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Europeanisation of the Legal Order of Ukraine: Domestic Practices of the Adjustment of the Competition Law + impact of the European Studies research on the domestic approximation practices

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JEAN MONNET CENTRE OF EXCELLENCE

Advancing European Studies in Ukraine: Interdisciplinary Approach

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Objectives

- Promoting development of educational and scientific activities, exchange of views on the EU and its relations with Ukraine under implementation of the Association Agreement
- Multidisciplinary approach: economy, politics, law, communications
- Various target groups
- Methodological hub with open educational resources on the European studies
- More information:
 - About the project: <http://www.iir.edu.ua/en/jean-monnet-center/>
 - Database of Teaching and Research information on the EU: <https://e-learning.iir.edu.ua/course/view.php?id=29&lang=en>



Project courses

□ **FOR STUDENTS:**

- EU IN INTERNATIONAL ECONOMIC INTEGRATION AND DISINTEGRATION PROCESSES (2021)
- EU LAW AND ITS IMPACT ON UKRAINE (2021)
- POLITICAL ACTORNESS OF THE EU (2022)

□ **FOR HIGH SCHOOL STUDENTS:**

- INTEGRATION OF UKRAINE WITH THE EU FOR YOUNG PEOPLE (2020-21)

□ **FOR LECTURERS AND RESEARCHERS:**

- FOREIGN POLICY AND COMMUNICATIONS IN THE EU (2021)
- EU ECONOMIC INTEGRATION AND THE ASSOCIATION AGREEMENT WITH UKRAINE (2021)
- IMPACT OF EU LAW ON THE UKRAINIAN LEGAL ORDER (2022)

□ **FOR PUBLIC SERVANTS:**

- ECONOMY, POLICY, LAW AND COMMUNICATIONS IN THE EU AND THE ASSOCIATION AGREEMENT WITH UKRAINE (2019-22)

□ **FOR REPRESENTATIVES OF NON-GOVERNMENTAL ORGANIZATIONS:**

- CIVIL SOCIETY ORGANIZATIONS IN DEVELOPMENT OF POLITICAL, ECONOMIC, LEGAL AND COMMUNICATION SYSTEMS OF THE EU (2021-22)

Europeanization of legal order of Ukraine

- - within the transposition of EU acquis
- - within the EU-Ukraine AA application:
 - Legislative
 - Executive enforcement
 - Judicial enforcement
- The case of competition law as an instrument of “speeding” & effective enforcement of DCFTA

Introduction

- Article 1 of the AA states that the purpose of the association is ‘to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market and to support Ukrainian efforts to complete the transition into a functioning market economy also through the progressive approximation of its legislation to that of the Union’
- 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
- Basic principles of undistorted competition in a market economy are among key principles of a deep and comprehensive free trade agreement established in accordance with the AA’s Section IV (‘Trade’)
- No annexes , all detailed list of obligations in the core text (pro&Contra)
- Special Annex to the AA (XXIII) contains only explanations of certain other terms.... So called - glossary (for example, Service of general economic interest ("SGEI"), Public undertakings, Exclusive & special rights etc.....
- and this glossary is not legally binding and is used exclusively for the interpretation of the provisions of AA

Title IV Trade & Trade Related Matters

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Chapter 10 Competition

- AA Preamble:such a Deep and Comprehensive Free Trade Area, linked to the broader process of legislative approximation.....
- Art. 2 AA: The Parties recognise that the principles of a free market economy underpin their relationship
- Art. 253-267 AA applied on a provisional basis from 1 January 2016 (note verbale 16 November 2015)

Due to the effective enforcement of implementation of perspective amendments to the competition law of Ukraine the mechanism of cooperation & coordination should be settled between national authorities (GD COM & AMCU)

These forms of cooperation include the exchange of information between AMCU, the European Union and its individual Member States. In addition, AA focuses on the fact that such cooperation shall not prevent the authorities from taking independent decisions.

- Discussions (at the request of either Party) of any questions arising from the interpretation or application of competition rules
- Consulting is the main instrument of an effective harmonization process and fostering mutual understanding of the parties in competition law enforcement – its implementation is foreseen in Article 260 AA.
- A process of consultation will be used during the interpretation or application of competition rules. However, this rules does not represent a firm commitment but merely the expression of the intention of the parties to provide each other with non-confidential information in order to improve the consultation process.
- And only: while enforcement state aid rules the sources of interpretation the criteria arising from the application of Articles 106, 107 and 93 of the TFEU, including the relevant jurisprudence of the Court of Justice of the European Union, as well as relevant secondary legislation, frameworks, guidelines and other administrative acts in force in the Union will be applied.

Ukrainian competition legislation

- Ukraine has begun the process of competition law adoption and the formation of its implementation policy in very difficult initial conditions (only 28 years ago there was a planned economy)
- 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
- Law on the Protection of Economic Competition – 2001 (N.B.: it was designed in light of the main principles of EU competition law!!!!)
- There are so many equivalent (written!!!) norms with the EU Competition Law
- But: there are some gaps &... enforcement of these norms is strictly different

Other labyrinth of approximation

- Fair & competitive activity of public enterprises and enterprises entrusted with special or exclusive rights
- adjust state monopolies of a commercial character within a period of five years from the entry into force of this Agreement, so as to ensure that no discriminatory measures regarding the conditions under which goods are procured and marketed exist between natural and legal persons of the Parties.
- + competition rules in other sectorial issues (for example energy market, domestic regulated price for the supply of gas and electricity, unbundling processes, transport sector etc.....)

“Europeanization” of competition law?

- the development of competition rules in regional economic integration groupings is dynamic
- Trade agreements spread European competition “spirit” to other states
- The implementation of competition rules there is a clear primacy of the EU, whose policy does not operate only inside the member states but also externally.
- Competition Chapter is based on EU Law (Competition Law)
- Even earlier: 2012 Ukraine-EFTA FTA - competition provisions are the same as in the EU (due to the EEA) but without strict timetable of implementation, only applying while mutual trade relations

Main developments

- The principle of transparency:
 - Art. 256 AA: in accordance with the art. 30 of Regulation 1/2003 requirement of official publication of the decisions, that make available to the other Party public information concerning enforcement activities of its competition laws and legislation partially - partially Done, AMCU's decisions are published in their website (BUT.... No preliminary conclusions, sometimes weak argumentations)
 - Art. 255 (para 5): shall adopt and publish a document explaining the principles to be used in the setting of any pecuniary sanctions imposed for infringements of the competition laws – partially Done, there is a methodic, BUT.. There is a recommendation ...

Approximation scheme under the AA

- Art. 256 AA: substantial aspects of the approximation of Ukraine legislation to European competition law and the timing of its implementation into the national legal system (almost within three years of the entry into force of the AA):
 - 1. The system of exemptions of prohibitions for vertical agreements should be implemented (in accordance with the Commission Regulation (EC) No 330/2010) – done!!!!
 - 2. The exemptions for transfer technology agreements should be implemented (in accordance with the Commission Regulation (EC) No 772/2004) – huge gap! BUT in the EU this Regulation was revised , but there is no changings in the text (DILEMMA & conundrum or bureaucratic puzzle)
 - 3. Huge developments in merger regulation (adoption of new thresholds)
 - 4. State aid rules implementation in accordance with Art. 262-263 AA (for the first time in Ukraine) –in force since 2 August 2017.

Transposing EU State Aid rules

- Law on State Aid to Undertakings (signed in 2014, in force since 2 August 2017)
- 264 notifications & 185 decisions (in merit)(among them 174 constitutes that there is no state aid) – only in 2018
- 3 decisions on incompatibility + recovery – very brave!!!!
- 23,5 mln USD of recovery of aid (three decisions: Vinnitsa, Jitomir, Chernivtsi) – one decision was claimed to court & 1 instance proved the incompatibility of state aid.... Whether it would be appealed ?
- Only 5,4 % of the decisions – all-Ukrainian territory, the rest – municipal authorities
- 379 interpretation notices by AMCU

Whether the Europeanization is in enforcement?

- Procedures
- Relevant market definitions (vary narrow approach)
- Recent “brave” symbolic decisions:
 - September 2019: abuse of dominant position with commitments on forced separations
 - 2017: investigation on abuse of dominant position & final statement of dominance with no abuse
 - 2016 abuse of dominant position with 2,5 mln Euro fine
 - + new practice: decision on discover unnotified concentration + commitments & fines
- Judicial review
- New stuff of AMCU
- Challenge: Nova Poshta case in state aid