

Ukrainian Antitrust Investigation into the Tobacco Market

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The Antimonopoly Committee of Ukraine ('the AMCU') has recently completed complex research into the national tobacco market.

The market research was triggered by the investigation against 'TEDIS' ('Company'), which has a monopoly on the market of cigarette distribution in Ukraine. The study started back in 2015 and resulted in the Company being fined for approximately EUR 16 million in December 2016.

Between 2013 and September 2015 (inclusive), the Company had a dominant position (monopoly) in the national market of distribution of cigarettes. The company is the only direct buyer and distributor of cigarettes of the largest (by volume) manufacturers.

The market of the investigation was the nationwide distribution market of cigarettes. During the research the AMCU determined that the activity of cigarette production in Ukraine was carried out by 7 manufacturers. The combined market share of the four largest of these companies was 99.5% (British American Tobacco, Philip Morris, JTI, Imperial Tobacco). Starting in 2013 the above companies had been selling the cigarettes only to TEDIS; no other entity was able to purchase cigarettes from the manufacturers. Thus, the company was the sole intermediary between the producers and consumers.

The specific market power of the Company arose from the acquisition of sole access to cigarettes purchased directly from the manufacturers and consisted of:

- the possibility at its sole discretion to determine the conditions for further sales of goods in the downstream markets of wholesale and retail trade of cigarettes;
- the possibility at its sole discretion to determine the conditions of supply of cigarettes to the buyers (wholesalers and retailers), including a limit of supply;
- the possibility at its discretion and without any economic basis to set the size of its own gross profit from the sale of cigarettes, and the amount of gross profit from the sale of cigarettes of its customers (wholesalers and retailers) by increasing the trade increment of TEDIS in the wholesale prices.

The Company had no competitors in the market, did not experience substantial competition and, due to its market power, had the ability to restrict competition, in particular by limiting the competitiveness, and infringing the interests of other cigarettes wholesalers and retailers.

The alleged abuse of dominance by Company consisted of:

- increasing its trade increment in the wholesale prices by decreasing maximum trade increment of its consumers (wholesalers and retailers); neglecting transportation costs of its customers, who carry out the export goods from TEDIS on their own;
- setting the wholesale prices of cigarettes to wholesale traders at the same level with the wholesale prices to retailers;
- setting wholesale prices of cigarettes to retailers on the same level with retail prices in its own retail network, that led to restriction competitiveness and the infringement of its consumers' interests;
- unilateral (without the consent of customers) limitation of sales ordered by buyers while there was no alternative source to purchase cigarettes.

The Company was fined by the AMCU approximately EUR 16 million.

It is worth mentioning that Ukrainian legislation provides for a fine of up to 10 % of the annual turnover for competition infringement in the form of abuse of dominance. In this case the AMCU used its Recommendations on approaches for fine calculation and took into account the absence of aggravating and mitigating circumstances, the level of profitability of the Company, the antisocial effect of cigarettes, and the impact on adjacent markets etc.

Moreover, TEDIS is obliged to provide the AMCU on a monthly basis for three years with information on sales volumes, purchase and sales prices of cigarettes set in its own retail network, set for other entities that are licensed to wholesale and/or retail trade tobacco products.

The Company denies the breach and currently appeals against the AMCU decision to the Commercial Court.