

The Ukrainian Competition Authority's latest decision in the pharmaceutical sector

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More than a year has passed since the Antimonopoly Committee of Ukraine (AMCU) completed its first investigations into the Ukrainian pharmaceutical market. However, it has recently struck another blow yet again and, one should say, with renewed vigour. The first companies that fell under antitrust sanctions were Alcon and distributors (Alcon case). The AMCU passed its relevant decision on 8 September 2016. Twenty days later, on 29 September 2016, sanctions befell Servier and its distributors (Servier case). After a lengthy pause, on 14 November 2017, the AMCU passed its decision on a competition violation committed by the French company Sanofi and two of Ukraine's largest distributors of medicines. The authority's allegations in the latter decision and the previous ones were generally alike – the global pharmaceutical company and distributors had built their relationships in a way that could harm the interests of other market players and consumers, divide the market as per product range, and boost prices for Sanofi medicines.

The sanctions in Sanofi's case totalled about EUR 4.33 million, which is an impressive amount for a comparatively small Ukrainian market. It is indicative that the aggregate fine imposed by the AMCU on Alcon and distributors amounted to only about EUR 51,000, while the sanctions for Servier and distributors were about EUR 111,000. Do these figures say that the Ukrainian competition authority believes Sanofi's vertical practices to have affected competition more? It is as likely as not. Also, the AMCU is evidently expanding its expertise by encountering counterarguments of businesses in courts regarding the first decisions passed. Indeed, some very controversial statements contained in the first two cases have somewhat been adjusted in the authority's decision against Sanofi. First of all, it concerns the AMCU's definition of the markets within the product boundaries of the French company's medicines. Thus, having surveyed medical institutions, the AMCU is further reinforcing its position by relying on their opinion that Sanofi medicines do not have an affordable alternative for a certain class of patients. However, the question of the ratio of a particular patient's individual demand to determining the market boundaries, i.e. how such demand correlates with the market demand, is left unanswered. At the same time, the AMCU considers the same molecular composition and pharmaceutical form of medicines to be an interchangeability criterion, completely ignoring the similarity of the therapeutic properties of medicines with different active substances. This approach is undoubtedly far from the practice of the EU Commission and the leading competition authorities and calls any subsequent analysis of Sanofi's distribution agreements by the AMCU into question. The authority's further findings are not less astonishing. By its ruling of 10 October 2017 on the lawsuit of a distributor in Alcon's case the Higher Commercial Court of Ukraine pointed to the lack of analysis in the court decisions of previous instances on how Alcon's distribution agreements affected the competition, i.e. what anticompetitive effects they entailed. This question can be similarly asked regarding the AMCU's decision supported by the lower courts. Nevertheless, no clear answer follows from the Sanofi case. The AMCU does not actually investigate competition, both among manufacturers – due to the artificial narrowing of the product boundaries, and among the major distributors of Sanofi products.

As we see, there are quite a lot of questions regarding the AMCU's current practice. The third decision concerning agreements that are specific in substance and content contains similar conclusions about the violation. It seems that the authority is primarily focused on applying sanctions and, in this light, merely borrows "evidence" from case to case, regardless of the well-reasoned arguments of businesses. The doubts as to the regulator's unbiasedness are aggravated by the absence of similar investigations with respect to national pharmaceutical manufacturers. Sanofi has already publicly announced its disagreement with the AMCU's findings and will appeal the decision in court. Thus, one more player is going into litigation with the AMCU, and the opposition between the pharmacists and the regulator is gaining further momentum.