

Report at the International scientific conference «European Union Law in the Decisions of the Member States' Constitutional and Administrative Courts and Public Administration» (October 18-19, 2017, Krakow, Poland).

"Europeanization" of Ukrainian competition law: main results & perspectives

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Abstract: Due to the process of globalization & liberalization of trade EU-Ukraine bilateral economic relations are based currently on the Deep & Comprehensive Free Trade Area. These preferential trade relations are matured in fair undistorted spirit. Domestic Ukrainian competition rules were developed under the European impact. Since EU-Ukraine Association Agreement ratification huge work on the development of competition rules enforcement started. Improved rules on M&A were introduced. Nowadays Ukrainian NCA faces the challenge of implementation state aid rules that were entered into force since August, 2, 2017. New spirit of ordoliberal ideas in competition should be permeated within constitutional & administrative dimension.

The process of Europeanization is an incremental process reorienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organizational logic of national politics and policy-

making¹. Using the legal instrument of concluding external agreements between EU & third countries we can assume the spreading of obligations of acquis implementation in third countries legal orders.

The process of harmonization of competition law of Ukraine started on the beginning of 2000-s, it was illustrated by the new Law of Ukraine “On protection of Economic Competition” (which was entered into force in 2002) that was elaborated under the main principles of the EU Competition Law. This Law was constantly amended to improve the system for monitoring compliance with the rules of competition. By the way almost all changes & other acts of Antimonopoly Committee of Ukraine (AMCU) were elaborated due to the EU competition law. The very great illustration of it is the Act of immunity of fines that was adopted in 2012 under the framework norm of the Law “On protection of Economic Protection”.

The EU-Ukraine Association Agreement (AA)² ratified in September 2014 replaces the PCA as the basic legal framework of EU-Ukraine relations (Art. 479 EU-Ukraine AA) and entered into force since 1 September 2017. Upon its entry into force the Association Agreement is considered as a part of national legislation (ch. 1, Art. 9 of the Constitution of Ukraine³) 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 2008⁴, entering into force of the Free Trade Agreement with EFTA countries in 2012⁵, signing & ratification of the Association Agreement⁶ 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 Agreement 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

¹ Ladrech, R. (1994), ‘Europeanization of Domestic Politics and Institutions: The Case of France’, *Journal of Common Market Studies*, 32:1, 69-88

² Association Agreement between the European Union and its Member States, of the one part, and Ukraine of the other part (OJ, 2014, L 161).

³ 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 after introducing relevant amendments to the Constitution of Ukraine”.

⁴ 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

⁵ 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.

⁶ 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.

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*.

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 DCFTA with Ukraine is somewhat particular. The competition chapter is much longer and is again divided in two sections⁷: 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 Association 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 Party⁸.

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’⁹. 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

⁷ Art. 253-267 EU-Ukraine DCFTA

⁸ Article 254 AA

⁹ Art. 259(2) EU-Ukraine DCFTA

time is made tangible via concrete obligations. Articles 106, 107 and 93 TFEU shall 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.

From the analyzed areas of approximation Ukrainian competition legislation to the EU law in accordance with the requirements of the Association Agreement can be concluded that the main drawback of Ukrainian legal system is the lack of proper enforcement levels and improving procedures transparent decision-making, including through the publication of the decisions of the national mechanism for antitrust body.

A necessary condition for harmonized system of regulation of competition there is cooperation and coordination, including the exchange of information between the relevant national authorities of Ukraine, the European Union and its Member States to further enhance effective competition law enforcement, and to fulfil the objectives of this Agreement through the promotion of competition and the curtailment of anti-competitive business conduct or anticompetitive transactions, as indicated by Art. 259 of the Agreement. In addition, this article focuses on the fact that such cooperation shall not prevent the authorities from taking independent decisions.

The main instrument of an effective process of harmonization and foster mutual understanding of the parties in competition are consulting, implementation of which is foreseen in Art. 260 Agreement. A process of consultation will be used during the interpretation or application of competition rules. However, this is not a firm commitment, and intention of the parties to provide non-confidential information in order to improve the consultation process.

In particular, it should be noted that the scope of the feature according to the Association Agreement is that none of the parties to the Agreement may not resort to dispute settlement procedures of the questions referred to the field of competition (Article 261 of the Agreement). The only obligation on the terms of harmonization of Ukrainian legislation in accordance with Art. 256 Agreement

may be subject to dispute settlement procedures. This means that the provisions of the Association Agreement are determined in order imperative principles of operation of free competition in the market in terms of free trade. Prohibition of anticompetitive practices in the form of concerted action or agreements, abuse of dominance, and the principle of control of concentrations are the basic elements of the implementation of free trade.

State aid provided by the companies may distort competition by giving advantages to certain companies or industries. Because state aid is considered a separate EU law and is subject to strict controls. In this regard, special attention is paid to the Association Agreement is a question of state aid.

Harmonization is a process of convergence towards the principles of another legal system, through which they undergo convergence. Thus, attention is paid not only to the material content of the rules is taken, but the complex nature of its practical application. In this respect, a crucial importance of the Court of the European Union, which interprets and explains the features of the implementation of European Union law.

To implement these commitments Ukraine has for three years after the entry into force of the Agreement adapt its legislation in this area with EU legislation and to establish appropriate and effective institutional framework, including operating an independent body with the necessary powers, the system of control provision and use of state aid, including the provision of relevant statistical information. In general, Ukrainian enforcement practice has a gap in social welfare oriented system of competition. The special clause in enforcement process should be allocated as an object of competition law as a whole mechanism of better consumer protection.