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BREAKING NEWS

The Supreme Commercial Court of Ukraine explained certain issues of the practice of competition law

The **Plenum of the Supreme Economic Court of Ukraine** expressed its position on a set of issues in the Resolution On Some Issues of Practice in Competition Legislation Application No. 15 as of 26.12.2011 in order to ensure "proper and uniform application of the provisions of competition law by commercial courts".

You may find detailed analysis of the abovementioned Resolution in section [Judicial Application of Competition Legislation](#).

THE RESULTS OF AMCU ACTIVITIES - 2011

Thanks to the actions of the Antimonopoly Committee of Ukraine for the socially significant markets, citizens and entrepreneurs in 2011 saved about 490 million UAH

In 2011, AMCU authorities have received and processed approximately five thousand notices of competition legislation infringement.

According to Rafael Kuzmin, bodies of the Committee ceased around 4.5 thousand violations of the legislation, which is 37.2% higher than in 2010. Among them, about 1.9 thousand abuses of monopoly power, 350 anticompetitive concerted actions of economic entities, a thousand anticompetitive actions of the authorities and more than 450 cases of unfair competition, of which 395 are related to untruthful advertising.

The size of fines imposed on violators' accounts to approximately 42 million UAH, which is one and a half times higher than the previous year. At the same time, as noted by Rafael Kuzmin, the Committee did not and does not intend to apply to violators strict financial sanctions. "The primary task of the Committee is to protect the interests of the citizens of Ukraine and fair competition, so the main thing for us is the cessation of the breach", - said Deputy Chairman of the AMCU.

The bodies of the Committee analyzed approximately 3.2 thousand regulatory acts that could affect the economic competition, and provided nearly 3.5 thousand of recommendations aimed at promoting competition and preventing monopolization of markets, by governmental bodies and local authorities.

Rafael Kuzmin emphasized that the conducting of comprehensive inspections, in which the whole system of the Committee has been involved, is the specific feature of the last year.

Such inspections have touched the markets of administrative, housing and communal services, electricity and gas, compressed and liquefied gas, food (vegetables, eggs and dairy products). In particular, the Committee examined about 4 thousand state agencies and entities that provide administrative services, and carried about three thousand inspections in housing and communal services concerning the activities of associations of condominiums.

In 2011, the intervention of the Committee has ensured the stabilization and reduction of prices for sunflower oil, as well as its stable and uninterrupted supply to the domestic market, and has prosecuted entrepreneurs for anti-competitive concerted actions in the markets of buckwheat and bread. The Committee acted quickly due to the increase of tariffs for the provision of places for food trade.

First Deputy Chairman of the Antimonopoly Committee stressed that fuel and energy markets remain the subject of constant attention of the Committee. First Deputy Chairman of the Antimonopoly Committee stressed that the subject of constant attention of the Committee remain the market's fuel and energy complex. For example, in 2011 the Committee provided the participants of the market of liquefied natural gas, which is used as motor fuel, with 76 recommendations to prevent or stop actions having signs of violations. In some regions violations on the fixed tariff electricity supply and gas cylinders market were suspended.

The bodies of the Committee continue active work on revealing anticompetitive concerted actions of economic entities in public procurement. Last year, the Committee adopted about 290 decisions on prosecution of unfair bidders. As part of the functions of the Committee authority to appeal decisions in the field of public procurement during 2011 handled about 665 complaints, of which about 234 has been satisfied and 159 refused.

During the past year the Committee considered around 756 applications for the concentration of economic entities and 58 applications for permission for concerted actions.

The Committee intends to continue to do its utmost to ensure that the protection of interests of the broad community of entrepreneurs and consumers on the socially significant markets.

AREAS OF AMCU FOCUS - 2012

The market of medicines, food, and others are to face extensive background checks of AMCU

According to Rafael Kuzmin in 2012, AMCU authorities intend to conduct extensive researches of the following markets: medical services and pharmaceuticals, petroleum products and liquefied natural gas, certain banking services, building materials, food products, services for the provision of places for food trade, customs services provided at customs control areas and points, compulsory technical inspection of vehicles, land relations, housing unfinished construction.

AMCU is investigating increased costs of hotels and taxi service before Euro-2012

AMCU examines the matters of increased tariffs for hotels and taxi service on the eve of Euro 2012.

"We are holding an investigation into these matters," - said Deputy Chairman of the AMCU, Rafael Kuzmin. "These are mainly anticompetitive concerted actions regarding parking, allocation of market by areas and attractive points as well as unreasonably high prices for services".

According to Rafael Kuzmin, in particular, the investigation is carried out on taxi market in Kiev. "This is a very big case, inspections are still in progress. We are working on it and will strengthen efforts in this direction," - said Deputy Chairman of the AMCU.

Rafael Kuzmin did not say who is the subject of the investigation and upon whose request the case is under investigation, referring to the secrecy of the investigation. But he noted that it were anti-competitive concerted actions.

Earlier in mass media appeared the information that the hotels are going to raise the accommodation prices before Euro 2012 in three or four times.

AMCU investigates the market of mobile roaming

AMCU together with the relevant authorities of Russia and Kazakhstan conducts a joint investigation on the telecommunications market, namely on the validity of the cost of mobile roaming. Chairman of the AMCU reported that the Committee fully supports the idea of reformation of the mobile roaming, if Moldova, Romania, Bulgaria, Turkey and other popular among Ukrainian citizens countries will combine their efforts.

"When you are traveling, for example, to Russia, and use the roaming service, 80% of income goes to the Russian mobile operators, and only 20% to ours. Almost the same situation is in other countries mentioned above, "- said Vasily Tsushko.

Therefore, he said, if AMCU synchronizes its investigation in the field of mobile roaming services with respective regulatory bodies in other countries, then, ultimately, the user benefits of mobile communications.

"The representatives of the Kazakh and Russian antitrust authorities reported that the investigation on the market of mobile roaming enabled them to reduce its cost by several times", - said Chairman of the AMCU. He also drew attention to the fact that, when Ukraine began to explore and investigate this question, we have already had per-second billing calls, while Russia and Kazakhstan - per minute. "And the cost of roaming, is lower than there" - said Vasily Tsushko.

According to him, so far, AMCU and other foreign participants of the process are working in the mode of consultations and suggestions.

Recall that in early 2011 upon the recommendation of the Antimonopoly Committee of Ukraine all the major mobile operators in Ukraine reduced roaming rates.

COMPETITION LEGISLATION REFORM

The Law on optimization of the AMCU structure

On January 15, 2012 [the Law of Ukraine On amending the Law of Ukraine On the Antimonopoly Committee No. 4287-VI](#) came into force.

According to abovementioned document, the number of state commissioners within AMCU has been reduced from ten to eight.

The number first deputies and deputies of the Chairman of the AMCU is also reduced. Thus, instead of the previously appointed two first deputies and three vice-presidents AMCU law provides for one first deputy and one Deputy Chairman of the department.

Among other changes, the law also grants AMCU the right, if necessary, to reorganize and liquidate the territorial offices.

JUDICIAL APPLICATION OF COMPETITION LEGISLATION

26.12.2011 The Plenum of the Supreme Economic Court of Ukraine (hereinafter referred to as – SECU) adopted the Resolution № 15 On Some Issues of Practice in Competition Legislation Application (hereinafter referred to as – Resolution)

In the indicated resolution SECU expressed its position on several issues in order to ensure "proper and uniform application of the provisions of competition law by commercial courts" and rendered recommendations of the Presidium of the Supreme Economic Court of Ukraine as of 29.10.2008 N 04-5/247 *On Some Issues on Practice in Competition Legislation Application* (with subsequent amendments) ineffective.

In accordance with the explanation given by SECU, disputes that arise out of relationships associated with restriction of monopolies and the protection of business entities from unfair competition, including disputes relating to the appeals of decisions (orders) of AMCU, and the case of claims of AMCU to recover from business entities fines and penalties for violation of competition law, shall be adjudged by economic courts.

When the dispute concerning the annulment of the AMCU order about the beginning of the proceedings on violation of legislation on economic competition protection is under consideration, the court shall verify only the existence of the circumstances of the adoption of the order in violation of the current legislation and / or the competence of the issuing body.

The SECU explained in item 2 of the Resolution, that the period for appeal of the AMCU decisions, stipulated by the current legislation of Ukraine, cannot be extended. The time limit for claims, set forth by the Civil Code of Ukraine, shall not be applied to such legal relations.

Besides, while adopting court decisions on bringing businesses to responsibility, courts shall take into account time limit for claims, set forth in article 42 of the Law of Ukraine *On Economic Competition Protection* and article 281 of the Law of Ukraine *On Protection against Unfair Competition*.

The SECU specified legal grounds for the AMCU decisions to be acknowledged invalid by commercial courts, namely:

- AMCU's violation of its competence to adopt decisions (for instance, the decisions is not signed by an authorized person).
- AMCU's violation of procedure while considering cases on breach of competition legislation or while conducting examination, if such violation of the AMCU prevented from finding actual evidences, which are significant for adoption of a proper decision in the case.

The SECU pointed out in item 8 of the Resolution, courts shall take into account following facts, while settling disputes on acknowledgment of concerted actions of businesses as anticompetitive practices:

- The absence of monopoly (dominant) position does not exclude a negative impact on the market.
- Evidences of formal approval of concerted actions (including but not limited to written agreements) are not required for acknowledgment of businesses' actions as anticompetitive practices in the form of similar actions.
- Features of businesses actions similarity is not the only sufficient evidence of prior concert (anticompetitive concerted actions).
- Fulfillment of contract (commercial) obligations does not discharge a business from liability for violation of law (anticompetitive concerted actions).

The Resolution contains a set of provisions, explaining the SECU's position on pricing:

- Establishment of maximum retail prices for definite goods by some businesses cannot be acknowledged anticompetitive concerted actions in the form of essential limitation of competitive ability of other businesses.
- AMCU may control compliance of businesses with the requirements of legislation on protection of economic competition in the field of establishment and application of free prices and tariffs.
- Application of different prices and other conditions to similar agreements with businesses, sellers or buyers without reasonable grounds may be deemed to be abuse of monopoly (dominant) position on the market, in notwithstanding that such relations were not set in writing (a written contract).

While considering disputes on failure to provide AMCU with requested information or providing incomplete information, courts shall take into account the following:

- AMCU's inquiry on information is lawful only in cases, directly set forth in current legislation, within the framework of considering a notice on violation of economic competition protection.
- The legislation does not stipulate a definite form of AMCU's inquiry on information. Thus, the inquiry may be sent to businesses in any written form. Nevertheless, if the business states no any AMCU's inquiry was received, the AMCU shall provide the court with a proper evidence of sending the inquiry to the legal address (address of registration) of the business and receiving it by an authorized person.
- The legislation does not stipulate any special form and any special procedure for providing an answer to a request of a body of the AMCU on rendering information. Therefore, the information to the relevant requests may be provided by a business entity in any form not prohibited by the law, as well as in any way. However, if a body of the AMCU objects to the receipt of information to a sent request, a business entity shall provide court with adequate evidence of its providing.
- Failure to provide information by a business entity to repeated requests by the AMCU on the same case is a separate violation of the legislation on economic competition protection in each case.
- Belonging the requested information to the restricted access information does not relieve an enterprise or an organization from the obligation to provide such information.
- Providing information within the prescribed period, but no in full volume is not considered to be failure to provide information within the prescribed period, and is a separate violation of the legislation on economic competition protection.

In considering cases related to the AMCU's definition of the monopolistic position of business entities, courts shall take into account the following:

- The establishment of the monopoly (dominating) position of a business entity includes the use of both structural and behavioral indicators that characterize the state of competition on the market.
- The statements of the parties to a dispute to the fact that this or that products market studying by the AMCU is not stipulated by the legislation shall not be taken into account by courts.
- The obligation to prove in court the fact of a business entity occupying the monopoly (dominating) position on the market lies on the AMCU.
- The economic courts shall control the correctness of the application of the relevant legal provisions by the AMCU.
- In paragraph 16 of the Resolution, the Supreme Economic Court of Ukraine indicates that the list of actions given in article 29 of the Commercial Code of Ukraine that are considered the abuse of the monopoly position on the market, cannot be regarded as exhaustive.

Taking into account the provisions of article 24 of the Law of Ukraine "On Protection of Economic Competition", the Supreme Economic Court of Ukraine indicated that the conclusion of the preliminary contract pending a permission on the competition, if this permission is necessary, is not considered a violation of the competition law, transfer of funds under such the contract does not indicate the acquisition of control by one economic entity over the other one and confirms the conclusion of a main contract in the future. Thus, it should be stipulated in the preliminary contract clearly that a main contract will be concluded after obtaining a permission of the AMCU.

Separately, the Supreme Economic Court of Ukraine explained the provisions of article 56 of the Law of Ukraine "On economic competition protection" with respect to the imposition of penalties, namely:

- The Court has no right to reduce the size of fines / penalties, if they are charged legitimately.
- The duration of stopping calculation of penalty at the time of review or revision by an economic court of a dispute on an invalid decision on imposition of a fine made by the AMCU or a relevant decision (order) of an economic court is determined solely by the period of time within which a specified consideration or review is performed.
- If the existence of a parallel dispute over the recognition of an invalid decision on the imposition of penalties is revealed while a dispute at a lawsuit of the AMCU to recover fines and/ or penalties, an economic court shall stop the proceedings pending a decision on a parallel case.
- Calculation and collection of fines, provided by part 5 of article 56 of the Law of Ukraine "On protection of economic competition" is mandatory and is not an administrative and economic sanction. Therefore, in this case the terms stipulated by article 250 of the Commercial Code of Ukraine are not applied.

In paragraph 23 of the Resolution, the Supreme Economic Court of Ukraine indicated that imposing liability on the improper comparative advertisement does not require the proof of the fact of declining demand for goods of a business entity with respect to the fact that the illegal comparison was carried out.

In the Resolution the Supreme Economic Court of Ukraine also draws attention to the regulations, international treaties of Ukraine and the convention to be followed in disputes relating to the protection of business entities and consumers against unfair competition, and at the same time with the protection of intellectual property rights.

INTERESTING: CASE STUDY

Pharmacies are penalized for the dissemination of misleading information

Donetsk regional territorial office of the AMCU fined the company "LIKA" (Makeevka, Donetsk region) 5 thousand UAH for unfair competition in the form of dissemination of misleading information. AMCU territorial department officers established that LIKA LTD placed untruthful advertising on the facade of pharmacy institution: "Permanent 7% DISCOUNT On Saturday and Sunday" though the discount appeared to be optional. The defendant terminated violation and paid a fine to the state budget.

Such violations of competition law by pharmacy institutions are not isolated events.

In Zaporizhzhya enterprise was fined 15 thousand UAH. for the false information about discounts on medicines

The Administrative Board of Zaporizhzhya regional territorial office of the Antimonopoly Committee of Ukraine imposed a fine of 15 thousand UAH on LLC "Vemafarm" for unfair competition in the form of dissemination of misleading information. LLC "Vemafarm" performing retail sale of pharmaceutical products, in August-November 2011 has placed

information about discounts and preferential weekend time, which contained false statements, causing delusion of consumers.

Department has determined that the granting of discounts during these periods was provided only for certain categories of consumers. The actions of the Company, which consisted in distributing advertising materials containing incomplete information about the specific medicines and discounts on them, are in violation of legislation on economic competition protection. The society has recognized and stopped the breach.

LLC "Farmitek" was obliged to terminate actions with characteristics of unfair competition

Kyiv City Territorial Department of AMCU has established the fact that the company has spread through the magazine "Provizor" information that medicinal products of direct action Proteflazidum and FLAVOZIDUM are homeopathic.

Since such actions mislead consumers, territorial office obliged to refute the defendant's false information.

One of the largest producers of soft drinks in Ukraine was fined for unfair competition

Rivne regional territorial office of the AMCU has fined one of the largest producers of soft drinks in Ukraine - the company "Erlan" (Dnipropetrovsk region) by 68 thousand UAH for unfair competition.

The company produces natural mineral water under the trademark "Calypso" and "Znamenovskaya", "Biola" and "Two Oceans" juice "Biola" and "Lito" iced tea "Biola Ice Tea», sweet sodas "Biola" and "Breeze".

According to the agency the labels of reconstituted juice of its own production did not contain complete information about the product, namely, it stated - 100% juice.

According to the territorial office such a method of presenting information can affect consumers' intention buy the product.

As a result, company was obliged to cease the infringement.

Businessman fined for dissemination of information about the lowest prices for food products

Chernivtsi regional territorial office of the AMCU ceased the activity with the signs of unfair competition from the sole proprietor Dubovik K.S.

The territorial office of the AMCU has established the fact that entrepreneur placed misleading information in the storefront of foodstuffs shop: "It is cheaper here", "cast a spell price", "Alcohol is cheaper here!", "Tobacco is cheaper here!"

Such actions could mislead consumers. The defendant admitted the violation and terminated illegal actions.

Manufacturer of detergent penalized for the dissemination of misleading information

Volyn regional territorial office of the AMCU fined the company "AGARTI" (Odessa) 5 thousand UAH for unfair competition in the form of dissemination of misleading information. The territorial office of the AMCU has established that the manufacturer placed false information on the detergent package "does not cause allergy".

Such actions confused consumers. The defendant admitted and ceased the violation, pledged to pay a fine to the state budget.

"Foxtrot. Household "was fined 427 thousand UAH for unfair competition

Luhansk regional territorial office of the AMCU imposed a fine of 427 thousand UAH on chain enterprise "Foxtrot. Household "(Kiev), one of the leading Ukrainian wholesalers and retailers of audio, video and home appliances, for violation of competition law.

As it has been established, the outdoor and indoor billboards stated: "Credit for all groups of goods 0% with no commissions, insurance and other hidden conditions. Environmentally-friendly!". However, the consumers, buying goods on credit, overpaid about 10% of their value.

Such actions recognized as violations of competition law by the AMCU territorial office.

"Ukrtelecom" fined 68 thousand UAH for abuse of dominant position

Sumy regional territorial office of AMCU fined Ukrtelecom JSC Sumy branch by 68 thousand UAH for abuse of monopoly power.

Sumy branch of JSC Ukrtelecom unlawfully introduced in the bill for telecommunication services the services of "Audioteks" provided by third parties.

At the same time, the refusal of the subscriber to pay for Audioteks services exclude payment for services provided directly to by the Sumy branch of JSC "Ukrtelecom". This could result in debts and, consequently, in termination of the provision of telecommunication services to consumers.

It obliged the Sumy branch of OJSC "Ukrtelecom" to stop the violation, in particular, to exclude the information on the amount to be paid for services provided by third parties from the bill and generate it to the separate bill.

"Audioteks" services - paid services of information and reference and playing character, which are distributed through television programs (various hoaxes and interactive games, polls, horoscopes and fortune telling, etc.).

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Company's press releases

- Legal Alliance became a member of the Public Council for State Inspectorate of Ukraine on protection of consumer rights
- Legal Alliance – associate of the 7th analytical conference “Ukrainian pharmaceutical market between crises”
- Legal Alliance Company advises pharmaceutical company in the course of antitrust investigation
- Legal Alliance told market participants about AMCU inspections
- Legal Alliance - Legal adviser to Apotex
- Legal Alliance - Legal adviser to EU Pharmacia

Upcoming events

13 March 2012 16:00:00	WORKSHOP "INSIDER INFORMATION: RISKS AND CONSEQUENCES"	350 UAH
27 March 2012 16:00:00	WORKSHOP "CHANGES TO THE LEGISLATION ON MEDICINES ADVERTISING. ANALYSIS OF PROMOTIONAL MATERIALS IN EXAMPLES"	350 UAH