

MARCH 23, 2009

## RECENT DEVELOPMENTS IN UKRAINIAN COMPETITION LAW AND PRACTICE

This NEWSLETTER is issued to keep Vasil Kisel & Partners clients and other interested parties informed of the latest developments in the Ukrainian competition legislation and enforcement practice.

This NEWSLETTER does not constitute a legal advice or an opinion rendered upon specific request. The information below has been prepared without enquiry into any individual case and should not be treated as a substitute for detailed advice in any such case.

Please find below a brief description of the most significant novelties of the Law of Ukraine "On Protection of Economic Competition,"

dated January 11, 2001 (the "Economic Competition Act") and AMC approaches to concerted practice and merger control issues.

### Merger Control

#### Legislative developments

In 2008, the AMC prepared draft legislation to amend the thresholds for merger clearance set forth in the Economic Competition Act. The draft legislation proposes to quadruple the existing thresholds, which are currently among the lowest of any national competition laws, including the CIS states. The draft legislation also clarifies that the merger notification obligations are not triggered when the asset/

turnover thresholds are met by only one party. Based on the said draft legislation currently considered by the Ukrainian Parliament, Ukrainian merger clearance is required if the following conditions are met:

- aggregate value of assets/turnover over the last financial year, including those abroad, by all participants of the transaction, exceeded an amount equivalent to EUR 50 million under the exchange rate of the NBU effective on the

○

Leonardo Business Centre

17/52-A B. Khmel'nitskogo St., Kyiv, Ukraine 01030

Telephone: +380 44 581 7777 Fax: +380 44 581 7770

E-mail: [vkp@vkp.kiev.ua](mailto:vkp@vkp.kiev.ua) [www.kisilandpartners.com](http://www.kisilandpartners.com)



last day of such financial year and aggregate value of assets/turnover in Ukraine at least by two participants exceeded an amount equivalent to EUR 4 million, or

- aggregate value of assets/turnover in Ukraine at least by one participant of the transaction, exceeded an amount equivalent to EUR 50 million under the exchange rate of the NBU effective on the last day of such financial year and aggregate value of assets/turnover over the last financial year, including those abroad, by any other participant of the transaction, exceeded an amount equivalent to EUR 50 million.

The respective draft does not envisage any changes in respect of market share thresholds, i.e. regardless of asset/turnover thresholds, Ukrainian merger clearance is required if either participant has a market share of over 35%, or a combined market share of the transaction participants exceeds 35% and the transaction takes place on the same market or on adjacent markets.

### Expectations for 2009

Under the Ukrainian merger control legislation failure to obtain mandatory AMC merger clearance can be subject to penalties of up to 5 % of the turnover of each party to the transaction (target group and/or purchaser group) from its worldwide sales as of the last financial year. Limitation period for such fines in Ukraine is 5 years.

At the end of 2008 AMC representatives publicly announced that one of AMC key tasks for 2009 is identification of breaches of competition legislation in historical M&A transactions. In other words, the AMC announced its intention to review historical structuring of target groups of companies for the purpose of checking compliance with the domestic competition legislation.

Following its announcement, the AMC on its own, has initiated several investigations in respect of major group of companies doing business in Ukraine, including global market players being present in Ukraine through subsidiaries. A number of market players has already received AMC requests for disclosure of relevant information. Some of them have been already penalized. Others, being potential infringers, have proceeded with developing strategies for elimination and/or minimization of risks caused by the said earlier or pending infringements.

### Concerted practice

In 2005 Economic Competition Act was amended with the provision under which taking by the market players of similar actions (omissions) on the market without having objective reasons to take such actions (omissions) that resulted in elimination of competition on the respective market constitutes an anticompetitive concerted practice. Since adoption of the respective provision, the latter has become the “favourite” in AMC enforcement practice.

In late 2008 and at the beginning of 2009, the AMC on numerous occasions has employed its “favourite”, mostly in respect of price fixing cases involving different product markets, such as oil and other petroleum products, farm and food products (grain, sugar, milk), telecommunication services, certain types of minerals, pharmaceuticals.



As opposed to the approach adopted in the EU where mere parallel behavior may not by itself prove a concerted practice (although it may amount to strong evidence of such a practice), the recent local cases evidence that AMC bases its approach on a presumption that parallel behavior of market players that resulted in elimination of competition on the respective market represents an anticompetitive concerted practice, unless the parties concerned proved that such behavior is justified by objective reasons.

A number of rights vested with global market players and generally considered by the competition authorities of jurisdictions with developed competition law enforcement practice as rights attributable to normal business operation, are mainly disregarded by the AMC in respect of concerted practice cases, i.e. the AMC does not consider the respective rights in connection with objective reasons to explain similar behavior of market players, particularly in respect of price fixing cases. Such rights, among others, include the rights to:

- adapt intelligently to the existing and anticipated conduct of the competitors, in particular - to observe the prices charged by the competitors and adjust their own prices in response so as to ensure they remain competitive;
- take any measures and any actions for maximizing profits from their operations;
- take every opportunity to cover the losses, without jeopardizing sales volumes;
- apply their own marketing (pricing) policy, unless the law explicitly says otherwise;
- set retail prices at an average market level;
- adapt to the circumstances prevailing in certain periods.

As a result, exercise of certain rights established in global competition compliance policy applicable to a particular market player could potentially be treated by the AMC as violation of Ukrainian competition law.

Given the above and in order to avoid numerous, continuous investigations often resulting in AMC decisions to impose a fine on respective market players and accordingly challenged by them through judicial review procedure, a number of global market players being active in Ukraine have decided to review their competition compliance policy being mandatory within the respective group worldwide and to amend such policy in respect of Ukrainian divisions to minimize key competition compliance risks.

Please, do not hesitate to contact us for any further information on the topic of this Newsletter or to address your other legal service needs.



**Denis  
Lysenko**

Partner

lysenko@vkp.kiev.ua



**Mariya  
Nizhnik**

Senior Associate

nizhnik@vkp.kiev.ua

Leonardo Business Centre  
17/52-A B. Khmel'nitskogo St.  
Kyiv 01030 Ukraine

Telephone: +380 44 581 7777

Fax: +380 44 581 7770

E-mail: [vkp@vkp.kiev.ua](mailto:vkp@vkp.kiev.ua)

[www.kisilandpartners.com](http://www.kisilandpartners.com)