

Private Antitrust Litigation

in 27 jurisdictions worldwide

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Ukraine

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Vasil Kisil & Partners

Legislation and jurisdiction

- 1** How would you summarise the development of private antitrust litigation?

Private antitrust litigation is in the process of development in Ukraine. The amount of private antitrust litigation cases is gradually increasing and the relevant court practice is in the process of formation. As the respective legislative basis is being permanently improved, private antitrust litigation is expected to gain a significant practical importance in the near future.

- 2** Are private antitrust actions mandated by statute? If not, on what basis are they possible?

Private antitrust actions are mandated by statute in Ukraine.

- 3** If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The following acts may be deemed the relevant Ukrainian legislation regarding private antitrust actions:

- the Constitution of Ukraine;
- the Civil Code of Ukraine;
- the Commercial Code of Ukraine;
- the Code of Ukraine on Commercial Proceeding;
- the Code of Ukraine on Civil Proceeding;
- the Law of Ukraine on Protection of Economic Competition; and
- the Law of Ukraine on Protection From Unfair Competition.

Private antitrust actions are normally considered by Ukrainian commercial courts if the parties are legal entities. Local commercial courts consider all cases as the courts of first instance. In case of further appeals the case may be reconsidered by the local appellate commercial courts, the Highest Commercial Court of Ukraine and the Supreme Court of Ukraine.

In case either party is an individual, the case may be considered by the civil courts. Local civil courts consider all such cases as the courts of first instance. If an appeal is filed the case may further be reconsidered by the local appellate courts and the Supreme Court of Ukraine.

- 4** In what types of antitrust matters are private actions available?

Private actions are available in all types of antitrust matters. However, the action for compensation of damages caused by unfair competition or the action for seizure of infringing products may be brought on the basis of special provisions of the the Law of Ukraine on Protection From Unfair Competition, but private cases regarding agreements restricting competition, abuses of a dominant position and merger control cases may be brought only on the basis of general provisions

of the Civil Code of Ukraine and the Law of Ukraine on Protection of Economic Competition. However, current Ukrainian court practice is not unified regarding the question of initiation of private antitrust actions only on the basis of general legislative provisions.

- 5** What nexus with the jurisdiction is required to found a private action?

Normally, antitrust private actions should be brought in the respective local court where the defedant is located (and in the case of a company, the place where the office of the defendant is officially registered).

- 6** Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Antitrust private actions may be brought against corporations and individuals who are private entrepreneurs, including those from other jurisdictions, subject to the conditions described in question 5.

- 7** If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Private action procedure

- 8** May litigation be funded by third parties? Are contingency fees available?

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

- 9** Are jury trials available?

Ukrainian laws provide for jury trials, particularly with respect to civil proceedings. However, no jury trials have been practically developed in the Ukrainian legal system so far.

- 10** What pre-trial discovery procedures are available?

Ukrainian law does not provide for any pre-trial discovery procedures as they are known in common law countries. At the pre-trial stage parties may exchange letters (eg, a cease-and-desist letter and a reply thereto) as well as file a motion for a preliminary injunction to secure evidence that may not be available at a later stage or that may be significantly difficult to obtain.

11 What evidence is admissible?

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, and 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 the facts of the case.

In civil 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 civil proceedings witness evidence is fully acceptable.

Expert evidence is allowed in both commercial and civil proceedings in the form of a written expert report submitted to the court by the experts appointed by the court. The report should answer the questions determined by the court. The parties are allowed to submit suggestions to the court 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 civil proceedings the parties may agree on the expert or experts who will provide the report.

12 What evidence is protected by legal privilege?

No evidence is protected by legal privilege. Under a general rule, a party has to prove the facts on which such party relies as a ground for its claims or objections. The law establishes two main requirements regarding evidence: it should be reasonable and admissible.

13 Are private actions available where there has been a criminal conviction in respect of the same matter?

In compliance with the effective Ukrainian legislation, private actions may be brought even if criminal proceedings in respect of the same matter are processed. The civil claim may be filed either within the criminal case or as a separate suit.

14 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

A plaintiff in a parallel private antitrust action may rely on evidence or findings in criminal proceedings initiated with respect to the same matter. However, it should be noted that in each matter the judge assesses evidence and findings and decides on its admissibility.

Leniency applicants are not protected from follow-on litigation.

15 What is the applicable standard of proof for claimants and defendants?

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.

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

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate 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 file a motion for extension.

In light of the above, a typical timetable for any court proceeding may not be easily estimated. The term of consideration for a case by courts of every instance, both within civil and commercial proceedings, may vary from one month (as the shortest practically possible term) to several years (if all possible appeals are filed). The term mostly depends on the complexity of each case.

The law does not provide for an expedited procedure.

17 What are the relevant limitation periods?

The limitation period for bringing a claim for violation of competition law is five years from the date of violation and in the case of a lasting (continuous) violation, the limitation period begins from the day of its actual completion. In some cases the law provides for a three-year limitation period.

18 What appeals are available? Is appeal available on the facts or on the law?

The decision of the court of first instance may be appealed to a court of appeals on the grounds of breach of material law; breach of procedural law (if the court of first instance made an improper court decision); incomplete consideration of the circumstances of the case; inconsistency of the court decision with the established circumstances of the case; or a lack of evidence.

In civil procedure, the decision of the court of appeals may be further appealed to the Supreme Court of Ukraine. In commercial proceedings the cassation complaint against a decision of the court of appeals may be filed with the Highest Commercial Court of Ukraine and a decision by the latter may be appealed to the Supreme Court of Ukraine.

Collective actions**19** Are collective proceedings available in respect of antitrust claims?

Ukrainian law does not explicitly provide for collective proceedings as they are known in common law countries. However, according to the effective procedural legislation of Ukraine (namely, the Code of Ukraine on Civil Proceedings and the Code of Ukraine on Commercial Proceedings) several plaintiffs may take a joint action against the same defendants if their claims are similar and based on a similar cause of action.

20 Are collective proceedings mandated by legislation?

See question 19.

21 If collective proceedings are allowed, is there a certification process? What is the test?

Not applicable.

22 Have courts certified collective proceedings in antitrust matters?

Not applicable.

23 Are 'indirect claims' permissible in collective and single party proceedings?

Indirect claims are generally not permissible under Ukrainian law.

24 Can plaintiffs opt out or opt in?

Not applicable.

25 Do collective settlements require judicial authorisation?

Not applicable.

26 If the country is divided into multiple jurisdictions, is a national collective proceeding possible?

Not applicable.

27 Has a plaintiffs' collective-proceeding bar developed?

Not applicable.

Remedies

28 What forms of compensation are available and on what basis are they allowed?

The court may grant the following final remedies against the defendant.

Prohibition to perform or obligation to terminate certain actions or activity

The court may grant this remedy if the actions or activity of the defendant constitute a breach of antitrust laws, and such breach negatively affects the rights or legally protected interests, or both, of the plaintiff.

Obligation to perform certain actions

The court may grant this remedy if the omission or inaction of the defendant constitutes a breach of antitrust laws, and such breach negatively affects the rights or legally protected interests, or both, of the plaintiff.

Invalidation of agreement

The court may grant this remedy if the challenged agreement has been made in violation of antitrust laws, and such agreement negatively affects the rights or legally protected interests, or both, of the plaintiff.

Invalidation or cancellation of an act of state or municipal body

The court may grant this remedy if the act issued by the defendant (state or municipal body) constitutes a breach of antitrust laws, and such breach negatively affects the rights or legally protected interests, or both, of the plaintiff.

Compensation of damages

The court may grant this remedy if:

- the actions or activity of the defendant constitute a breach of antitrust laws;
- such breach negatively affects the rights or legally protected interests, or both, of the plaintiff;
- as a direct result of such breach, the plaintiff suffered damages; and
- the amount of damages is proven by sufficient evidence.

Public disproof of false, false or inaccurate, or incomplete information, or all of the above

The court may grant this remedy if the information about the plaintiff disseminated by the defendant is incorrect, untrue or false, and dissemination of this information negatively affects the business reputation of the plaintiff.

Update and trends

Current discussion concerns whether a person or entity is required to obtain a decision by the Antimonopoly Committee of Ukraine on an antitrust matter before initiation of a private antitrust action on the same matter.

29 What other forms of remedy are available?

Interim remedies are available in antitrust law cases in Ukraine.

Commercial courts

As interim remedies, a commercial court may issue preliminary injunctions to seize property or money, or both, or to prohibit 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.

Civil courts

As interim remedies, a civil court may issue preliminary injunctions to seize property or money, or both, or to prohibit the defendant or third parties from taking certain actions.

A civil court may grant interim remedies in the event of an obvious danger to the rights or interests of the plaintiff, 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.

30 Are punitive or exemplary damages available?

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

31 Is there provision for interest on damages awards?

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. There is no provision for interest on damages awards.

32 Are the fines imposed by competition authorities taken into account when settling damages?

Formally the amount of damages to be compensated does not depend on the fact 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 of Ukraine regarding the amount of the fine.

33 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

The plaintiff or 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.

34 Is liability imposed on a joint and several basis?

Pursuant to Ukrainian laws, liability may be imposed on a joint and several basis, which makes every defendant in a lawsuit liable for the entire amount of the plaintiff's damages.

35 Is there a possibility for contribution and indemnity among defendants?

In the case of joint and severable liability, the defendant who paid the whole indemnification to the prejudiced party may claim a refund of an appropriate share from other defendants in line with their actual contribution.

36 Is the 'passing-on' defence allowed?

According to the effective Ukrainian competition law the passing-on defence is not available.

37 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

No specific defences are provided by competition law.

38 Is alternative dispute resolution available?

The only alternative dispute resolution used in Ukraine is arbitration, which is applied only upon agreement by the parties.

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