OECD Reviews of Competition Law and Policy

# UKRAINE

2016

# OECD REVIEWS OF COMPETITION LAW AND POLICY

# UKRAINE

## 2016

**A report on the implementation of previous recommendations**

Please cite this publication as:
OECD (2016), *OECD Reviews of Competition Law and Policy: Ukraine 2016 - A Report on the Implementation of Previous Recommendations*

*The OECD has two official languages: English and French.*
*The English version of this report is the only official one.*

# FOREWORD

Over the years, OECD competition law and policy peer reviews have proved to be a valuable tool for countries, whether OECD members or not, to reform, and strengthen their competition frameworks. It is anticipated that the Review of Ukraine carries on this tradition.

A peer review is a two stage process: first, a report is produced by the OECD Secretariat on the current state of the country's competition framework and its enforcement practice; and second, a peer review based on the report is performed either in the Competition Committee or the OECD Global Forum on Competition. Ukraine underwent its peer review during the Competition Committee meeting held at the OECD in November 2016.

This Review is somewhat different from a standard OECD competition peer review as its objective is to review the Antimonopoly Committee's (AMC) progress in implementing the recommendations found in the peer reviews of the OECD (2008) and UNCTAD (2013) – see Box 1 - with a particular emphasis on post-Euromaidan[1] developments regarding the competition regime, institutional arrangements, and the work product. Relevant recommendations from the peer reviews are reiterated. The report does not hesitate to issue new recommendations in order to ensure that the AMC is given a coherent roadmap to guide reform efforts.

This report is timely as competition regains importance as a driver for Ukraine's economic growth. However, recovery from the extended period of political and economic turmoil which impeded implementation of the peer

[1] The Ukrainian revolution of 2014 (also known as the Euromaidan Revolution) took place in early 2014, when a series of violent events in the capital, Kyiv, culminated in the ousting of Ukrainian President, Victor Yanukovych. This was immediately followed by a series of changes in Ukraine's sociopolitical system, including the formation of a new interim government, the restoration of the previous constitution, and a call to hold impromptu presidential elections within months.

review recommendations and weakened enforcement will be challenging. The current legal, institutional and budgetary frameworks pose severe constraints on a successful recovery. However, the commitment of both the AMC's leadership and staff to reform are reasons for optimism.

The recommendations in the report focus *inter alia* on:

- the urgent need to increase budget, remuneration and technical equipment in absolute terms, as well as, in relation to the AMC's ever increasing tasks;
- an effective enforcement framework to punish and deter hard core cartels and bid rigging;
- prioritisation of the AMC's work and reconsideration of the resource and task allocation between the central and the regional offices;
- increased transparency on enforcement priorities but also within enforcement procedures;
- advocacy directed towards the government, regulators, the business community and the general public.

This report was undertaken at the request of the government of Ukraine. The lead reviewers were Ms. Edith Ramirez, US FTC; Ms. Michal Halperin, Israel; and Mr. Tibor Menyhart, Slovak Republic. The report was prepared by Mr. Stephan Luciw and Mr. William Kovacic working as consultants for the OECD Secretariat, with the support of Mr. Pedro Caro de Sousa, Ms. Adi Egozi, Ms. Lynn Robertson and Ms. Sabine Zigelski of the OECD Secretariat. The OECD would like to thank the US FTC and the United States Agency for International Development, the Canadian Competition Bureau and the Slovak Republic for their support, both financial and in-kind, which made this project possible.

## TABLE OF CONTENTS



### Tables

## Boxes



## Charts

## Executive Summary

Ukraine's Antimonopoly Committee is today characterised by a renewed commitment to enforcing a competition regime aligned with international standards and best practice. Emerging from a history of economic and political turmoil, the AMC does, however, face several challenges that have the potential to undermine its effectiveness despite the willingness of AMC leadership and staff to devote the time, effort and skills necessary to improve the competition framework.

In the early 1990's, as the country engaged in the transition from a centrally planned to a market economy, it appeared that the AMC and Ukraine's competition regime were on track to evolve in accordance with internationally recognised standards. This trajectory was interrupted by the severe political and economic turmoil that hit Ukraine in 2013 and still reverberates today. The AMC's budget was slashed, and enforcement stalled taking a severe toll on the agency's staff. The AMC lacked the capacity to implement many of the Recommendations issued in previous peer reviews by the OECD (2008) and UNCTAD (2012).

Today, the AMC seems to be back on track. Working with international partners, the AMC is trying to rebuild substantive programmes and align Ukrainian competition law and policy with international standards and practices. This Review aims to take stock of the implementation of the recommendations of previous reports. It considers progress in the implementation of these recommendations; and the relevancy of outstanding recommendations. Additional recommendations are also provided to ensure that the AMC has a comprehensive roadmap to achieve an effective competition law regime.

The AMC participated actively in this Review as did other branches of the government of Ukraine. During an on-site visit the Review team met with a wide range of government and non-governmental representatives, including but not limited to: Antimonopoly Committee of Ukraine (central office and regional offices); Ministry of Economic Development and Trade of Ukraine; National Commission for State Energy and Public Utilities Regulation; National Commission for the State Regulation of Communications and Informatization ; Business Ombudsman Council; Centre for Economic Studies; the EU Project for the Harmonization of Public Procurement System in Ukraine with EU Standards; American Chamber of Commerce; the Competition Development Foundation; and the Civil Council of the Antimonopoly Committee. Of note, the AMC also hosted one member of the Review team for the duration of this project.

During the Competition Committee meetings at the OECD in Paris (November 2016), three countries, USA (FTC), Israel and the Slovak Republic, acted as lead examiners. The heads of these agencies peer reviewed Ukraine using this Review as a basis for their examination. The Chairman of the AMC, Yuriy Terentyev, answered questions form the lead examiners and provided his own assessment of Ukraine's competition law and enforcement and challenges.

The OECD's recommendations address resource constraints and independence; the need for an improved legal framework for hard core cartels and bid rigging; elimination of conflicts with the Commercial Code; as well as, explicit and transparent priority setting and processes within the AMC.

**Resource constraints and independence of the AMC**

The AMC is one of the most poorly funded government agencies in Ukraine. Staff earn on average less than USD 200 (United States dollar) per month. The number of staff is not adequate to accomplish the growing mandate of the AMC, which for example, now includes public procurement appeals and the enforcement of the law on state aid. The review repeats the recommendations of previous reports to improve the funding of the AMC significantly and to increase staff and funding in proportion to the additional and important tasks of the AMC.

Appointment and dismissal rules of the Chairman and the State Commissioners are not transparent. Clear and merit based appointment procedures of the AMC staff and leadership, along with budgetary autonomy, will enable the AMC to accomplish its mandate and deliver high quality services to the Ukrainian society independently of stakeholder influence.

**Improved legal framework for the prosecution of hard core cartels and bid rigging**

Hard core cartels and bid rigging are acknowledged universally as extremely harmful activities that must be prevented and prosecuted. The AMC lacks many of the tools considered as essential for effective prosecution and deterrence, inter alia: limited powers to seize documents and to interview individuals; no searches of private premises; no provisions for subsequent applicants in the leniency regime; no sanctions on individuals for competition law infringements; and, finally, no effective fine collection system. The Review recommends and repeats previous recommendations to create the required legal framework for an effective cartel regime and to enable the AMC to enforce its decisions directly.

**Elimination of conflicts with the Commercial Code**

The Commercial Code contains a number of provisions that conflict with Ukraine's Antimonopoly Law creating uncertainty, and inhibiting both foreign investment and legitimate business co-operation. The provisions in question include, an unconditional ban on anti-competitive concerted actions without efficiency considerations; and, a requirement for AMC approval of any acquisition of control over another business entity, regardless of its size. This Review repeats and reinforces the recommendation found in previous peer reviews to remove these conflicts.

**Improve priority setting and increase transparency in AMC procedures**

Severe budgetary restraints coupled with an extensive workload call for a strong focus on enforcement priorities and the careful use of discretion.

Furthermore, the AMC's enforcement priorities and procedures must be transparent in order to generate trust and understanding with the private sector, improve AMC's decisions and, more generally, foster a culture of competition across all levels of Ukraine society. The Review reiterates the peer reviews' recommendations to, first, strengthen the AMC's discretion to take up cases; second, to set priorities; and third, to increase communication efforts aimed at both the business community, and society at large.

## 1. Introduction

In the early 1990s, Ukraine was one of many countries to create a new competition law system to facilitate the transition from a centrally planned to a market-based economy. In many ways, the beginnings of Ukraine's competition regime and the Antimonopoly Committee of Ukraine (AMC) were promising. Amid extremely difficult initial conditions – notably, decades-long pervasive state control of the economy and the absence of institutions needed to support a market economy – the AMC achieved genuine success in attracting strong leadership, building a capable staff, and developing programmes to address private and public impediments to competition.

As the AMC reached its 20th anniversary, the promise of a good start had evaporated, and the nation's competition law system faced grave dangers. Severe political and economic turmoil beset Ukraine in 2013, and the shocks still reverberate today. For an 18-month period, the AMC was headed by an acting chair with uncertain authority and frail political support. The agency's board functioned with five commissioners, four fewer than the number specified in the Antimonopoly Law. Budget cuts of roughly 70 percent caused a haemorrhaging of experienced managers and professional staff. The fulfilment of the recommendations set out in peer reviews conducted by OECD in 2008 and UNCTAD in 2013 became impossible. The AMC nearly foundered.

Today, the AMC can be seen once again as a start-up institution with a renewed commitment to achieve the aims of the 1990s competition reforms. In 2015, the government appointed a new board fulfilling high level leadership posts. The AMC has begun the difficult process of restoring lost human capital, rebuilding its substantive programmes, and resuming the journey, recommended in the OECD and UNCTAD reports, towards the attainment of accepted international standards for competition law implementation.

The path ahead for an older agency made new again is perilous. Powerful forces in business and within the government resist the market reforms needed to spur growth in what remains a stagnant economy. In funding, the AMC lags badly behind many other public agencies in Ukraine and most of its peer organisations abroad. Case handlers earn approximately EUR 200 per month, and the AMC's communications and information technology system is operating with hardware purchased over ten years ago. Within the past five years, major new responsibilities involving public procurement and state aid

were stacked upon this weak institutional frame with no commensurate increase in resources.

The difficulties ahead should not be under-estimated. Daunting, disheartening obstacles stand before the reconstruction of an effective competition law regime, yet we discern a path to success. There is a visible, extraordinary commitment among AMC leadership and staff to raise the quality of the agency's performance. New leadership has a clear understanding of the problems to be overcome and a good sense of how to try to do it. As discussed in more detail below, the revitalisation of Ukraine's competition law system will require disciplined efforts by AMC leadership to define priorities, select a strategy to achieve them, and choose projects that will bring the strategy to life. All of this must be done alongside efforts to retool the agency's organisation and operations to increase its efficiency.

The budget austerity that afflicts the agency is formidable, yet it supplies an urgency to make difficult, clear-headed decisions about how to improve agency structure and operations in order to use resources to the greatest positive effect. The AMC also enjoys the benefit of several technical assistance programmes designed to increase the agency's capability and to assist in designing its future programmes. The success of the AMC's makeover will depend heavily on how wisely these resources are provided by donor bodies and used by the AMC. Existing and contemplated donor projects provide a crucial, one-time opportunity to upgrade the institution and set it on an upward trajectory.

The magnitude of the task facing the AMC and those who would support its work is formidable. The difficulties confronting the AMC counsel caution and realism in forming expectations about how quickly Ukraine's competition law system can improve. The full realisation of the reforms described below is likely to be a relatively slow and gradual process. Realism must be matched by ambition – the determination of the AMC to make Ukraine's antimonopoly system a true catalyst for economic progress. All that we have seen in our field work and research suggests that this vital ingredient of motivation is abundant within the AMC. Such ambition, unsupported by institutional reforms and greater resources, may not suffice to ensure success. Without them, here is little point in trying.

**Box 1. Recommendations of the Competition Law and Policy in Ukraine (OECD 2008) and the Voluntary Peer Review of Competition Law and Policy: Ukraine (UNCTAD 2013)**

The following recommendations were used as the basis for this assessment.

**1. Recommendations addressed to the legislature/national government**

1. Enhance discretion to set priorities.
2. Use the NCP to upgrade Ukraine's competition policy system.
3. Provide adequate resources to assure that the AMC can maintain high standards of performance in accomplishing its mission.
4. Assure the autonomy of the AMC.
5. Amend the commercial code to eliminate conflicts between it and the competition law enforced by the AMC.
6. Transfer resources and competences regarding state price inspection and consumer protection to the AMCU.
7. Clarify the jurisdiction of the courts to promote specialisation and grant specialised courts exclusive jurisdiction over appeals from AMC decisions in competition cases.
8. Modify the merger notification thresholds.
9. Prohibit mergers that conceal ultimate beneficial owners.
10. Strengthen the AMC's investigative authority to permit searches of business premises and, where approved by court, searches and seizures of evidence from personal residence.
11. Revise the leniency programme to reduce fines for parties other than the first to file.
12. Establish effective penalties for hard core collusions.
13. Establish unconditional liability for bid rigging.
14. Authorise the AMC to seek court injunctions against competition law violations during the pendency of the AMC proceedings.
15. Modify procedures for collecting monetary penalties imposed by the AMC.
16. Adopt procedures enabling the AMC conduct trials for the purpose of imposing administrative penalties.
17. Establish or increase administrative penalties for violations of the competition law.
18. Temporarily restrict private damage actions to cases which the AMC has found a violation.

19. Require private parties who raise competition law issues in court cases to notify the AMC.
20. Improve regulatory system for natural monopolies.
21. Enact an effective system for controlling anticompetitive state aid.
22. Refine the public procurement law.
23. Eliminate non- transparency in public procurement.
24. Amend the Unfair competition Law as the AMC proposes.

**2. Recommendations addressed to the AMC**

1. Enhance the process for setting priorities and develop annually a strategic plan to realise them.
2. Continue serving as a competition advocate to other parts of the government, with particular focus on increasing the understanding of competition policy principles among judges, prosecutors, and other law enforcement and regulatory agency personnel.
3. Continue harmonising the Ukrainian competition law regime with that of the EU, including the development of additional block exemptions.
4. Adjust case enforcement priorities to correct the imbalance between abuse of dominance and horizontal concentrated actions.
5. Strengthen media outreach.
6. Develop an evaluation programme.
7. Provide more guidance concerning enforcement intentions.
8. Increase transparency of decisions to provide more guidance and predictability to the bar and private sector.
9. Issue guidelines on the imposition of monetary penalties for violations of the competition laws.
10. Issue merger guidelines to increase the transparency of the AMC's analytical approach in reviewing concentrations.
11. Exercise due care in demanding documents in concentration permit application proceedings.
12. Expand the use of market studies.
13. Consider invoking Article 48.3 so that, in appropriate cases, AMC orders terminating anticompetitive conduct will not be stayed automatically for the duration of judicial proceedings.
14. Strengthen the mechanism to monitor the implantation of remedies.

15. Continue existing programmes to: (1) Expand co-operation with international competition organisations and competition agencies of other nations, and develop the staff foreign language capacity. (2) Increase the recognition and acceptance of competition principles in society. (3) Enhance the investigative and analytical skills of the agency staff through training programmes, the exchange of personal with other competition agencies and other available means.

16. Improve co-operation with other Ukrainian law enforcement agencies and sectoral regulators.

## 2. Recent Developments in Legislation and Organisation

A number of significant reforms to Ukrainian competition law have taken place since the last peer review, by UNCTAD, in 2013[2]. The main legislative changes adopt some of the recommendations from older reviews by other international organisations.

One important reform focused on merger control. Following the OECD and UNCTAD's recommendations, the Ukrainian parliament, in January 2016, amended the rules on merger control.[3] The reform increased the merger notification thresholds, which had been in effect for over 14 years. In addition, the new law simplifies merger control procedures by: (a) allowing the parties to conduct preliminary consultations with the AMC; (b) introducing a fast-track procedure for simpler cases where the decision will be issued in 25 instead of 45 calendar days; (c) allowing the parties to offer structural and behavioural remedies in cases the AMC did not approve the merger.

Another needed change focused on enhancing the AMC's transparency. The AMC decisions previously did not have to be published; reforms adopted in July 2015 require the publication of all decisions on the AMC's official webpage within 10 working days from the adoption of the decision.[4]

2 UNCTAD voluntary peer review of Competition Law and Policy: Ukraine Overview (2013).

3 № 935-VIII "On Amendments to the Law of Ukraine "On Protection of Economic Competition".

4 "On Antimonopoly Committee of the Ukraine" the Law of Ukraine "On Protection of Economic Competition" and the Law of Ukraine "On Protection Against Unfair Competition".

The AMC has also been tasked with additional significant responsibilities in the fields of state aid and public procurement. With respect to state aid, the Ukrainian parliament adopted in 2014 the "Law On State Aid to Undertakings"[5] which requires a fully operational, EU-style state aid system by August 2017. The registration of existing state aid measures must take place within one year of the entry into force of the law, while new state aid must be reported and approved before being put into effect. The AMC is responsible for enforcement of this law. Concerning public procurement, a law requiring the adoption of an electronic system for public procurement was approved in 2015.[6] Under this new law, appeals against any decision, action or omission of the contracting authority may be filed through the e-procurement web-portal at any stage of the tender procedure. The AMC continues to be responsible for deciding appeals regarding violations of public procurement rules, a role it has fulfilled since 2006.

In addition to these reforms, a number of legal changes are currently making their way through the legislative process. Several of them respond to recommendations cited in reviews carried out prior to the 2013 UNCTAD review. These legislative proposals address, for example, increased discretion for the AMC in determining which cases to investigate[7]; judicial specialisation, and the routing all appeals involving competition law to a newly created specialised Palata (highest court)[8]; and the optimisation of the fine collection procedure[9].

5 The Law of Ukraine No 1555-VII "On State aid to Undertakings, adopted on 10 July 2014.

6 The Law of Ukraine No [№922-VIII] "On Public Procurement" was adopted on 25 December 2015.

7 At the time of drafting, the proposed amendments have passed the public hearing stage of the legislative process and were submitted to the Ministry of Justice for review.

8 This court would also look at intellectual property cases. A draft law was been introduced in Parliament in May 2016, and the Law of Ukraine "On Judicial System and Status of Judges" was adopted on 2 June 2016. This Law has come into full force on 30 September 2016.

9 The Ministry of Justice is preparing a reform of the State Enforcement Service. Furthermore, the AMC is preparing a draft legislative proposal on this and other topics, which will include a provision granting the committee's decisions a status allowing its enforcement without recourse to courts being necessary.

# 3. Analysis of Progress on Recommendations

## *3.1 Competition Policy*

### *3.1.1 Upgrade the National Competition System and Align it with International Best Practices*

*(Recommendations: 1.2; 2.2; 2.3)*

A number of recommendations focused on upgrading Ukraine's competition policy system, and, in particular, aligning it with international best practices. These recommendations by their very nature were open ended, and they have been partially fulfilled, as is made clear throughout this report.

- National Competition Policy

The National Competition Plan (NCP) was identified as a vehicle to improve the competition policy framework. At the time of the review, preparation was underway on the 2014-2024 NCP and it was foreseen that that the AMC should lead the preparation of the NCP. This plan, which should have been adopted by early 2014, aimed to create a binding national competition policy that would safeguard and prioritise competition at all levels and in all state actions. The NCP would be a catalyst to ensure sufficient resources for the AMC and to set enforcement priorities. The NCP would include a road map for the implementation of pro-competitive reforms in areas such as, natural monopolies, anti-competitive regulations, competitive neutrality, government procurement and state aid. (Recommendation 1.2)

The events of 2014 and subsequent political turbulence impeded the adoption of this NCP. However, in 2016, the AMC with the Ministry of Economic Development and Trade (MEDT), started work on a new National Competition Policy. The AMC is drawing upon World Bank experience garnered in the preparation and implementation of similar NCPs in other Eastern European countries. While the AMC has set an ambitious completion date, 2018, it is cognisant of the challenges to be overcome, including buy-in by various branches of government.

- Advocacy

Even without an adopted NCP, the AMC has continued to advise government ministries and regulatory agencies on the competition effects of

legislation, regulations, and other actions. Since 2008, the AMC has devoted substantial resources to reviewing draft regulations, legislation, and resolutions developed by other government agencies.

While this advocacy effort deserves recognition, it was recommended that consideration should be given to developing the capacity of other government agencies to detect potential anti-competitive effects of proposed regulation, legislation and so forth. Engaging other actors would reduce AMC involvement and free resources to pursue other activities. (Recommendation 2.2)

The AMC has been working to improve the understanding of competition policy in other government agencies, but remains involved extensively in the development of proposals by other agencies. Furthermore, the AMC is continuing its own advocacy activities, such as market studies, binding recommendations, roundtables and working sessions on the development of competitive markets in a variety of regulated sectors.

While it is undeniable that the AMC engages in extremely valuable and demanding advocacy work, this recommendation has not been implemented.

- Alignment with International Standards

A last recommendation that falls within this section calls for Ukraine to continue harmonising its competition law regime with that of the EU, including the development of additional block exemptions. (Recommendation: 2.3)

**Box 2. Ukraine Competition Law: Pre-existing Block Exemptions**

Under the AMC Standard Requirements to Concerted Practices of the Undertakings for their General Exemption from the Requirement to Obtain Prior AMC Clearance of 2002 (the "General Exemption Regulation"), the following actions are presumed to be legal and apply to both horizontal and vertical agreements:

- de-minimis exemption - where the aggregate market share of the parties (including their respective groups) in any of the product markets concerned is less than 5%, and
- market-share-based exemptions – where the aggregate market share of the parties (including their respective groups) in any of the product markets concerned is less than 15% per cent, provided (alternative conditions):

  i) the aggregate worldwide turnover or assets value of the parties (including their respective groups) did not exceed EUR 12 million in the preceding financial year;

  ii) the aggregate worldwide turnover or assets value of at least two undertakings which belong to the parties' groups did not exceed EUR 1 million in the preceding financial year, or

  iii) the aggregate turnover or assets value in Ukraine of at least one undertaking which belongs to either party's group did not exceed EUR 1 million in the preceding financial year.

The above market-share-based exemptions do not apply to hard-core restrictions, including:

- price-fixing
- territorial, customer or supplier and other market-sharing
- restrictions on production or distribution of products, or
- bid-rigging.

The Law establishes that concerted actions that do not present a substantial threat to competition on the market while having a concrete positive effect on the economic development of Ukraine may be performed either on the basis of block exemptions or on the basis of an individual authorisation from the AMC or the Government of Ukraine. The Law includes the following block exemptions for concerted actions:

- concerted actions of medium-sized enterprises relating to joint purchase of goods, which do not lead to substantial restriction of competition and facilitate increased competitiveness of them (Article 7)
- concerted actions relating to intellectual property rights (Article 9), or
- other concerted actions meeting the standard requirements set forth the General Exemption Regulation.

The Law provides for further block exemption for vertical restraints concerning a product's supply (Article 8) and use and the transfer of IPRs or use of IP (Article 9). In respect of product supply, the general prohibition does not apply to those restrictions imposed on the other party to the agreement, which limit:

- use of products supplied by the imposing undertaking or use of products of other suppliers;
- purchase of other products from other suppliers or sale of such other products to other undertakings or consumers;
- purchase of products that, owing to their nature or according to custom in trade and other fair business practices, are not related to the subject matter of the relevant agreement (tying); or
- price formation or establishment of other contractual terms and conditions for selling the products supplied by the imposing undertaking to other undertakings or consumers.

These exemptions apply if concerted actions do not lead to substantial restriction of competition on the whole market or a part thereof, do not restrict the access of other economic entities to the market, and do not lead to an economically unjustified price increase or a shortage of goods.

Following the signature of the EU-Ukraine Association Agreement in 2014, the AMC has taken steps to align Ukrainian competition law with EU standards. These steps address: (i) the transparency and publicity of AMC decisions; (ii) merger control; (iii) the preparation of a number of guidelines, of which one, on the calculation of fines, has already been published; and (iv) drafting block exemptions on vertical practices and technology transfers as part of the EU's technical assistance project, which are foreseen be published in late 2017 and 2018.

This recommendation has been adopted, and work on further implementation is ongoing.

### *3.1.2 Ensure a Coherent Legal Framework*

*(Recommendation: 1.5)*

Previous peer reviews observed that the Commercial Code includes a number of provisions which are inconsistent with Ukraine's competition law. These inconsistencies create uncertainty for business and could discourage

foreign investment. The reviews recommended the elimination of the contradictory provisions in the Code. (Recommendation: 1.5)

The purpose of the Commercial Code, which came into force in 2004, is to establish a comprehensive legal system for commercial conduct, and includes a chapter on prohibitions on anti-competitive conduct. The inconsistencies that are detrimental include: a comprehensive ban on anti-competitive concerted actions, with no allowance for the AMC to permit conduct; and a requirement that AMC approval is needed before obtaining control of any business entity, regardless of the size of the firms involved.

Despite the AMC's efforts, no amendments have been made to the Commercial Code eliminating the contradictory provisions. This recommendation has not been addressed.

### *3.1.3 Effectiveness and Impact*

*(Recommendations: 1.1; 2.1; 2.4; 2.5; 2.6; 2.7; 2.8; 2.9)*

A number of recommendations focused on topics to increase the AMC's effectiveness and impact, and, ultimately, the implementation of Ukraine's competition policy.

- Priority Setting

Recommendations cited that the AMC should: (i) shift its enforcement activities towards horizontal concerted practices, instead of focusing on monopolistic practices; and (ii) adopt an annual strategic plan for enforcement, which should be subject to public consultation before adoption and published after it is adopted. (Recommendations: 2.1; 2.4)

These recommendations have only been partially adopted.

The AMC prepares and publishes an annual strategic plan which involves limited consultation. Regarding the relative proportion of enforcement activities, in 2008 only 4% of the cases were related to concerted practices. Currently, such cases represent 12-15% and the number continues to grow. The section below on restricted agreements and abuse of dominance cases highlights some of the challenges the AMC faces in this area.

- Transparency

Transparency helps to amplify the impact of any competition agency's enforcement actions which are by nature limited. It is crucial for the effective implementation of a competition policy and the creation of a competition culture there is widespread understanding in the private sector of the requirements of competition law and the consequences of non-compliance.

The reviews recommended that the AMC increase the transparency of decisions to provide more guidance and predictability to the bar and the private sector. Media outreach should be improved, in particular through the development of a media plan and the provision of regular training for press service employees. Lastly, it was recommended that the AMC provide guidance, in the form of guidelines or other policy instruments, on (i) its enforcement intentions; and (ii) the calculation of monetary penalties. (Recommendations: 2.5; 2.7; 2.8; 2.9)

These recommendations have been partially met, and work is continuing in this area.

Regarding the publication of decisions, reforms adopted in 2015[10] require the publication of all AMC decisions on competition enforcement and unfair competition. Since 2015, all the decisions are now available on the AMC website. Work is underway on a procedure to expedite the publication of decisions without the inclusion of corporate confidential information.

Progress is ongoing to improve media relations. The AMC has established a Unit of Public Relations and Interconnection with media, comprised of five members, which is currently drafting a communication plan.[11] In addition, the

10 The Law of Ukraine dated 12 November 2015 № 782-VIII "On Amendments to Some Laws of Ukraine Concerning the Ensuring Transparency of the Activity of the Antimonopoly Committee of Ukraine".

11 Members of this unit take part actively in training programmes conducted by the Department of Information and Communications of the Cabinet of Ministers of Ukraine and the Ukrainian Crisis Media Centre. It is planned that media officers will benefit from additional training, in the context of international support provided to the AMC and further internal initiatives. For example the EU Project «Support for the Implementation of the EU-Ukraine Association Agreement» (ASSOCIATION 4 U) offered training programmes for employees of press services.

AMC issued a range of publications, including a monthly digest summarising its work. The success and effectiveness of these initiatives can be measured by the significant number of references to the Committee's work in the internet, print media, and the increasing appearance of Committee members in broadcast media. It is worth noting that of the 180 requests for information from journalists processed by the AMC since 2008, 110 took place in the first half of 2016.

Pursuant to Article 255 of the EU-Ukraine Association Agreement, the AMC published its first set of guidelines on the calculation of monetary fines in September 2015. Subsequent amendments in February and again in August of 2016 clarified the guidelines and improved transparency.[12] When drafting these guidelines, the AMC took into account international experience and consulted extensively with the private bar, the Ukrainian business community and international experts. The guidelines provide a flexible approach which allows for fines to be increased and decreased depending on aggravating and mitigating factors.

**Box 3. Antimonopoly Committee of Ukraine: Criteria for setting fines**

The AMC issued revised Guidelines on Approaches for Calculation of Fines for Economic Competition Law Infringements in August 2016. This document determines approaches, principles and mechanisms for the calculation of the amount of fine for violations of the legislation on protection of economic competition. According to these Guidelines, the calculation of the amount of fine should be done on proportionality, adequacy and non-discriminatory basis and with a due regard to the need of ensuring deterrence effect.

The calculation of the amount of fine shall be carried out in two stages:

1. In the first stage – the basic amount of fine is determined (5, 10 or 15% of revenues from the conduct depending on whether the conduct is considered to be a minor, medium or serious infraction). These base amounts can then be adjusted subject to 3 indexes used for fine determination, making the possible base range a maximum of 30%.
2. In the second stage – the basic amount of fine shall be corrected with due regard to aggravating and mitigating circumstances.

In most cases of violations such as anti-competitive concerted practices of economic entities, abuse of monopoly (dominant) position, unfair competition, carrying out concentration without due authorisation of the Committee, which has led to the monopolisation of commodity markets or to significant restriction of competition on it, the basic amount of fine shall be calculated as a percentage of seller's income (earnings) or buyer's costs related to the violation and depending upon gravity of the violation.

12 www.amc.gov.ua/amku/doccatalog/document?id=128682&schema=main.

In the second stage, the basic amount of the fine can be increased up to 50% in the case of proof of aggravating circumstances such as:

- the party initiates the actions (inaction), and/or was the directing party (on anticompetitive concerted actions)
- the party created obstacles in the investigation in cases of abuse, or
- the party refused to co-operate.

The basic amount of the fine can be reduced up to 50% in the case of proof of mitigating circumstances:

- termination of the respondent actions (inaction)
- eliminating the conditions that contributed to the commission of violations
- the actual failure by the participant to participate in the concerted actions for some time and the availability of evidence that the entity actually competed in the market during the time of the breach
- co-operation in the proceedings with the AMC that contributed to clarify the circumstances of the case, including the identification of other violations of law on the protection of economic competition, including those committed by others, and
- committing violations due to the influence of the executive power body, local government body, and administrative management.

The AMC needs to provide further guidance in the key areas, such as horizontal and vertical restraints, concentrations, and the treatment of parallel conduct as concerted actions. Such guidance can be as formal guidelines, or, on a case-by-case basis, through the rigorous articulation of the AMC's reasoning supporting its decisions. The private sector, such as the Civil Council, has requested such guidance from the AMC. A lack of resources and expertise precludes the AMC from addressing this issue as quickly as it would like.

- Monitoring and Impact Assessment

Agency effectiveness and impact can only be determined if the agency is subject to regular monitoring. Thus, the reviews recommended that the AMC establish a programme for regular evaluation of its competition law enforcement. Such a programme is also crucial for identifying weaknesses and potential areas for improvement. (Recommendation: 2.6)

At present, there are surveys of monthly, quarterly and annual performance indicators related to the performance of the main tasks entrusted to the AMC. Monthly analysis and syntheses of the performance indicators of the AMC's various departments are incorporated in annual reports addressed to the Political Economy Committee of the Verkhovna Rada[13].

Furthermore, there is a system for evaluating at least once a year the comparative efficiency of regional offices which adopt 90% of the Committee's decisions. Such an evaluation takes into account enforcement decisions, amount of fines imposed, rate of decisions judicially overturned, and the economic effect of enforcement decisions. The results of this evaluation process are used in the annual evaluation of the regional offices' heads and in planning of the Committee's activities.

These efforts, while certainly valuable, do not amount to a regular evaluation programme for competition law enforcement at a national level. An effective evaluation programme is national in scope, comprehensive and implemented at regular intervals, i.e. annually, in order to benchmark progress.

These initiatives also do not consider the assessment of the various tools adopted by the AMC for competition law enforcement, for example, the leniency programme, which was identified in previous peer reviews as an area which should be subject to regular assessment.

Taking into consideration initiatives to date, this recommendation can be considered as partially adopted.

### *3.2 Institutional Matters*

#### *3.2.1 Resources*

*(Recommendation: 1.3)*

It was noted in 2008 that attributing procurement related functions to the AMC meant that the agency's budget allocation should be increased commensurately or these procurement functions should be reassigned to another agency. The compensation system for AMC officers and staff should be

13 The Verkhovna Rada is the unicameral parliament of Ukraine, composed of 450 deputies.

designed and funded to attract and retain personnel with the necessary legal and economic expertise. Sound enforcement of competition laws requires sophisticated skills. Faulty, or inadequate, enforcement by the AMC will harm the national economy. (Recommendation: 1.3)

This recommendation has not been addressed at all. Public procurement and state aid competences have been added to the AMC's remit while the budget of the AMC has dropped significantly since 2014. As of 1 July 2016, the total amount of the AMC's 2016 budget shortfall was equal to UAH 42.4 million (approx. EUR 1.5 million). Furthermore, the AMC faces serious constraints regarding basic hardware and software to enable it to pursue its work.

An inadequate budget, budgetary uncertainty and the severe deficit affect the AMC's ability to function properly, as well as to recruit and retain good employees. The number of AMC staff has remained relatively stable at the central office albeit with significant turnover. However, the same cannot be said for the regional offices who have suffered from a substantial loss of staff. Civil society groups have voiced concern over the departure of a significant number of qualified staff over the past several years due to the lack of salary funding, leaving the AMC bereft of institutional knowledge or experience. In the face of a shrinking staff, the government has sill increased the AMC's workload significantly, with public procurement and state aid work added to the list of responsibilities on top of the current mandate.

**Chart 1. Antimonopoly Committee of Ukraine: Budget and Staff**

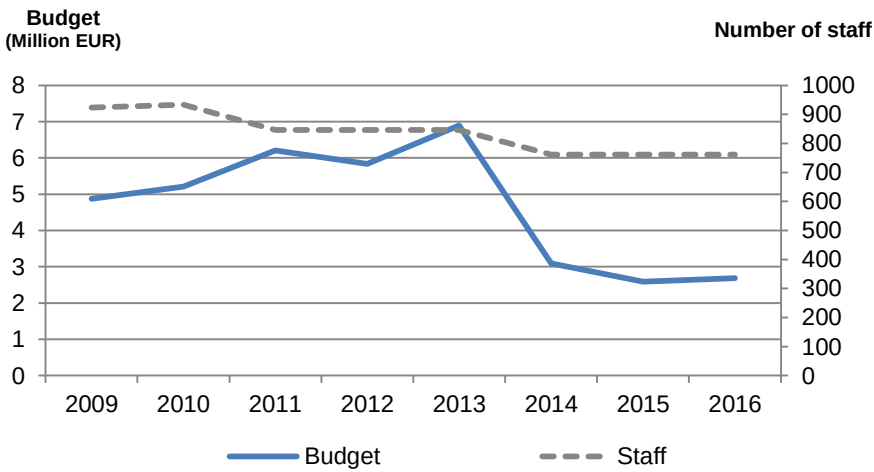
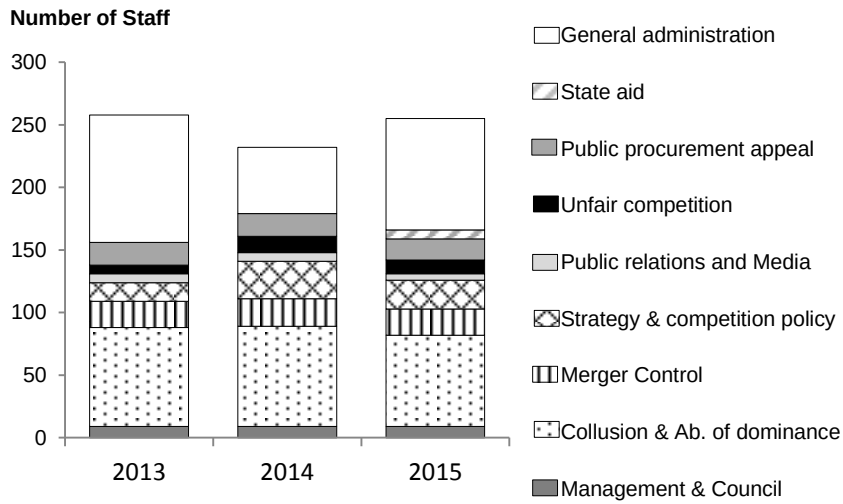


**Table 1. AMC Budget and Staff**

| | Number of staff | | Budget expenditure in Euro (for Central office and Regional branches) |
|---|---|---|---|
| | Central office | Regional branches | |
| 2009 | 260 | 664 | 4 874 340 |
| 2010 | 270 | 664 | 5 208 570 |
| 2011 | 236 | 610 | 6 207 350 |
| 2012 | 243 | 603 | 5 838 170 |
| 2013 | 258 | 588 | 6 894 020 |
| 2014 | 232 | 529 | 3 094 090 |
| 2015 | 258 | 503 | 2 588 110 |
| 2016 | 258 | 503 | 2 688 070 |

**Chart 2. Antimonopoly Committee of Ukraine: Staff breakdown by area of activity**




The AMC is facing a major challenge with regards to salary funding. Current average costs per month per 1 employee are approximately UAH 5.3 thousand (approximately EUR 177). Compared to other Ministries and State Committees, the AMC is significantly underfunded regarding staff.

**Chart 3. Antimonopoly Committee of Ukraine: Budget per Staff Member**

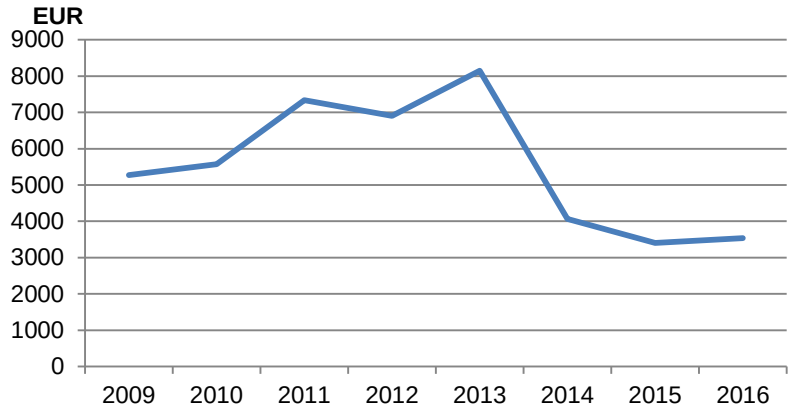



**Table 2. Average Cost of State Employees in Ukraine**

| Name of State Authority | Average costs per month per 1 employee, (Thousand UAH) | EUR (currency exchange rate 29.96 as of 07.09.2016) |
|---|---|---|
| Ministry of Defense | 28300 | 944.6 |
| Ministry of economic development and trade | 11200 | 373.8 |
| Ministry of finance | 10400 | 347.1 |
| Ministry of internal Affairs | 9800 | 327.1 |
| State Financial Inspection | 7600 | 253.7 |
| Ministry of Ecology and Natural Resources | 7200 | 240.3 |
| Ministry of Foreign Affairs | 7000 | 233.6 |
| State Fiscal Service | 7000 | 233.6 |
| State Service of Financial Monitoring | 6700 | 223.9 |
| State Committee television and radio broadcast | 6500 | 217.0 |
| Ministry of Culture | 6500 | 217.0 |
| Ministry of Education and Science | 6500 | 217.0 |
| Ministry of energy and coal production | 6500 | 217.0 |
| Ministry of Informational Policy | 6400 | 213.6 |
| State Service of Intellectual Property | 6100 | 203.6 |
| State Service of Export Control | 6000 | 200.3 |
| Antimonopoly Committee of Ukraine | 5300 | 176.9 |

AMC employees do not benefit from any introductory training when hired, or any regular job specific training throughout their careers due to a lack of resources and capacity. However, this lack of internal training is compensated by several capacity building missions from donors over the last year.

Technology plays an increasingly important role in effective enforcement. The AMC's information technology, both software and hardware, are outdated. No capital budget is available for maintenance and prospects to upgrade in the future are dim.

### *3.2.2 Autonomy*

*(Recommendations: 1.1; 1.4)*

- Appointment Process

According to the Constitution of Ukraine, the Verkhovna Rada appoints the AMC Chairman. Since the majority in Verkhovna Rada controls the appointment processes for the Chairman and the Constitution is silent as to the appointment of the other State Commissioners, there is little security against politicisation of AMC appointments.

**Box 4. Structure of the Antimonopoly Committee of Ukraine**

The AMC is designated as a "state body "with special status. The AMC is governed by a Chair and eight State Commissioners, who are appointed for a period of 7 years. From 2015 until early 2016, many changes took place in the composition of the AMC due to political upheavals. On May 2015, the President of Ukraine appointed a new Chair Commissioner as well as eight new State Commissioners in the ensuing months, thereby refreshing AMC leadership.

The Chairman's powers are specified in Article 9 of the law, which provides the Chairman with three groups of responsibilities: organisational, procedural and representative. The Chairman heads the AMC and directs its activities, for example, submitting proposals concerning the appointment and dismissal of State Commissioners and distributing duties among them; approving organisational structure and budgetary allocations of the Committee and its territorial offices; and issuing acts that are binding for officials of the Committee and its territorial offices. At the same time, the Chairman also has the status of a State Commissioner and, therefore, is provided with all powers of State Commissioner stated in Article 8 of the law.

The State Commissioners' responsibilities are designated by the Chairman. Each State Commissioner is in charge of specific market sectors and regions.

Since most of the heads of departments left the AMC at the end of 2015 due to budget cuts, the new State Commissioners have had to assume temporarily these positions. Currently, the competencies between the Chairman and State Commissioners seem to be blurred and the law does not explain clearly enough their working relationship.

There are various ways in which AMC decisions can be taken. Each territorial branch has three members who can fine legal entities up to UAH 60 000 (USD 2 500) for local matters. There is an ad hoc committee, comprised of one State Commissioner and two heads of local offices, who can take full decisions. An administrative college, comprised of three State Commissioners, can also take full decisions. And, finally, the full Committee hearing is vested with the same powers. Coherence is ensured by instruction letters, and the fact that all decisions can be appealed to courts, or in the case of territorial decisions, to the central office of AMC, which then can be appealed to judicial courts. The central office also exercises its own control ex officio, and can transfer any investigation from a territorial to the central office or a different territorial office.

It was recommended that the AMC's independence and autonomy from the executive and political pressure be reinforced. (Recommendation: 1.4)

Since the reviews, recognisable efforts have been made to strengthen the autonomy of the AMC. In particular, the procedures for the appointment of the Chairman, his Deputies and the State Commissioners have been amended. Following changes to the law, the Chairman shall be appointed by the President and subject to consent from the Verkhovna Rada, whereas the other State Commissioners are appointed by the President at the recommendation of the Prime Minister on the basis of proposals made by the Chairman. As of 1 July 2016, the regional offices function within the framework of the AMC and the heads of regional offices as well as their deputies can be appointed and dismissed by the AMC's Chairman.

Furthermore, due to a recently implemented law[14], the Chairman and Commissioners are no longer civil servants and instead possess a status equivalent to government ministers. This grants them a certain elevated status and presumably more job security, better pay and protection from influence. A newly created position, "Chief of Administration" leads the AMC's administration. Appointed by a Commission within the Cabinet of Ministers, after a competitive process, the nominee will be considered as a civil servant. With this new Chief of Administration AMC Commissioners will be able to

14 As of May 1, 2016, the Law of Ukraine "On Civil Service" has come into effect.

focus more on decision-making and their work as a collegial decision-making body rather than on the administrative activities of the various AMC units.

These amendments are important steps to ensure that no one prevailing political party has complete control of the appointment process for the leadership of the AMC. However, it would seem that there is still the potential for undue political influence. First, Commissioners and the Deputy Chairman are still not appointed and dismissed by an open competitive process but by the President of Ukraine upon recommendation of the Prime Minister. Furthermore the Constitution of Ukraine empowers the Verkhovna Rada to appoint the Chairman following a recommendation by the Prime Minister. Since the Constitution prevails over ordinary law, the constitutional procedure takes precedence over the one described in paragraph 51 above creating fertile grounds for conflict and confusion.

In short, this recommendation has only been partially addressed.

- Ability to set priorities

In order to increase its autonomy and effectiveness, it was recommended that the AMC be granted greater discretion regarding whether to open a case, either *ex officio* or following receipt of a complaint. (Recommendation: 1.1)

Under the current law, the AMC must initiate research into a matter if: (i) a business entity claims a violation of its rights; or (ii) public authorities or government entities notice a violation of the laws, except if the AMC decides that the case will have no significant influence on competition in the market. It is not clear if this exemption has been used regularly, or at all.

The AMC sets out its priorities in its annual strategic plan, and reviews the implementation of the plan. In setting its priorities, the AMC meets with several industry and civil society representatives and associations. Within this framework, the AMC has commenced work on a strategy plan for 2016-2020. It is anticipated that this multi-year strategy plan will impact the AMC's annual plan and thus influence the AMC's decisions on which cases to take on.

Nonetheless, at present the AMC's ability to control its work load is limited. While legislative proposals to improve the situation are under consideration, this recommendation has not been fully addressed.

### *3.2.3 Specialisation*

*(Recommendations: 1.6; 178; 1.18; 1.19)*

- Administrative Specialisation

Previous peer reviews have made a number of recommendations in favour of the centralisation of powers regarding, *inter alia*, competition law at the AMC. These recommendations include that consideration be given to: (i) transferring the resources currently used by the MEDT for state price inspection to the AMC; and (ii) transferring the functions and resources of the state agency for consumer protection to the AMC. (Recommendation: 1.6)

These recommendations have not been addressed. It should be noted that a number of these recommendations would lead to an increase in the competences of the AMC, and hence their implementation requires a corresponding increase in AMC resources.

- Judicial Specialisation

Another set of recommendations in the peer reviews focused on courts, particularly on their role in competition law enforcement, and their relationship with the AMC.

Judicial specialisation in the treatment of competition cases was recommended, as well as that a set of specialised courts be given exclusive jurisdiction over appeals from AMC decisions in competition cases. (Recommendation: 1.7)

These recommendations have been partially addressed. At present, case law has settled that commercial courts have exclusive jurisdiction to consider competition law matters. On the other hand, appeals of AMC decisions are still heard by administrative courts.

Ukraine is undergoing a court reform which will attempt to address the historic corruption of the Ukrainian court system and also the various layers of courts[15]. A draft law was introduced in Verkhovna Rada in May 2016, and the

15 The OECD Anti-Corruption Division is currently working on a review of the situation in Ukraine and a report in anticipated in June of 2017.

Law of Ukraine "On Judicial System and Status of Judges" was adopted on 2 June 2016[16]. This law created a specialised IP and competition Palata in the highest court for appeal; however, it did not create any specialisation at the lower levels.

Other peer review recommendations focused on the relationship between courts and the AMC. In particular, it was recommended that: (i) courts are required to notify cases which raise competition law issues to the AMC, which would then be entitled to intervene as a third party in the proceedings; and (ii) private damages actions are restricted temporarily to cases in which the AMC has found a violation. (Recommendations: 1.18; 1.19)

These recommendations have not been addressed by the legislature, but partial fulfilment has been achieved judicially. At present, the AMC is empowered to request information about cases involving competition law issues as opposed to mandatory notification by the courts although, in practice, courts seem to contact the AMC of their own volition. As regards private damages actions, case law has determined that there is no right to private damages for competition law infringements absent a previous decision by the AMC that such infringements took place.

### *3.3 Anticompetitive Practices*

The previous peer reviews have not issued recommendations related to the substantive provisions governing restrictive agreements and abuse cases. Recommendations were limited to investigation and enforcement powers in these areas. In order to give a comprehensive picture of the AMC's activities, a brief description of the legal framework is provided as well as some observations on the enforcement practice.

#### *3.3.1 Restrictive Agreements*

Concerted practice is defined as agreements and any other concerted competitive behaviour or omission by business entities, including legal and natural persons, engaged in commercial activities as well as any governmental agencies. Furthermore, establishment of a joint vehicle or an association is considered to be a concerted practice of its founders if the establishment or

16 Some provisions of this Law came into effect on 17 July 2016, but this Law will come into full force on 30 September 2016.

incorporation of such entity aims at, and shall result in, the co-ordination of competitive behaviour: (i) of its founders; or (ii) of the established business entity and its founders[17].

Article 6 of the Competition Law contains a prohibition of anti-competitive concerted actions, which "have led or may lead to denial, elimination or restriction of competition". Article 4 makes no distinction between horizontal and vertical concerted actions, but does include a non-exclusive list of anticompetitive practices that constitute potential violations. The list covers price-fixing, market division, restriction of outputs or inputs, discrimination between similarly situated parties and tying, and adds bid-rigging, boycotts and other conduct-restraining market entry or exit, and actions designed to impede the competitive ability of other companies "without an objective basis".

There are no presumptive rules regarding horizontal practices, i.e. to have an infringement, the AMC must prove that the horizontal practice (regardless of the exact activities) led or may lead to denial, elimination or restriction of competition[18]. Such an approach has been confirmed several times by the courts, including the Supreme Court of Ukraine[19] which set out that, in order to qualify an entity's actions as a violation under Competition Law (either anticompetitive concerted practice or an abuse of dominance), it is necessary at least to determine that the violation could lead to the prevention, elimination or restriction of competition or to an infringement of third parties' interests.

The General Exemption Regulation defines the concept of 'vertical concerted practices' as any agreements or other concerted practices entered into

17 Ukrainian competition law takes similar approach to restrictive agreements as Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Section 1 of the Sherman Act. The rules applicable to restricted agreements and concerted actions are provided in Articles 5-11 of the Competition Law.

18 There is no presumption of violation based on market shares. However, based on general block exemptions as set out later in in this review, certain actions, depending on market share, are presumed to be legal, since there is no potential negative effect on competition.

19 Guidelines on Competition Legislation Application (dated 26.11.2011, as amended) http://zakon3.rada.gov.ua/laws/show/v0015600-11/print1452601809537814.

between undertakings aimed at or resulting in co-ordination of competitive behaviour, or entry into an association as a member in the situation where the participants to such concerted practices do not and cannot compete under the actual conditions in the same product market, having at least potentially the purchase-and-sale relations in the relevant product market or markets. It should be noted that there have been no significant vertical concerted practices decisions issued by the AMC in the last 7 years, since 2009.

Under clause 3 of Article 6 of the Competition Law, "anticompetitive concerted actions include (...) those similar actions (or omissions) taken by the market operators on the product market, which resulted or may result in prevention, elimination or restriction of competition where analysis of the respective market conditions evidences lack of objective reasons for such actions (omissions)." Thus, to qualify the behaviour of market operators as violations of clause 3 of Article 6 of the Competition law, both criteria shall be satisfied, namely (i) lack of objective reasons and, (ii) negative effect (potential effect) on Ukrainian competition.

The AMC has used clause 3 of Article 6, with its focus on market analysis of conduct that lacks objective reason, to take on several parallel pricing cases as concerted actions; however, it should be noted that the default for enforcement still tends to be towards abuse cases. The AMC claims the reason for this is that it is difficult to prove collusive activities with its existing deficient investigatory powers, and within its current culture case officers argue that horizontal concerted actions are much harder to prove than abuse of dominance matters. Furthermore, there is lack of experience in investigating collusive practices, and path-dependency in favour of investigating monopolistic practices means that investigators tend to default to looking at cases as abuse of dominance cases.

**Table 3. Distribution of Competition Cases in Ukraine**

| | Concerted actions stopped | Abuse of Dominance actions stopped |
|---|---|---|
| 2009 | 584 | 1477 |
| 2010 | 391 | 1063 |
| 2011 | 346 | 1997 |
| 2012 | 521 | 2540 |
| 2013 | 684 | 3228 |
| 2014 | 445 | 2221 |
| 2015 | 524 | 2169 |

* These actions were stopped via recommendations or sanctions

**Box 5. Case Example: Antimonopoly Committee of Ukraine Exchange of Information**

In April, 2015, the AMC released a decision on a cartel food retail case involving 15 global and local food retailers and AC Nielsen. The AMC imposed a penalty for cartel collusion in the aggregate amount of UAH 203 616 million. Furthermore, the AMC imposed various remedies, including that AC Nielsen and the retailers stop the violation of competition law within two months by bringing its activities with respect to receiving and disclosing of the information within the scope of the legislation, and that the retailers were obligated to change their contractual relationships with suppliers and producers, to ensure that the pricing approach for its customers be in line with the legislation.

In this case, the AMC established two violations, specifically; i) that the information exchange between food retailers through AC Nielsen led to a restriction of competition in the market for the organisation of retail trade in non-specialised stores; and ii) that retailers used similar mechanisms of interaction with suppliers, which lead to similar changes in prices of commodity sold by retail chains to end users and lead to a restriction of competition. Each violation was proven with different instruments of justification. The first was based on direct evidence of an agreement obtained during the conduct of unscheduled inspection by the AMC of AC Nielsen and the retailers. The second decision was based on indirect evidence and took into consideration that the analysis of the situation on the commodity market denied the existence of objective reasons for committing such actions, and therefore committed violation envisaged by the respective laws.

Few of the defendants paid the fine voluntarily. The majority have decided to challenge the AMC decisions in a court. Certain decisions are still being challenged in the Court of first instance. Two decisions have been already overruled by Highest Commercial Court of Ukraine.

### *3.3.2 Abuse of Dominance*

Article 12 of the Competition Law sets out that an entity holds a dominant position in the market if it has no competitors in the market or if it does not face significant competition in the market due to, among other things, the other market players' limited access to raw materials and distribution channels, existence of entry barriers and certain privileges. An entity is presumed to enjoy a dominant market position if it holds a market share in excess of 35%, unless it can prove significant competition on the part of the other market players (a rebuttable presumption). An entity with a smaller market share may also be considered dominant if there is no significant competition due to the comparatively small market shares of its competitors. Several undertakings may

also be deemed to collectively enjoy a dominant position on the market (collective dominance) if either 1) the combined market share of three or fewer undertakings exceeds 50%; or, 2) the combined market share of five or fewer undertakings exceeds 70%.

In recent years, the AMC has been attempting to reduce significantly the role of structural market indicators (market share of enterprises) in the designation of dominance, and increase the role of behavioural aspects, such as economic analysis of the market situation and the negative effects on competition and consumers. With this new approach, the structural indicators only play the role of a certain procedural test, indicating a threshold after which the economic entity in question has to prove that it is exposed to substantial competition. Thus, if the entity's market share exceeds 35%, it has to prove that it is exposed to substantial competition, and the AMC can counter such arguments. When the market share is 35% or less, the entity may also be considered dominant, but only if the AMC can prove that it is not exposed to substantial competition and the entity cannot refute this, especially in cases where market shares of its competitors are relatively small.

The AMC feels that the use of structural indicators, as necessary rather than sufficient criterion, ensures the adequacy of its approach to the designation of a dominant position, taking into account the specificities of the Ukrainian markets and the state of competition on them. As a result, mostly entities with a 50% or higher market share have been recognised as dominant in recent years. This situation is in line with the approach to the designation of a dominant position in many other countries.

Article 13.1 of the Competition Law provides the general standard for determining when an entity has abused its dominant position. A dominant entity's activity is abusive when (a) the conduct has resulted or can result in the prevention, elimination, or restriction of competition, especially by diminishing the competitiveness or infringing the interests of other entities or consumers, and (b) the restriction of competition would be impossible if substantial competition existed in the market. Article 13.2 enumerates specific actions (or forms of inaction) similar to those in Article 102 TFEU which are considered to be an abuse of a dominant position and are prohibited by Article 13.3 of the Competition Law[20]. These prohibitions provide grounds for expansive

[20] The following practices are regarded as abuses of a dominant market position (with no exclusions or exemptions):

intervention by the AMC to address a broad range of conduct by dominant firms. Given the case load of the AMC in this area, the AMC uses these prohibitions often.

Most abuse of dominance cases heard by the AMC follow provisions regarding the setting of the price or another condition of purchase on a level which could not be possible in a truly competitive environment. The AMC faces a challenge in its economic analysis not to define the "correct" or "wrong" price, but to assess the price which would have existed in a competitive environment. For this evaluation, it is necessary to find a comparable market with effective competition. Here the empirical applications can cover the spectrum from simple average price comparisons to complex econometric estimations. Given the current state of economic development within Ukraine, in some cases it is not possible to find such a market and a counterfactual market outcome, based on comparative analysis of costs, has to be defined.

- Setting prices or conditions that could not have been established in a competitive market environment.
- Applying different prices or conditions to identical agreements without justifiable grounds.
- Imposing contractual conditions that have no connection to the subject of the agreement.
- Limiting production, markets or technological development in a manner that may cause harm to other companies or customers.
- Refusing to purchase or sell goods in the absence of other sources or distribution channels.
- Substantially limiting the competitiveness of other companies without justifiable grounds.
- Hindering market access for companies, or ousting them from the market.

**Box 6. Antimonopoly Committee of Ukraine: Investigation and Decision on PJSC Gazprom**

In January 2016, the AMC issued a much publicised decision against the Russian gas company PJSC Gazprom. The investigation started in 2015 after the AMC looked at possible violations of the law by JSC "Gazprom" in certain transport issues in the market of natural gas upon the submission of a complaint by the Cabinet of Ministers. The Committee discovered that Gazprom was abusing its dominant position in the market place, being the only undertaking entitled to buy services of natural gas transit pipelines through Ukraine. Gazprom was not co-operative throughout the investigation. The Committee adopted a decision which confirmed that Gazprom in the period of 2009 to 2015, as a buyer, failed to take measures to ensure that the remunerations of services for natural gas transit pipelines through Ukraine were based on reasonable terms, i.e. terms that would have been applied if competition in the buyer market had existed. This led to infringement violation of the interests of Ukraine's state gas company, Naftogaz.

Based on its findings and using the fine guidelines in place at the time (including the addition of an additional fine for aggravating factors), Gazprom was fined UAH 85 billion (approx. USD 3.4 billion). Further, Gazprom was ordered to stop all violations. The maximum fine possible under the law for this type of violation is 10% of the total turnover for the preceding year. The fine imposed was 8.6% of turnover for 9 months in 2015. Currently, Gazprom has exhausted almost all legal appeals, however it should be noted that the appeals were won on procedural grounds without substantive review.

The decision has caused controversy due to the fact that it came after a bill for USD 2.5 billion was sent from Gazprom to Naftogaz for failing to buy a contracted amount of gas in the third quarter of 2015. The Russian energy company said that according to the "take or pay" terms of the contract in place, Naftogaz had to buy a minimum of gas annually or face a penalty.

In the last few years, the AMC has attempted to refocus its efforts on promoting competition as opposed to responding to excessive pricing issues raised by the government or the public. Instead of reacting to price increases, the AMC has introduced a new approach of deep comprehensive market research, intended to eliminate causes of respective infringements and conditions that facilitate them.

**Box 7. Case Example: Antimonopoly Committee of Ukraine Abuse of Dominance**

In 2015, the AMC adopted a decision on the case of abuse of the monopoly position by Lukoil Aviation Ukraine, which involved excessive prices for aviation fuel and discrimination at the Kharkov and Odessa airports. A fine of UAH 18 718 million was imposed. LLC "LUKOIL Aviation Ukraine" was obligated to stop the violation, which consisted of charging excessive prices for services of aviation fuel sale and refuelling aircraft by amending service contracts for the sale of aviation fuel and refuelling aircraft and establishing transparent and predictable price lists for such services. Kyiv Economic Court confirmed the legality of the AMC's decision. Currently, the decision of the Kyiv Economic Court is being appealed by LLC "LUKOIL Aviation Ukraine" in the Court of Appeal. The case has been referred for appellate review and the decision has been stayed until the court's decision.

### *3.4 Merger Control*

*(Recommendations: 1.8; 1.9; 2.10; 2.11)*

Like most jurisdictions in the world, Ukraine has established a pre-notification merger system. Mergers shall be cleared if they do not lead to monopolisation or to a significant restriction of competition in the requisite market or in a substantial part thereof. Dominance is presumed if a company has a market share exceeding 35%, two companies have a market share exceeding 50%, or three parties have a market share exceeding 70%. Merging parties whose market shares exceed these thresholds must prove that they are not dominant. In such cases, the parties concerned shall prove the existence of competition to overcome the above presumption. A company will also be deemed dominant if it is not exposed to substantial competition as a result of the limited access of other entities to raw materials or their distribution markets.

The analytical framework for the substantive assessment of mergers is not very well defined, e.g. there is no guidance on what constitutes a "significant restriction of competition in the market". However, the following considerations are usually deemed relevant: market shares and concentration levels; countervailing buyer power; barriers to entry; degrees of market openness assessment of effects of the merger on competition in the market.

Previous peer reviews have issued recommendations for merger control. These recommendations can be summarised as follows: (a) the merger control thresholds should be amended in line with international best practices; (b) merger guidelines to increase the transparency of the AMC's analytical approach in reviewing concentrations should be prepared and issued; (c) the ultimate owners of the merging parties should be identified; and (d) the AMC should exercise due care in demanding documentation in concentration permit application proceedings.

### *3.4.1 Merger Thresholds*

Until 2016, a merger notification would be required for any transaction where: (i) the previous year's aggregate worldwide asset value or turnover of the participants exceeded EUR 12 million, and (a) at least two participants had a worldwide asset value or turnover of over EUR 1 million each, and (b) the asset value or turnover in Ukraine of at least one participant exceeded EUR 1 million; or (ii) the individual or aggregate market share of the participants in either the affected market or an adjoining market exceeds 35%. It was widely recognised that Ukraine's notification thresholds were too low and did not have a sufficient local nexus in Ukraine. It was accordingly recommended that these merger thresholds should be modified and, in particular, raised, and the market share threshold eliminated. (Recommendation: 1.8)

Earlier in 2016, the merger control thresholds were amended so that a merger must now be notified when: (i) the parties' combined aggregate worldwide assets or sales exceed the equivalent of EUR 30 million; and at least each of two parties to a transaction have assets or sales in Ukraine exceeding the equivalent of EUR 4 million; or (ii) the total cost of assets or the total product sales of the target in an acquisition, or of one of the joint venture founders in Ukraine exceeds the equivalent of EUR 8 million, and at least one other party's aggregate worldwide sales exceeds the equivalent of EUR 150 million. The market shares threshold was eliminated. [21] It is too soon to assess the impact of these changes on the number of notifications; however the AMC expects notification numbers to drop by approximately 40% in the long term thanks to these changes.

[21] Law of Ukraine dated January 26, 2016 № 935-VIII "On Amendments to the Law of Ukraine "On Protection of Economic Competition" on improving efficiency of the control over the economic concentrations".

Further legal changes were made to enable the AMC to focus better on transactions that pose a risk for competition in the market. In particular, such amendments provide for: (i) preliminary consultations with applicants; and (ii) a simplified procedure for transactions which obviously would not affect competition. This recommendation seems to have been almost fully adopted. However, the law can be interpreted as requiring the turnover and assets of the seller's corporate group to be taken into account when assessing whether the merger thresholds are met. This goes against international recommendations. We have been informed that the AMC considers that such an interpretation goes against the legislator's intention and intends to issue secondary legislation setting out that the turnover or assets of the seller's corporate group shall not be taken into account for merger control purposes unless the seller maintains joint control.

### *3.4.2 Ultimate / Beneficial Owners*

Since 2001, merging parties have been obligated to disclose the ultimate beneficial owners; however, it was possible to obtain merger clearance even if such disclosure did not take place. Disclosure of the ultimate owners of the merging parties is necessary for the identification of the corporate groups entering into a transaction and the identification and assessment of the economic reality and impact of a merger. Thus, it was recommended that the law be amended to prohibit concentrations of economic entities which conceal their real owners. (Recommendation 1.9)

According to the new law, should the applicants fail to disclose information about ultimate beneficial owners of the merging parties, the notification shall be declared incomplete.[22] In order to ensure the effectiveness of this requirement, rules were adopted requiring the submission of documents allowing the Committee to verify the identity of the real (beneficiary) owner of the notifying parties. Failure to provide this information may also lead to the AMC declaring the notification incomplete. A declaration that the notification is incomplete means that it will be not accepted for consideration and the transaction cannot be cleared.

Thus, this recommendation was adopted.

22 Law of Ukraine dated 26 January 2016 № 935-VIII "On Amendments to the Law of Ukraine "On Protection of Economic Competition" on improving efficiency of the control over the economic concentrations".

### *3.4.3 Information requirements*

The AMC has discretion to determine the information required to conduct its merger assessment. A common complaint cites the onerousness of the merger control procedure in terms of the information requirements imposed by the AMC. In previous peer reviews, it was recommended that due care be exercised regarding the documentation required with the initial merger notification. This documentation and information should be limited to the minimum necessary for determining whether the transaction: (1) meets the notification thresholds, and (2) raises any competitive issues warranting further investigation. (Recommendation: 2.11)

A number of steps have been adopted towards reducing the burden on parties notifying a merger to the AMC. A simplified, fast-track procedure has been adopted for cases where the risk of competition concerns is small: such as transactions where only one party is active in Ukraine; when horizontal overlaps fall below a 15% market share or vertical overlaps fall below a 20% market share; or, when the transaction amounts to the acquisition of sole control by an undertaking that already has joint control over the target. The information and documents to be submitted with a merger notification have been significantly shortened for simplified, "fast track" procedures. Further, a mechanism for preliminary consultations of the merging parties with the AMC has been introduced. The merging parties may discuss what information and documents must be submitted with the notification.

Some uncertainty regarding merger control is still prevalent. It is unclear what percentage of mergers will benefit from fast-track and, it seems that the documentation requirements have not yet changed for the ordinary merger control procedures. Furthermore, it is not clear whether the preliminary consultation mechanism has resulted in a limitation of the documentation and information requirements for these procedures to those relevant to determine whether the notification thresholds are met and whether the transaction raises any competitive issues, as planned.

This recommendation has been partially adopted, and further work is ongoing.

### *3.4.4 Merger Guidelines*

Generally applicable regulations and block exemptions used in antitrust enforcement have provided some guidance to the AMC's substantive analysis of mergers. However, previous peer reviews considered that the AMC's analytical approach to reviewing concentrations was unclear. Hence, the preparation and publication of better guidelines on this topic was recommended. (Recommendation 2.10)

The AMC is developing regulations and guidelines on principles and approaches coherent with international best practices to be applied by the AMC when assessing mergers. Among these are guidelines on horizontal merger assessment, turnover calculation, the concept of control, and market definition. There are also several publicly available AMC 'information letters' and 'clarifications' covering AMC approaches to a number of merger control topics[23] such as: barriers to market entry, application of merger control procedure in cases of common share purchases.

Some of this work is required by the Ukraine-EU Association Agreement, and is underway within the framework of the Component-1 of the Technical Assistance Project "Twinning" with the European Commission. This project, lasting 32 months started 1 July 2016, provides general training and assists in the development of guidelines on competition law. Initial work, until 2017, is devoted to merger control (horizontal guidelines, notification procedure, calculation of turnover, procedural issues, simplified procedures, access to final decisions).

The AMC is adopting international best practices to assess mergers. For example, there used to be two grounds for merger review procedures to move to a stage of in-depth investigation: monopolisation or significant restriction of competition in a market and/or the necessity of an in-depth study. Following legal reforms, the AMC can now initiate in-depth investigations into mergers only if there is a risk that it will lead to the monopolisation or significant restriction of competition in the market or in a substantial part of the market.[24]

23 www.amc.gov.ua/amku/control/main/uk/publish/article/122783;jsessionid=31567134DB717DC1EA6FA2ED9AEAE35B.app1.

24 Law of Ukraine dated 26 January 2016 № 935-VIII "On Amendments to the Law of Ukraine "On Protection of Economic Competition" on improving efficiency of the control over the economic concentrations",

These are also the sole grounds for prohibiting a transaction or imposing conditions.

In short, this recommendation has been partially adopted and work is ongoing.

### *3.5 Market Studies*

*(Recommendation: 2.12)*

It was recommended in 2013 that the AMC expand its use of market studies, especially in public utility sectors and in areas featuring high levels of concentration. (Recommendation: 2.12)

The AMC is legally empowered to conduct market studies. Since the recommendation to expand their use was issued, the AMC has conducted more market studies in a wider range of sectors, including: (i) central water supply and disposals[25]; (ii) energy[26]; (iii) pharmaceuticals[27]; (iv) aviation[28]; (v) security services[29]; and (vi) light oil products. Furthermore, and as exemplified by the last case, the AMC may start proceedings for an infringement of competition law if the recommendations of its market studies are not implemented and there is evidence that competition law has been infringed.

25 www.amc.gov.ua/amku/doccatalog/document?id=126337&schema=main.

26 www.amc.gov.ua/amku/doccatalog/document?id=125980&schema=main.

27 www.amc.gov.ua/amku/doccatalog/document?id=124744&schema=main.

28 www.amc.gov.ua/amku/control/main/uk/publish/article/116877;jsessionid=0A4963792F5B5B24A9C318103200E13B.app1.

29 www.amc.gov.ua/amku/doccatalog/document?id=125326&schema=main.

**Box 8. Case Example: Market study of Ukraine's Electricity market and the Adjacent Market of Energy Coal**

The AMC completed a complex market study on the electricity market and the adjacent market of energy coal in May 2016. The AMC's final report made 20 proposals which were dedicated to the establishment of an equal and transparent operational environment for all participants of these markets. These proposals were related to the following:

- eliminating preconditions for violations of the legislation on protection of economic competition, namely in the form of abuse of dominant positions by subjects of natural monopolies in the energy sphere
- increasing transparency of activities of subjects of natural monopolies, namely through removing subjects of natural monopolies from activities in adjacent markets and accelerating transition through stimulating regulation
- developing competition in the potentially competitive geographic markets
- establishing equal conditions, in particular, with regard to price setting, resources' provision and access of all participants of Wholesale Electricity Market of Ukraine to networks
- simplifying the procedure for providing services on connection of ultimate consumers
- cancelling (decreasing) cross-subsidisations
- improving the situation of payments for electricity, namely through increasing responsibility for non-payment
- reforming the coal sector to make it more open and competitive, and
- accelerating the process of bringing operational conditions in the electricity markets into compliance with the requirements of the Treaty Establishing the Energy Community and Association Agreement between the European Union and Ukraine.

The final report was submitted for the consideration to the concerned bodies of state power (namely, Cabinet of Ministers of Ukraine, Ministry of Energy and Coal Industry of Ukraine, and the National Commission for State Regulation of Energy and Utilities) and to the market participants, including the Wholesale Electricity Market Board (WEM Board).

Both market participants and the State Regulation of Energy and Utilities Regulator provided positive feedback. The WEM Board has established a working group on competition development that is charged with the elaboration of a road map for implementation of the AMC's recommendations.

This recommendation has been addressed.

## *3.6 Investigations and Sanctions*

### *3.6.1 Penalties against natural persons*

*(Recommendations: 1.12; 1.17)*

Previous peer reviews recommended sanctions for individuals for breaches of the competition law, particularly: (i) for cases of hard core collusion; and (ii) for government officials whose actions break the law[30]. (Recommendations: 1.12; 1.17)

Cartels by their very nature are difficult to detect. The lack of an effective leniency programme which applies to individuals as well as corporations, together with the lack of personal liability has led to a weak cartel enforcement programme in Ukraine. Individuals have little incentive to turn to the AMC.

To date, these recommendations haves not been addressed. Competition law does not provide for sanctions to individuals for competition law infringements, even if the Code of Ukraine on Administrative Offences allows for individuals to be subject to small fines for certain administrative infringements.

The following are two examples of how insignificant, and therefore ineffective, these small fines can be. For the non-compliance with AMC decisions, the AMC can administer fines of up to 16 times the tax-exempt minimum wage (approx. UAH 145) as set by Parliament for the year. The AMC can administer fines of up 20 times the tax-exempt minimum wage (approx. UAH 340) as set by Parliament for the year in cases of failure to submit information when requested by the AMC.

30 At the time, these included penalties regarding violations of Articles 15, 16, and 17 of the Competition Law (relating to anticompetitive agency orders and decisions, unlawful delegation of agency authority, and agency actions inducing or legitimising violations of the competition laws by others), and for violations of Article 20.4 of the AMCU Law (failing to submit to the AMCU for approval a proposed agency regulation affecting competition).

### *3.6.2 Bid Rigging*

*(Recommendation: 1.13)*

A specific recommendation regarding hard-core collusion advised that the Public Procurement Law should be amended to establish unconditional liability for bid rigging for the participants in a bid rigging cartel. Sanctions should be imposed in the form of fines and disqualification for violators. (Recommendation: 1.13)

In April 2014, the AMC established a mechanism for the publication of information on undertakings who engaged in bid rigging. Undertakings on this list will not be eligible to participate in public procurement procedures for 3 years from the date of the AMC decision on the infringement. Bid rigging is otherwise subject to the same fines as other concerted practices as set out by the newly implemented AMC guidelines[31].

This recommendation has thus been only partially addressed.

### *3.6.3 Investigations*

*(Recommendation: 1.10; 1.11)*

- Dawn Raids

A number of previous recommendations targeted the inadequate investigative powers of the AMC. In particular, it was recommended that AMC's lack of powers to search business premises and seize evidence of competition law violations, and where approved by court, search and seize evidence from personal residences, be remedied. (Recommendation: 1.10)

Today the AMC has the authority to request information in writing, conduct unscheduled inspections of businesses and seize evidence located on the premises. The AMC has the authority to examine office premises and transport vehicles belonging to the undertakings. Private residences are not

[31] As per the new Guidelines, the fine would be calculated with a 15% initial fine which could be doubled via indexes up to 30% on affected turnover, then applying any aggravating or mitigating factors. The cap for this fine, however, would be 10% of total annual turnover per year.

included in this authority. In order to exercise these powers, the AMC can ask for the assistance of the police, customs and other law enforcement authorities in the investigation, including for seizing evidence.

However, the AMC cannot search for and seize documents without the consent of the undertakings under investigation unless the investigators possess a warrant signed by a Commissioner that identifies the specific document to be seized. Similarly, while the AMC has the authority to invite employees and other individuals to interviews, the individual cannot be questioned unless s/he consents. A number of practices have been developed in order to overcome the difficulties raised by these requirements. For dawn raids, a Commissioner attends the inspection of the business premises. The AMC's authority to impose a fine in case the undertaking obstructs the inspection can also be used to promote the undertakings' co-operation. According to the law[32] obstruction of inspection and seizure of evidence is a violation of the law which carries a fine of 1% of the income of the undertaking in the preceding year. For interviews, the AMC can request the employee's manager to instruct the employee to attend the interview, and the AMC can fine undertakings which employees refuse to be interviewed, for obstructing the investigation.

Although these practices marginally improved the AMC's ability to conduct dawn raids and investigations, the current situation still does not enable the AMC to fulfil its mandate and collect sufficient evidence to prove violations of the competition law. With regard to searches, mandatory consent of the undertaking is still a fundamental obstacle in collecting evidence. Obviously, if an undertaking has committed a violation of the law, it would prefer paying a fine of 1% of its income for obstruction, rather than to give its consent for seizure of evidence, which could result in a much higher fine. The AMC still does not have the power to search and seize evidence from private residences, thus preventing it from collecting potentially substantial evidence. With regard to interviews, the same problem of consent from the individual makes it difficult for the AMC to obtain information from that same individual. In addition, often individuals claim illness or that they are indisposed in some other way (e.g., on vacation), which allows them to evade questioning, without the deterrent of a fine.

It is important to note that, since 2014, there has been a significant, and continual, reduction in the number of inspections of economic entities. This decrease is due to the need to reduce administrative pressure on business, and in

32 Article 50(16) and Article 52(2) of the LPEC.

particular due to the prohibition of scheduled inspections of economic entities imposed by the Verkhovna Rada in the second quarter of 2014-2015 and the first quarter of 2016[33]. Fewer inspections contributed to the reduction of terminated violations in 2014-2015 in comparison to 2013.

Thus, the recommendations regarding dawn raids have not been effectively adopted.

- Leniency

The reviews recommended reforms to the leniency programme. Parties other than the first to file should be able to benefit from fine reductions thereby creating incentives for co-operation, facilitating evidence collection and enhancing the effectiveness of the AMC's investigations, in line with international practice. (Recommendation: 1.11)

**Box 9. Antimonopoly Committee: Leniency Programme**

Article 6 of the Law of Ukraine "On Protection of Economic Competition", sets out the general conditions of release from the responsibility for committing anticompetitive concerted practices (i.e. cartel agreements) for undertakings whose co-operation with the AMC has essential importance to prove the existence of the practice.

According to this Article, an undertaking that has committed anti-competitive concerted practices and who earlier than the remaining participants in the actions voluntarily informs the AMC of this fact, and submits information of essential importance to taking a decision on the case, must be relieved from the responsibility for committing anti-competitive concerted practices.

At the same time, conditions of release from the responsibility are limited by a number of circumstances. The conditions of release are not applicable for an undertaking which:

- having informed the AMC of anticompetitive concerted practices, did not take efficient measures to terminate the actions
- was the initiator of the anticompetitive concerted practices or managed them, or
- did not submit all such evidence or information on the relevant violation committed by the undertaking that was known to and that could be freely got by the undertaking.

33 In 2014, the AMC conducted 217 on-site routine and unscheduled inspections to verify compliance to the law (185 inspections of economic entities and 32 inspections of public authorities). In 2015, the AMC conducted 87 on-site routine and unscheduled inspections (46 inspections of economic entities and 41 inspections of public authorities).

Regarding leniency proceedings, to date undertakings have applied for leniency only in two cases. Furthermore, the Verkhovna Rada has refused amendments to the leniency procedure proposed by the AMC to allow the reduction of fines for the second and third companies to apply for leniency

As a result, the recommendation has not been adopted and it is still the case that only the first undertaking to file can benefit from leniency.

### *3.6.4 Enforcement*

*(Recommendations: 1.14; 1.15; 1.16; 2.13; 2.14)*

- Enforcement of AMC Decisions

A good number of recommendations addressed the effectiveness of the AMC's enforcement activities. A particular concern was the lack of enforceability of the AMC's decisions, which means the AMC must apply for judicial enforcement of its decisions. This is the case both for final and interim decisions.

As regards final decisions, in 2008 it was observed that, while the AMC is legally empowered to conduct proceedings and to impose administrative penalties, the Verkhovna Rada had not provided the AMC with the necessary powers to enforce these penalties. Consequently, to enforce an administrative penalty, the AMC had to petition a general jurisdiction court under procedures established in the Code on Administrative Offences. It was recommended to adopt the necessary legal provisions to allow for direct enforcement. (Recommendation: 1.16)

Concerning interim injunctions, the AMC was only allowed to apply before a court for the enforcement of final decisions finding a competition infringement. It was recommended that the AMC be allowed to apply for judicial injunctions against anti-competitive conduct during the pendency of investigations. (Recommendation: 1.14)

While the AMC has not been allowed to apply for interim judicial injunctions during the pendency of investigations, the AMC can set up an interim injunction if an applicant asks for such an action in his application, and then apply the injunction when it opens the matter. However, and since the law generally requires judicial enforcement of AMCU decisions, addressees of these injunctions simply ignore them. They consider any decision not final until

enforced by a court, and use the appeal process to drag out the process as long as possible.

As such, to date these recommendations have not been enacted.

Despite these limitations, the AMC is empowered to prevent appeals against its final decisions from having a suspensory effect by issuing an order for the purpose of protecting the public interest or preventing negative or averting irreparable injury to affected business entities. It was recommended in 2008 that the AMC make use of this power. (Recommendation: 2.13)

However, if the execution of an AMC decision requires judicial enforcement, it follows that attempts to withdraw suspensory effect during judicial appeals are unlikely to have any effect since enforcement will usually only be granted when the appeal is refused. Furthermore, accused parties could use this appeal time to continue their conduct or to restructure their corporate entities so that any ultimate enforcement has little effect.

- Enforcement of Sanctions

As a result of the length of judicial appeals, but also of the ineffective enforcement procedure, previous reviews perceived the collection of monetary penalties imposed by the AMC as ineffective. Particular concerns were that, to collect fines, the AMC must petition a court for an order requiring payment and then refer the order to the State Executive Service, the government agency responsible for collection of administrative penalties, for execution. Perpetrators were able to evade the payment of fines by liquidating the sanctioned economic entities and then reregistering them as new enterprises. These issues must be addressed so that fines can be collected and the sanctions have an effective deterrent effect. (Recommendation 1.15)

These recommendations have not yet been met.

- Monitoring of Remedies

Previous reviews observed the absence of a mechanism to monitor compliance with remedies. It was recommended that: (i) the AMC develop an electronic database that records all outstanding remedies, tracks compliance with remedial obligations, and identifies all changes in ownership or status of parties subject to remedial obligations; and (ii) the AMC, as part of its routine

practice, require parties subject to remedies to file periodic compliance reports that, among other information, account for progress made to fulfil remedial duties and identify changes in ownership. (Recommendation 2.14)

Presently, remedies are recorded on an Excel spreadsheet and there is no formal mechanism for monitoring them. In merger control, the AMC imposes a reporting obligation regarding commitments proposed by the parties or remedies imposed by the AMC, but no indication is given of how these obligations are enforced in practice if they are not met.

Consequently, this recommendation has not been adopted.

### *3.6.5 Co-operation with National and International Enforcement Agencies*

*(Recommendations: 2.15; 2.16)*

- National Co-operation

Earlier peer reviews recommended expanding efforts to improve co-operation with other enforcement agencies particularly by establishing working groups involving representatives of the institutions or the signing of memoranda of understanding. The goal is to benefit from effective assistance from such agencies when investigating competition infringements. (Recommendation: 2.16)

Since 2008, the AMC has taken a number of steps to improve its co-operation with various law enforcement agencies, such as the Ministry of Internal Affairs of Ukraine, the Security Service of Ukraine, the Customs authorities, the State Fiscal Service of Ukraine and the Prosecutor General's Office of Ukraine. To date, this co-operation includes notifications from these agencies regarding practices that infringe on competition law and sharing of basic information; however, more meaningful co-operation, such as joint investigations, has yet to be realised.

The AMC is also finalising memoranda of co-operation and information exchange with the National Police of Ukraine, the National Anti-Corruption Bureau of Ukraine, and the State Fiscal Service of Ukraine. Presently, co-operation with these agencies occurs on a case-by-case, personal relationship basis. It is hoped that these memoranda will provide structure to the inter-agency relationships and allow for more efficient co-operation and information sharing.

This recommendation has been addressed and further work is ongoing.

- International Co-operation

It has been suggested that the AMC expand co-operation with international competition organisations and competition agencies of other jurisdictions; it further suggested developing the AMC staff's foreign language capacities. (Recommendation: 2.15)

Legally, the AMC is empowered to co-operate with international organisations, government authorities and non-governmental organisations of other states on matters which are within the competence of the Antimonopoly Committee, including through exchanges of information relevant for the pursuit of statutory goals. Co-operation can take place within the framework of international treaties entered into by Ukraine or, even when there are no such treaties, within the scope of MOUs entered into by the AMC. Within the context of these powers, the AMC has sent numerous information requests to competition agencies of countries party to the bilateral Memoranda with the AMC.

Prior to 2008, the AMC had bilateral agreements providing for extensive co-operation[34] with the authorities of Russian Federation, Georgia, Azerbaijan, Armenia, Latvia, Slovakia, Hungary and Bulgaria. Agreements providing for more limited levels of co-operation, such as joint consultation about general policy topics, and the exchange of analytical and technical expertise, were in place with Belarus, Bulgaria, Czech Republic, France, Lithuania and Poland.

Since 2008, the Committee has signed five additional bilateral memoranda of co-operation with competition authorities of Austria, Romania, Switzerland, Turkey and Moldova. These memoranda set out procedures for co-operation

[34] All these treaties provide for: (i) notification respecting anticompetitive conduct or enforcement activities in one country that affect the interest of the other; (ii) exchange of information about particular business entities involved in enforcement investigations and cases (subject to applicable confidentiality restrictions); and (iii) joint co-ordination of enforcement activities in cases where the parties are investigating the same firm, conduct or transaction. Some of these agreements also include a provision whereby one party may request that the other party investigate conducts occurring within its geographic jurisdiction if the conduct affects markets in the requesting party's jurisdiction.

through experience and information exchanges, consultations, training, and participation in conferences.

This recommendation has been adopted, and further work is ongoing.

### *3.7 Regulated Sectors*

*(Recommendations: 1.20; 2.16)*

Previous peer reviews observed that while Ukraine's fundamental approach to the regulation of infrastructure networks conforms to conventional competition law theory, the implementation and enforcement of the existing framework needed to be improved. Furthermore, the efficiency of state regulation needed to increase. The relationship between the AMC and sector regulators is important to further these goals and ensure increased consumer welfare; thus, it was also recommended that the AMC establish a mechanism to improve and formalise these relationships. (Recommendations: 1.20; 2.16)

**Box 10. Governance of Regulated Sectors in Ukraine**

According to the Law of Ukraine "On Natural Monopolies", the activity of economic entities is regulated in the fields of energy and utilities, and in the field of transport and industrial waste.

According to Article 13 of the Law of Ukraine "On Natural Monopolies", independent regulators shall:

- develop and adopt special terms and rules for doing business by subjects of natural monopolies and by economic entities which acts in adjacent markets, control over its compliance and take measures in order to prevent violations of these terms and rules in the prescribed manner
- shape price policy in the relevant spheres of natural monopolies, determine terms of consumer access to goods that are produced by subjects of natural monopoly, and
- submit to the relevant public authorities: proposals on contract awards; proposals on the elaboration of quality standards and indicators of goods and services; and, proposals on the regulation of investment processes in the sphere of natural monopolies.

The main guiding principles for the AMC in this area are the following:

- development of competition and consumer protection shall be absolute priority for reforming natural monopoly markets and adjacent markets

- activities of subjects of natural monopolies shall be fully transparent and shall be performed in accordance with requirements of competition legislation, and
- all products (works, services) shall be sold on the basis of competition market-based principles and under conditions of minimal level of state intervention.

As of today, Ukraine has the following regulators:

**1) Energy and Utilities:** The National Commission for the State Regulation in the Energy Sector and Utilities (NERC), according to a recently adopted law, shall regulate the following:

i) in the energy sphere:

- activities in production, transportation, distribution, supply of electricity
- activities in transportation, distribution, storage (injection, extraction), providing services in installation and supply of natural gas, and
- activities in pipeline transportation of oil, oil products and other substances

ii) in the sphere of utilities:

- activities in heat energy generation of heat producing plants, including those for combined generation of heat energy and electricity, transporting it with super grids or local (distribution) transmission networks, supplying heat energy in volumes exceeding the level established by terms and rules for undertaking economic activities (licensing provisions)
- activities in the field of central water supply and water disposal in volumes exceeding the level established by terms and rules for undertaking economic activities (licensing provisions), and
- activities in the field of recycling and damping household wastes in volumes exceeding the level established by terms and rules for undertaking economic activities (licensing provisions).

**2) Communications:** The National Commission for the State Regulation of Communications and Informatization (NKRZI) is a state collegial body subordinated to the President of Ukraine and accountable to the Verkhovna Rada, and is responsible for telecommunications, Informatization , the use radio frequencies and the provision of postal services. In this sphere NKRZI performs the functions of a licensing body, authorisation authority, regulatory agency, and state supervisory body.

**3) Transportation:** A national commission for regulating activities of subjects of natural monopolies in the sphere of transport has still not been established. An agency-level system for regulating activities of subjects of natural monopolies in the sphere of transport is applied in Ukraine. This system provides simultaneous execution by the Ministry of Infrastructure of Ukraine both the function of state administration body and the function of the sectoral regulating body that shall be carried out by the national commission for regulating activities in the sphere of transport according to the Law of Ukraine “On Natural Monopolies”.

Under the current legal framework, the AMC is merely responsible for overseeing the compliance with the requirements of the legislation on protection of economic competition during fixing of prices and tariffs by sectoral regulators. Furthermore, the AMC should seek to ensure that the promotion of competition and consumer protection shall have absolute priority in the reform of natural monopoly markets and adjacent markets; that natural monopolies shall act transparently and in accordance with the requirements of competition legislation; and that the provision of goods, works and services shall take place on the basis of market-based principles and under conditions of minimal level of state intervention.

There are reforms affecting a number of regulated sectors – such as energy and other utilities, or telecommunications – in which the AMC is actively involved, mainly by commenting on proposed legal acts. The AMC promotes competition in the markets for oil products, gas and electricity, utilities (heat, water, waste collection and recycling) and telecommunications. The AMC has long sought to promote competition in the transport sector as well, but reform has lagged in this sector[35].

Furthermore, the AMC has held meetings with sector regulators – including government ministries, the National Commission for State Regulation of Energy and Utilities, and the National Commission for the State Regulation of Communications and Informatization – to create and formalise institutional relationships. In 2015 alone, the AMC participated in 76 meetings with inter-agency bodies. Additionally, the AMC is currently negotiating and drafting

35 There are mechanisms in Ukraine that help to avoid the excessive regulation:

- control of the anticompetitive actions of bodies of state power by the AMC;
- Law of Ukraine "On Principles of Regulatory Policy in Economic Activity" that outlines principles for regulatory policy, such as: appropriateness, adequacy, efficiency balance, predictability and transparency. The Law notes the need to analyse the impact of the regulatory act, control of its effectiveness and review;
- the State Regulatory Service was established in order to implement the Law; and
- approval of regulatory acts by the AMC, including their evaluation based on the OECD Competition Assessment Toolkit.

memoranda of co-operation with the Ministry of Economic Development and Trade of Ukraine, the Ministry of Agrarian Policy and Food of Ukraine, the National Commission for State Regulation of Energy and Utilities, the National Commission for the State Regulation of Communications and Informatization , and the State Service of Ukraine on Food Safety and Consumer Protection. These memoranda delineate areas of responsibility and co-operation.

Work on these recommendations is therefore on going or adoption is imminent.

### *3.8 Competitive Neutrality*

Another set of recommendations focused on a level-playing field for undertakings. These recommendations can be broken down into: (i) state aid; (ii) public procurement; and (iii) unfair competition.

#### *3.8.1 State Aid*

*(Recommendation: 1.21)*

In 2008, the Peer Review recommended that the government take steps, even if merely incremental ones, to control anti-competitive state aid. (Recommendation: 1.21)

Ukraine is taking significant steps in this direction, particularly as a result of the EU-Ukraine Association Agreement, which has led to the adoption of a statute on "On State Aid to Undertakings" (henceforth, the "State Aid Act)[36]. All new state aid must be compatible with the State Aid Act from the date this Act enters into force on 2 August 2017; all instances of state aid, including those adopted before the State Aid Act entered into force, should be aligned with the State Aid Act within 5 years of the Act entering into force, i.e. by 2 August 2022.

The State Aid Act established a State Aid Monitoring Unit within the organisational structure of the AMC in December 2015. At present, the State Aid Unit comprises seven persons. It has been recommended that the team

[36] Law of Ukraine dated 1 July 2014 № 1555-VII "On State Aid to Undertakings".

should consist of 72 people, approximately 10% of total AMC total staff.[37] No increase in the AMC's resources is foreseen to deal with this added responsibility of the AMC and hence the AMC expects to hire at most 32 in the near future.

The AMC has also adopted a decree setting out the relevant procedure for monitoring state aid.[38] A number of other decrees relevant for the monitoring of state aid and the enforcement of the State Aid Act are being finalised or awaiting implementation. These decrees should come into effect at the same time as the State Aid Act on 2 August 2017.

The AMC, with the support of EU Project "Harmonization of Public Procurement System in Ukraine with EU Standards", is implementing a pilot project on state aid measures in the energy sphere. The project assessed 27 schemes in the energy and oil and gas sectors, and identified 16 instances of state aid which should be redesigned. In addition, the AMC is already monitoring draft legal acts in order to identify instances of state aid. As of July 2016, 127 drafts had been reviewed, which led to 12 letters to the relevant entities recommending the amendment of the draft legal act. These recommendations are non-binding.

The AMC is engaged in an effort to promote awareness of state aid principles in order to ensure compliance by public authorities by the time the State Aid Act enters into force. The AMC's goal is to reduce state aid from 9% of GDP, to 2% of GDP by the time all instances of state aid are supposed to be aligned with the State Aid Act in 2022.

The recommendation has been adopted, and further work is underway.

### *3.8.2 Public Procurement*

(Recommendations: 1.22; 1.23)

A level playing field is also important in public procurement. A second area where a level playing field is important is government contracts. Previous

37 *European Union funded project "Harmonisation of Public Procurement System in Ukraine with EU Standards," which is assisting the reform of public procurement together with the inception of Ukraine's state aid regulatory system.*

38 Committee's Decree dated December 28, 2015 № 43-рп.

peer reviews found that the AMC reviewed complaints on public procurement operations. However, the MEDT held the regulatory, monitoring and methodology functions, including operating the official Public Procurement Web Portal (where tender notices and tender documentation are published). This division of responsibilities resulted in an overlap of competences and conflicts of powers.

Consequently, the reviews recommended the establishment of a transparent public procurement system through the implementation of e-procurement based on international best practices. A second recommendation focused on the allocation of responsibilities for public procurement in Ukraine. The competences of the MEDT and the AMC should be better specified in order to avoid competence overlap. (Recommendations: 1.22; 1.23)

Since the peer reviews, a new law on public procurement came into effect in April 2016 and introduces an electronic process, "ProZorro". The potential impact of MEDT's ProZorro has been widely recognised. Indeed, Porzorro won the Public Sector Award at the World Procurement Awards in early 2016. The MEDT is working on its automated risk management to help identify bid rigging.

Ukraine has also implemented a project to harmonise its public procurement system with EU Standards. Through the project, Ukraine established a comprehensive and transparent regulatory framework for public procurement, set-up an efficient public procurement institutional infrastructure, and has ensured the accountability and integrity of public authorities regarding public procurement.

In summary, the recommendation that a transparent public procurement system be established through the implementation of e-procurement based on international best practices has been adopted.

The UNCTAD Review recommended clarification of the attribution of competences between the AMC and the MEDT, and that the "monitoring" function is streamlined to ensure that the MEDT focuses on the economic analysis of the efficiency of public procurement. The overlap of competencies had led to a duplication of the appellate functions and ultimately litigation to resolve the problems. Since the UNCTAD review, the monitoring function was removed from the domain of the MEDT and assigned to the State Audit Service of Ukraine (SAS). The AMC and the MEDT have agreed that the public procurement monitoring function should be limited to the economic analysis of

the procurement process, which currently has not been mandated to any particular body, namely with a view to increase the efficiency of the process and assisting with the improvement of process to assist the procuring entities in obtaining goods and services and the best prices possible. Currently, there is a draft law at the Verkhovna Rada which proposes to expand the SAS's powers of monitoring to include control of the procurement process. Should such a law be passed, the attribution of competencies would be further complicated and confusing for all the players and the public.

As a result, the recommendation that the competences of the MEDT and the AMC should be better specified has not been adopted, and the current situation is arguably worse that at the time of the last peer review.

### *3.8.3 Unfair Competition*

(Recommendation: 1.26)

It was recommended in the past that several amendments be adopted to improve or clarify various provisions of the Unfair Competition Law. (Recommendation: 1.26)

Following amendments to the Law of Ukraine dated 18 December 2008 № 689-VI "On Amendments to the Law of Ukraine "On Protection Against Unfair Competition" two new Articles were adopted: i) a new Article 15-1 dealing with the dissemination of misleading information as an unfair competition practice; and ii) a new Article 28-1 setting out a 3 year limitation for the liability for unfair competition violations.

Moreover, according to the Law of Ukraine dated 12 November 2015 № 782-VIII "On amendments to some laws of Ukraine concerning the ensuring the transparency of activities of the Antimonopoly Committee of Ukraine", Article 30 of the Law of Ukraine was amended providing for the publication of the decisions of the AMC on unfair competition cases on its official web-page within 10 working days from the date on which the decision was adopted.

The other recommendations proposed at the time of the 2008 Review have also been adopted.

## 4. Strengths and Weaknesses

### *4.1 Strengths*

#### *4.1.1 Commitment*

Despite the considerable problems that confront the AMC, senior leadership and career staff share a strong commitment to build an effective agency. In the face of poor compensation and a frail administrative infrastructure, the agency's personnel collectively exert maximum effort. We take note, for example, that the AMC public procurement group routinely works twelve hour days to meet mandatory deadlines for the resolution of contract formation appeals. The personnel of the AMC have made, and continue to make, substantial personal sacrifices to see that the agency carries out its duties successfully. This determination to persevere and succeed will be indispensable to the AMC's future progress.

#### *4.1.2 Chairman and Board*

New appointments to the AMC board over the past two years have equipped the agency with a highly professional and committed chairman and board. They have played a pivotal role in helping the AMC recover from a near-death experience. Together, the AMC chairman and commissioners combine experience (from private sector and public sector positions, alike) and knowledge that is vital to the agency's restoration. Superior leadership is essential to a successful AMC future.

#### *4.1.3 Senior Leadership*

A crucial foundation for future AMC reforms is the arrival, within the past year, of highly talented senior managers in a handful of the agency's operating units. They bring impressive experience from the private sector to the tasks of defining and implementing a new AMC strategy. Experience in other agencies has suggested that a recovery effort usefully can begin with a cadre of superb senior managers. The AMC is off to a good start on that path. We also note the concern that the struggle to carry out programmatic and organisation reforms may overwhelm the new team, and the resource issues noted below may make it difficult to retain them over the long run.

### *4.1.4 Trend toward Better Prioritisation and Strategic Planning*

The agency's top leadership displays a high awareness of needed improvements. They have made considerable progress toward defining the agency's ends, selecting priorities, and choosing a strategy to achieve them. The creation of a forward-looking strategy is one manifestation of a new management philosophy that seeks to maximise the social return from the expenditure of AMC resources and to focus the agency's programmes on the most serious competitive problems in the country. Thoughtful prioritisation and strategy-setting are vital for an agency that suffers from a grave mismatch between its policy mandate and the agency's means to execute it.

### *4.1.5 Evaluation and the Commitment to Improve*

The AMC displays a strong willingness to study its past performance, to identify areas for improvement, and to devise measures to strengthen its effectiveness. The agency has started to engage in consultations with external constituencies and developing internal procedures to evaluate the effects of AMC projects. The commitment to a regular cycle of experimentation, assessment, and refinement is an important characteristic of competition agencies that have demonstrated a track record of continual improvement. External consultation should be continued and expanded.

### *4.1.6 Advocacy*

The AMC has over the last few years played a valuable role as a consultant to the government and regulatory agencies regarding how legislation, regulations, and other actions would impact competition. Since 2008, the AMC has devoted substantial resources to reviewing draft regulations, legislation, and resolutions developed by other government agencies. As one of its main goals, the AMC continues to act as a competition advocate and it works to improve the understanding of competition policy by personnel at other government agencies. It plans to spearhead the drafting and implementation of a national competition policy, which will serve as a roadmap to all levels of government and to the public. Such a document, if successfully adopted by Ukraine, would serve as a cornerstone for the development and transition of the economy.

### *4.1.7 Progressive Alignment with EU Standards*

The signature of the EU-Ukraine Association Agreement in 2014 provided the necessary impetus to commence the alignment of Ukraine's competition law with EU standards. To date, these steps have included: (i) ensuring the transparency and publicity of AMC decisions; (ii) reforming merger control; (iii) preparing a number of guidelines; and (iv) elaborating block exemptions on vertical practices and technology transfers. These steps are simply the first of many which must be taken and Ukraine should build on this momentum and continue to align with EU Standards. Proper internal co-ordination of the international efforts that will be undertaken to assist with these projects is essential to their success.

### *4.1.8 Co-operation and Technical Assistance Projects*

Previous reviews had recommended that the AMC expand its co-operation with international competition organisations and competition agencies of other nations. Since that time, the AMC has gone on to successfully sign bilateral memoranda of co-operation with several competition authorities. As well, it has become a regular participant both at the OECD and at UNCTAD. It has currently opened its doors to several technical assistance and twinning projects aimed at increasing the competency of the staff and further assuring that Ukraine implements international best practices where needed. The AMC should continue on this route of opening itself to outside scrutiny and assistance in development. Further co-operation with international competition organisations and competition agencies from other countries can only serve to continue the AMC's development and ultimate transition into an active member of the global antitrust community.

## ***4.2 Weaknesses***

### *4.2.1 Resources*

AMC personnel are badly underpaid compared to their international peers and even other staff of Ukrainian public administration. Wages are decidedly subpar, and the AMC lacks resources to provide other incentives – e.g., participation in workshops, training programmes, and conferences outside Ukraine – that can induce staff to remain, despite poor compensation. To compound these problems, the AMC lacks strong internal resources, in the form of well qualified and experienced senior staff, to provide advanced informal on-

the-job training. Over time, these weaknesses will inhibit the AMC's ability to recruit and retain the staff and leadership it requires to carry out future reforms and to perform its duties effectively. In addition, a poor remuneration even according to wage standards within Ukraine will not help to mute potential allegations of corruption. This could seriously endanger all the good work the AMC is doing. We do not see how the AMC can fulfil its intended role if resource and compensation deficiencies are not corrected. In the absence of enhancements, there are severe limits to how far the sense of commitment and dedication of the agency's staff can carry the institution.

### *4.2.2 Information Technology*

The AMC's information technology suite – computers and communications systems – are over ten years old. A state-of-the-art system is essential for the agency to perform existing tasks adequately, to undertake new duties (such as the state aid control programme), and generally to improve productivity. Without major enhancements, the information technology system inevitably will diminish prospects for the AMC's continuing recovery.

### *4.2.3 Blurred Allocation of Functions between the Board and Staff*

During the crisis of 2013 to 2015, AMC board members, by necessity, undertook a greater role in overseeing investigations and cases. The custom of oversight has continued to the present, at a cost. Board members are too involved with details and not enough with strategic direction and management. While both are much needed in an agency overburdened with cases, Board members need to strike the right balance. Some jurisdictions consider that involvement by board members in the management of cases they will ultimately decide creates risks of blurring the prosecutorial and adjudicative function, and may inhibit the ability of other board members to meaningfully exercise their adjudicative roles. Other jurisdictions do not share these concerns as long as there is an effective system for appeals to Courts. Another concern is that excessive involvement in the control of cases may inhibit the professional development of middle managers and staff, who are relegated to lesser roles in the management of cases.

### *4.2.4 Effectiveness of the Regional Offices*

The AMC dedicates a substantial part of its resources to the agency's 20+ regional offices. The contribution of the regional offices to AMC programme does not appear to be commensurate with the resources allotted to them. Regional offices appear to devise projects without adequate consultation with AMC headquarters to ensure that such projects are well matched to the agency's goals. Headquarters personnel also appear to have an uncertain grasp of how the regional offices are functioning – their priorities, what matters they are pursuing, how they are resolving disputes, etc. Among other effects, better integration of regional office operations into the AMC's larger programme would allow AMC to use its resources more efficiently and to articulate more clearly its interpretation of competition laws and its enforcement policies. Better integration would also help avoid inefficient duplication of functions with sectoral regulators at the local level.

### *4.2.5 Enforceability of Decisions and Limited Judicial Expertise in Competition Law*

Many of the judges who hear disputes involving AMC cases lack a basic understanding of competition law and economics. One contributing factor to this is that competition cases are not heard by a single court, but instead are divided between two different court levels (administrative and economic). The judiciary's limited expertise in the field prevents courts from making well-founded decisions in cases and appeals involving competition law. This is especially problematic since there is a lack of enforceability of decisions at the AMC, which means the AMC must apply for judicial enforcement of all its decisions. As a result of the length of judicial appeals, but also of the ineffective enforcement procedure, the collection of monetary penalties imposed by the AMC continues to be ineffective.

### *4.2.6 Permission-Oriented Work Culture*

The AMC professional staff is hard-working and committed to making the AMC a better competition agency. However, AMC staff are confronted with an unmanageable workload which undermines its ability to be efficient and carry out effectively its mandate. While competition agencies around the world all face challenges to managing their workloads, this situation is exacerbated in the AMC for two reasons. First, AMC staff are reluctant to advise terminating proceedings for cases that lack merit without engaging in a formal and resource-

intensive investigative and decision-making process. This is also due to concerns that by exercising discretion, the AMC risks incurring allegations of undue influence by private actors. Second, the AMC cannot control the inflow of investigations, not only adding to the workload but also leading to potential misallocation of resources by an already resource-poor agency.

### *4.2.7 Anticompetitive practices*

The AMC's record on enforcement has been mixed, specifically in the area of concerted actions. As was noted, despite its best intentions, the default for enforcement still tends to be towards abuse cases. A lack of experience in investigating collusive practices and path-dependency in favour of monopolistic practices means that investigators tend to default to looking at cases as abuse of dominance cases. While the ratio of concerted practices to abuse cases has started to improve, there is still a long way to go. Further, the AMC has been attempting to reduce significantly the role of structural market indicators (e.g. the market share of enterprises) in the designation of dominance, and increase the role of other considerations in its analysis, such as economic analysis of the market situation and the negative effects on competition and consumers.

However, the limited cases we were able to review showed that this new approach has yet to be applied in the majority of cases. Most abuse of dominance cases heard by the AMC follow provisions regarding the setting of the price or another condition of purchase on a level which allegedly could not be possible in a truly competitive environment. The AMC finds itself expending significant resources to address excessive pricing and other price control measures – hence trying to treat the symptoms of competition failures and not the causes. In general, the quality of the market analysis in AMC's decisions is incomplete and superficial, though a few of the decisions demonstrate a deeper understanding of the products or services in question.

### *4.2.8 Investigation powers*

A critical factor limiting the AMC's ability to act effectively against violations of competition law is the set of restrictions imposed on its ability to collect evidence. Of key importance is the restriction on the collection of evidence through searches, seizures or interviews. While conducting unannounced inspections, the AMC staff are prohibited from seizing documents or conducting interviews without the consent of the entity under investigation. Additional restrictions on investigation power include the complete prohibition

of any scheduled inspections which is imposed periodically by the Verkhovna Rada (e.g., during Q2 2014, Q2 2015, and Q1 2016). Further, the AMC lacks effective powers to identify the beneficial owners of many firms that are nominally controlled by offshore companies.

### *4.2.9 Leniency Programme*

To date, the existing leniency programme has had limited success. Complete immunity from fines is only allowed for the first undertaking to inform the AMC. Many leniency regimes benefit from contributions by subsequent informants to improve access to evidence and to speed up investigations. So far the Verkhovna Rada has not amended the leniency programme such that the AMC can reduce fines to companies that apply for leniency subsequent to the original leniency applicant, thereby limiting the AMC's ability to encourage co-operation.

### *4.2.10 Concentrations*

Concentrations have undergone the most legislative change, but this is also an area where the AMC has endured severe criticism in the past. This area is still ripe for vast improvement and development. For example, but more importantly, currently, there is no guidance on what constitutes a "significant restriction of competition in the market" which is the defining concept to identify problematic concentrations. As regards the improvements that have been recently adopted, such as the amended merger control thresholds and the new fast-track approach, the AMC should monitor the effect of these steps on the filing of notifications to ensure that the marketplace is responding to these changes and that they have been sufficient to reduce the previous administrative burdens which led businesses to simply avoid filing in Ukraine. The recent extension of the amnesty for past mergers is a positive step in the right direction. In addition, the AMC has historically had a reputation for opaqueness, inconsistency, delays and a lack of concern for the legitimate concerns of the notifying parties and improvements beyond those already made seem possible.

### *4.2.11 Coherent legal framework*

Ukraine's legislative process is complicated with the Verkhovna Rada, Cabinet of Ministers and individual Ministries regularly adopting secondary legislation or making rules or regulations which conflict with primary legislation and often include various exceptions and exemptions to laws. For example, it was observed in previous peer reviews that the Commercial Code includes a number of provisions inconsistent with the competition law that create uncertainty for business enterprises and do nothing to attract foreign investment. To date, nothing has been done to correct these inconsistencies. Further, competition laws that lack clarity – for example, the provision requiring the turnover and assets of the seller's corporate group to be taken into account when assessing whether the merger thresholds are met – should be addressed and brought into alignment with international norms. The government's tendency to grant exclusions from the application of the procurement laws should also be halted, as should the attempts to confuse the competencies between the MEDT and the AMC with the expansion of powers to the State Audit Service.

## 5. Prioritised Recommendations

### *5.1 To Parliament and Government*

### *5.1.1 Institutional Matters*

- Ensure the autonomy of the AMC and provide adequate resources to assure that the AMC can maintain high standards of performance in accomplishing its mission. Allow for flexibility in the use of staff resources between the central and regional offices.

Sufficient financial and human resources are key to independent and effective enforcement of competition rules. The AMC is one of the most underfunded bodies of state power among all public authorities of Ukraine, according to the total expenditure of the State Budget of Ukraine for 2016. The AMC's current budgetary constraints are having a negative impact not only on its human resources recruitment efforts, but also on the day-to-day functioning of the organisation. Compensation needs to be addressed at every level to ensure that the AMC is able to recruit and retain the proper people and to ensure its development is successful. The salaries and working conditions in all parts of the AMC need to be competitive compared to relevant line ministries and

regulators that deal with complex economic issues, courts and to a certain extent also private practice. The lack of additional resources for the current and anticipated work of the procurement and the state aid groups is outright alarming. Both groups have been tasked with considerable responsibility without the commensurate funding or manpower. Additional resources are urgently needed.

Further, the AMC currently lacks freedom in the allocation of staff and budgets between the territorial and central offices. This would allow readjusting allocation according to internal priority setting and could somewhat alleviate resource constraints.

Possible solutions include a significantly increased, separate budget allocation in the overall state budget for which the AMC has budgetary autonomy to spend, or allowing the AMC to generate their own revenues by collecting user fees (e.g. from merger filings or procurement appeals). Other agencies are funded by taxes or contributions levied on undertakings in general. Independent sources of funding would also offer a degree of insulation from potential political influence.[39]

- Introduce transparent appointment and dismissal rules for the AMC Chairman and the State Commissioners and ensure continuity

It is recommended to establish a standardised procedure for appointing and dismissing all members of the AMC, without exceptions, including the Chairman and state commissioners. This procedure could be carried out by the Parliament of Ukraine based on the proposal of the Prime Minister or the President of Ukraine. All members should have clearly defined terms in order to ensure continuity and to prevent undue political influence. A simultaneous appointment or dismissal of all members of the committee should be avoided. A staggered approach would prevent this.

The appointment of the members of the committee should be merit-based and occur in a clear and transparent manner, and appointed members of the committee should be individuals with a higher degree in law or economics with work experience in the areas of competence of the AMC.

39 More on the need for budgetary autonomy and sources for funding for a competition authority see here: https://one.oecd.org/document/DAF/COMP/GF(2016)5/en/pdf; in particular 3.1 and 3.2.3.

- The AMC should be given the discretion to decide which cases to initiate and to manage its case load so as to optimise the use of its scarce resources.

Under the current legal framework the AMC does not have much discretion which cases to take on and which complaints to investigate or reject. It should have the right to reject complaints, discontinue investigations, or withdraw legal appeals if they do not fit its transparent enforcement priorities. Given the limited resources the AMC has available, making choices is inevitable and will increase the overall effectiveness of competition law enforcement in Ukraine. Excessively limiting the discretion to select cases for investigation will lead to an overall insufficient enforcement regime.

### *5.1.2 Anticompetitive Practices*

Ensure that hard core cartels and bid rigging are deterred effectively and punished by

1. Strengthening the AMC's investigation powers;

2. Revising the leniency programme to include fine reductions for other parties than immunity applicants;

3. Establishing individual liability and increasing administrative penalties to individuals;

4. Ending fine evasion;

5. Establishing direct enforceability of AMC decisions; and

6. Enabling the AMC to co-operate with other jurisdictions.

The OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels[40] stipulates that competition laws should provide for effective and deterrent sanctions for firms and individuals; and for enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to

40 http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=193&InstrumentPID=189&Lang=en&Book=False.

impose penalties for non-compliance. The relevant legal provisions and the enforcement powers of the AMC should be adapted and changed in the following ways:

1. Strengthen the AMC's investigation powers

According to the current legislation, the AMC is restricted in its ability to collect evidence as it cannot search for and seize documents without the consent of the undertaking under investigation, and cannot question an individual without their consent. Another limitation for the AMC in collecting evidence is the fact that it is not permitted to conduct searches and seize documents from private premises. Taken together these shortcomings seriously limit the AMC's ability to obtain evidence for competition law infringements and open opportunities to hide and destroy evidence once it becomes known that an investigation is ongoing.

The AMC should not need the consent of the undertaking under investigation in order to search for and seize evidence of competition law violations. Furthermore, it should not need the consent of individuals in order to question them keeping in mind the requisite rights of individuals not to self-incriminate.

In addition, the law should be modified in a way that when approved by the court, the AMC should be allowed to search and seize evidence from private premises. The law should also be modified to increase the penalties for economic entities who fail to comply with reasonable demands for the AMC for documents and other information.

2. Revise the leniency programme to include fine reductions for other parties than immunity applicants

The rationale behind a leniency policy is generally two-fold: (i) increased deterrence; and (ii) enforcement efficiency. Due to these reasons, it is considered, on balance, to be in the public interest to entirely or partially forgo the punishment of someone who violated the law, even if considered in isolation, it may offend traditional notions of justice.

The Ukrainian leniency programme provides for immunity for the first party to report a violation that was not known to the AMC. Current practice in many jurisdictions is to provide for a reduction in fines also for subsequent

parties that come forward after the initial immunity is granted so as to increase the incentives for co-operation and to expedite settlement of matters. There is currently no programme for subsequent leniency applicants in Ukraine. We recommend that the leniency programme should include a decrease in the amount of fine compared to its full size, taking into account the degree of co-operation and various other factors for subsequent applicants.

In accordance with the developed proposals, the liability will only be decreased for undertakings that submit to the AMC material evidence of anticompetitive concerted actions in addition to those already available in the AMC. Alignment with the ECN Model Leniency Programme could be considered to facilitate application across jurisdictions.[41]

3. Establish individual liability and increase administrative penalties to individuals

The law does not provide for sanctions to individuals for competition law infringements, even if the Code of Ukraine on Administrative Offences allows for individuals to be subject to small fines for certain administrative infringements. The Code should be amended to allow the AMC to impose administrative fines on individual offenders.

The individual fines for violations of the legislation on protection of economic competition need to be significant in order to have a deterrent effect. This could be achieved through the amendment of the Code of Ukraine of Administrative Offences that increases the number of tax-deductible minimum citizen incomes which are provided for by this Code or through the development of a special fines regime within another legal framework.

4. End fine evasion

Currently guilty parties successfully avoid the payment of their fines through liquidation, re-registration or changing the name of the charged and fined economic entity. To address this problem, the law should be amended to include liability of the parent company in an infringement case and to respectively attribute liability for a breach by a subsidiary both to the subsidiary and to its parent company, where they form part of the same group of undertakings. Ukraine should consider the implementation of the EU approach

41 http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf

where the parent group can be held jointly and severely liable for antitrust violations committed by one of the group's subsidiaries. This could safeguard the AMC's ability to recover fines in cases where a subsidiary would organise its insolvency or be liquidated in an attempt to avoid liability.

5. Establish direct enforceability of AMC decisions

Decisions of the AMC which have become binding (no appeal or decision confirmed by a court) should be directly enforceable. Today the AMC, in order to enforce its decisions (i.e. prohibition and fines) , must apply to the court in order to obtain an enforcement document, and then apply to the State Enforcement Service of Ukraine with this enforcement document, which enables the State Enforcement Service of Ukraine to enforce the AMC's decisions. The direct enforcement status of decisions of the AMC will enable the AMC to apply for the enforcement of its decisions straight to the State Enforcement Service of Ukraine. This will again enhance effectiveness and deterrence of the cartel regime.

6. Enable the AMC to co-operate with other jurisdictions

The OECD Recommendation, confirmed by current international trends, stipulates that an effective hard core cartel regime requires co-operation and information exchange with international counterparts. The AMC should be enabled to implement the Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations[42] and the OECD Recommendation Concerning International Co-operation on Competition Investigations and Proceedings.[43]

### *5.1.3 Procedures and Enforcement - Authorise the AMC to seek court injunctions against competition law violations during the pendency of AMC proceedings*

Currently, the AMC is only allowed to apply before a court for the enforcement of final decisions finding a competition infringement. Some competition law violations create facts and cause harm that cannot be undone and require immediate action. It is recommended that the AMC be allowed to

42 www.oecd.org/daf/competition/cartels/35590548.pdf.

43 www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm..

apply for court injunctions against anti-competitive conduct during the pendency of its investigations.

### *5.1.4 Clarify the jurisdiction of the courts to promote specialisation and provide training to judges*

Currently, competition disputes are handled by both administrative as well as commercial courts. Furthermore, the courts and judges lack specialised knowledge of competition law and principles. This leads to consequences such as contradictory and mutually exclusive rulings in cases regarding competition law. As competition law matters are often complex and economically sophisticated, some specialisation of judges, or some concentration of the cases on a few generalist judges, would greatly help the review of these cases. These judges should receive appropriate training, as competition law matters require a deep understanding of competition law concepts, economic thinking and competition economics which cannot be expected from generalist judges.

It is suggested to make amendments to the procedural laws, which would enable the establishment of a group of judges specialising in competition law, who are qualified to handle disputes in the sphere of competition law. These judges would require intensive training. Specialised trainings can be given by government institutions, the legal and academic community, non-governmental organisations and can also involve international organisations. [44]

### *5.1.5 Public Procurement - Review and improve the Public Procurement Law and Process*

Currently, the AMC's public procurement division is faced with tight timelines and few resources. In its effort to meet its obligation as an appellate body for public procurement disputes, the Committee finds its staff working long hours and three commissioners are constantly occupied with the tasks associated with this work. Further resources are required in this area and the timelines for appeals must be amended to provide more time for proper review of matters. Alternatively, a different mechanism could be set up for reviewing procurement disputes, thus removing it from the AMC altogether. Data screening should be implemented to assist with detection of possible bid-rigging. The government should assess the public procurement laws and

[44] See for example section 7.2.1 in www.oecd.org/daf/competition/resolution-of-competition-cases-by-courts-2016.htm.

practices at all levels of government in order to promote more effective procurement and reduce the risk of bid rigging in public tenders. The OECD Recommendation on Fighting Bid Rigging in Public Procurement could be used as a template for such a review, including the 2016 Report on implementing the Recommendation.[45] OECD bid-rigging training could be provided to all parties involved in the public procurement process, including the other agencies and ministries.

### *5.1.6 Amend the Commercial Code to eliminate conflicts between it and the competition laws enforced by the AMC*

Amendments to the Commercial Code to remove serious conflicts with the competition law provisions should be implemented as soon as possible to provide clarity to the AMC on the enforcement of competition laws. As already criticised in previous reviews, the Code contains a number of conflicting provisions which create uncertainty and inhibit foreign investment. The inconsistencies that are detrimental include: a comprehensive ban on anti-competitive concerted actions, with no allowance for the AMC to permit conduct; and a requirement that AMC approval is needed before obtaining control of any business entity, regardless of the size of the firms involved.

### *5.1.7 Regulated Sectors - Improve regulatory systems for natural monopolies*

The government should facilitate and push for the MOU's to be signed between the AMC and the other regulated sector agencies. These MOU's should delineate clearly areas of responsibility of each agency to minimise duplication of work in certain problematic areas (for examples complaints regarding pricing of energy). These should cover the work of the AMC regional offices at the local level as well as at the national level.

The AMC and regulated sector agencies need to establish permanent working groups to focus jointly on areas of competition. Staff exchanges between organisations should be considered.

45 www.oecd.org/daf/competition/oecdrecommendationonfightingbidriggininpublicprocurement.htm

Finally, the government should speed up the establishment of an independent collegiate body (national commission) for the state regulation in the sphere of transport.

### *5.2 To the AMC*

#### *5.2.1 Institutional Matters*

- Enhance priority setting to ensure that violations with the greatest impact on competition and the economy are effectively prosecuted

It is anticipated that a properly drafted and implemented National Competition Policy and 5 year strategy plan will directly impact the annual plan of the AMC, and thus directly influence its choices on which cases to take on. These documents should be aligned. Drafting should include input from various stakeholders and the end result should be transparent. Annual evaluations should be measured against these documents.

Taking into account the limited resources of the AMC, the committee should concentrate on identifying violations which threaten free competition, the termination of which would have a significant impact on the economy. These actions need to be characterised by the application of sound economic analysis, fullness and diversity in the assessment of evidence, and a transparent decision-making process. Specifically the committee should concentrate on the identification and termination of cartels and the removal or prevention of structural obstacles to competition to prevent the abuse of dominant positions on socially important markets. Transparency and disclosure of its priorities are crucial to establishing its credibility in the marketplace and to justifying the recommended discretion in taking on cases.

On a day-to-day basis, establishment of an internal case screening mechanism with participation of key management could advance the prioritisation process.

- Further harmonisation of the Ukrainian competition law regime with international best practices

The AMC has started to harmonise the country's competition practices with international best practices. At this time, several international projects are ongoing or about to start which will assist the AMC with further alignment with

its colleagues within the EU and abroad. The current work with the EU Twinning project and the other international projects (such as the FTC and the ERBD) within the AMC should continue. Success of these international efforts can only be realised if the AMC plays a co-ordination role to ensure no duplication of efforts or resources on the part of the donors and wide exposure to these projects on the part of the AMC staff. An assessment of these efforts should be done in due time to ensure progress is being made and that the path to harmonisation is successful.

- Improve co-operation with other Ukrainian law enforcement agencies

There is a need to develop and implement legal and organisational mechanisms to structure the AMC's interaction with law enforcement agencies (for example the National Police) during the investigation of cases on violations of the legislation on protection of economic competition. This evolution from willingness-based co-operation to clearly articulated, binding co-operation will ensure that roles and responsibilities in joint investigations and information sharing are explicitly allocated. Memoranda of understanding should be executed with key partners and further relationship building in the form of working groups, exchanges and sharing of best practices would be particularly important. Consideration should be given to elevating the AMC's status to that of an enforcement agency to allow it the independence to carry out its investigations without influence or having to rely on others for assistance.

- Develop an evaluation programme and reporting

Regular evaluation should be done against the annual plan – setting out goals and then measuring against them. See the points above about integrated programmes. This will increase transparency and provides a valuable opportunity to the AMC to learn, improve and enhance the effectiveness of its enforcement activities. It will also challenge the staff to improve its investigations and methods. Overall it will provide the AMC with greater credibility.

The mandatory annual report of the AMC to the Parliament of Ukraine should allow for public accessibility to the reported materials of the AMC. Results of the parliamentarian response should be disclosed to the public.

### *5.2.2 Anticompetitive Practices*

- Provide more guidance concerning enforcement priorities

Current international trends in the competition arena are towards more transparency regarding agencies' enforcement priorities. This often includes roundtable meetings with the bar and private sector, public outreach, and the publication of public annual plans setting out an agency's strategic objectives. The AMC should ensure that it undertakes similar advocacy efforts and provides similar clarity across all of its lines of work. Guidance to the public will also help to spread the knowledge about competition law requirements and will help to improve competition culture on all levels.

- Shift the enforcement balance towards anticompetitive horizontal agreements, in particular hard core cartels

As explained above, the AMC still deals with many abuse cases and addresses perceived pricing abuses. These cases are difficult in nature and do not address the root causes for the alleged infringements. They treat symptoms instead of underlying causes. Stepped up enforcement against hard core cartels would address directly the most harmful kind of competition law violations and would bring immediate results by making markets work competitively with all the associated benefits to consumers and society as a whole. It would also increase the credibility of the AMC as an enforcer, improve deterrence and have a large preventive effect.

- Improve the analytical methods and introduce more and better economic analysis

In order to bring more economic analysis to its decisions, AMC will need to improve its investigative methods to understand better the competitive dynamics of the markets and the various market participants. AMC will, therefore, need to be more proactive in reaching out to market participants for information. This process will require AMC to gain more credibility with the business community generally. AMC staff will need to demonstrate competence in understanding markets generally, and be able to provide credible assurances that the information and opinions of the economic entities can be kept confidential if so requested. To this end, AMC should seek to recruit economists with industrial organisation training to its staff.

### *5.2.3 Merger Control*

- Introduce/strengthen informal consultations in merger cases

Merger control is often the main window through which the business community and international investor perceives a competition authority. Historically, the AMC has had the reputation for opaqueness, inconsistency, delays and a lack of concern for the legitimate concerns of the notifying parties. While many steps have been taken to address these issues, preliminary consultations with merger applicants should be embraced by the AMC staff, and such consultations should happen early in the process and as often as possible thereafter. Together with these consultations, the business and legal community eagerly await the regulations and guidelines on principles and approaches to be applied by the AMC when assessing mergers. All of these steps, together with the current work being provided by international partners, are needed to help revamp and bring credibility to a vital branch of the AMC. A mechanism for preliminary consultations with merger parties needs to be implemented and made clear to staff and the marketplace. This will benefit the AMC as well as the parties to the merger and help clarify competition concerns and streamline notifications and information requirements. In addition, the AMC leadership needs to ensure that informal consultations during the examination period should be allowed and even encouraged by its staff, well beyond the mandatory consultation steps. The availability of merger guidelines issued by the AMC should enhance the effectiveness of such consultations.

- Move towards structural commitments and implement effective monitoring

While commitments may be behavioural or structural, no structural commitments have been imposed during the last 10 years. Structural commitments should be imposed where appropriate and are considered to be the superior instrument by many competition authorities. Only structural commitments can solve a structural competition problem as presented by an anticompetitive merger. There are few mergers where behavioural commitments would be considered to be better placed; for the most part these are vertical mergers. In most cases they can at best serve as ancillary commitments to ensure the success of a predominantly structural commitment in a transition period.

For monitoring purposes, the AMC imposes a reporting obligation regarding commitments proposed by the parties or remedies imposed by the AMC. Currently, there is no mechanism in place to monitor remedies and this task has been assigned to the Legal Department which is overburdened with various matters and cannot monitor effectively. Structural commitments also reduce the monitoring burden significantly. In addition, trustees could be charged with the task and report back to the AMC. The lack of enforcement of any violations of these obligations is worrisome and needs to be addressed. Clear messaging to the marketplace as to the consequences of non-compliance should be provided and followed through by the AMC.

### *5.2.4 Procedures and Enforcement - Increase transparency of decisions to provide more guidance and predictability to the bar and the private sector*

In an effort to meet its legislative disclosure obligations regarding decisions, the AMC has published all decisions over the last several years and simply removed sensitive corporate information. These decisions, however, do not always establish the detailed reasoning behind the AMC's decision and the AMC needs to do a better job of setting out reasoning. More user-friendly materials should be produced. Decisions published by the Committee should be written in a clear manner with special attention to the guidance and precedential value that such decisions provide to the legal and business communities. Additional short abstracts of decisions would reach a wider audience than full decisions.

### *5.2.5 Advocacy – Continue efforts and become the voice of competition on all levels*

The AMC should continue serving as a competition advocate to other parts of the government, with particular focus on increasing the understanding of competition policy principles among judges, prosecutors, and other law enforcement and regulatory agency personnel. To do so, the AMC could consider releasing preliminary findings.

It will be particularly effective for the AMC to intensify the assessment of draft decrees of the President of Ukraine, bills under consideration of the Parliament, and draft resolutions of the Government of Ukraine, based on procompetitive principles. The results of such examinations must be published. The AMC members should aim to be represented in higher institutions of the

Ukrainian government in order to advocate for procompetitive principles and oversee decisions that may affect the state and development of economic competition. Consideration should be given to the preparation of MOU's to help develop expertise in other ministries and agencies, possibly with exchanges to assist the development of competition expertise within these bodies.

The use of the OECD Competition Assessment Toolkit is encouraged. It provides helpful guidance and practical experience in a language that can be understood also by non-competition experts. [46] This Toolkit could be implemented in various problematic sectors to ensure the proper pro-competitive regulations are implemented and that the sectors develop properly. The remit of the Ministry of Health is one area which could benefit from the application of the Toolkit immediately.

46 The toolkit is available here: www.oecd.org/competition/toolkit.

www.oecd.org/competition