Competition & Antitrust - Ukraine

In focus: trends and best practices in Ukrainian competition law

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Introduction

The global economic downturn, political instability and military action have substantially affected the Ukrainian economy. The country badly needs reform in all major areas, including competition law and enforcement. It is hard to overestimate the role of the antitrust authority in such reforms, considering the number of monopolies that Ukraine inherited from the Soviet era and those created in the decades since independence, many of which are vertically integrated. This update touches on the latest trends in competition law enforcement in Ukraine and considers necessary further steps as well as the role of the antitrust authority in enforcement.

Despite the difficult economic situation, competition law enforcement has developed significantly over the past few years, with more cartel investigations, greater control over dominant undertakings and a significant increase in monetary penalties. Although no dramatic changes have been made to the Law on Protection of Economic Competition 2001 (referred to as the 'Competition Act'), amendments have been introduced through secondary legislation – in particular, acts of the Anti-monopoly Committee (AMC) – and case law. These changes mainly relate to market demands and include the introduction of a leniency programme, a refocusing of unfair competition law enforcement and progress in preparing vertical guidelines.

Vertical guidelines

Every industry has felt the need, one way or another, for clearer distribution rules. For the past few years, markets have been awaiting the introduction of vertical guidelines setting general rules and criteria for the restrictions that may be allowed in vertical agreements (eg, with regard to distribution and supply). Despite significant progress in preparing these guidelines – primarily through public discussions between the AMC and the markets, publication of draft guidelines and submission of comments on the draft guidelines by market players (business and legal experts) – the regulations have not yet been adopted, leaving the oversight of vertical agreements in a grey area.

However, the authorities have sent important signals on what to expect next. In discussions with the regulator at numerous professional events and association meetings, it has been noted that the draft guidelines should cover best practices in EU and US competition law, while also considering the peculiarities of the Ukrainian market and existing market practice in the field. Pursuant to the draft, the guidelines will regulate the two main types of restriction that are generally included in vertical agreements. Hardcore restrictions such as price fixing and market division will be *per se* prohibited. However, the guidelines will allow certain restrictions under clearly defined conditions. These include exclusivity and non-compete clauses, exchange of information, selective distribution and bonuses and rebates. The assessment will be based on market share. If the relevant parties do not meet the market share thresholds, any restrictions must be individually approved by the antitrust authority before they can be introduced into an agreement.

Unfortunately, the challenging political situation in Ukraine has affected the timing of the adoption of the

vertical guidelines. However, it still appears to be at the top of the antitrust authority's agenda, considering the number of recent cases on the matter (eg, regarding information exchange in the pharma and retail industries, as well as exclusivity and non-compete issues).

Procedural code and methodology for fine calculation

It is a well-known fact that the existing law does not properly regulate the procedures governing AMC market investigations. Companies are often restricted from accessing the materials on their case; the AMC may investigate the case for several years, but leave the company only a few weeks to prepare counterarguments. In other cases it is difficult to determine whether or when the AMC will even initiate an investigation. In order to provide better clarity in this regard – for both the regulators and the markets – it is crucial to adopt a procedural code for competition law investigations, a draft of which has existed for several years now.

Another aspect of effective procedure in any public authority is transparency. This starts with simple issues, such as state officials' availability to market players, which helps the antitrust authority to understand market concerns and find resolutions. In particular, key decision makers at all levels should be available to the market to facilitate effective communication. Further, the antitrust authority should publish its decisions. Only in this way will the markets better understand the practice of competition law enforcement and adjust their policies and conduct accordingly. This will increase transparency in the authority's decision making and limit subjective interpretations of case law. The current situation in this regard requires further reform.

The case-by-case approach on fine calculation should also be addressed. While it is understandable that the antitrust authority has room for interpretation in order to take into account all peculiarities of a case, the complete absence of regulations on fine calculation provides a significant amount of freedom in this regard, which can lead to abuse. In order to avoid this risk, clear regulations – or at least a letter of interpretation from the antitrust authority – should be issued and made publicly available, so that the markets can transparently quantify antitrust risks.

Leniency programme

Over the past few years, the AMC Resolution on the Establishment of the Procedure for Liability Release 2012 – the leniency programme – has been finally adopted. It sets out the criteria for liability release (ie, leniency) for undertakings in cartel cases, as well as procedural requirements to obtain such leniency.

The leniency programme relieves cartel participants of liability where they voluntarily refer first to the AMC disclosing the cartel and effectively cooperate with the authority (ie, provide sufficient evidence to prove the existence of the cartel). A cartel participant cannot be granted leniency if it acted as a facilitator of the cartel, managed the cartel or fails to provide sufficient evidence to prove the existence of the cartel. The leniency programme also establishes technical rules on how undertakings can apply for leniency.

Adoption of the leniency programme was welcomed by the markets, although experts pointed to certain issues relating to the assessment of cooperation between the antitrust authority and cartel participants seeking leniency. The criteria for the applicant's 'sufficient' cooperation with the authority and the authority's obligations to collect as much evidence itself as possible remain unclear under the latest version of the leniency programme, leaving room for subjective interpretation. Moreover, concerns have been raised over the practical implications of the priority system for leniency applications and the means of ensuring confidentiality in such applications. In addition, the adoption of the leniency programme has further fuelled desire for public guidelines setting clear criteria for fine calculation and private enforcement.

Thus far, practical application of the leniency programme has been limited and it is thus too soon to make any conclusions. However, it has given market players solid grounds to seek relief from – or at least mitigation of – liability in cartel cases. It will take time and significant effort to make this programme work efficiently and convince market players that the programme is an effective competition law enforcement tool. The needed push to bring this about may come in the form of joint investigations of EU member state authorities and the AMC in some markets (eg, oil and gas).

Penalty trends

In recent years the AMC has significantly increased fines for all types of infringement. A recently issued fine of €40 million in a cartel investigation is the highest recorded. Monetary penalties for other types of infringement have also been high – in certain cases, far exceeding €10 million. Notably, the fines –

which can be as high as 10% of the infringing undertaking's global annual turnover (eg, for concerted actions and abuse of dominant position) – have not yet hit the maximum allowed by law. As such, fines may potentially increase further (eg, a preliminary fine of approximately UAH2 billion in retail cases has been suggested, pending review).

While higher penalties are perceived as promoting compliance with competition law, their enforcement requires certain changes. Clear guidelines on fine calculations should be adopted, as mentioned above. Moreover, fines should not be imposed simply with regard to the maximum amount allowed by law; rather, they should be proportional to the infringement in question and come with clear criteria for mitigation.

The judiciary has sent an important message with regard to penalties, essentially suggesting that failure to obtain merger control approval (where required) might serve as grounds for invalidation of the transaction upon submission to the AMC. This position has clarified and reconfirmed the general provision established in the Civil Code 2003. Although no deals have been rejected on these grounds thus far, relevant case law may potentially increase.

Legislative trends

The markets are anticipating greater certainty in respect of the possible increase in certain financial thresholds, which will not only affect transactions subject to prior merger control approval, but also hopefully lead to changes to concerted action exemptions. An expedited review procedure for merger control applications shall also be provided for in the law. In addition, numerous AMC position papers – on distribution guidelines, fine calculation guidelines and best practices in unfair competition cases, among other things – are forthcoming. Overall, these positive steps shall soon be put into practice.

For further information on this topic please contact Antonina Yaholnyk at AstapovLawyers International Law Group by (+38 044 490 7001), fax (+38 044 490 7002) or email (yaholnyk@astapovlawyers.com). The AstapovLawyers International Law Group website can be accessed at www.astapovlawyers.com.

Author

Antonina Yaholnyk

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