

# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2022 – Ukraine

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### Competition Policy in Wartime

Over a year, Ukraine courageously resists a full-scale attack by Russian troops and fights for its freedom, independence, and territorial integrity. This reality affects all the processes in the country. Competition policy is no exception (see previous posts on the Kluwer Competition Law Blog on this topic [here](#)).

This overview describes the changes that took place, are taking place, and are expected to take place in competition policy and competition law enforcement in Ukraine under the war impact, applying the chronological approach with a focus on 2022.

### Cessation of competition policy enforcement (March – July 2022)

Ukraine is a unitary country. Its competition policy has always been highly centralized. The main functions for the competition policy making and its implementation lie with the central authorities – the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine, the Ministry of Economy of Ukraine, and the Antimonopoly Committee of Ukraine (AMCU). Regional authorities, including the territorial branches of the AMCU, have significantly less power.

While the issue of competition policymaking is strategic and is more flexible in terms of place and manner of its performance, the issue of its implementation is quite strictly regulated. Only some of the functions can be implemented remotely. The semi-invasion of Kyiv by the Russian occupying forces at the beginning of March 2022 resulted in significant restrictions on the access of employees of central authorities, including AMCU, to workplaces and, therefore, the ability to perform the duties and powers assigned to them fully. As a result, on 03.03.2022, the AMCU issued the order “*On some issues of organizing the activities of the Antimonopoly Committee of Ukraine under martial law.*” It suspended:

- The consideration of applications and cases on violation of the legislation on the protection of economic competition, on unfair competition, applications and cases on granting permission for concerted actions and concentration of business entities, applications for providing preliminary conclusions regarding concerted actions and concentration of business entities, application for

review of AMCU decisions, submitted to the AMCU and decisions on which have not been adopted as of February 25, 2022;

- The consideration of notifications about new state aid from providers of such aid, about changes to the conditions of current state aid, cases about state aid, applications for illegal state aid, fulfilment of the conditions of admissibility specified in the decision, adopted as a result of consideration of cases about state aid and other under the legislation, letters on providing clarifications on the application of legislation in the field of state aid, submitted to the AMCU and decisions/clarifications on which have not been adopted as of February 25, 2022;
- The consideration of complaints about violations of legislation in the field of public procurement submitted to the AMCU and decisions on which had not been made as of February 25, 2022;
- The period for providing information on requirements and other requests of AMCU officials, the deadlines for providing answers which fell on February 25, 2022, and later.

Hence, almost all the competition law enforcement activities of the AMCU were suspended at the beginning of March 2022 and mainly resumed only in July 2022, when the Russian military was pushed back from the Kyiv region. Only the consideration of applications and cases for state aid remains suspended due to the specifics of providing state aid during martial law, defined by para 52 of the “*Final and Transitional Provisions*” of the Law of Ukraine “*On State Aid for Business Entities*”.

However, during this period, new applications regarding the concentration and coordinated activities of business entities were still being accepted. Moreover, at the end of March 2022, the AMCU developed the “*Advisory Clarifications*” that substantially simplified the initial notification requirements for concentration during the period of martial law. However, the full procedure for considering applications and cases on concentrations and coordinated activities of business entities will not be restored until a later time. According to these clarifications:

- The package of documents for initial notification has been significantly reduced;
- The possibility of electronic notification introduced;
- The fines for the implementation of concentration, concerted actions without prior permission of the AMCU have been minimized (approx. 1.2 thousand euros, while under normal conditions, the amount of the fine is up to 5% of the violator’s annual turnover) in case of prior notification at least 15 days before the conclusion of the agreement and if the agreement did not lead to a significant restriction of competition.

Such an approach addressed the fall in economic activity, left room for “*rescue M&A*” and complied with the competition legislation requirements in terms of implementing sanctions imposed against Russian business.

### **Specifics of competition policy implementation in wartime (post-July 2022)**

In June-July 2022, the full work of the AMCU resumed, which posed a challenge when considering the realities of wartime. First of all, one should consider that the conduct of war does not allow for the implementation of a competition policy in the entire territory of Ukraine. It is impossible to implement such a policy in temporarily occupied territories, and it is complicated in front-line regions. The full-fledged implementation of the competition policy is only possible in the relatively peaceful regions of Ukraine.

### *Market changes*

The war realities significantly changed the competitive disposition of markets on the demand and supply side. Demand for luxury goods fell, and demand for essential goods, construction materials, military and/or dual-purpose goods increased. On the supply side, there have been no less drastic changes: the industrial giants of Eastern Ukraine have largely lost their assets under military operations and, therefore, lost their market positions; about half of the capacity of Ukraine's energy infrastructure has been ruined due to missile attacks, significantly diminishing the ability of the economy to produce energy-intensive products; better positions on the Ukrainian markets are occupying by importers, while market boundaries are blurring along the borders and clearly outlining along the front line. Thus, the information on the boundaries, capacity and structure of markets, and typical patterns of competitive behaviour within them collected by AMCU in pre-war times has lost its relevance today, while the collection of new information is complicated.

### *Procedural challenges: access to information*

Data from public electronic registers, the State Statistics Service of Ukraine (hereinafter – SSSU), has always been the source of complete and methodologically correctly collected information for the AMCU. The responses of applicants, litigants and third parties to the AMCU requests were just additional sources of information, need for the specification of the picture of competitive disposition. Today, access to public electronic registers is temporally restricted and sometimes – closed.

There are delays in the submission of statistical reports by economic entities allowed due to a problematic war situation that brings forth the inability of SSSU to provide complete and valid macro statistical reports. Hence, the parties' responses to the requests of the AMCU turn into the primary source of information, leaving the puzzle of competitive disposition unfinished. This requires AMCU officials to be more ingenious in searching for information and more meticulous in their analysis, increasing the risk of making insufficiently substantiated decisions. To improve access to information collected by state agencies, agreements between various authorities and information agencies can be helpful. These agreements can facilitate the exchange of information that is not publicly available. This could partially address the shortage of information that the AMCU is facing.

As for the information, the collection of which is currently discontinued, or which occurs exclusively voluntarily, we currently have to make do with fragmentary data sources, overcoming this problem with higher standards of its investigation.

### *State aid enforcement*

The situation on the state aid control is equal, and perhaps even more difficult. In 2022, Ukraine received approximately 30 billion dollars of international financial aid from partner countries. Some of this aid was utilized to support the economy, relocate enterprises from occupied and front-line regions to safer ones, and other similar initiatives. Applying the pre-war state aid control rules,

which required prior notification at least 105 days before the provision of state aid, could be a highly inefficient use of time resources in war times.

Therefore, in the spring of 2022, temporary changes were made to the Law of Ukraine “[On State Aid to Business Entities](#)“, which fixed the suspension of notification of state aid for the period of martial law introduced on March 3, 2022, and recognized any state aid provided during this period as permissible aid. However, this does not mean that the analysis and control over the provision of state aid are not carried out altogether. Today, it is non-imperative and can occur before, during or after the provision of state aid. For example, the programs for the future reconstruction of Ukraine are monitored by officials of the AMCU Department of Monitoring and Control of State Aid in advance. They are part of working groups that focus on relevant programs and ensure that they comply with both Ukrainian and European legislation. They take into consideration Ukraine’s commitments made in the Association Agreement and acquire the status of a candidate for EU accession.

Current monitoring of state aid occurs thanks to operational advisory requests that state authorities can send to AMCU in making a decision on granting or changing the conditions for providing state aid. Ex-post monitoring and control of state aid occur through manual monitoring by AMCU officials throughout the acts on providing state aid using electronic resources of central, regional and local authorities and providing them with recommendations on eliminating/minimizing the risks of such aid for competition if necessary.

#### *A positive outlook*

Therefore, it can be inferred that the temporary gaps in the institutional structure of Ukraine’s competition policy caused by the war are currently being resolved, thanks to the deliberate and responsible efforts of the officials of the AMCU and the civil servants of other state and local authorities engaged in the development and execution of competition policies.

In 2022, Olha Pishchanska, head of AMCU mentioned that the AMCU has opened 226 new cases of collusion in public procurement, tenders and auctions. Another 219 investigations, which may lead to the opening of proceedings in the future, are at the final stage of completion. During the war specifically, the AMCU opened 122 cases and 176 investigations.

### **Competition law and policy in Ukraine – the way forward EU membership**

A significant part of AMCU’s work is focused on changing Ukraine’s competition law and competition policy towards its integration with EU competition law in the context of European integration.

The draft Law of Ukraine “[On Amendments to Certain Legislative Acts of Ukraine on Improving the Activities of the Antimonopoly Committee of Ukraine No 5431](#)” has been widely discussed within the Verkhovna Rada of Ukraine, as well as wider society, receiving [controversial assessments](#). Among the most debated provisions of the Draft law are:

- Providing the AMCU with the right to independently regulate its essentially law-enforcement

activities;

- Limitation of the right of the participants in the case to review the evidence in the case;
- Provision and use of evidence by the AMCU outside the limits of the legally established procedural order of their receipt and without assessment of their admissibility/legality;
- Expansion of the range of transactions recognized by the law as economic concentration and the implementation of which will require the prior approval of AMCU;
- The presumption of acquisition (and therefore the existence) of control in the case of acquisition of shares;
- Parts that ensure reaching or exceeding only 25% in the highest management body of the company;
- Cancellation of the right of a person who has been harmed by relevant violations of competition legislation, to be compensated in a double amount.

However, the AMCU **considers** new powers for setting its priorities, new specific tools such as market investigations, and powers to raid the premises of individuals to be vital for the effective enforcement of competition law.

Even though the application of the Law of Ukraine “*On State Aid to Business Entities*” was suspended during the war and would be suspended for a year after it ended, the AMCU continues to develop draft criteria for the Government to assess the admissibility of certain categories of state aid to business entities and is actively working to generalise the practice of applying state aid legislation. For example, in 2022, clarifications were adopted in the following areas: heat supply, healthcare, water and maritime transport, local taxes, sports, household waste management and passenger transportation by road.

The AMCU is **considering** some special approach for the compatibility of state aid to address social and economic problems related to the military aggression of the Russian Federation, and in the future, conditions for exempting the providers of such state aid from the obligation to report it to the AMCU.

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