

# Ukraine

Oleksiy Fialtov



Oleksandr Mamunya



## Vasil Kisił & Partners

### 1 General

#### 1.1 Please identify the scope of claims that may be brought in Ukraine for breach of competition law.

Ukrainian competition laws allow bringing competition law claims for:

- (1) anti-competitive coherent practice;
- (2) anti-competitive acts by governmental and municipal bodies;
- (3) abuse of market power;
- (4) restrictive or discrimination business practice;
- (5) breach of merger control rules;
- (6) obtaining unlawful advantages in competition (e.g. defamation of competitor, tie-in trade, bribery of competitor's employees, etc.);
- (7) unauthorised use of business reputation of other persons (i.e. trade name, trademark or other designation, advertisement, packaging, comparative advertising etc.); and
- (8) unlawful collection, disclosure and use of commercial secrets.

#### 1.2 What is the legal basis for bringing an action for breach of competition law?

The claims for breach of competition laws may be brought on the basis of Constitution of Ukraine, Laws of Ukraine on Protection of Economic Competition and on Protection from Unfair Competition, Constitution of Ukraine, the Civil Code of Ukraine, and the Commercial Code of Ukraine, Paris Convention for the Protection of Industrial Property.

#### 1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims is derived from both international and national law.

#### 1.4 Are there specialist courts in Ukraine to which competition law cases are assigned?

There are no specialist courts in Ukraine to which competition law cases are assigned. Competition law cases in disputes between business entities and private entrepreneurs shall be considered by commercial courts. The claims against the anti-competitive acts of governmental and municipal bodies shall be considered by the administrative courts.

Cases regarding protection from unfair competition may also be processed by the Antimonopoly Committee of Ukraine, which is a governmental body controlling enforcement of competition laws, under special non-judicial procedure.

#### 1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

A business entity or private entrepreneur whose rights or legally protected interests are infringed by a breach of competition law may bring an action for such breach against the person or entity committing the breach.

Multiple claimants (e.g. in case of collective claims) are allowed.

Class actions as such, as well as actions by representative bodies are not applicable in Ukraine as the procedural laws allow applying to courts for protection of the claimant's rights and interests only.

However, the Antimonopoly Committee of Ukraine is specially authorised by law bring an action for breach of competition law in the public interest. Also, prosecutors (state attorneys) may bring actions in the interests of the state, though they rarely do this in competition matters.

#### 1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Taking any claim, a Ukrainian court shall consider (1) subject jurisdiction and (2) territorial jurisdiction.

##### 1. Subject jurisdiction

1.1. Commercial court takes on a competition law claim if (i) the parties to the case are legal entities or private entrepreneurs and (ii) the claimant is seeking protection of rights or interests arising from commercial relations and the nature of the dispute is commercial.

1.2. Administrative court takes on a competition law claim if the claimant is seeking invalidation/cancellation or termination of an anti-competitive act or action of a governmental or municipal body.

##### 2. Territorial jurisdiction

2.1. Commercial court takes on a competition law claim if the defendant is located within the administrative boundaries of the region or city falling under the jurisdiction of the relevant court.

2.2. Commercial court takes on a competition law claim if the defendant is located within the administrative boundaries of the region or city falling under the jurisdiction of the relevant court.

If the defendant in the case is a governmental body with authorities covering the whole territory of Ukraine, such a case shall be considered by the Circuit Administrative Court of the city of Kiev irrespectively of the location of the defendant.

### 1.7 Is the judicial process adversarial or inquisitorial?

Judicial process is adversarial.

## 2 Interim Remedies

### 2.1 Are interim remedies available in competition law cases?

Interim remedies are available in competition law cases in Ukraine.

### 2.2 What interim remedies are available and under what conditions will a court grant them?

#### 1. Commercial courts

As interim remedies, a commercial court may issue preliminary injunctions seizing property and/or money, or prohibiting the defendant or third parties from taking certain actions.

A commercial court may grant interim remedies if failure to grant them would make the enforcement of the future judgment on the merits of the case impossible or complicated.

#### 2. Administrative courts

As interim remedies, an administrative court can suspend the challenged act of the governmental or municipal body, or prohibit taking certain actions.

An administrative court may grant interim remedies in the event of an obvious danger to the rights or interests of the claimant, or if the protection of these rights and interests may become impossible unless interim remedy is granted, or the renewal of such rights and interests may require considerable efforts and expenses, or if the challenged act or action of the defendant is obviously unlawful.

## 3 Final Remedies

### 3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

The court may grant to the claimant the following final remedies against the defendant in a competition law case:

- (1) Prohibition to perform/obligation to terminate certain actions or activity:  
The court may grant this remedy if: (i) the actions/activity of the defendant constitute a breach of competition laws; and (ii) such breach negatively affects the rights and/or legally protected interests of the claimant.
- (2) Obligation to perform certain actions:  
The court may grant this remedy if: (i) the omission/inaction of the defendant constitute a breach of competition laws; and (ii) such breach negatively affects the rights and/or legally protected interests of the claimant.
- (3) Invalidation of agreement:

The court may grant this remedy if: (i) the challenged agreement has been made in violation of competition laws; and (ii) such agreement negatively affects the rights and/or legally protected interests of the claimant.

- (4) Invalidation or cancellation of an act of state or municipal body:

The court may grant this remedy if: (i) the act issued by the defendant (state or municipal body) constitute a breach of competition laws; and (ii) such breach negatively affects the rights and/or legally protected interests of the claimant.

- (5) Compensation of damages:

The court may grant this remedy if: (i) the actions/activity of the defendant constitute a breach of competition laws; (ii) such breach negatively affects the rights and/or legally protected interests of the claimant; (iii) as a direct result of such breach, the claimant suffered damages; and (iv) the amount of damages is proven by sufficient evidence.

- (6) Public disproof of false and/or false or inaccurate and/or incomplete information:

The court may grant this remedy if: (i) the information about the claimant disseminated by the defendant is incorrect, untrue or false; and (ii) dissemination of this information negatively affects the business reputation of the claimant.

- (7) In administrative proceedings, the court may grant other remedies which the court considers appropriate to protect the rights or interests of the claimant.

### 3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

The court determines the amount of damages according to the amount of actual damages and lost profit duly evidenced within the proceedings. To be awarded compensation, the claimant should prove that the actual damages and the lost profit were directly caused by the defendant's breach of law and the rights or interests of the claimant.

Exemplary damages are available as remedy for anti-competitive coherent practice, abuse of market power, and breach of merger control rules.

### 3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

Formally the amount of damages to be compensated does not depend on the fact and/or amount of the fine imposed by the Antimonopoly Committee. However, in practice the court sometimes takes into account the conclusions made by the Antimonopoly Committee regarding the amount of the fine.

## 4 Evidence

### 4.1 What is the standard of proof?

No general standard of proof has been provided for by the effective Ukrainian law. However, in some specific cases certain facts shall be proved only by certain types of evidence specifically provided by the effective Ukrainian laws.

Also, in commercial proceedings the court practically accepts documentary or material evidence only, save for some minor exemptions.

#### 4.2 Who bears the evidential burden of proof?

In commercial and administrative proceedings the plaintiff bears the evidential burden of proof. However, as an exemption from the above rule, in administrative cases regarding compliance of acts and actions of the state and municipal bodies with the competition laws, the burden of proof is on the defendant (state or municipal body).

#### 4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

In commercial proceedings the courts accept documentary and material evidence, including written explanations regarding the merits of the case submitted by the representatives of the parties and other persons participating in commercial court proceedings, as well as expert evidence.

Witness evidence as such is not allowed in commercial proceedings. However, officials of legal entities, state and municipal bodies may participate in the commercial proceedings (if engaged by court) with a special status and provide explanations regarding facts of the case.

In administrative proceedings the courts also accept documentary and material evidence, including written explanations regarding the merits of the case submitted by the representatives of the parties and other persons participating in commercial court proceedings, and expert evidence. However, unlike commercial proceedings, in administrative proceedings witness evidence is fully acceptable.

Expert evidence is allowed in both commercial and administrative proceedings in form of written expert report submitted to the court by the experts appointed by court. The report should answer the questions determined by the court. The parties are allowed to submit to the court suggestions regarding the experts to be appointed and the questions to be addressed to the experts. While in commercial proceedings the appointment of experts is at the judge's discretion, in administrative proceedings the parties may agree the expert or experts who will provide the report.

#### 4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The possibilities to obtain documents from the opponent party or even a third party without their willingness to disclose are rather limited. Formally the legal entities and state bodies are obliged to answer and provide information and documents to the requests of attorneys-at-law. However, in practice such requests are often disregarded.

The documents which a party does not have are normally obtained during the court proceedings according to a court disclosure ruling issued upon a motion of a party. In some cases, there is a possibility to file such a motion and obtain a disclosure ruling before the claim is filed.

Also, a court may at its own discretion request from a party to the case or a third party to disclose documents and information the court considers important for the case.

#### 4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

In commercial proceedings witness evidence is not available. In administrative proceedings, a witness may be forced to appear. Cross-examination of witnesses is possible. In practice, the court

would decline any question to the witness which, in the opinion of the judge, does not relate to the subject of the dispute of the parties.

#### 4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

An infringement decision by the national competition authority (which is the Antimonopoly Committee of Ukraine) has probative value as to liability and enables claimants to pursue follow-on claims for damages in the courts.

#### 4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Only the participants to the case may have access to the case files.

The court decisions shall be publicly accessible on an official website (though in practice not all the court decision are published), except for personal information of natural persons mentioned in the court decision. Also, a person may apply to the court for a copy of a court decision affecting the rights and obligations of such person.

The court sessions are generally public. However, the court may prohibit access of the public to the court sessions in order to keep confidential the state or commercial secrets or any other information which any of the parties treats as confidential.

## 5 Justification / Defences

#### 5.1 Is a defence of justification/public interest available?

Defence of justification/public interest is not available in Ukraine.

#### 5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

According to the effective Ukrainian competition law the "passing on defence" is not available and indirect purchasers have no legal standing to sue.

## 6 Timing

#### 6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The limitation period for bringing a claim for breach of competition law constitutes five years as from the date of the breach (in case of continuous breach - as from the date of its completion). In some cases the law provides for a three-year limitation period.

#### 6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

As a general rule, the law provides that the court shall consider a case within two months (in each court instance). However, this term is not always complied with. Also, for a number of reasons this term may be extended, for example if the proceedings are suspended, or if the parties motion for extension.

Typically a case is considered by courts of all instances for one month (as the shortest practically possible term) to several years (if all possible appeals are filed).

The terms of consideration of a case at administrative courts of appeal and Superior Administrative court due to their overload are considerably longer than those at relevant commercial courts.

The law does not provide for an expedited procedure.

## 7 Settlement

### 7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

The parties require the permission of the court to discontinue breach of competition law claims. Namely, the court shall approve the settlement agreement made by the parties. The court shall not approve the settlement agreement and shall continue the proceedings if the scope of the settlement agreement differ from or is broader than the scope of the dispute, or infringes the effective law, or infringes the interests of third parties. There are insignificant differences between the competence of administrative and commercial courts with regard to approval of the settlement.

## 8 Costs

### 8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The claimant/defendant normally may recover its legal costs from the unsuccessful party. However, the reasonable amount of fees which may be recovered very much depends on the discretion of the judge.

### 8.2 Are lawyers permitted to act on a contingency fee basis?

The lawyers are not prohibited from acting on contingency fee basis. However, according to the general court practice, only actual legal costs but not contingency fee expenses can be compensated to the winning party to the court proceedings.

### 8.3 Is third party funding of competition law claims permitted?

Third party funding of competition law claims is permitted. However, only the expenses of a party to the case may be compensated in the event of court decision in favour of such party. If a third party finding the competition law claim is not a party to the case, its expenses would not be compensated.

## 9 Appeal

### 9.1 Can decisions of the court be appealed?

Decisions of the courts of first instance may be appealed to the court of appeals. If appealed within terms for appeal, court decision is not enforceable.

Enforceable administrative and commercial court decisions of first instance (those not appealed within terms for appeal and those confirmed by court of appeals), as well as the decisions of the court of appeals, may be appealed by a cassation complaint filed with the Superior Commercial Court or Superior Administrative Court respectively.

The decisions of the Superior Commercial Court and Superior Administrative Court may be appealed by a cassation complaint to the Supreme Court of Ukraine.

## 10 Leniency

### 10.1 Is leniency offered by a national competition authority in Ukraine? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Leniency may be offered by the Antimonopoly Committee of Ukraine only in case of anti-competitive (coherent) practice. However, the available leniency shall not provide the applicant with immunity from civil claims.

### 10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

According to the effective Ukrainian law an applicant for leniency shall not be permitted to withhold evidence disclosed thereby when obtaining leniency in any subsequent court proceedings.

**Oleksiy Filatov**

Vasil Kisil & Partners  
17/52-A Bogdana Khmel'nitskogo St.  
Kyiv 01030  
Ukraine

Tel: +380 44 581 7777  
Fax: +380 44 581 7770  
Email: [filatov@vkp.kiev.ua](mailto:filatov@vkp.kiev.ua)  
URL: [www.kisilandpartners.com](http://www.kisilandpartners.com)

Oleksiy Filatov is a partner and head of litigation practice of Vasil Kisil & Partners.

Since 1998, Mr. Filatov has been representing major international as well as local clients at Ukrainian and international courts, State Department of Intellectual Property and the Antimonopoly Committee of Ukraine. His main specialisations are litigation, competition, corporate and intellectual property law. Mr. Filatov graduated from Taras Shevchenko Kyiv National University, Ukraine in 1998 and joined Vasil Kisil and Partners in 2003.

Mr. Filatov is a member of Kiev Region Bar Association, Ukrainian Bar Association, International Bar Association, and International Trademark Association. According to PLC *Dispute Resolution 2007/08*, Mr. Filatov has been recommended as one of the leading Ukrainian litigators.

**Oleksandr Mamunya**

Vasil Kisil & Partners  
17/52-A Bogdana Khmel'nitskogo St.  
Kyiv 01030  
Ukraine

Tel: +380 44 581 7777  
Fax: +380 44 581 7770  
Email: [mamunya@vkp.kiev.ua](mailto:mamunya@vkp.kiev.ua)  
URL: [www.kisilandpartners.com](http://www.kisilandpartners.com)

Oleksandr Mamunya is an associate with Vasil Kisil & Partners. He specialises in competition law, intellectual property, and litigation. In 2004 he graduated from the Law department of Taras Shevchenko National University of Kyiv, and in 2005 earned a diploma of the Academy of World Intellectual Property Organisation (WIPO).

Mr. Mamunya is a member of Kyiv Region Bar Association, Ukrainian Bar Association, and International Trademark Association.

## VASIL KISIL & PARTNERS

### ATTORNEYS & COUNSELLORS AT LAW

Established in 1992, Vasil Kisil & Partners is one of the leading Ukrainian law firms. 55 experienced and skilled attorneys of the firm work across a range of specialised business law areas, including antimonopoly and competition, arbitration and litigation, banking and finance, corporate, commercial, energy and natural resources, intellectual property, international trade, mergers and acquisitions, labor and employment, real estate and taxation.

The clients of the firm include international and domestic companies, as well as private individuals, dealing in agriculture, banking, chemical, construction, financial, energy, hi-tech, general commodities, insurance, IT, media, metallurgy, pharmaceutical, real estate, shipbuilding, telecommunication, trading, transport, and other industries and economy sectors.

Vasil Kisil & Partners' team is dedicated to the highest level of service according to internationally accepted professional and ethical standards. The firm and its attorneys are continuously recognised by international legal directories and guides such as Chambers Global and Chambers Europe, PLC Which Lawyer?, IFLR1000 and Who's Who Legal.