

April 23, 2020

NEWSLETTER

2019 AMCU REPORT – WHAT IS DONE AND WHAT IS NEXT?

1. The Antimonopoly Committee of Ukraine (“Committee”) has recently published its annual Report featuring the Committee’s activities for 2019 (“Report”). In this newsletter we provide a brief overview of some of the most interesting parts of the Report.
2. The Committee in its Report provided opinion and comments as to the competition environment on the following markets: electricity, oil, liquefied and natural gas, communal services, transportation, telecommunications, administrative and general services, financial services, pharma, FMCG (including chicken meat and tobacco) and nitrogen fertilizers markets.
3. Generally, it is worth mentioning that there was no real progress in 2019 with collection of fines imposed by the Committee. The total amount of fines imposed in 2019 constitutes UAH 8.7 B (approximately EUR 295 M). However, only UAH 150 M (approximately EUR 5 M) in fines were paid to the state budget. The largest fine imposed by the Committee is equal to UAH 6.5 B (approximately EUR 220 M) for anticompetitive concerted actions of 4 largest tobacco companies and Tedis Ukraine (distributor holding dominant position at tobacco wholesale market). The mentioned fine is now being challenged in Ukrainian courts.
4. The Committee produced its first decision on a compulsory split in the last 24 years after the decision on the compulsory split of dairy producers had been adopted back in 1995. The split decision was adopted in terms of the Ostchem Group (nitrogen fertilizer market player) abuse of dominance case. Along with the compulsory split, the Committee fined one of the Ostchem Group companies for UAH 107 M (approximately EUR 3.6 M). Currently, the Committee’s decision is challenged in terms of two court cases initiated by the dominant company itself and by its shareholder. This case is likely to contribute meaningfully to Ukrainian competition practice, especially considering that there are currently no specific regulations or well-established practice on a compulsory split.
5. It was noteworthy that the Committee looked deeper into competition issues on various markets, including some absolutely new markets like plagiarism checkers. In 2018, the Ministry of Education signed a Memorandum on

Cooperation with 3 entities selling plagiarism check software. Under the Memorandum, Ukrainian universities were required to use only software of the specific entities for plagiarism check purposes. Following Committee`s review of the Memorandum and raising competition concerns through issuance of the recommendations, the Ministry of Education terminated the Memorandum. This illustrates well that the Committee is capable and ready to investigate completely new and innovative markets.

Merger Clearances and Concerted Actions Permits

6. In 2019 the Committee reviewed the same number of merger filings as previously in 2018 (532 merger filings). In contrast to the previous years, the majority of the merger filings were submitted by Ukrainian companies (about 66 %). The number of merger filings by Ukrainian companies increased by 61 % (351 in 2019 comparing to 218 in 2018). Overall the Committee handled 20 Phase II merger clearance proceedings in 2019.
7. In 2019, 151 out of 532 (comparing to 91 out of 532 in 2018) applications were reviewed under a fast-track procedure. In the same vein the number of fast-track reviews compared to the total amount of filed applications increased by 14.4 % in 2019.
8. According to the Report, agricultural market players were most active in terms of merger clearances in 2019: 93 merger clearances were issued for agricultural companies (21 % of all issued clearances).
9. It is worth mentioning that in 2019 the Committee imposed two historically largest fines for concentrations without a merger clearance: UAH 58 M (approximately EUR 2 M) on DCH Group and UAH 55 M (approximately EUR 1.85 M) on TAS Group. You may find some details of the mentioned fines in one of our [previous newsletters](#).
10. In 2019 the Committee reviewed 68 concerted actions filings and gave its approval 62 times. Only in two cases, the Committee initiated the Phase II concerted actions proceedings, and just in those two cases the Committee imposed additional obligations on concerted actions` participants.
11. In order to improve the merger clearance procedures and practices, the Committee adopted the Guidelines on Application of Merger Control Rules to Joint Ventures. The Committee clarified cases when creation of a joint venture requires merger clearance and when a concerted actions permit is needed. The Guidelines were drafted in terms of implementation of the EU Twinning project aimed at approximation of Ukrainian competition rules to the EU standards.
12. We hope that in 2020 the Committee will devote some attention to improving of the rules governing concerted actions permits. Such rules are definitely not

up-to-date and occasionally cause practical inconveniences for concerted actions` participants.

State aid

13. In 2019 the Committee received 605 notifications on state aid which is by 34 % less than in 2018. Furthermore, only in 324 cases decisions on merits were adopted. Only in 12 cases the Committee found the aid to be incompatible and in 6 cases ruled to return the unlawful state aid back to state/municipal budget.
14. The Committee also continues developing the existing state aid rules. Among other initiatives, the Committee drafted and submitted for review by the Cabinet of Ministers the Draft Laws on changes to the Tax Code and Customs Code to bring them in line with the State Aid Law. The Committee stated that it keeps working further on legislative changes to the State Aid Law aimed at correcting the existing procedural flaws and bringing the existing legislation fully in line with the EU acquis.
15. While state aid complaints and cases are still not that much widespread, we believe that there may be some rapid developments in the state aid sphere in 2020, especially considering that many of the anticipated support measures related to COVID-19 are expected to fall under state aid regulations.

Anticompetitive concerted actions

16. In 2019 the Committee issued 799 decisions on anticompetitive concerted actions (only 263 decisions were issued in 2018). Anticompetitive concerted actions constituted 39 % of all competition law infringements which is by 19 % more than in 2018. 775 decisions (97 %) were related to bid-rigging (250 decisions (95 %) in 2018). The total amount of fines imposed for bid rigging was more than UAH 1.5 B (approximately EUR 51 M). It is expected that the volume of state procurement related work may be distributed and handled by the Committee more efficiently after the new regulations on state procurement take effect this year and the antimonopoly reform legislation package is adopted hopefully by the end of 2020.

Ongoing investigations

17. Currently there is a couple of ongoing cases which may result in imposition of significant fines and are worth mentioning due to their potential impact on Ukrainian practices.
18. The Committee initiated abuse of dominance case against Ukrzaliznytsia, the Ukrainian state-owned railroad monopolist. The case was triggered by Ukrzaliznytsia`s de facto refusal to operate through the so-called “low-activity” stations and offering to supply freight cars to such stations only for an additional fee. This case is particularly interesting from the perspective that the

affected companies may be eligible to claim double damages from Ukrzaliznytsia, which had been already done by large Ukrainian exporter Nibulon a few years ago in another abuse of dominance case in the amount of UAH 120 M (approximately EUR 4 M).

19. There are also two abuse of dominance cases against MHP Group (Ukrainian chicken meat market leader). In mentioned cases the Committee claimed that MHP Group's actions led to restriction of competition and overpricing. This case was among the first investigations to follow numerous Committee's public announcements, which revealed the Committee's strategy to take a closer look at the FMCG markets in Ukraine (tobacco case may be also considered to serve as a proof of the chosen strategy).
20. According to the Report, in 2020 the Committee was going to focus its investigation efforts on the following markets: pharmaceuticals (which will have a particular importance due to the widespread of COVID-19; it is also obvious now that such efforts will be expanded to the medical devices sector), electricity, oil and natural gas, transportation (including air, seaports and road transportation), state property privatization (likely to be postponed till the next year due to COVID-19 pandemic and its economic consequences) and FMCG (both suppliers and retailers will be in the focus of Committee's attention). The Committee also plans to follow thoroughly the procurement procedures and commercial practices of the largest state-owned companies.
21. Generally, one may conclude that the Committee's work results showed some positive dynamics in 2019. Although not that swiftly, the Committee certainly develops and demonstrates more diversified portfolio of investigations, market inquiries and new approaches, which should be properly addressed by additional competition compliance measures for Ukrainian and foreign businesses to which Ukrainian competition rules apply.

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