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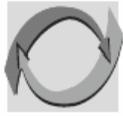


9<sup>th</sup> ASCOLA Conference Warsaw 2014 on  
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

# **Enforcement of Competition Rules in the Association Agreement between EU & Ukraine**

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CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW  
Warsaw, 26–28 June 2014

# **Enforcement of Competition Rules in the Association Agreement between EU & Ukraine**

by

*Kseniya Smyrnova*<sup>1</sup>

## **Summary**

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#### **I. Preliminary process of harmonization of Ukrainian competition law**

In Ukraine, which declared independence and embarked on democratic reforms, there is a transition from central planning economy to economic liberalization, which leads to transform of legal regulation of competition.

According to that suggests UNCTAD, compared with other countries with competition protection system, Ukraine has begun the process of adopting competition laws and the formation of its implementation in a very difficult initial conditions. Economic and political conditions in Ukraine and other former Soviet republics have been particularly tough. We can be convinced of that Ukraine and other former Soviet republics, the oldest had the slightest prospects for a successful transition to the new regime among all countries involved in the creation of Protection of Competition in the period from 1990 to the present time.

The process of harmonization of legislation with EU law Ukraine is one of the key areas of cooperation. It defines the conditions for the further deepening of economic and sectorial cooperation and creates legal preconditions for the next stage of European economic integration. Nevertheless norms in Partnership & Cooperation Agreement (PCA) that was signed in 1994, are the norms of “soft law”, there were no strict obligations on harmonization of Ukrainian legislation, but thus the special Art. 51 PCA stressed the competition as a one of the priorities of harmonization.

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A necessary condition for the functioning of a market economy is its effective legal regulation. Legal regulation of competition with the aim to determine the bona fide business relationship undistorted market is one of the fundamental principles of a free market economy. So the competition law seems to be the core element of free market economy, especially under the condition if its developing by setting up a free trade area between Ukraine & the EU.

Due to the integration policy of Ukraine, its accession to the WTO, signing of the Association Agreement (Agreement was signed in March 2014 partially in the form of political part of it, but with the commitments to sign economic part in nearest future) the review and analysis of antitrust policy EU is becoming increasingly important for Ukraine.

The process of harmonization of competition law of Ukraine started on the beginning of 2000-s, it was illustrated by the new Law of Ukraine “On protection of Economic Competition” (which was entered into force in 2002) that was elaborated under the main principles of the EU Competition Law. This Law was constantly amended to improve the system for monitoring compliance with the rules of competition. By the way almost all changes & other acts of Antimonopoly Committee of Ukraine (AMCU) were elaborated due to the EU competition law. The very great illustration of it is the Act of immunity of fines that was adopted in 2012 under the framework norm of the Law “On protection of Economic Protection”.

## **II. Association Agreement between EU & Ukraine: new step forward**

Termination of the PCA leads to a new agreement on cooperation between the parties. Discussion around of what was to become the new enhanced agreement between Ukraine and the European Union to replace the PCA ended in 2008, due to the Paris Summit Ukraine-EU, it was determined that this should be the association agreement. 19 December 2011 at a summit in Kiev, Ukraine and the EU representatives announced the completion of negotiations on the Association Agreement (AA). Officially parties initialized the AA on the 30<sup>th</sup> of March 2012. Then national legislation (including rules on competition) was continuously amended with the view of future implementation of AA. Association Agenda (2009, in revised versions 2013) as a special bilateral document stipulates the necessary steps on future harmonization of Ukrainian legislation with the EU Law almost in all spheres.

Signed on March 21, 2014 the political part of the Association Agreement (AA) specifies in its preamble that the process of adaptation contribute to the gradual economic integration and deepening of political association between the parties. In the very preamble of this issue is given much attention, including the leading role is defined as a mechanism for

adapting the regulatory implementation of a comprehensive and deep free trade area between Ukraine and the European Union. It is noteworthy that in the text of the AA, the term “harmonization” is not used widely, instead we can see the term "adaptation", "legal convergence", "recognition of international standards", "transposition" and so on. The vast majority of researchers use the term "harmonization" as an umbrella term.

Comparing current AA with Ukraine with agreements with others countries we can suppose that this AA is a “four generation agreement”, the first of a new generation of Association Agreements between the EU and the Eastern Partnership countries with the deep & comprehensive free trade area. Then, the “deep” and “comprehensive” character of the FTA will be explored in order to conclude that the EU-Ukraine DCFTA is the first of a new generation of FTAs concluded by the EU which will, once entered into force, gradually and partially integrate Ukraine into the EU Internal Market, under the condition that Ukraine approximates its legislation to the EU *acquis communautaire*.

The “deep” character of the DCFTA on the other hand refers to Ukraine’s commitment to approximate its legislation to the *acquis communautaire* in order to achieve economic integration in the EU Internal Market. The DCFTA contains numerous legislative approximation clauses according to which Ukraine must approximate its domestic legislation or standards to the EU *acquis*. Title IV of the Association Agreement, illustrates that this agreement not only covers the traditional FTA areas such as market access for goods, but also includes public procurement, IPR, competition, energy, etc.

### **1. Substantial aspects of implementation in competition regulation**

So, the AA focuses on the main principles of the undertaking’s conduct on the market that can impede, restrict or distort the competition (including the prohibited conduct under art. 101 (1) TFEU, abuse of dominant position & certain concentrations that result in monopolization or a substantial restriction of competition in the market in the territory of either Party). Honestly saying, those provisions are implemented into Ukrainian legislation.

Article 1 of AA states that the purpose of the association is “to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market ..... and to support Ukrainian efforts to complete the transition into a functioning market economy also through the progressive approximation of its legislation to that of the Union”. Basic principles of undistorted competition in a market economy is one of the key principles of a deep and comprehensive free trade agreement that is established in accordance with Section IV Trade and issues related to trade.

Competition issues are included into a separate Chapter 10 of the Treaty (Articles 253 - 267), which consists of two sections: antitrust & merger; and state aid. By the way this division is almost typical for the EU law. Association Agreement was attached by a special Annex 23 which contains explanations of the basic definitions relating to competition. In particular, the following glossary contains definitions such as "Public undertakings", "exclusive rights", "Service of general economic interest ("SGEI")", "State monopoly of commercial character", "Important project in the common European interest or in the common interest of the Parties" and so on. As defined in the Annex 23, this glossary is not legally binding and is used exclusively for the interpretation of the provisions of the articles of the Agreement. This practice of different legal norms from binding point of view of the Agreement and its annexes is new in the bilateral relationship, however, is acceptable to the EU law. Interpretation of certain definitions, concepts, principles must be consistent in order to achieve a single "unified" legal regulation of relations.

The Agreement identifies the key practices and economic transactions that could potentially adversely affect the functioning of markets and undermine the benefits of trade liberalization established between the parties. These anti-competitive practices are a) agreements and concerted practices between undertakings, which have the purpose or effect of impeding, restricting, distorting or substantially lessening competition in the territory of either Party; b) the abuse by one or more undertakings of a dominant position in the territory of either Party; c) concentrations between undertakings, which result in monopolization or a substantial restriction of competition in the market in the territory of either Party (Art. 254 AA)

Generally, Ukrainian legislation plays the fundamental principles of fair competition and prohibits the foregoing acts that are clearly enshrined in Art. 42 para 3 of the Constitution of Ukraine which ensures the protection of competition in entrepreneurial activity. The types and limits of monopolies are determined by law. In other words, Art. 254 AA reflected in the laws and regulations of by the AMC.

In particular, in accordance with domestic law Art. 254AA refers to the concepts of "anticompetitive concerted actions", which are understood as concerted actions that have led or may lead to the prevention, elimination or restriction of competition (Art. 6 of the Law of Ukraine "On Protection of Economic Competition"), "Abuse of monopoly (dominant) position in the market" which refers to the acts or omissions of an entity that holds a monopoly (dominant) position in the market that have led or may lead to the prevention, elimination or restriction of competition or infringement of interests of other undertakings or

consumers, which would be impossible conditions of substantial competition in the market (Article 13 of the Law); and the notion of "control of concentration," which is defined in Art. 22 of the Law.

It is noted that the parties in determining the importance of the implementation of the guidelines set out in Art. 254, apply them to the "non-discriminatory transparent manner, respecting the principles of procedural fairness and the right to protection" (Article 255 AA).

Besides executed at that moment the Association Agreement emphasizes the existence of legal gaps in the process of harmonization and clearly defines the requirements that must be incorporated into national law and the terms of their performance.

A special article (Article 256) of the Association Agreement is devoted to the substantial aspects of approximation of Ukraine to European Union law on the protection of competition and the timing of its implementation. Conventionally, these substantial requirements can be grouped according to the areas to which they relate, in particular, the procedural aspects of antitrust law, the legal regime of concerted action control concentration, the activity of state monopolies and state aid.

1. In the area of improving the *procedural aspects* of the application of the competition it is important to implement the principle of transparency and argumentation making AMC and courts in cases of concerted actions and concentration and their timely publication. So, for three years from the date of entry into force of the Law of Ukraine "On Protection of Economic Competition" must be supplemented AMC obligation to publish decisions in cases of violation of the legislation on protection of economic competition, and making for the control of concentrations (para 1, 3 Art. 256 AA).

The current Art. 48 Law of Ukraine "On Protection of Economic Competition" as well as Law of Ukraine "On the AMC" does not define duty AMC officially publish its decisions. This commitment stems from Art. 256 para 1 of Association Agreement, which clearly stated the rule to be implemented in the legislation of Ukraine, namely Art. 30 Regulation No 1/2003 of 16 December 2002.

Also there is a strict obligation to AMC to adopt and publish a document explaining the principles to be used in the setting of any pecuniary sanctions imposed for infringements of the competition laws; and a document explaining the principles used in the assessment of horizontal mergers.

2. The following requirements on the approximation of the laws of Ukraine to EU law are provisions for the mandatory implementation of *rules concerning exemptions from prohibited anticompetitive conduct for vertical agreements*. Article 10 of the Law of Ukraine

"On Protection of Economic Competition" contains general requirements for concerted action as may be permitted. Instead, the special act (Procedure Applicable to Submission of Applications for Authorization for Concerted Practices of Economic Entities (Procedure for Concerted Practices dated 2002) on the procedure for submission of applications to the AMC for granting permission for concerted actions of undertakings presented a detailed procedure for proceedings to grant prior authorization for concerted action. In the EU, common practice is to provide the so-called "block exemptions" from anti-competitive agreements.

In Ukraine the practice of Block Exemption System by BER (Regulations No 330/2010) for vertical agreements generally is absent. For certain types of horizontal agreements are subject to typical requirements for concerted actions of economic entities on the specialization of production, compliance with which enables these concerted actions without the permission of the AMC 2008. Article 256 para 3 of the Association Agreement provides a direct link to the specified Regulations, which must be implemented in the Ukrainian legislation within three years after the entry into force of this Agreement.

In the scope of enforcement of anticompetitive acts Association Agreement emphasizes the strict necessity to fill in to the Ukrainian legislation the system of block exemptions for agreements on technology transfer, which is provided in Regulation 772/2004 of 27 April 2004. For full implementation is given as three years after the entry into force of the Agreement.

3. Association Agreement contains additional requirements for the improvement of *legal regulation of concentrations*. Thus, Art. 256 para 2 of the Agreement provides links to some articles of Regulation 139/2004 of 20 January 2004 (ie Art. 1 and Art. 5 (1) and (2)), to be implemented into national law within three years from the entry into force of this Agreement.

It should be noted that the practice of the AMC under Articles 22 and 23 of the Law "On Protection of Economic Protection" is significantly different from the practice of the European Commission in the sphere of control of concentrations.

The Law specifies that the concentration can be made only if the prior clearance (authorization) of transactions obtained in cases stipulated by law, if the total cost of assets or the total product sales of the participants in the concentration, with relations of control being taken into account, in the last financial year, including those abroad, exceed the sum equivalent to 12 mln euros defined in accordance with the official exchange rate to be established by the National Bank of Ukraine and to be effective on the last day of the financial year while the assets (total assets) or the sales (total sales) of products, including

those abroad, of at least two participants in the concentration, with relations of control being taken into account, exceed the sum equivalent to 1 mln euros, and • the assets (total assets) or the sales (total sales) of products, in Ukraine only, of at least one participant in the concentration, with relations of control being taken into account, exceed the sum equivalent to 1 mln euros. (Art. 24 of the Law). Another possible case of a clearance is such a transaction as a share of the market of products of any undertaking concerned in concentration, taking into account the relationship of control, is more than 35 per cent in the relevant market.

Requirements of AA can completely change the financial and economic indicators of the concentration subject to mandatory "authorization" competition authority.

As we can see while comparing with the EU control of concentration, the analysis of the relevant market share held by the concentration, is not determinative for the EU practice. Instead, the financial indicators used in the Ukrainian Law, comparing with the European law are differ and cause an increased number of requests to the AMC for permission to conduct transactions on the merger by medium sized entities. It can be assumed that harmonization of control of concentrations primarily aimed at reducing the number of applications entities permission and effort competition authorities should focus on those transactions that can actually significantly change the structure of the market for a long time.

Also, the Association Agreement refers to the improvement of the mechanism of calculation of financial indicators in control of concentrations. In Ukraine, the procedure for calculating the parameters of concentration, which is an annex to the Regulation on the concentration, it is characterized by detailed analysis of performance and needs to be improved in accordance with Art. 5 of Regulation 139/2004.

Particular requirements contained in the Agreement to bring the activities of *state monopolies* in line with the basic principles of competition law. Thus, Art. 258 AA ensures to adjust state monopolies of a commercial character within a period of five years from the entry into force of this Agreement, so as to ensure that no discriminatory measures regarding the conditions under which goods are procured and marketed exist between natural and legal persons of the Parties.

## **2. Improvement of enforcement of competition rules**

But the system of unfair & transparent enforcement of its provisions is the main practical gap in Ukraine. Thus, the whole range of competition rules in Association Agreement (AA) are introduced in the text of the Agreement unlike other spheres of economic cooperation that are represented in detailed schemes of harmonization supplemented in the annexes.

The main difficulties are faced on the process of effective enforcement of the above-mentioned competition laws in a transparent, timely and non-discriminatory manner, respecting the principles of procedural fairness and rights of defense. With the aim to improve the transparent system of enforcement of competition rules Art. 256 of AA includes detailed scheme of implementation of specific provisions within three years of the entry into force of this Agreement.

This means to amend current Ukrainian laws with the appropriate provisions. Mainly it concerns the improving of decision making process by the Antimonopoly Committee of Ukraine, the obligation to implement block exemptions system for categories of vertical agreements and concerted practices (in accordance with the Regulation 330/2010) & for categories of technology transfer agreements (Regulation 772/2004). Also the financial criteria on control of concentration should be changed (under the convergence with the criteria under Regulation 139/2004).

### **3. State aid regulation in Ukraine: gaps & tendencies**

The most vulnerable area is the legal regulation of state aid. It should be noted that the issue of harmonization of state aid rose in both bilateral documents: Action Plan (2005), as well as Association Agenda (2009, in revised version 2013).

Special attention in Association Agreement is paid to state aid regulation that is not regulated in Ukraine. Art. 262 AA promotes that “any aid granted by Ukraine or the Member States of the European Union through state resources which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods is incompatible with the proper functioning of this Agreement insofar as it may affect trade between the Parties”. Moreover Art. 262 provides the strict obligation to adopt special act on the system of monitoring & control of state aid schemes under the Art. 107 TFEU & implemented regulations. According to this analogy Association Agreement also contains requirements under which state aid can be compatible and can be recognized as valid. In particular, the assistance provided for the purpose of providing consumers with socially important goods, provided that such assistance is not discriminatory in relation to the place of origin of goods; and to redress to victims of man-made emergencies and natural disasters. Such assistance is considered acceptable (paragraph 2 of Art. 262 Agreement). The second category of exceptions allows following types of state aid with the aim to promote economic and social development of the regions in which the standard of living is low and the unemployment rate - high; implementation of national programs or solving social and economic problems of national character; facilitate the development of certain types of

business activities or undertakings that carry out activities in certain economic areas, if it does not conflict with other applicable international agreements; maintenance and preservation of the national cultural heritage, whose influence on competition is negligible (para 3 Art. 262 Agreement). In accordance with the EU practice second group exemptions is different from the previous one that for such removal is necessary not only relevant notification, but the decision of the European Commission, which has exclusive authority to resolve the issue. The Association Agreement states the need to introduce little help legal mechanism that a priori does not make a significant impact on trade between the Parties. Art. 263 states that any aid below the threshold of EUR 200.000 per undertaking over three years does not need to be notified.

It's worth stressing that the state aid regulation under Association Agreement will be applied using as sources of interpretation the criteria arising from the application of Articles 106, 107 and 93 of the TFEU, including the relevant jurisprudence of the Court of Justice of the European Union, as well as relevant secondary legislation, frameworks, guidelines and other administrative acts in force in the Union.

Thus, provisions on state aid should be implemented within five years from the entry into force of this Agreement. By the way, the draft Law "On State Aid to Undertakings" was elaborated with the group of Ukrainian & European experts & was transmitted to the legislative body (Verhovna Rada) in April 2013, but it's very difficult to envisage the further destiny of this draft.

Provisions of this draft law fully reflect all the requirements of the Association Agreement. In case of adopting this law the Art. 267 AA will be fully implemented. It is expected that in the event of approval of the draft law by Verkhovna Rada of Ukraine of its entry into force will take place three years after the official publication, as stated in the final provisions of the draft law. In fact, this term coincides with the requirements contained in the Association Agreement.

According to the draft law "On State Aid...» Antimonopoly Committee of Ukraine becomes the special Authority receive notifications of new state aid to providers of such aid, taking them to the examination or rejection of their proceedings; determining membership of a State aid measures to support businesses within the resources of the State or local resources, evaluating the admissibility of state aid on competition, decision-making; collection and analysis of information on measures to support businesses within the state or local resources, etc. (Art. 8 of the draft law).

The draft law regulates state aid monitoring, the procedural aspects of notifications to AMC for determining misuse of state aid and the procedure for its recovery.

We should stressed on the provision of AA (Art. 267 para 3(a)) on fact that during the first five years after the entry into force of this Agreement, any public aid granted by Ukraine shall be assessed taking into account the fact that Ukraine shall be regarded as an area where the standard of living is abnormally low or where there is serious underemployment (under Art. 107(3)(a) TFEU).

### **III. Some conclusions**

From the analyzed areas of approximation Ukrainian competition legislation to the EU law in accordance with the requirements of the Association Agreement can be concluded that the main drawback of Ukrainian legal system is the lack of proper enforcement levels and improving procedures transparent decision-making, including through the publication of the decisions of the national mechanism for antitrust body.

A necessary condition for harmonized system of regulation of competition there is cooperation and coordination, including the exchange of information between the relevant national authorities of Ukraine, the European Union and its Member States to further enhance effective competition law enforcement, and to fulfil the objectives of this Agreement through the promotion of competition and the curtailment of anti-competitive business conduct or anticompetitive transactions, as indicated by Art. 259 of the Agreement. In addition, this article focuses on the fact that such cooperation shall not prevent the authorities from taking independent decisions.

The main instrument of an effective process of harmonization and foster mutual understanding of the parties in competition are consulting, implementation of which is foreseen in Art. 260 Agreement. A process of consultation will be used during the interpretation or application of competition rules. However, this is not a firm commitment, and intention of the parties to provide non-confidential information in order to improve the consultation process.

In particular, it should be noted that the scope of the feature according to the Association Agreement is that none of the parties to the Agreement may not resort to dispute settlement procedures of the questions referred to the field of competition (Article 261 of the Agreement). The only obligation on the terms of harmonization of Ukrainian legislation in accordance with Art. 256 Agreement may be subject to dispute settlement procedures. This means that the provisions of the Association Agreement are determined in order imperative principles of operation of free competition in the market in terms of free trade. Prohibition of

anticompetitive practices in the form of concerted action or agreements, abuse of dominance, and the principle of control of concentrations *are the basic elements of the implementation of free trade.*

State aid provided by the companies may distort competition by giving advantages to certain companies or industries. Because state aid is considered a separate EU law and is subject to strict controls. In this regard, special attention is paid to the Association Agreement is a question of state aid.

Harmonization is a process of convergence towards the principles of another legal system, through which they undergo convergence. Thus, attention is paid not only to the material content of the rules is taken, but the complex nature of its practical application. In this respect, a crucial importance of the Court of the European Union, which interprets and explains the features of the implementation of European Union law.

To implement these commitments Ukraine has for three years after the entry into force of the Agreement adapt its legislation in this area with EU legislation and to establish appropriate and effective institutional framework, including operating an independent body with the necessary powers, the system of control provision and use of public assistance, including the provision of relevant statistical information.