallelism. In practice, the AMC often establishes the alleged infringement by means of a simple correlation analysis, a technique which is ill-suited for such a purpose. Indeed, it is well-known from economic theory that price parallelism by itself is not inconsistent with strong competition.

Box 4: Appeals of AMC decisions

AMC decisions may be subject to a full substantive review by the AMC itself (the administrative procedure) and/or by the court (the judicial procedure).

Administrative procedure

Any person who participated in a case has the right to submit an application for a review within two-months of the date of the decision. Decisions of the territorial branches of the AMC can be reviewed by the administrative board within the AMC. Decisions of the state-empowered officials of the AMC or of the administrative board can be reviewed only by the AMC itself. In 2011 the AMC reviewed 1210 of its prior decisions.

Judicial procedure

A claimant, a defendant or a third party has the right to appeal AMC decisions in a commercial court within two months. The Ukrainian judicial system has several layers.

- Decisions of the AMC or its administrative board or its state-empowered officials can be appealed to the Commercial Court of Kyiv.
- Decisions of the administrative board of a territorial branch of the AMC can be appealed in regional Commercial Courts.
- Decisions of the Commercial Courts can be appealed to the Commercial Court of Appeal.
- Decisions of the Commercial Court of Appeal can be contested in the Highest Commercial Court of Ukraine.

The judicial procedure is frequently used to contest AMC decisions. On average, the appeal procedure in a regional court, followed by the Commercial Court of Appeal and the Highest Commercial Court, may take up to 1-1.5 years. In 2011 more than 200 of AMC decisions were appealed in courts.

Fines for competition infringements have been steadily rising in recent years. For instance, in the course of 2011 the total amount of fines was €4.2 mln, compared to just €2.6 mln in 2010. Two types of infringements account for the majority of fines: anti-competitive agreements (39%) and abuse of dominance (27%). Despite an increase in the level of imposed fines, their collection often remains a separate challenge for the authority. The fines may be contested in courts and/or paid with a significant delay, e.g. in 2011 only 50% of the fines were actually paid. For more information on fines see Box 5 below.

Competition Authority: The Antimonopoly Committee of Ukraine (AMC)

An overview

In Ukraine competition law is applied and enforced by the Antimonopoly Committee of Ukraine (AMC). The AMC was established in 1993. The act "On the Antimonopoly Committee of Ukraine" provides for the basic principles of the functioning of the competition regulator, its structure, goals and powers. The AMC can both investigate cases and take enforcement decisions.

Box 5: AMC fines

Antitrust fines are among the highest that are imposed by Ukrainian law enforcement authorities, comparable only to fines for tax law violations. However, maximum fines (i.e. on the level of 10% of the turnover) have rarely been levied by the AMC in practice.

In 2012 the AMC fined a wood industry association and its 14 members €41 mln for bid rigging in auctions relating to untreated wood. This is the highest cartel fine in the authority's history. Prior to this decision, the highest fine was €26.5 mln, when the AMC fined Crebo JV, Ukrtatnafta and Luk-Avia Oil for setting excessive prices for aviation fuel at the Kyiv international airport during 2009. Notably, all companies have successfully appealed the AMC decisions and in the end the fines were not collected. One of the parties – Crebo JV – was liquidated in the course of the bankruptcy proceeding.

The AMC can also fine state-owned companies for breach of competition law. The largest sanction of this kind (€20 mln) was imposed in 2012 on spirit producer Ukrspirt for abuse of dominance. The AMC found that by raising the salaries of its staff, the company increased its overheads by 4%. At the same time, Ukrspirt commission fees were increased by 15%, which lead to corresponding increases in consumer prices. According to the AMC, these actions were not economically justifiable.

The AMC is controlled by the president and responds to the Parliament of Ukraine. The governing body of the AMC consists of a chairman and 8 state commissioners. The chairman is appointed for a seven-year term by the President, in agreement with the Parliament.

The AMC has a central office in Kyiv, the capital of Ukraine, and 27 regional branches. In 2011 the authority employed 788 people, of which 55% have background in economics and 25% have background in law.

International cooperation

Since the early 1990s, the AMC has been an active participant in various international competition policy projects by the United Nations Conference for Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD), and the International Competition Network (ICN).

In addition to this, the AMC has entered into numerous bilateral and multilateral cooperative arrangements with competition enforcers in the CIS and Eastern Europe. Agreements with these countries provide for joint coordination of investigations, exchange of information as well as notifications in case anticompetitive conduct in one country affects the interest of the other.

Ukraine signed the “Agreement of the Commonwealth of Independent States on Pursuing Coordinated Antimonopoly Policy” in 1993. This agreement establishes an Interstate Council on Antimonopoly Policy (ICAP) to facilitate implementation of its terms. ICAP’s duties are to develop criteria and methods for the assessment of monopolistic activities and unfair competition, harmonize national competition laws, refine rules and procedures for investigating anticompetitive conduct, facilitate coordinated actions among the parties, and develop resolutions to settle disputed matters.¹⁰ ICAP members usually meet several times a year to discuss a wide range of questions and new developments in the area of competition, consumer protection and advertising.

Cooperation with domestic authorities

The AMC liaises with various Ukrainian industry regulators such as the National Commission for the State Regulation of Communications and Information, the National Electricity Regulation Commission, and the National Commission for Financial Markets. These bodies are mainly responsible for sector-specific regulation. The AMC may share its experience in market analysis and exchange information with these authorities. This cooperation is especially vital in those cases where the correct application of key competition law concepts (e.g. market definition, dominance, etc.) depends on the specific aspects of the industry in question.

The AMC also liaises with the State Committee for Technical Regulation and Consumer Policy, the main government body responsible for consumer protection. According to the Ukrainian legislation, certain violations of consumer rights can also be considered as infringements of Article 1 of the Competition Act. In such cases the AMC is empowered to impose turnover fines that generally exceed the level of fines levied for breach of law in the area of consumer rights.

Key recent developments and future prospects of competition enforcement in Ukraine

Several important changes occurred in the course of 2011 and 2012.

First, the AMC introduced new a Leniency Procedure, according to which the authority will grant full immunity for the first applicant only. Although the concept of leniency was initially introduced in the Competition Act adopted in 2001, the absence of clear guidelines made it superficial and to date (2012) there has not been any public records of leniency applications in high profile cases. If the new policy is successful, one can expect a certain reduction in the frequency of cartels and anticompetitive concerted practices in the future.

Second, the Parliament prepared a draft bill in which the market share threshold for single dominance is proposed to be raised from 35% to 50%; similar increases in thresholds are proposed for mergers that would require the AMC clearance. If these changes are implemented, they will allow the AMC to focus its efforts on the investigation of those practices that can appreciably restrict or distort competition. The proposal, however, does not discuss a change in the thresholds for collective dominance.

Third, currently the AMC discusses draft regulations that would define clear rules for the application of Article 8 of the Competition Law. This regulation is the so-called block exemption regulation on vertical restraints and is analogous to the European Commission’s approach towards those vertical agreements that are likely to stimulate competition, promote technological progress and benefit consumers.¹¹

Despite moderate progress in the recent years, the AMC still has a long way to go to raise the standards of competition enforcement to the level of its Eastern European neighbours or that of Russia. One area which needs significant development is the application of economic methods in competition investigations. Currently very little of the AMC work is based on robust economic analysis, despite the fact that a number of AMC staff have a degree in economics (see the section on the AMC above).

Other crucial areas requiring further improvements include the development of guidelines for the assessment of abuse

of dominance allegations and concerted actions. This is essential because the standards of proof used by the AMC when investigating these types of abuses tend to vary from case to case. Further, given its propensity to impose fines and sanctions, the AMC needs to clearly outline its basic principles on the method of setting fines. All this will ensure the transparency and impartiality of AMC decisions that are extremely important for legal certainty.

Endnotes

- 1 See Ph.Jehiel, B.Moldovanu, E.Stacchetti (1996) “How (Not) to Sell Nuclear Weapons”, *The American Economic Review*, Vol. 86, No. 4, pp. 814-829.
- 2 See <http://zakon2.rada.gov.ua/laws/show/z0090-94>.
- 3 See <http://zakon2.rada.gov.ua/laws/show/z0139-02>.
- 4 See the EC Horizontal Merger Guidelines, http://ec.europa.eu/competition/mergers/legislation/notices_on_substance.html#hor_guidlines.
- 5 See <http://zakon2.rada.gov.ua/laws/show/z0284-02>.
- 6 See <http://zakon2.rada.gov.ua/laws/show/z0238-02>.
- 7 See <http://zakon2.rada.gov.ua/laws/show/z0317-02>.
- 8 See [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:NOT).
- 9 See <http://reyestr.court.gov.ua/Review/20020807>.
- 10 See 2008 OECD Report “Ukraine – Peer Review of Competition Law and Policy”, <http://www.oecd.org/dataoecd/44/26/41165857.pdf>.
- 11 See the European Commission Regulation No 330/2010 “On the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices”.

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