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Competition law issues in EU-Ukraine, Moldova & Georgia Association Agreements (comparative aspects)

by Kseniia Smyrnova[1]

As comparing with other countries with competition protection systems, UNCTAD noted that Ukraine has begun the process of competition law adoption and the formation of its implementation policy in very difficult initial conditions. Economic and political circumstances in Ukraine, as well as in other former Soviet republics, have been particularly tough. At the same time Ukraine adopted its competition law system at the beginning of a period of rapid growth in the number of jurisdictions with competition laws throughout the world. As UNCTAD experts stressed the journey towards an effective competition policy system in Ukraine has been arduous[2]. In the early 2000s, various market reforms and de-monopolization measures were taken. Despite various market reforms and de-monopolization measures, Ukraine's economy still features exceptionally high levels of concentration unrelated to superior economic performance.

Nevertheless, the process of harmonization of national legislation with the EU law was & remains one of the key areas of cooperation between Ukraine and the EU. Harmonization defines the conditions for further deepening of economic and sectorial cooperation and creates legal preconditions for the next stage of European economic integration. Nevertheless, the rules contained in the

[1] Dr. of Jur. Sc. (Dr.hab.), Professor, Institute of International Relations of Taras Shevchenko National University of Kyiv, Member of Public Council of Antimonopoly Committee of Ukraine (Kiev, Ukraine), ksenya.smyrnova@gmail.com

[2] See Voluntary Peer Review of Competition Law and Policy: Ukraine Overview, UNCTAD, 2013 // http://unctad.org/en/PublicationsLibrary/ditcclp2013d3_overview_en.pdf

Partnership & Cooperation Agreement[3] (PCA) signed in 1994, has 'soft law' character – the PCA did not place Ukraine under a strict obligation to harmonization its legislation. At the same time however, the special Article 51 PCA stressed that competition was one of the priorities of harmonization. The EU-Ukraine Association Agreement (AA)[4] ratified in September 2014 replaces the PCA as the basic legal framework of EU-Ukraine relations (Art. 479 EU-Ukraine AA). Upon its entry into force the Association Agreement is considered as a part of national legislation (ch. 1, Art. 9 of the Constitution of Ukraine[5]) and in case of conflict with the norms of current legislation is subject to priority application (ch. 2, Art. 19 of the Law of Ukraine "On international agreements of Ukraine").

Due to Ukraine's integration policy, its accession to the WTO in 2008 [6], entering into force of the Free Trade Agreement with EFTA countries in 2012[7], signing & ratification of the Association Agreement[8] with the EU, the open free trade areas opened their doors for Ukraine. Due to this fact the most important issue related to liberalized trade is competition rules that become increasingly crucial for Ukraine.

Comparing the current Association Aagreement with Ukraine with analogue acts signed by the EU with others countries, it can be said that this is a 'fourth generation agreement'. It is the first of a new generation of Association Agreements between the EU and countries of the Eastern Partnership that covers a deep and comprehensive free trade area (DCFTA). Considering further on the 'deep' and 'comprehensive' character of the FTA, it can be concluded that the EU-Ukraine DCFTA is the first of a new generation of FTAs concluded by the EU which will, once in force, gradually and partially integrate the economy of Ukraine into the EU Internal Market. Its integration into the Internal Market will take place, however, only under the condition that Ukraine approximates its legislation to the EU *acquis*.

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[3] The Partnership and Cooperation Agreement between EC & its Member States & Ukraine was concluded in 1994 and entered into force in March 1998. The PCA formed the legal basis of EU-Ukraine relations, providing for cooperation in a wide range of areas. It was concluded for the term of 10 years, but Art. 101 PCA provided the process of its automatic prolongation in case of denunciation notice absence.

[4] Association Agreement between the European Union and its Member States, of the one part, and Ukraine of the other part (*OJ*, 2014, L 161).

[5] Article 9 of the Ukrainian Constitution of 1996 provides that: "International treaties in force, consented by the Verkhovna Rada of Ukraine [Ukrainian Parliament] as binding, shall be an integral part of the national legislation of Ukraine. Conclusion of international treaties, contravening the Constitution of Ukraine, shall be possible only aft er introducing relevant amendments to the Constitution of Ukraine".

[6] Law of Ukraine "On ratification of Protocol of Ukraine's accession to the WTO" dated 10.04.2008 No 250-VI // Verhovna Rada Bulletin. – 2008. - № 23. – P. 213

[7] Law of Ukraine "On ratification of Free Trade Agreement between Ukraine and Member States of EFTA" dated 07.12.2011 No 4091-VI // Official Journal of Ukraine. - 13.01.2012. - № 1. - P. 9.

[8] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part // OJ L 161 29.5.2014. – P.3- 2137.

On the other hand, the 'deep' character of the DCFTA refers also to Ukraine's commitment to approximate its legislation to the *acquis* in order to achieve its economic integration with the EU Internal Market. The DCFTA contains numerous legislative approximation clauses according to which Ukraine must approximate its domestic legislation or standards to the EU *acquis.* Title IV of the Association Agreement shows that the EU-Ukraine AA not only covers traditional FTA areas, such as market access for goods, but also includes public procurement, IPR, competition, energy, etc.

The EU-Ukraine, EU-Georgia and EU-Moldova FTAs were announced as being the first in a series of so-called Deep and Comprehensive Free Trade Agreements (DCFTAs)[10]. Within this category, the competition chapters are nevertheless very diverse[11].

The competition chapter in the DCFTA with Georgia is very superficial[12]. Cooperation provisions are not foreseen. Principles governing anti-competitive business practices and state interventions as well as subsidies provide that parties should maintain comprehensive and effective competition laws, and implement such legislation via a functioning authority, respecting the principles of transparency, non-discrimination, procedural fairness and respect for the rights of defence. Some provisions deal with the regulation of state monopolies, state enterprises and enterprises entrusted with special or exclusive rights, mainly requiring transparency. One provision regulates subsidies, which is not excluded from the DSM, in contrast to the rest of the competition chapter. There is no prejudice to the rights and obligations in the WTO agreement, and parties should 'take into account the limitations imposed by the requirements of professional and business secrecy in their respective jurisdictions'[13].

The EU-Moldova DCFTA's competition chapter is comprised of two sections, one dealing with antitrust and mergers, and one revolving around state aid[14]. Again the obligation of maintaining competition laws and operational authorities is included. The provision on the implementation of competition laws emphasizes the independence of the competition authorities, a feature that is not present in any of the other DCFTAs. Again, state monopolies, public undertakings and undertakings entrusted with special or exclusive rights are regulated, in the sense that they should be subject to competition laws. Furthermore, cooperation and exchange of information is foreseen. However, the relevant provision is rather weak, merely stating that 'each competition authority may inform the other competition authority of its willingness to cooperate with respect to the enforcement activity of any of the Parties'[15]. Exchange of non-confidential

[10] European Commission, The EU's Association Agreements with Georgia, the Republic of Moldova and Ukraine, Brussels, 23 Jun. 2014, MEMO/14/430.
[11] Demedts V. Which Future for Competition in the Global Trade System: Competition Chapters in FTAs // Journal of World Trade. – 2015. - 49, no. 3 .- P. 407–436.
[12] Art. 203-209 EU-Georgia DCFTA
[13] Art. 209 EU-Georgia DCFTA
[14] Art. 333-344 EU-Moldova DCFTA
[15] Art. 337 EU-Moldova DCFTA

information is allowed, subject to the confidentiality laws of each party and limited by the national requirements of professional and business secrecy. The entire section is excluded from dispute settlement. The section on state aid does not apply to fisheries and agriculture. The assessment of state aid is regulated, referring back to Article 107 TFEU, and the parties are to establish and maintain state aid legislation and an authority, thereby adhering to the transparency-principle. Again parties should 'take into account' limitations following from professional and business secrecy obligations, and a rather unique review clause is included.

Finally, the DCFTA with Ukraine is somewhat particular. The competition chapter is much longer and is again divided in two sections[16]: antitrust and mergers; and state aid.

The first section on antitrust and mergers traditionally elaborates on the importance of regulating anti-competitive behaviour, and indicates the practices that are considered inconsistent with the agreement. The AA focuses on the main principles of an undertaking's conduct on the market that can impede, restrict or distort competition (including conduct prohibited under Article 101 (1) TFEU, abuse of a dominant position and certain concentrations that result in monopolization or a substantial restriction of competition in the market in the territory of either Party). The Associaiton Agreement identifies the key practices and economic transactions that could potentially adversely affect the functioning of markets and undermine the benefits of trade liberalization established between the parties. These anti-competitive practices include: a) agreements and concerted practices between undertakings, which have the purpose or effect of impeding, restricting, distorting or substantially lessening competition in the territory of either Party; b) the abuse by one or more undertakings of a dominant position in the territory of either Party; c) concentrations between undertakings, which result in monopolization or a substantial restriction of competition in the market in the territory of either Party[17].

What is characteristic of the EU-Ukraine DCFTA is the provision on approximation of law and enforcement practice, with strict deadlines and hard obligations. Parties should exchange information and cooperate on enforcement matters, although the obligations are again particularly weak, stating that 'the competition authority of a Party may inform the competition authority of the other Party of its willingness to cooperate with respect to enforcement activity. This cooperation shall not prevent the Parties from taking independent decisions'[18]. The agreement foresees that the parties should consult each other, but this is not regulated in detail, nor is it mandatory.

The EU-Ukraine AA pays special attention to state aid, which remains unregulated in Ukraine. The principle of transparency is again central, and this time is made tangible via concrete obligations. Articles 106, 107 and 93TFEU shall

[16] Art. 253-267 EU-Ukraine DCFTA
[17] Article 254 AA
[18] Art. 259(2) EU-Ukraine DCFTA

serve as sources of interpretation. Finally, concrete changes to the domestic system of state aid control are required and listed in the agreement.

What sets the EU-Ukraine DCFTA apart from the other DCFTAs is that Ukraine will align its competition law and enforcement practice to that of the EU acquis in a number of fields. As a result, there are actual substantive requirements for the domestic regime. This type of commitment cannot be found in other post-Global-Europe FTAs. What is remarkable is that the scope of the EU acquis to which Ukraine should approximate its laws is not included in an annex but in the main text of the agreement. This of course has consequences for the procedure to change this content. A formal treaty change will be required, which is rigid and burdensome. Furthermore, Ukraine commits itself to adopting a system of control of state aid similar to that in the EU and inspired by TFEU articles, including an independent authority. The level of detail in these provisions can also be considered quite novel.

The DCFTA is one of the most ambitious bilateral agreements that the EU has ever negotiated with a trading partner and should offer Ukraine a framework for modernization of bilateral trade and investment relations and a model for economic development.