

ЮРИДИЧЕСКАЯ ПРАКТИКА

No. 38 (926) International Relations dated September 22, 2015 (Accent)

Expert campaign

Leading international experts: new antimonopoly policy will make the authorities' work more open and transparent



Competition Development Foundation is ready to support AMCU's positive initiatives and to delegate its experts. PICTURE (from left to right) Oleksandr MELNYCHENKO, Hassan QAQAYA, Segiy TSIVKACH and Russell DAMTOFT

Recently, the Antimonopoly Committee of Ukraine (AMCU) has developed recommendational explanations about fines imposing policy. To discuss that initiative, the Competition Development Foundation (CDF) arranged the round table.

Issues of transparency and openness of AMCU work were discussed in the JP interview by competition experts: Associate Director, Office of International Affairs at US Federal Trade Commission **Russell Damtoft**, CDF Expert Council Member and the Head of Competition Law and Consumer Policies Branch at UNCTAD (1998-2015) **Hassan Qaqaya**, CDF Co-Chairs **Sergiy Tsivkach** and **Oleksandr Melnychenko**.

- What do you think about that AMCU initiative? Has the Committee selected the right way or may be it needs any other approach?

Russell Damtoft (RD): During the round table arranged by Competition Development Foundation, AMCU management, international experts, national business representatives and lawyers had effective discussion about new AMCU initiatives. I believe that AMCU's desire to ensure transparent competition friendly policy and approaches is the correct step of the regulator. Antimonopoly laws and policy AMCU pursues should lead to effectiveness improvement, i.e. lower prices and wider choice for consumers. Moreover, the more opinions of interested parties will be considered by competition relations system, the better it will work. In USA, we do not try to "monopolize" market work concept, instead, we have continuous dialog with all interested parties. Moreover, during investigation, there is continuous communication among the company representatives subject to investigation and the authority officials so to ensure that such company representatives know what the company is charged with and are able to argue such charge.

Hassan Qaqaya (HQ): Previously, the business used to blame unclear and unpredictable penalty system as well as the absence of objective criteria for penalties calculation: fines were either too high, either too small. The event arranged by the Competition Development Foundation showed that the strategy selected by new AMCU management provides for ensuring dialog between the regulator and business community, and to make the authorities' work more open. In particular, the regulator's goal is to ensure more transparent fines calculation procedure using advanced international standards and practices applied in USA and EU.

Oleksandr Melnychenko (O.M.): Initiatives offered by the Committee are really welcomed. They develop basical competition legislation principles and make relations between AMCU and business more legally clear. It is very important that Ukrainian methodology is developed on the basis of the advanced experience of European and worldwide agencies. When such approaches are implemented, it will allow to improve the credibility to Ukrainian law enforcement practice in competition and antimonopoly regulation sphere.

- What do you think about the amount of offered fines?

R.D.: Now, I'm not going to discuss certain amounts of fines but I can say that it is very important to ensure fines are high enough to prevent competition laws violations. It is only up to AMCU to decide on certain amount

of fine in each separate case.

H.Q.: The aim of certain legislation and application procedure is not to boost the coffers but to defend and develop competition and to make economic more competitive and open which will positively influence the consumers' wealth. However, the penalty system shall have deterrent effect because violation of competition rules may be very profitable for separate companies but very harmful for economics in general. Also, I believe that the amounts of fines shall be differentiated by types depending on law violation types. For example, cartels shall be punished by larger fines than abuses of a monopolistic (dominant) position, and merger rules violation by even lower fines.

Sergiy Tsivkach (S.Ts.): I would like to underline that offered methodology explained the procedure for fines determination within the scope previously established by the Law of Ukraine "On Protection of Economic Competition". One of the key innovations is imposition fines considering amount of violation-related sales, unlike previous practice when fines were imposed depending general amount of the company sales. All in all, the amounts of fines correspond to European practice.

- Is the similar world practice when antimonopoly authorities approve such explanations?

H.Q.: During the discussion at the event, we heard that the USA had similar guidelines as well as the United Kingdom and Germany. I think that almost all competition authorities have strict guidelines about imposing fines. And clearness is the only aim of that. Also, it is very important for business community to have certain clearness about the laws to adapt to existing environment. Besides, the issue who will actually pay fine imposed on breaching company, shall be discussed. A company may raise prices actually putting the burden of fines on consumers, in whole or partially. So, fines are working but not the only instrument used to defend the competition.

R.D.: The culture of competition and business in Ukraine can differ from other countries, including the USA and the European states and in connection with this there can be a misunderstanding of that thin line between the intensive competition which we encourage, and the anti-competition practices limiting the competition which we want to warn. Penalties are useful to control the anti-competition behavior and should be up to standard, allowing to constraint such actions of businessmen. But control is not the only goal. The competition law should facilitate recovering of the competition, where it suffered from anti-competition practice. The explanation for business by means of decision-making and communications is not less important, what behavior is considered lawful and what is not. The competitive business environment will serve for the benefit of Ukrainian entrepreneurs as it will allow them to better compete on the EU market and other markets of the world as well. When business meets strong competition in the country, it becomes powerful and consequently shows better results in the competition in the worldwide markets. I consider that the choice of an active position in this issue, made by the AMCU management, inspires and will lead to improvement of the national markets. The competition authority can be the only interested institution with the corresponding powers, capable to become the "voice" of competition in national political quarters.

- Is publication of AMCU decisions really important?

O.M.: Publication of decisions may be the key factor of foreseeability and understanding of the Committee's policy. When the business and lawyers are able to learn and analyze such decisions, that will improve the level of compliance with competition legislation among fair businessmen. It is particularly important when the subject of analysis become Committee's decisions about strategic and socially important markets of the country: energy supply, food, transport, communications, pharmacy and health. We do hope that companies will cooperate with AMCU and with their business colleagues respectively, and will not abuse their right of determination submitting to the Committee information as confidential or restricted considering that such information may not be generally known.

- Will the antimonopoly process parties be able to refer in court processes to AMCU explanations about fines? Will it be possible to appeal the document in court?

S.Ts.: Yes, it is possible if AMCU in its decisions will apply certain provisions from recommendatory explanations. If the Committee refers in its decision to explanation clause where, for example, the basis fine amount is determined with extenuating or aggravating circumstances and makes mistakes in certain calculations, of course, it may be used by the party as the basis for appellation. At the same time, availability of two agencies in justice responsible for competition disputes (administrative and commercial laws) may lead to

discrepancies in recommendation explanations application approved by the Committee.

As for the second part of question, if shortly, then yes, because any AMCU decision may be appealed in court. And the said document shall come into force by the decision of the Committee as collegiate authority.

- Is that document a regulation?

O.M.: Of course, not. At the same time, that document was approved in strict compliance with Art. 4 of the Law on protection of economic competition and its target was common application of competition legislation provisions. Previously, the Committee had applied that form of competition law enforcement but as a rule, they were regulator's internal documents. Now, any competition lawyer may use that instrument in his/her daily practice.

- In your opinion, which recommendational explanations AMCU shall approve in the near future?

S.Ts.: Most likely, the most lawyers' attention may be drawn to the Committee's explanations in the following law enforcement AMCU activities: anticompetitive actions of bodies of state power, anticompetitive concerted practices of economic entities and concentration of economic entities. Competition Development Foundation is ready to support AMCU's positive initiatives and to delegate its experts to the respective working groups.

*(Conversation was held by **Oleksandr BILDIN**,
"Judicial Practice")*



Издательство ЮРИДИЧЕСКАЯ ПРАКТИКА © 1997 - 2015