

Competition Law and Policy in Ukraine – Wartime Overview

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Wartime Implications

Russian military aggression against Ukraine started on February 24, 2022, and the end of February 2022 became a critical point for the Antimonopoly Committee of Ukraine (“AMCU”). The AMCU was forced to take rapid actions aimed at ensuring the safety of its staff and the legality of competition enforcement in Ukraine.

At that time, the AMCU initially decided to relocate its central office and personnel from Kyiv to Lviv and was required to suspend most of its functions. The relevant procedural document was published by the AMCU on March 7, 2022. By this decision, the AMCU suspended its review of the following:

- Merger control and concerted actions cases;
- Complaints alleging a violation of the competition law;
- Complaints alleging unfair competition;
- Applications to receive preliminary conclusions on merger control and concerted actions;
- Applications to verify/reconsider AMCU decisions;
- State aid notifications and cases, letters to clarify the application of state aid legislation; and
- Complaints alleging violation of public procurement legislation.

This suspension applied to cases where no final decision had been taken on or before February 25, 2022 (and for the period of martial law).² The AMCU also decided to suspend the deadlines for providing information in response to AMCU requests in cases where the deadline for providing such information fell on or after February 25, 2022.

Resumption of the AMCU’s Activities

Subsequently, the AMCU gradually began to resume its activities and relocated to Kyiv on May 6, 2022. The AMCU clarified certain practical aspects of some of its wartime restrictions. In particular, on April 1, 2022, the AMCU published guidelines on merger control and concerted action procedures for the period of martial law. Considering that during the period of martial law, the AMCU’s ability to review applications for merger clearances and concerted action permits had been significantly limited, the AMCU decided to introduce a temporary simplified filing procedure.

The relevant procedure was later abandoned, and the AMCU resumed reviewing applications under the standard procedure as of June 9, 2022. In July 2022, the AMCU also resumed most of the paused activities, except state aid notifications and cases.

In terms of state aid, the situation looks fairly straightforward, as the Ukrainian parliament *de facto* deactivated the Ukrainian state aid control system for the period of martial law. The relevant legislative amendments took effect on April 13, 2022, and the AMCU issued the accompanying guidelines on April 15, 2022.

State aid granted during martial law is automatically considered compatible with Ukrainian state aid law. Additionally, state aid grantors are not obliged to file notifications of state aid granted during the period of martial law and one year thereafter. The AMCU will also not perform any of its state aid control obligations for the duration of martial law.

For obvious reasons, a comprehensive state aid control system in a time of war could create obstacles to speedy economic decisions that may be needed for the survival and subsequent recovery of the Ukrainian economy. Nevertheless, the AMCU is using this pause in state aid activities to attempt to fill in existing regulatory gaps (by drafting various state aid

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² President Volodymyr Zelenskyy declared martial law on February 24, 2022.

compatibility criteria and sending them for Government approval).

The AMCU's Activities in 2022

The AMCU recently published an annual report covering its activities in 2022 where it summarized the following as the main priorities for the past year:

- Improvement of the state aid legislation and updating the state aid registry with information on existing state aid;
- Discovery and termination of competition infringements in the electricity and natural gas markets;
- Discovery and termination of competition infringements in the seaports and railroad cargo markets;
- Discovery and termination of competition infringements in the banking and finance markets;
- Developing AMCU guidelines on consumer surveys;
- Research on competition in the building materials market;
- Discovery and termination of competition infringements in the field of state property privatization auctions.

Of course, due to the fact that during most of 2022, Ukraine was in a full-scale conflict with Russia, the scale of the AMCU's activities significantly diminished by comparison with 2021.

The following reductions in enforcement activity are evident:

- - 64 percent in terminated violations;
- - 92 percent in the amount of imposed fines;
- - 38 percent in the amount of paid fines and late payment charges;
- - 74 percent in the number of public procurement complaints;
- - 64 percent in the number of reviewed draft legislative acts; and
- - 90 percent in the number of received state aid notifications.

While, due to obvious reasons, the number of procurement complaints filed with the AMCU (as an appeal body) significantly decreased in 2022, the AMCU has of late been more active in this field, and there is a clear trend indicating an increase in complaints.

Nevertheless, the AMCU calculated that the economic impact of its activities in 2022 increased by 2 percent compared to 2021.

On a separate note, the AMCU devoted a great portion of its time to attempts to change competition and state aid laws, with the aim of strengthening the legal framework and to enable it to implement the law more effectively. While some of these legislative initiatives received controversial assessments, it is expected that this so-called first stage in Ukrainian antimonopoly reform will be adopted soon. Following this, the second stage of the reform (devoted to ensuring the AMCU's institutional independence, enhancing appointment procedures for AMCU officials, and strengthening its enforcement powers) will be discussed, adopted, and, eventually, implemented.

Sectoral Focus Points of the AMCU

While the AMCU devoted a significant portion of its time to socially vital issues (e.g. utilities, gas, electricity, etc.) which do not directly and immediately influence private businesses in Ukraine (excluding the so-called "oligarchs"), some of the AMCU's activities in 2022 should be noted by businesses and serve as a guide for "homework" to be done both to avoid competition-related problems for themselves, and to determine when filing a complaint to the AMCU may be of merit.

For instance, the AMCU has recently paid particular attention to a submarket in seaports, where it found that different discounts were applied to similarly-situated customers by the state authorities, and were therefore deemed to be anti-competitive. The AMCU also started an investigation into alleged abuse of dominance by one of the Ukrainian seaports, which allegedly discriminated against certain sea freight forwarders.

It also appears that the AMCU's ongoing cement market review revealed several competition concerns. The AMCU further plans to dive deeper into competition issues in Ukraine's historically highly concentrated cement markets in 2023. Additionally, fast-moving consumer goods ("FMCG") suppliers should be aware that the AMCU has concerns with the state of affairs in FMCG and retail markets.

In 2022 there was also an noteworthy case concerning a company (Orimi Ukraine) that received a comparatively high (UAH 80M) fine for unfair competition in the form of providing misleading information on the absence of connections between its ultimate beneficial owners ("UBOs") and Russia. Thus, companies should be very careful when presenting any information concerning their relation to and/or activities in Russia, as the AMCU may apply a particularly strict approach to any misleading information.

The AMCU's Priorities and Activities in 2023

It could also be of value to outline the AMCU's priorities for 2023:

- Discovery and termination of competition infringements in the banking and finance markets;
- Discovery and termination of competition infringements in the electricity and natural gas markets;
- Discovery and termination of competition infringements in the petrol markets;
- Discovery and termination of competition infringements in the field of state property auction privatization;
- Research on competition in building materials markets; and
- Legislative support and advocacy for the state aid monitoring and control system;
- Strengthening cooperation with EU competition authorities.

Overall, in the course of the first half of 2023 the AMCU was again devoting significant part of its efforts to legislative initiatives that due to

Ukraine becoming the EU membership candidate had been reshaped a bit. The AMCU is now particularly focused on alignment of all its regulations with the EU acquis. In June 2023 the AMCU declared its intention to relaunch leniency program in Ukraine and published the draft law designed to improve existing leniency rules and procedures. Overall, the draft is in line with the EU rules on fines immunity and reductions and received mostly positive comments.

In the first half of 2023 the AMCU was also busy with public procurement and bid rigging investigations. The merger clearances workload is definitely present, but its volume is much smaller than during the period preceding Russian full-scale invasion. Cases on violation of merger control laws have become routine for the AMCU and the amounts of the relevant fines is constantly increasing. Some decisions of the AMCU in remarkable cases (e.g. a case involving the AMCU imposing fines on Ukrainian subsidiaries of international energy companies for failure to provide the AMCU with information on their non-resident affiliated companies participating in non-Ukrainian JV), had been recently challenged before Ukrainian courts. One should expect results of these actions to have a significant impact on further similar cases.

Future Challenges: Consequences of War for the Ukrainian Economy and the AMCU's Future Role

Of course, the Russian war against Ukraine will not only bring thousands of human losses to Ukraine, but will also significantly affect its economy. The extent of this effect will depend on the steps that will be taken both by the international community (meaning predominantly post-war economic support) and by Ukrainian authorities.

Overall, competition and transparency in rebuilding Ukraine will be fundamental. Therefore, the effective functioning of the AMCU after the war will be crucial. We hope that the AMCU will perform its functions professionally and effectively, and that potential cashflows from international donors and private

businesses will be used to rebuild Ukraine, rather than being misappropriated through excessive income on “wild” markets through abusive pricing practices. Enhancing the governance of the AMCU in promoting market competition and combating monopolistic practices would also support Ukraine’s long-term reform prospects.

While the *de facto* pause in the proper launching and functioning of state aid procedures in Ukraine creates risks of future significant

structural and behavioral problems for various sectors of the Ukrainian economy, this situation may also provide a good opportunity for the AMCU to learn lessons from previous mistakes and shortcomings, to properly amend out-of-date legislation, and to implement best practices in competition enforcement. Ukraine’s move towards EU membership leaves no room for further wasted time. The AMCU and other Ukrainian authorities should take immediate action to harmonize Ukrainian regulations and practices with European standards.