

The Role of the Antimonopoly Committee in the Development of Competition in Ukraine

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Abstract

Antitrust policy has been an indispensable element of the economic reforms in the countries of Central and Eastern Europe and of the former Soviet Union, including Ukraine. The present study gives a comprehensive picture of the evolution of antitrust policy in Ukraine from 1992 to 2003, and describes the role of Ukrainian competition authority in the development of competition. This paper shows that on the one hand, rules and appropriate procedures, as well as the institutional framework have been established. On the other hand, there has been a lack of a unified state approach to the reformation of the economy in general, and to the problems of the development of competition in particular. The actions of different state organs were not synchronized, and competition policy in Ukraine failed to become the main element of the economic policy setup.

Keywords: Competition, Competition policy, Transition Economies

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Introduction

Antitrust policy has been an essential element of the economic reforms introduced in the countries of Central and Eastern Europe and of the former Soviet Union, including Ukraine. In 1991 Ukraine became an independent state, abandoned central planning and started the transformation of its economy. As the country inherited a highly monopolized structure of economy from the Soviet Union, de-monopolization and development of competition have been among the main goals of the structural changes in both production and organization of the economy as a whole.

The role of increased competition is of particular importance in transition economies because it includes a mechanism of market selection, improves performance of incumbent firms and encourages entry of low-cost firms. A host of studies has addressed the theory and applications of antitrust policy in transition, mainly in Central and Eastern Europe (e.g. Estrin and Cave 1993; Fingleton et al 1996; Sturm et al 2001). However, countries of the former Soviet Union including Ukraine have attracted much less attention. Since transition countries are far from being a homogeneous group, every country having its own peculiarities. Conclusions drawn out for Central and Eastern Europe may not always fit other countries. Hence, a thorough study of the issue based on the Ukrainian experience is also needed.

Ukraine adopted its first antitrust law – the Law on Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activity – in 1992, and established its competition authority – the Antimonopoly Committee of Ukraine (AMC) – in 1993. The law was amended several times, and finally it was replaced by the law of the second generation “On Protection of Economic Competition”, effective 2002. Thus, there have been accumulated more than ten years of a valuable experience in the field that has to be assessed.

The purpose of the present study is to give a comprehensive picture of the development of antitrust policy in Ukraine from 1992 to 2003, and of the role of the Antimonopoly Committee in this process. It describes the evolution of competition policy in Ukraine, and examines its implementation. The main emphasis is made on the place of the competition authority in the economic policy setup and on the need of harmonization of all aspects of the reforms. The paper also compares the Ukrainian experience with that of the other transition countries.

It will be shown that the development of the competition policy in Ukraine included establishment of the rules and appropriate procedures, as well as of the institutional framework. The competition authority was mostly engaged in detecting and terminating violations of the antimonopoly legislation, and was quite successful in this

area. At the same time, the competition policy in Ukraine generally failed to become the central component of the economic policy of the state.

1. Competition Policy in Transition: an Overview

What is required to ensure competition in transition countries is still viewed as controversial. There is a broad range of economic policies that can support the encouragement of rivalry. Among the policies that have been argued to be the most effective ways of reaching this objective are competition policy, trade liberalization, policies aimed at hardening budget constraints and reducing barriers to exit, or encouraging entrepreneurship and reducing barriers to entry.

North (1981) points out that the need for competition policy stems from the experience that every firm quite naturally attempts to obtain a position unchallenged by competition. Fingleton et al (1996) also note that free functioning of the markets does not always assure effective competition and the absence of effective competition may lead to considerable welfare losses for a society; therefore, there is a necessity of competition policy.

Schaffer (1993) refutes two the most frequent arguments why competition policy might not be especially important in transition economies. The first one is that if a country is open enough to foreign trade, international competition will restrain domestic monopolies and keep them behaving properly. According to the second argument, empirical studies of the welfare costs of oligopolistic behavior suggest that the welfare loss is rather small. The author disproves both arguments on the grounds of importance of emerging private sector.¹ If international competition is used to keep monopolies under pressure, the pressure will be imposed on the private sector as well and will inhibit its growth. Also, the welfare costs of monopolistic behavior are typically static measures. When talking about the development in a transition economy, dynamic efficiency is more important.

Fingleton et al (1996) add to the foreign competition argument that there are cases when foreign competition will be inadequate, in particular, in location-specific services, in cases where transportation costs are high, and where regulatory barriers can artificially separate domestic market from the world market. Also, the authors claim that liberalization of prices and markets in transition countries may not be sufficient to ensure competition because of high barriers to entry. Thus, there is a need for a special policy that would assist and defend the development of competition.

Two definitions of competition policy can be proposed: general and narrow. In a general sense the term refers to those tools of public policy that lay the foundation for

¹ By the private sector the author means the emerging private sector that mainly consists from small and medium-sized firms, and does not include the privatized or formerly state-owned sector.

markets or facilitate the creation and growth of efficient and competitive firms that can both deliver goods and services to the nation's own citizens (and inputs to intermediate business) and engage in trade and competition in international markets. A narrow definition comprises "antitrust" rules that prohibit anti-competitive actions and transactions by enterprises (Fingleton et al 1996). In this paper the term competition policy will be used in the narrow sense, and will be also referred to as antitrust policy.

It is necessary to note that competition policy is just a part of economic policy implemented by government, and different policies should be consistent one with another. Stockmann (1993) emphasizes that competition policy is important, but it cannot guarantee the proper functioning of markets if other government policies are not compatible with market economy.

Fingleton et al (1996) indicate that countries in transition will wish to use competition policy to influence the development of their economic structures on the way from central planning to market economy. The authors also claim that competition policy should be adapted to the needs of transition. First, there are many important differences between transition and market economies in their initial conditions, which means that the effects of anti-competitive behavior can be more damaging for transition economies. Also, there is urgency in introducing competition policy, because otherwise the whole transition of an economy would be not credible.

Stockmann (1993) defines five main issues of competition policy in transition: First, countries in transition should [...] introduce adequate and practical substantive rules on competition. Second, they should establish appropriate procedures allowing for swift and effective action. Third, they should provide for the institutional framework necessary for the effective implementation of rules and procedures. Fourth, they should provide the ways and means to ensure that competition aspects are duly taken into account when other government policies are formulated and implemented. Fifth, via their anti-trust authorities, countries in transition should make great efforts to explain the market economy and all its elements, including competition, to the public...

Competition rules are embodied in the form of legislation. Generally, most antitrust laws are related to protection of actual and potential competition. They also occasionally include other issues like consumer protection, privatization and unfair competition. The implementation of competition law can be undertaken by specialized bodies or by courts. Every country in transition is unique and has its own peculiarities. They differ in reform paths and may choose different ways of implementing competition policy. And if a policy exists, its implementation should be evaluated from time to time in order to compare the goals of its introduction with the actual results.

2. A Summary of Economic Reforms in Ukraine

Before turning to the development of antitrust policy in Ukraine and analyzing its implementation, it is crucial to describe the economic environment in which this policy must work. The collapse of the centrally planned economy, together with late and inadequate reforms, brought hyperinflation, shrinking output, rapid currency depreciation and high annual budget deficits in the early 1990s. A stabilization program introduced in the mid-1990s was relatively successful (EIU 2002), although structural reforms in several important areas, including privatization, were lagging behind. Although the state had privatized more than 80% of all enterprises (accounting for over 60% of output) by early 1999 (*Ibid.*), controlling shares in many privatized enterprises remained in government hands, maintaining the influence of former communist directors and precluding significant productivity gains. Moreover, there has been little change in the behavior of privatized enterprises. About 85% of all shares have gone to incumbent managers and employees. Enterprises purchased by insiders are generally reluctant to change behavior, reduce costs, and dismiss excess labor. They continue to seek subsidies, privileges, and state contracts (D'Anieri et al 1999). The preservation of management that was accustomed to cooperative behavior during Soviet times, and that lacks the skills of operating in a market environment makes collusion between privatized firms more likely (Fingleton et al 1996). Also, around 6,000 enterprises remained under state control. These enterprises were considered of strategic importance to the country, including those in heavy industry, defense, energy, transport and communications (EIU 1996). In order to preserve the profitability of its enterprises, the government can attempt to limit competition in the "strategic" branches using administrative measures, which can create a conflict with competition policy.

Without de-monopolization, privatization is in danger of becoming a process of transformation of state monopolies inherited from the Soviet times to private ones. According to the AMC, on January 1, 2001 there were 365 enterprises that had a monopoly position in 562 national markets, and 3,469 enterprises had a monopoly position in 5,626 regional markets (AMC 2000). The Committee emphasizes that the contraction of the quantity of monopolized national markets has been a general tendency (see table 1). At the same time, from 2000 to 2002, the quantity of monopolized national markets decreased only by two. Thus, the process of de-monopolization of the national markets has basically stopped.

Table 1. Dynamics of the quantity of monopolized national markets in Ukraine

Branch	The quantity of monopolized national markets	
	In 1994	In 2000
Mechanical engineering	303	253
Chemical industry	124	91
Metallurgy	93	71
Forestry, paper industry	25	11
Light industry	55	30
Other branches	100	106
Total	700	562

Source: the AMC Annual Report 2000

According to the AMC, the branch structure of monopolized markets remains relatively stable (see table 2). The largest group of monopolized markets in Ukraine is the group of markets of natural monopolies, and adjacent markets, the monopolization of which is caused by the influence of natural monopolies. The quantity of markets monopolized due to administrative factors is also high. Although the structure of monopolized markets remained the same, the number of the markets increased from 2000 to 2002 considerably due to an increase in the number of monopolized local markets.

Table 2. Branch structure of monopolized markets in 2000 and 2002

Group of markets	2000		2002	
	Quantity of monopolized markets	% to total	Quantity of monopolized markets	% to total
Markets of natural monopolies	1,842	29.7	2,384	34.3
Markets of communal services (excluding natural monopolies)	1,038	16.8	1,073	15.4
Markets of services related to administrative restrictions	990	15.9	914	13.2
Markets of services related to implementation of state functions	609	9.8	890	12.8

Markets of products of the industries that require large investments	415	6.8	413	5.9
Potentially competitive markets, de-monopolization of which is not completed	232	3.7	103	1.5
Infant markets	104	1.6	-	-
Markets related to distribution schemes	84	1.3	79	1.1
Other monopolized markets	874	14.4	1,095	15.8
Total	6,188	100.0	6,951	100.0

Note: the markets include both regional and national ones.

Source: the AMC Annual Report 2000, 2002

These numbers, however, should be taken with some reservations. Ukrainian competition legislation does not contain a definition of monopolized market. Allegedly, the AMC defines all markets where at least one agent is a monopolist as monopolized. This approach disregards the level of concentration in markets: it identifies a market as monopolized if there is an enterprise with anywhere from 35% to 100% of market share. Moreover, the AMC itself recognizes the fact that its analysis of markets is far from being complete. For example, the abovementioned increase in the number of monopolized local markets in 2000-2002 was a result not of monopolization, but of the analysis of new regional markets.

There is other information one can use to assess the level of monopolization of the economy. The quantity of enterprises with a monopoly position was approximately 0.6% of the total quantity of enterprises in Ukraine in 2000. According to data from the Ministry of Economy, by the end of 1999, enterprises having a monopoly position in national markets produced 23.1% of output, and these enterprises employed 13.3% of the total workforce. Counting local markets as well, the share of the monopoly sector in Ukraine was about 40% of GDP in 2000 (AMC 2000). These facts confirm that the Ukrainian economy is still highly monopolized.

The impact of foreign direct investments (FDI) on the development of competition has been limited. Unfortunately, Ukraine has one of the lowest FDI per capita of Central and Eastern Europe. In the period 1991-98, US\$87.5 billion flowed into Central and Eastern Europe. Only about 3% (US\$2.7 billion) of this amount went to Ukraine. In terms of FDI inflows as a percentage of GDP, Ukraine, with average annual inflows equal to 1.5-2% of GDP, lags far behind Central Europe, which averages around 4% (EIU 2002). Naturally, investors have been attracted primarily to the most profitable

sectors, affecting the structure of the markets. The sectors receiving the most FDI were the communications sector, the food industry, domestic trade, mechanical engineering and metallurgy, finance, and the fuel industry. Generally, the regime of equal treatment of foreign businesses is provided. There are some sector-specific restrictions on foreign investment, especially in banking, insurance and telecommunications. Other sectors, such as armaments or alcoholic spirits, are completely closed to foreign investment (van Zon 2000).

Concerning foreign trade, the period of 1991-94 was characterized by very slow liberalization, with an introduction of a Soviet-style foreign trade system with export quotas and licenses in 1993/94. The liberalization of the trade and payments system that removed export controls took place only in late 1994/early 1995 under pressure from the International Monetary Fund (1997).

All the features of economic reforms in Ukraine described above have direct implications for competition policy. Ukraine inherited a highly monopolized and concentrated structure of economy from the Soviet era. On the whole, privatization has not resulted in a profound restructuring of enterprises, which are still mostly controlled by soviet-type managers. Often these enterprises possess a dominant position in the markets, and may attempt to exercise their power to achieve monopoly profits, which is an easier way to survive than to undertake restructuring to attract investments. Also, cooperative motives in the behavior of managers remain strong, which makes collusion among them quite likely.

De-monopolization of the Ukrainian economy has been considerable but not sufficient. Many markets are monopolized due to administrative reasons. Entry of new firms has been limited, and they face many obstacles. The level of foreign direct investment is low and mostly limited to a small number of profitable industries. Ukrainian foreign trade is liberalized and Ukrainian producers face severe import competition, but not in all markets. The impact of these issues on the implementation of competition policy in Ukraine will be demonstrated in section 4. After the evaluation of the economic environment in which antitrust policy has to work, it is necessary to describe the set of rules that constitute this policy.

3. The Legal Framework of Competition Policy in Ukraine

The first competition law, *The Law on the Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activity*, was adopted on February 18, 1992. The Law defines the legal grounds for limitation of monopolization, prevention of unfair competition in entrepreneurial activities, and the exercise of state control concerning the norms of antimonopoly legislation.

A monopoly position is defined as a dominant position of an economic entity that allows it, on its own, or together with other entities, to restrict competition in the market of a particular product. A monopoly position is one where an economic entity's share of a particular product market exceeds 35%. Where shares are less than 35%, a monopoly position obtains by a decision taken by the AMC, depending on the circumstances. Article 4 of the Law declares imposition of onerous contract terms, limiting or stopping production, refusing to buy or sell goods in an absence of alternatives, creation of barriers to entry, and discriminatory and monopoly pricing as abuse of monopoly position if they result in restriction of competition.

When assessing dominance, the degree of competition in a market is disregarded, and the decision is based on a mere market share making it too easy to label a firm as a monopolist. In this respect the Law is similar to the competition laws of the first generation in countries of Central and Eastern Europe that also tended to presume dominance using a market share as the main measurement, and in some cases rely on that criterion alone (Fingleton et al 1996; Hoekman and Djankov 1997; Pittman 1998; OECD 1999).

According to Article 5 of the Law, anti-competitive concerted actions are the actions that result in setting or maintaining monopoly prices; market partition that can result in its monopolization; and the removal of sellers, buyers and other economic entities from the market, or restriction of their access to it.

Article 6 comprises cases of discrimination of economic entities by state organs, such as, for example, prohibition of establishing new enterprises, imposing restrictions on performing certain activities or producing certain types of products, granting privileges or other advantages to some economic entities, and prohibition of sale of products from one region into another. Such provisions are also quite common in competition legislation of transition countries, for example in Hungary, Estonia, Latvia, Lithuania, and Russia.

The Law on the Limitation of Monopolism is quite inattentive to economic concentration.² It does not define the circumstances under which an approval of the AMC for a concentration is required, nor does it delineate the conditions of such an approval. These issues are to be covered by resolutions and regulations of the Government and the AMC. The regulations³ define that the approval is generally required if at least one of the participants of concentration is a monopoly, or if total assets or total turnover of the

² This is the case for many competition laws of first generation. For example, Estonia did not have merger control provisions until 1998 and could not prohibit anticompetitive mergers until 2001. First competition law of Poland also did not contain merger control (Fingleton et al 1996).

³ The Resolution of the Cabinet of Ministers of Ukraine "On the Implementation of the Mechanism of Preventing Monopolization of Goods Markets" No. 765 adopted on November 11, 1994 and the Regulations of the Antimonopoly Committee of Ukraine "On the Control of Economic Concentration" No. 15-p adopted on December 09, 1994.

participants exceeds a certain threshold. It was not explicitly specified when the concentration should be approved or rejected until 1998, when the AMC amended its regulations. According to the new rule, a concentration shall be approved if it does not result in monopolization of markets, or in a substantial restriction of competition, or if the positive effect in the interests of society outweighs the negative effect of restriction of competition. This approach represents a mixture of the European standard⁴ focused on dominance⁵, and the American standard⁶ focused on protection of competition, and additionally it allows for the efficiency defense. A similar methodology was adopted in Russia (Pittman 1998). The competition laws of the first generation in Czech Republic, Slovakia, and Hungary also use a comparison of positive effects of a merger and negative effects of limiting competition in merger control (Fingleton et al 1996).

The Law contains the provisions for punishment of anti-competitive behavior. The AMC imposes fines for abuse of a monopoly position, anti-competitive concerted actions, and non-notification of a merger. Individuals also bear civil responsibility and can be fined. In cases when economic entities abuse monopoly position in a market, the Committee has the right (but not the obligation) to make a decision on splitting up monopolistic formations. The decisions of the AMC can be appealed in court within 30 days.

Until 1997, the Law also covered unfair competition that included unlawful use of the business reputation of another economic entity, discrediting competitors, unlawful collection, disclosure and use of commercial secrets, and unfair advertising.⁷ A separate unfair competition law - the Law on Protection Against Unfair Competition - was adopted in 1996 and came into force on January 1, 1997. Article 1 of this law gives a general definition of unfair competition as any act performed in the course of competition contradicting the rules, trade and other fair customs of entrepreneurial activities. The new law also broadens the scope of activities which are qualified as unfair competition.⁸ The AMC remains responsible for considering such cases. Scherer (1994) argues that the presence of unfair competition clauses in competition legislation of some transition countries (e.g. Hungary, Russia, Ukraine, the Baltic States) can be related to an attempt of a government to replace business ethics with legal regulation. At the same time

⁴ See Article 2 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

⁵ Before the Council Regulation (EC) No 139/2004 of 20 January 2004, which states that a merger must be blocked if it would "significantly impede effective competition", came into force on May 01 2004.

⁶ See Horizontal Merger Guidelines of U.S. Department of Justice and the Federal Trade Commission. Issued: April 2, 1992. Revised: April 8, 1997. http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html

⁷ In December 1994 the President issued a decree that made the AMC responsible for detecting and terminating cases of unfair advertising. In June 1996 the Parliament adopted the Law on Advertising and made the Commission on Protection of Consumer Rights the main body dealing with unfair advertising. The Presidential Decree on unfair advertising was abrogated in October 1996.

⁸ For example, comparative advertising, instigating a boycott, bribing an employee of a competitor, and gaining an unlawful advantage in the course of competition.

Stockmann (1993) notes that in absence of well-functioning judiciary competition authority may appear to be the only body that can protect fair competition. Hopefully, with the development of legal system and business ethics, the cases of unfair competition will be left to courts and professional associations of entrepreneurs.

On the whole, The Law of Ukraine on the Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activity, since its inception, was concerned mostly with abuses of dominant position, discrimination of economic entities by bodies of state power, and cases of unfair competition. Anti-competitive concerted actions and merger control were described in much less detail. Such a design of the competition law can be explained by a highly monopolized structure of the economy in Ukraine in the early 90s and a virtual absence of a competitive environment at that stage. The Law is also quite similar to the early competition legislation of other transition countries.

Gradually, the changes in the economy rendered the competition legislation of the first generation arcane, and led to the adoption of a new competition law. The Law of Ukraine on the Protection of Economic Competition was adopted in 2001, and came into force in March 2002. One of the innovations of the law is the joint dominance of several economic entities in a market. The degree of competition in a market is also taken into account, and a firm with 35% of the market is not presumed dominant if it is exposed to substantial competition. The list of abuses of dominant position has not changed significantly, and the list of anti-competitive concerted actions has been extended.

One of the main novelties of the new law is a procedure of the possible authorization of anti-competitive concerted actions. The AMC can allow such actions if their participants prove that the actions promote efficiency and development.⁹ The concerted actions may not be authorized if, as a result, competition is substantially restricted in the whole market or in a significant part thereof. This scheme is copied from the European Union¹⁰ where it is based on Article 81 of the EEC Treaty.¹¹ The experience of the implementation of Article 81, however, has caused some concerns in Europe, and in 1999 the European Commission suggested a radical reform¹² of the existing

⁹ For example, improvement of the production, purchase or sale of goods; technical, technological, and economic development; development of small or medium-sized enterprises; optimization of the export or import of goods; elaboration and application of unified technical conditions or standards for goods; and rationalization of production.

¹⁰ The existing procedural system had been laid down principally in Council Regulation No. 17 of 1962, Official Journal P 013, 21/02/1962 P. 0204 – 0211.

¹¹ The European Commission can certify that agreements notified to it by enterprises are not contrary to European competition law. It may also exempt some anticompetitive agreements if the overall benefits of the agreement outweigh its anti-competitive aspects.

¹² The reform proposal is based on the fact that many notified agreements do not involve serious problems for competition and involves the termination of the centralized system of notification to the Commission of agreements between enterprises. The Commission therefore hopes to concentrate more on investigating agreements that seriously harm competition in the common market, particularly cartels. The Council adopted

procedural system. Hence, Ukraine has adopted the approach that proved inefficient in Europe and is going to be abandoned. The pre-notification procedure is also rather difficult for the specialists of the AMC due to the lack of experience and resources. It is even more burdensome for the entrepreneurs because it requires the payment of a fee, preparation of documentation, and drawing on consultants. It is possible to say that introduction of the pre-notification procedure emerged more from the desire of Ukraine to approximate to the legislation of the European Union than from efficiency reasons.

The new law is also more focused on the control of economic concentration – the issue previously covered mostly by secondary acts of legislation. The law describes types of economic concentration and the cases when it requires authorization by the AMC, as well as the conditions of granting such permission. New merger provisions stipulate the necessity of notification of a merger only if the total assets or the total sales of the participants of the concentration exceed certain monetary limit. The requirement of authorization of a merger if at least one of the merging entities has a monopoly position in the market or if their total share on the market exceeds 35% is terminated. The AMC allows the concentration if it does not result in the monopolization or in the substantial restriction of competition in the whole market or a significant part thereof. The AMC no longer can clear a merger on efficiency grounds.

In general, the new antimonopoly law is much more detailed. It contains many important definitions and description of procedures. This is apparent because the draft of the law was prepared by the AMC and was based on its experiences from 1993-2001.

Antimonopoly legislation requires the presence of control over its execution. Ukraine adopted the institutional approach¹³ to the implementation of competition policy and established an administrative body for this purpose: the Antimonopoly Committee of Ukraine is a central body of executive power with a special status, and its purpose is to ensure the state protection of competition. The adoption of the Law on the Antimonopoly Committee of Ukraine in 1993 and the appointment the Committee's state commissioners inaugurated its full-scale activity. The network of territorial offices was established in 1994-1995. The Committee is subordinate to the President of Ukraine and is accountable to the Supreme Rada (Parliament) of Ukraine. The AMC includes the Chairman and ten state commissioners. The Chairman is appointed and dismissed by the President of Ukraine with consent of the Parliament. The term of office of the Chairman and the state commissioners is seven years.

this proposal as Council Regulation (EC) No 1/2003 of 16 December 2002 (Official Journal L 1, 04.01.2003, pages 1-25). This regulation will replace Regulation 17/62 when it comes into force on 01.05.2004. Until then, Regulation 17/62 remains in force.

¹³ See Fingleton et al (1996), pp. 86-88 for a discussion of this approach and a description of the competition authorities in Hungary, Poland, Czech and Slovak Republics.

The basic tasks of the AMC are exercising state control over the observance of antimonopoly legislation; preventing, detecting and terminating violations of antimonopoly legislation; exercising control over economic concentration; and promoting the development of fair competition. The prosecution and decision-making are concentrated within a single office. The Antimonopoly Committee can require state organs and economic entities to terminate actions that indicate violations of antimonopoly laws. The AMC formulates and submits for consideration drafts of legislative acts that regulate matters concerning the development of competition and competition policy and de-monopolization of the economy.

The Law of Ukraine on the Protection of Economic Competition, adopted in 2001, has had an ambiguous impact on the competence of the AMC. On the one hand, the AMC obtained more freedom in making decisions, because the law contains a lot of relative notions like "considerably", "substantially", "unjustified" etc. This enables the Committee to decide on the severity of violations, and depending on circumstances, the case can be closed or a recommendation can be issued. But this also gives more discretion to the officials that have to make concrete decisions.

On the other hand, the Government may now authorize concerted actions and concentration that were not authorized by the AMC, if the positive effect in public interests outweighs the negative consequences of the restriction of competition. According to the Resolution of the Cabinet of Ministers of Ukraine No 219 adopted on February 28, 2002, the economic entities that are refused authorization of concerted actions or concentration by the AMC have the right to apply to the Ministry of Economy for such authorization within 30 days. The Ministry then organizes a special commission and re-examines the case and makes a proposition to the Government on granting permission or rejecting it. The Government ultimately makes a final decision concerning the application.

The reasons for the adoption of such a provision in the law are not completely clear. If an economic entity does not agree with the decision of the AMC, it can appeal to the courts. The procedure of re-examination of cases by the Government will lead to a duplication of functions of the AMC, and require more resources and experienced staff. It can also lead to decisions favoring the development of industry over competition. Akimova and Scherbakov (2002) refer to these norms as "a sign of an implicit domination of industrial over competition policy." In general, this provision significantly limits the independence of the competition authority, and may result in the adoption of more cautious decisions by the AMC, considering their possible re-examination, which could damage the image of the Committee. To my knowledge, there are no similar norms in competition laws of any country in Central and Eastern Europe.

In summary, the legal framework of antitrust policy in Ukraine has developed considerably since the beginning of transition. It passed the stage of its infancy, became closer to the standards of the European Union, remaining different though in some aspects. Ukraine also established a competition authority – the Antimonopoly Committee. The next section examines the implementation of antitrust policy by this body.

4. Implementation of Antitrust Policy in Ukraine

The adoption of the antimonopoly legislation in 1992 and the establishment of the Antimonopoly Committee in 1993 created the grounds for implementation of antitrust policy in Ukraine. In 1994, the Committee started investigating cases and taking actions aimed at the protection and development of competition. The scope of activities of the AMC can be divided into two major parts: exercising state control over the observance of antimonopoly legislation, and the structural regulation of markets.

4.1 Control over the observance of antitrust legislation

The mere existence of competition law is not sufficient; the law should be enforced. Exercising the state control over the observance of the antimonopoly legislation by economic entities and state organs is one of the most important tasks of the AMC. Violations of antimonopoly legislation include abuse of monopoly position, anti-competitive concerted actions, unfair competition, anti-competitive actions of state organs, and other violations. The following sub-sections include a description of the caseload of every type of violation.

4.1.1 Abuse of monopoly position

Abuses of dominant position in 1994-2002 constantly had the largest share of violations of the antitrust legislation (see figure 1). The structure of the cases of abuse of monopoly position was relatively stable. The cases of price abuse had the biggest share, and the second largest group was the imposition of onerous contract terms. Together these two groups constituted around 90% of all the violations every year.

As was mentioned in section 2, Ukraine inherited a highly monopolized structure of economy from Soviet times. In the beginning of transition, when de-monopolization of the economy and the development of a regulatory framework had just started, monopolies were trying to take advantage of their positions, for example, during price liberalization (see case 1). Monopolists often represented the structure of industry when all plants in a branch in a region were incorporated into amalgamations and assigned to the relevant ministries. This scheme was created to fit the needs of central planning. In

market conditions it leads to impeding competition, lowering efficiency and abuse of dominant position.

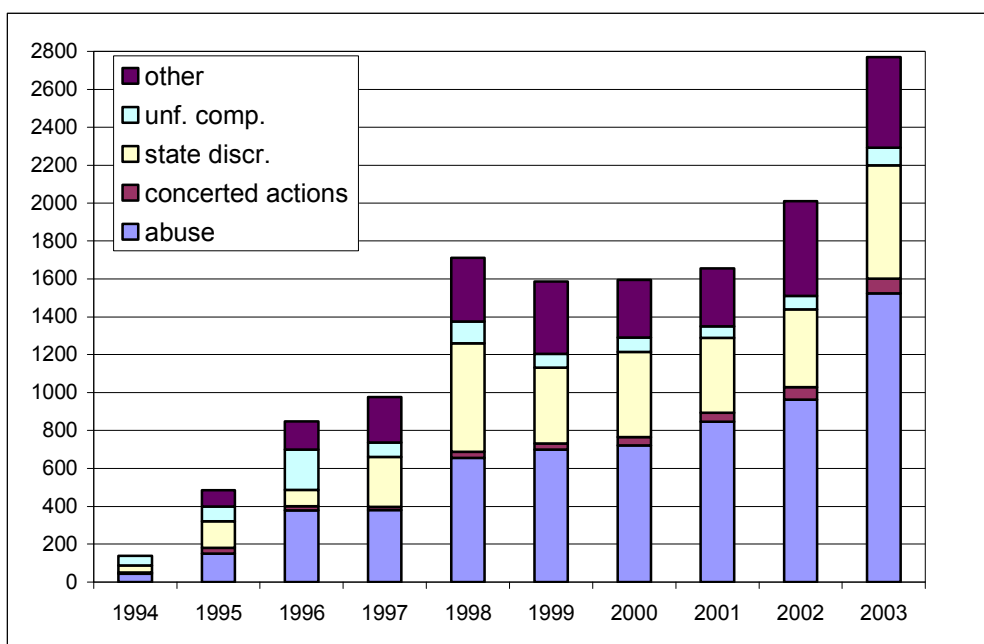
Case 1 Abuse of monopoly position by the *Vinnytsamiasprom* and *Vinmolprom* joint stock companies

In 1995, the *Vinnytsamiasprom* (Vinnytsa Meat Industry) and *Vinmolprom* (Vinnytsa Milk Processing Industry) joint stock companies were monopolies on the relevant regional markets of meat products and butter, respectively. When prices were liberalized and the Cabinet of Ministers issued resolution No. 733 “On Pricing under the Conditions of Reforming the Economy” on October 21, 1994, both enterprises increased wholesale prices for meat products and butter to the level of monopolistic prices. Moreover, *Vinmolprom* had previously decreased the volume of butter wholesale, which caused a shortage of this product on the market. After the AMC organs took action, the *Vinnytsamiasprom* and *Vinmolprom* joint stock companies ceased violating the regulations and remitted the illegally gained profits to the state budget.

Economies of all transition countries were highly monopolized in the beginning of reforms, although the level of monopolization differed among countries (Fingleton et al 1996). Not surprisingly, cases of abuse of dominant position have also been numerous in other post-communist countries, for example in Hungary, Poland, Slovakia and Czech Republic, and the Baltic States (Fingleton et al 1996; OECD 1999). In all countries of the Commonwealth of Independent States (CIS) the violations related to abuse of dominance also constitute the overwhelming majority of cases examined by antitrust authorities (Yacheistova 2000).

A large part of the cases of monopoly abuse in Ukraine (e.g. 42% in 1998, 41.9% in 1999) was committed by natural monopolies, i.e. communications enterprises, power, heat, water, gas supply enterprises, etc. The tariffs for goods and services of natural monopolies were regulated as a rule; however, the regulation did not guarantee a complete protection from violations. Inspections conducted by the AMC showed that the existing mechanism of tariff regulation had loopholes that allowed overestimates of costs and setting monopoly prices. Violations were also committed by providing services of lower quality, illegally increasing tariffs, demanding extra payments, price discrimination etc.

Figure 1. Dynamics and structure of violations of antimonopoly legislation terminated by the AMC in 1994-2002



Note: for 1994 – number of cases examined and cases dismissed due to voluntary termination of violations, for 1995-2002 – number of violations terminated. Cases of unfair advertising are excluded.

Abuse – abuse of monopoly position; Concerted actions – anti-competitive concerted actions; State discr. - discrimination of entrepreneurs by state organs; Unf. Comp. – unfair competition; Other – other violations.

Source: Annual Reports of the AMC for 1994-2002

Another way of taking advantage of a monopoly position under the constraints of state regulation of tariffs was imposition of onerous contract terms, often along with a threat to refuse to sell a product or a service. Case 2 serves as an illustration, and also provides an example of “cooperation” between a state body (here – the Ministry of Transport) and a natural monopolist (the Ukrainian Railroad). This case comprises both an abuse of a monopoly position and interference in the economic activities of enterprises by the Ministry.

Case 2 Abuse of monopoly position by Ukrzaliznytsia (Ukrainian Railroad)

Three enterprises addressed to the AMC with complaints about actions of the *Ukrzaliznytsia* (Ukrainian Railroad). They informed that the deputy minister of transport of Ukraine and the general director of *Ukrzaliznytsia* issued an order, according which, enterprises being owners of freight cars were obliged to purchase a park of sets of wheels for 10 years in the quantity of 9.4% of the total number of their own freight cars and to transfer them to a car depot of the relevant railroad. If an enterprise had refused to purchase and transfer the sets of wheels, the railroad would have refused to accept orders for freight with its cars.

Railroads occupied monopoly position on the market of rendering services associated with the use of tracks. Thus the enterprises being owners of cars had to unconditionally fulfill the requirements of railroads in order to secure their economic activities. As the result of the investigation, *Ukrzaliznytsia* admitted wrongdoing and terminated the violation.

The main explanation of the large share of cases of monopoly abuse being committed by natural monopolies is the underdeveloped system of regulation of monopolies, which mainly consists of setting tariffs or their maximum levels. There was a significant lack of legislation in this area. The Law on Natural Monopolies was adopted only in 2000. According to the Law, national committees are to be established in designated areas. Nevertheless, as yet they have not been set up. Thus, the AMC still remains the major power that can limit the freedom of natural monopolies¹⁴. But this problem is not just a Ukrainian peculiarity. For example, Yacheistova (2000) reports that in all CIS countries the majority of the cases of abuse of dominance have taken place in the area of natural monopolies. The same holds for the Baltic States (OECD 1999). The system of effective regulation of natural monopolies is still being built in all transition countries, and antimonopoly authorities often have to serve as a substitute for regulatory organs using the tools of competition law (Estrin and Cave 1993; Ordovery et al 1994; Fingleton et al 1996).

As was mentioned in section 2, markets of services related to the performance of state functions are one of the largest groups of monopolized markets in Ukraine. The economic activities that create these monopolized markets include rendering paid-for services by state organs, granting the functions of state organs to economic entities, and a self-willed expansion of economic activities of state organs, followed by coercion of entrepreneurs to use their services. The AMC points out that the practice of providing services related to state functions has considerable deficiencies (AMC 2000 Sec. 4.2). These include a limitation or a complete elimination of competition on the markets; a possibility of committing discriminative actions; and artificially impeding the development of entrepreneurship. Moreover, state organs occupying monopoly position on markets of services related to implementation of state functions can commit "usual" types of abuse of monopoly position (see case 3).

¹⁴ In 2004 the legislation has been amended and the AMC has received authority to control pricing by natural monopolies. Thus, this practice is not going to change soon.

Case 3 Abuse of monopoly position by the Chernivtsi State Inspection for control of quality of medicines

The Inspection was imposing additional contract terms that were not related to the subject of the contract. It was making agreements according to which its contractors, besides for the services of controlling the quality of medicines themselves, were obliged to pay for methodological, information and consultation services and for providing reagents. The contractors had to pay for those “extra” services irrespectively of their need in them and even when such services were not in fact provided.

Several points concerning the procedure of detecting the cases of monopoly abuse by the

AMC deserve mentioning. First of all, the Committee forms a list of economic entities occupying monopoly position. The aim of the list is a permanent state control over economic activities of monopolies. The Committee can conduct planned inspections of monopolistic structures over the observance of the antimonopoly legislation. These inspections usually resulted in termination of a large share of violations in the form of monopoly abuse (e.g. 77% in 1996). Also, every year the Committee prepares a plan of inspections of markets. Therefore, the emphasis of the work of the AMC can change from year to year. For example, in 1998 the priority was the markets of particular social importance, such as markets for communal and residential services. In 1997 the Committee was mainly concerned with markets of natural monopolies, financial markets and markets of grain processing and storage. This approach can be justified given the limited human and financial resources of the Committee.

To sum up, the main reasons of the abundance of the cases of monopoly abuse include: highly monopolized structure of the economy; underdeveloped system of regulation of natural monopolies; support of monopoly structures by state organs; and the situation when state organs implement engage in economic activities. Introduction of effective regulation of natural monopolies, further de-monopolization of the economy, elimination of entry barriers, contraction of economic activities of state organs, development of the legal system and legal consciousness of entrepreneurs are the main ways to reduce the number of cases of monopoly abuse.

4.1.2 Anti-competitive concerted actions

Anti-competitive concerted actions form another type of violations of the antitrust legislation. The share of anti-competitive concerted actions in the total number of violations of the antitrust legislation in 1994-2002 was low (see table 3). A similar picture in the CIS countries is reported by Yacheistova (2000). The structure of the violations in Ukraine was changing from year to year. Price agreements and actions aimed at the elimination of other competitors were the most frequent.

Table 3. Violations detected and terminated by the AMC in 1994-2003

Type of violation	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Abuse of monopoly position	43	150	380	381	655	699	721	847	962	1,524
Anti-competitive concerted actions	7	31	21	17	32	33	44	47	66	77
Discrimination of entrepreneurs by state organs	38	139	86	263	574	399	448	396	411	599
Unfair competition	51	79	212	76	115	73	79	60	71	92
Other violations	-	86	149	239	335	383	303	306	500	478
Total	139	485	848	976	1,711	1,587	1,595	1,656	2,010	2,770

Note: for 1994 – number of cases examined and cases dismissed due to voluntary termination of violations, for 1995-2002 – number of violations terminated

Source: Annual Reports of the AMC for 1994-2002

The AMC argues that the low number of terminated violations of this kind can be explained by the low number of violations taking place in the economy (AMC 1997 Sec. 1.2). For instance, in 1997 only 1.4% of all applications to the AMC were related to anti-competitive concerted actions. Moreover, the Committee claims that anti-competitive concerted actions are highly difficult to prove because in most cases they are agreed upon secretly, which makes exposure of such agreements and collection of evidence extremely complicated (AMC 1995 Sec. *Illegal agreements between entrepreneurs*). For example, in 1997 the AMC managed to find sufficient evidence only in half of the cases initiated.

The low number of cases of anti-competitive concerted actions can be explained by frequent changes in economic conditions (high inflation, changes in the taxation system, etc.) that make collusion more difficult to sustain; frequent changes of managers and owners of enterprises; and the highly monopolized structure of the economy. It is possible to expect an increase in the number of cases of anti-competitive concerted actions with the development and stabilization of the economy. This claim can

be partly proven by the steady growth in the number of terminated violations from 1997 onward.

The agreements aimed at setting (maintaining) monopoly prices were among the most frequent violations. The first price cartel was discovered by the AMC in 1997 (see case 4) in a regional

Case 4 Anti-competitive concerted actions of a group of enterprises in Vinnytsa

During an inspection of the market for photo-services (development of film and printing photos), the Vinnytsa Territorial Office of the AMC revealed a price-list signed by representatives of 11 entrepreneurs acting in the market. The price-list contained agreed-upon prices on photo-services and a prohibition of wholesale and personal discounts for the services. After the price list was signed the entrepreneurs whose prices for the services were different from those on the list, simultaneously increased their prices.

In Vinnytsa there were no other firms except those 11 that were providing services of development of film and printing photos. The entrepreneurs therefore eliminated competition among themselves, which allowed them to set high prices.

market of photographic services. In this case the detection of the anti-competitive agreement was comparatively easy due to the existence of the signed document.

It is worth noting that the cases when a document (minutes of a meeting of members of an association, a contract, an agreement etc.) signed by the parties engaged in concerted actions served as the proof were quite numerous, which is a sign of low awareness of competition legislation in business circles. In other cases the AMC used such evidence as simultaneous increase in prices by several economic entities, the same level of prices of the goods supplied by different firms given dissimilarities in costs of those firms.

The legacy of central planning includes a "cooperative" way of thinking that was necessary for many managers of state enterprises to keep their positions. This type of behavior is still present. Some managers of former subsidiaries of a monopolistic structure that became independent enterprises and competitors were trying to restore their market power through illegal agreements (see case 5).

Case 5 Anti-competitive concerted actions of enterprises in the grain processing and storing industry

In 1996, 25 enterprises were created on basis of subsidiaries of *Poltava Production Amalgamation* in the grain processing and storing industry. Five of them were engaged in storage of grain and processing it into flour. In November 1996 directors of those five enterprises agreed to set unified prices on flour, rye flour and bran. Since the enterprises controlled around 80% of the relevant market, the agreement practically eliminated the competition among them.

The actions of the enterprises were qualified as anti-competitive concerted actions that led to the setting monopolistic prices.

Cases when former subsidiaries of a single enterprise agreed on territorial division of markets were also present. In many cases of collusion, the enterprises engaged in it were members of branch associations. Although the former administrative system of managing the economy (ministry – republican association – regional association – enterprise – subsidiary) was broken, and the associations cannot interfere in economic activities of their members, the very existence of branch associations can assist collusion, for example through facilitating a regular information exchange.

In addition to horizontal anti-competitive concerted actions, concerted actions of a vertical type also took place. In a number of cases, a monopoly position of one participant of an agreement secured the market power of another participant in its market, which was competitive before. Combination of anti-competitive concerted actions with abuse of monopoly position by one of the parties of an agreement was also quite frequent.

The AMC points out that inspections of some markets (gas supply, processing and storage of grain, metallurgy, chemistry industry) make it possible to assume the existence of “shadow” groupings that include directors of enterprises and state officers. But the criminal nature of such groupings, the fact that their activities are related to tax evasion, income concealment, and the fact that they include not economic entities but physical persons make it impossible to use antitrust legislation against them (AMC 1997 Sec. 1.2).

The new competition law has introduced the procedure of pre-notification of some concerted actions. In 2002 the AMC examined 38 applications; there were no refusals, and permission was granted in 31 cases (77 applications, 58 permissions and 1 refusal in 2003). The rest was not reviewed due to the lack of information provided by the applicants, withdrawal of the applications, and in cases when the authorization was not needed. The information in the reports for 2002 and 2003 is not detailed enough to assess the new procedure. So far, it is possible to conclude that the AMC is quite reluctant to reject authorization, which partly supports the preliminary analysis of the procedure in section 3; on the other hand, firms just do not apply for authorization when it is likely to be denied.

4.1.3 Unfair competition

Ukrainian competition legislation from the beginning of its existence also embraced unfair competition issues. The absence of a well-functioning judiciary and business ethics can explain this fact. The share of violations in the form of unfair competition declined gradually year after year (see table 3), especially after the exclusion of unfair advertising¹⁵ from the scope of responsibilities of the AMC in 1996. On

¹⁵ In 1995 and 1996 the AMC was responsible for detecting and terminating cases of unfair advertising, which included, for example, advertising containing the image of the State Emblem of Ukraine; containing amounts of

the one hand, this can be explained by the enhancement of legal consciousness of entrepreneurs. The AMC even notes that entrepreneurs started to apply more often to courts directly (AMC 2001 Sec. 2.1.4). On the other hand, the share of applications from entrepreneurs concerning unfair competition was very low. For example, in 2000 from 2,109 applications only 139 (6.6%) were related to unfair competition. This fact may be explained by an insufficient level of legal knowledge of entrepreneurs in the area, and the inability to protect their rights. Moreover, the large share of the shadow economy makes it impossible to use the legislation against non-registered entities.

The structure of cases of unfair competition was relatively stable. The articles Unlawful use of trademarks, advertising material, and packing; Discrediting an economic entity; and Gaining unlawful advantages in competition, were used most frequently. There also was an increase in the application of the general definition of unfair competition when a case examined could not fit any other article.

The AMC notes that foreign enterprises use mechanisms of defense of their business reputation more actively than Ukrainian firms. The case of the German firm *Bayer AG* protecting its trademark "ASPIRIN" in 1997, can serve as an example.

Case 6 Unfair competition on the part of the *Tekhnolog* Closed Corporation (the city of Uman)

The *Pakharenko and Partners* Firm of Patent Attorneys, which was empowered to represent the interests of a German firm *Bayer A. G.* in Ukraine in case of violations of the rights of ownership with respect to its trade mark, applied to the Committee with an application. The application stated that *Tekhnolog* Closed Corporation (the city of Uman) had unlawfully used the trademark "ASPIRIN".

It was found during the case examination that the mentioned trademark had been registered in Ukraine for the name of *Bayer A. G.* (Germany).

The Committee qualified the actions of the *Tekhnolog* Closed Corporation as unfair competition in the form of use of trademarks without permission of an authorized person that can result in confusion.

concludes that this fact genuinely reflects the level of development of the business culture in Ukraine as compared to the developed countries (AMC 1998 Sec. 2.4). The development of cooperation between Ukrainian and foreign firms can assist the development of business ethics in Ukraine.

Cases of unfair competition come under the responsibility of competition authorities in many CIS countries as well as the Baltic States, and constitute a significant part of activities for some of them (OECD 1999; Yacheistova 2000).

4.1.4 Anti-competitive actions of state organs

The discrimination against economic entities by bodies of state power¹⁶, local self-government, and administrative and economic management and control¹⁷ was

dividends to be paid; containing false or incorrect information; advertising of tobacco products, strong drinks, etc. In 1995 the Committee terminated 557 such violations (in 1996 – 184) which constituted 53.5% (in 1996 – 17.8%) of the total number of violations terminated by the AMC according to its authority.

¹⁶ These are defined as ministries, other central bodies of executive power, and local bodies of executive power.

¹⁷ These are defined as unions of enterprises, other economic entities and public organizations fulfilling functions of management and control within the limits of their competence delegated to them by bodies of state power and local self-government.

among the most frequent violations of the antimonopoly legislation. According to the AMC (AMC 1995 Sec. *Discrimination against Entrepreneurs by Authorities*; AMC 1997 Sec. 1.3), the causes of anti-competitive actions by state organs include their unwillingness to diverge from the old style of management, and the low level of legal awareness among the authorities, especially local ones.¹⁸ Moreover, central and local authorities continue to perform functions as both state authorities and economic entities. This leads to a direct intrusion in the activities of enterprises, as the authorities attempt to provide benefits to “their own” enterprises and to restrain the activities of outsiders. Central and local authorities continue to illegally delegate some state administrative functions — regulation, control, conclusion of contracts, etc. — to economic entities or associations, which leads to discrimination against enterprises and limitation of competition.

Case 7 Discrimination against entrepreneurs by the Ministry of Agriculture and Foodstuffs of Ukraine

In 1995, the Ministry issued an order “On the establishing the *Kharkiv Oblast Enterprise for Raising, Keeping and Wholesale of Pedigree Animals*.” In accordance with this order, other organizations were prohibited from engaging in this kind of activities. The *Kharkivplemservis* collective enterprise that incurred considerable losses as a result of the order, filed an application to the AMC that classified the actions as discrimination against entrepreneurs by authorities.

The investigation showed that the Ministry violated Article 3 of the Law on Pedigree Breeding by failing to elaborate a method of issuing permits to economic entities to engage in stockbreeding activity. This led to the introduction of illegal prohibitions and to actual elimination of competition on pedigree stock markets. After the Committee interfered, the Ministry canceled the provisions of the aforesaid order that were not in line with the antimonopoly legislation.

One of explanations of the high number of violations committed by state organs is also the liberal approach used by the AMC. Many actions of ministries, agencies and other state organs that indicated violations were terminated without examining cases, but by conducting negotiations and consultations. The Committee also often addressed “official appeals containing proposals for voluntary termination of violations” to the state organs (AMC 1997 Sec. 1.3). By means of these recommendations 75% of the violations were terminated in 2000, and 90% in 2001. Administrative proceedings against the officials that committed violations were often not instituted.

Case 8 Discrimination by the Perevalsk District State Administration of Lugansk region

In 1997, the Perevalsk District State Administration issued an order “On Measures Concerning Insurance of Storage of Material Values of Enterprises, Institutions, and Organizations of All Ownership Forms and Putting in Order Collection, Storage, Processing, and Transportation of Scrap Ferrous and Nonferrous Metals.” Some clauses of the order prohibited private citizens and entrepreneurs from any activities associated with collection, storage, processing, and sale of scrap ferrous and nonferrous metals without agreement of the Perevalsk District State Administration. Heads of motor transport, department of railroads and road militia were ordered not to allow transportation of scrap metal and cable products without written permission of the district state administration.

The Lugansk Territorial Office of the AMC qualified that sort of actions as discrimination by state organs against entrepreneurs in the form of establishing prohibition with respect to certain

Article 20 of the Law of the Antimonopoly Committee of Ukraine requires agreement of the AMC on drafts of the decisions of central and local executive bodies, and bodies of local self-government that can lead to distortion of competition. The aim of this requirement is control over the observance of competition legislation by state organs when making decisions. The quantity of documents examined by the AMC was large (e.g. 1,195 in 1996, 1,386 in 2001). Nevertheless, this mechanism was not effective, and the requirement was often ignored by state organs. In 1996, 90% of the detected cases of state discrimination were associated with non-observance of the requirements. Moreover, the propositions made by the AMC after examination of the drafts were not often taken into consideration. For example, in 2001 only 56% of the recommendations were taken into account.

The provisions dealing with control over activities of state organs that can restrict competition can be found in the competition laws of Hungary, Slovakia, Czech Republic, the Baltic States, and most of the CIS countries (Fingleton et al 1996; Yacheistova 2000; OECD 1999). Nevertheless, this type of violation constitutes a more serious problem in the CIS countries, which can be related to a low level of legal awareness and discipline in their state organs, and to other abovementioned reasons relevant to Ukraine. For example, in Russia 44% of all infringements of antimonopoly legislation in 1997 and 40% in 1998 involved anticompetitive actions of government structures (Yacheistova 2000).

4.1.5 Other violations of antimonopoly legislation

Until 1998, according to the classification of the AMC, other violations included non-fulfillment or delayed fulfillment of decisions of the AMC concerning termination of violations of antimonopoly legislation, as well as a non-submission, and delayed submission of information, or a submission of falsified information to the AMC. In 1998, responsibility was introduced for unauthorized economic concentration in cases when such authorization was required. In 2001 unauthorized concerted actions were added to this group of violations.

4.2 Structural measures assisting the development of competition

Assisting the development of competition in Ukraine is another important task of the AMC. The Committee participated actively in the legislative process and also took measures for structural regulation of the economy. Antitrust authorities can influence market structure by breaking up a monopolistic enterprise, or by allowing or prohibiting a merger (Estrin and Cave 1993). Moreover, in the process of transition, a competition authority can participate in privatization and de-monopolization of the economy.

4.2.1 De-monopolization and privatization

De-monopolization is a prerequisite for efficient reforms. In 1994 the Parliament of Ukraine approved the State Program of De-monopolization of the Economy and Development of Competition that defined de-monopolization as a set of measures aimed at decreasing the level of monopolization of markets. The main methods of de-monopolization include:

- decentralization of management;
- lowering or eliminating barriers to entry;
- stimulating the entry of new economic entities to the monopolized markets;
- breaking up state monopolies;
- liquidation of state organizational structures of monopolistic type.

De-monopolization of the economy was performed predominantly by central and local bodies of executive power according to plans of restructuring by the economic branch and region. The AMC participated in the process by examining the plans; making propositions and issuing requirements; granting or denying consent for the establishment, or reorganization of economic entities, or purchase of assets and shares. Despite the fact that the Committee did not have the deciding power in the process of de-monopolization, it was able to influence it. For example, in 1996 as a result of the measures taken by the AMC, 273 state monopoly formations were split up and 78 state structures of a monopoly type were liquidated.

Since 1997 emphasis has shifted from structural measures (breaking up and liquidation of monopolies) towards non-structural measures¹⁹ (de-centralization of management, elimination of entry barriers, and stimulating entry). Quite often, measures aimed at the elimination of barriers to entry included reconsideration or abolition of decisions of state organs that had created those barriers. The most effective ways of stimulating entry were abolition of state price regulation on relevant markets, and organizing tenders for a right to render services (e.g. in transportation or communal services).

The AMC was engaged in monitoring the effects of the de-monopolization of the economy. According to the analysis implemented by the Committee, the results were both positive and negative. Positive effects included an increase in the number of enterprises proposing goods of higher quality for lower prices, which forced other enterprises to improve quality and to cut costs. Negative effects included a decrease in the level of production, lower profitability, and an increase in costs. The AMC particularly noted that the new entrants were generally more effective and successful than incumbent firms. This may be explained by a crisis in management, lack of efficient

¹⁹ The classification of the measures is taken from Annual Report for 1998, section 3.3.

ownership on privatized firms, and general critical condition in Ukrainian economy. In general, the results of the monitoring showed that de-monopolization created great incentives for economic entities to increase their profitability, and at the same time speeded up the transfer of control over less successful firms to the more efficient ones (AMC 2001 Sec. 2.4.2).

The AMC also played a major role in privatization. According to the Law on the Privatization of State Property,²⁰ observance of the antimonopoly legislation is one of the main principles of privatization. The legislation provided the AMC with powerful tools to influence the process. The representatives of the AMC were taking part in privatization commissions, and making propositions concerning privatization plans. The basic tasks concerning control over the observance of antitrust requirements during transformation included favoring the creation of a competitive environment; prevention of transforming state monopolies into private ones; and the prevention of monopolization of markets (AMC 1996 Sec. 1.6).

In general, the Committee insisted on breaking up monopolistic structures before their privatization, if such a break up was possible and desirable from its point of view. These cases mainly included a separation of horizontally integrated structures with subsidiaries that could become competitors. At the same time, the AMC supported the privatization of enterprises occupying monopoly positions without breaking them up (e.g. 170 monopoly formations were privatized in 1996, and 44 in 1997), if dissolution would have damaged their competitiveness. For example, in 1996 the Committee supported the preservation of regional gas supply enterprises, the *Ukrnafta* (Ukrainian Oil) Public Corporation and other monopolistic structures.

In some cases, the Committee tried to suppress the attempts of privatization organs and local state organs to implement privatization of monopolies without breaking them up when this was not justified by economic reasons. Nevertheless, the representatives of AMC did not have a deciding vote in privatization commissions, and sometimes the AMC was unable to persuade privatization organs in correctness of its opinion.

Case 9 Privatization of the *Krymhleb* Enterprise

According to an assignment given by the Government, a commission including a representative of the AMC examined a situation of privatization of the *Krymhleb* (Crimean Bread) Enterprise. The AMC proposed privatization of the enterprise with its preliminary reorganization, taking into consideration the fact that the enterprise occupied a monopoly position on regional market of bread and bread products, and included 10 subsidiaries that were not tied by technological links.

According to the experience of the AMC, the prices on bread were more stable and sometimes even significantly lower in the regions of Ukraine where baking industry was previously de-monopolized. Nevertheless, the organs of the State Property Fund and the Ministry of Agro-industrial complex made a decision on privatization of the enterprise without breaking it up.

²⁰ A

After 1998, the emphasis of privatization was shifted to “strategic” enterprises, and enterprises that had an influence on the security of the state. After the mass privatization was mainly over, the quantity of documents examined by the AMC dropped considerably (from 1,290 in 1998 to 307 in 1999). The main method of privatization of the strategic objects was through the sale of stocks on auction, and the AMC participated in this process mainly using the means of control over economic concentration.

4.2.2 *Economic concentration*

The general approach towards the cases of economic concentration was as follows. If the concentration did not result in a monopolization of markets or in a substantial limitation of competition, such concentration was allowed. The Antimonopoly Committee also supported the establishment of vertically integrated structures, particularly if it ensured the equality of participants, reduced costs and favored “an emergence of national competitive economic entities” (AMC 1996 *Introduction*). The cases of conditional authorization also took place.

If a concentration could result in a monopolization of markets or in a substantial limitation of competition, it was prohibited. However, if the positive effects from the concentration in the interests of society outweighed the negative effects from the limitation of competition, it was allowed. Sometimes, the AMC supported the creation of monopolistic structures on these grounds, but it was not always consistent in defining the positive effects. For instance, in 1996 the AMC supported creation of a pool to provide insurance for nuclear power stations. The pool became a monopolist, but it was the only way to secure the accumulation of financial resources; thus, the monopolization was justified. In 1997 another monopoly - the *Avtoport Chop* Closed Corporation - was created to provide specialized premises for customs control, and all vehicles carrying international cargoes had no choice but to purchase its services. The creation of the enterprise was heavily supported by the Customs Office (Zerkalo Nedeli 1997b). This union of an economic entity and a state body given that the customers did not have any choice other than buying the service was dangerous and literally invited the monopolist to abuse its power. The Committee in its decision only obliged it “not to create obstacles for other companies with respect to rendering transport and expedition services,” i.e. asked the firm not to violate the law.

In general, the AMC had a double standard for creation of state and private monopolies, and this approach was stated by the Head of the AMC. The question of creating state monopolies, he says, is

... less significant than the problem of private monopolization, because state structures exist while the state needs them, and can then be easily re-

organized. But when private monopolies are created, they start to govern the state. This is much more dangerous ... (Zerkalo Nedeli 1998)

If this approach were coupled with an effective system of regulation of state monopolies, it would be understandable; but so far, even the AMC itself has admitted the absence of such system. Moreover, given that in the majority of the cases of abuse of monopoly position is committed by natural monopolies controlled by the state, the liberal approach of the AMC towards the creation of new monopolistic structures is not justified.

This liberal approach may be based on the place of the AMC within the bodies of state power. The Committee cannot, for example, repeal a decision of the Government, even if the decision is violating the law. The AMC can issue binding orders for ministries and other state organs, and appeal to court if the orders are not obeyed. But concerning laws, decisions of the Government, and decrees of the President, the AMC can only present its opinion, and this opinion can be taken into account or disregarded. If the creation of a monopoly structure takes place in accordance with a state program, the AMC can be tempted to find efficiency grounds for the authorization even if there is none.

The following case can serve as an example. In 1994 the Committee objected the creation of the *Ukrneftegaz* (Ukrainian Oil and Gas) National Stock Company that would unite all 375 enterprises of the industry subordinated to the State Commission on Oil and Gas. The Government disregarded the objection and *Ukrneftegaz* was created by a Presidential Decree, but later its creation was repealed by the Parliament. Later on, in 1996 the AMC recognized the fact that due to the presence of numerous associations of horizontal type oil and gas industry was highly concentrated and competition in it was limited. The same year the Committee received an application from the founders of the *Ukrainian Consortium of Gas Resources* with a request of consent to its establishment, and surprisingly enough, authorized this concentration.

The consortium involved many large monopoly formations engaged in the gas industry and other powerful commercial structures dealing with gas import. The creation of the consortium was in line with resolution of the Government of reforming the industry.²¹ Later, the Government empowered the consortium to fulfill some state functions. Thus, the monopolization of the gas industry by a group of enterprises related by means of control was finished. Later on, a special parliamentary commission came to the conclusion that there existed a "half-legal cartel" that controlled the oil and gas

²¹ The Basic Directions of Reforming Petroleum and Gas Industry were approved by the Resolution of the Cabinet of Ministers of Ukraine No 1510 on December 16, 1996.

industry (Zerkalo Nedeli 1997a). The existence of the consortium also led to numerous violations of law and abuses.²²

This case shows that sometimes the AMC was not consistent in its own decisions, and could be influenced by the Government. But in fact, the cases where its consent for creating state monopolies was not even asked were numerous, for example, during creation of such companies as *Neftegaz Ukrainy* (Ukrainian Oil and Gas), *Ukrtelevradio* (Ukrainian Television and Radio), *Ukrizdatpoligrafprom* (Ukrainian Publishing and Polygraph Industry) (Zerkalo Nedeli 1998). This shows that there was a lack of a unified state approach to the problem and the actions of different state organs were not synchronized.

5. Evaluation of the implementation of antitrust policy

The methodological difficulties to evaluate the effectiveness of competition policy are mentioned by several authors. Török (2003) emphasizes that efficacy of most components of economic policy can be measured. For monetary policy the measures can include the rate of inflation and the balance of payments; for fiscal policy it can be the budget deficit. The implementation of competition policy does not have such a measurement. Nevertheless, some methods have been proposed.

Dutz and Vagliasindi (1999) were the first to assess the efficacy of competition policy implementation across 18 countries for the year 1997. Figure 2 reports all countries ranked by the raw scores for competition policy implementation. This is constructed based on on a major survey distributed to all competition agencies, supplemented by a separate survey instrument to law practitioners and others familiar with legal practice in the area of competition policy in each country. The indicator is also decomposed by the key dimensions related to (1) enforcement,²³ (2) advocacy²⁴ and (3) institutional aspects,²⁵ measuring each dimension on a 0-1 scale. Ukraine appears to lag behind the more advanced transition countries. It is also easy to see a significant variation across countries, both in the overall and specific dimensions, which can be interpreted as differences in competition rules and their implementation.

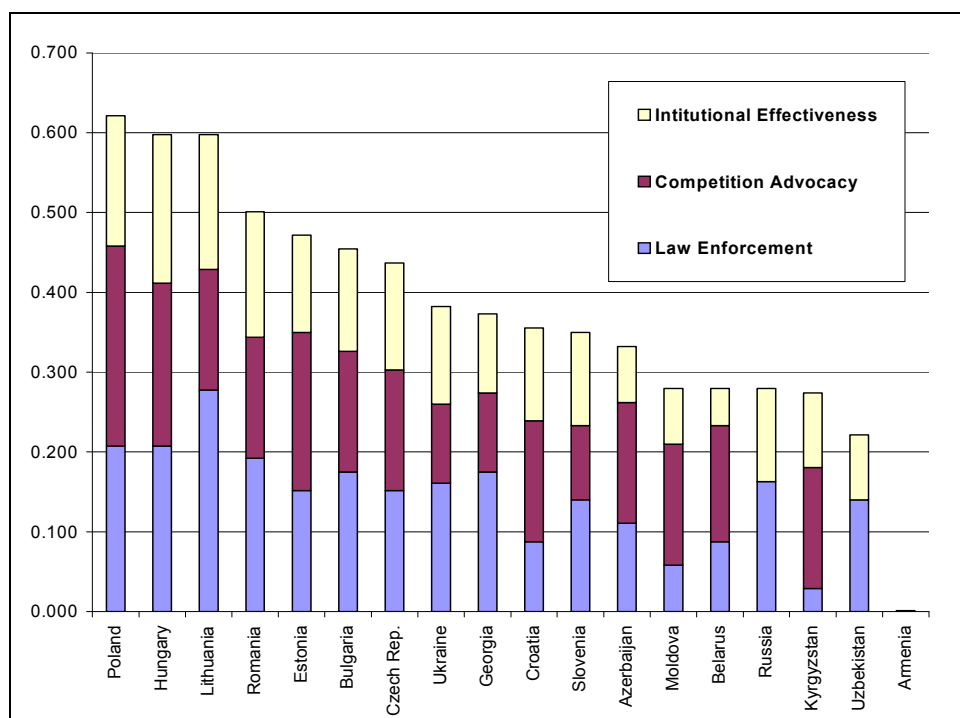
²² In 1998 the President of the consortium was arrested by the State Prosecutor's Office. The Office is still investigating activities of other members of the consortium. The Prime Minister Lazarenko is now under arrest in the USA being accused of money laundering.

²³ Evaluations of the rules and enforcement practices towards anti-competitive acts by firms and state executive bodies, with inclusion of relevant fines.

²⁴ Assessment of the impact of the agencies in introducing pro-competitive modifications to rules concerning a broad range of economic policies affecting competition, specifically the regulation of infrastructure sectors and privatization policies, and education and institution-building efforts.

²⁵ Assessment of the degree of political independence of the competition authorities, the transparency of the agency and the efficiency of the appeals process.

Figure 2. Competition policy implementation - Effectiveness indices (1997)



Source: Dutz and Vagliasindi (1999)

The method described above assesses the effectiveness of competition policy in general and may be used to compare different countries. Nevertheless, the implementation of competition policy consists of the investigation of hundreds of cases; there is, therefore, also a need for case-by-case evaluation. For instance, Duso, Neven and Röller (2003) assess the effectiveness of the European merger control using the reaction of the stock market price of competitors to the merging firms. Unfortunately, the replication of this method on the Ukrainian data is technically impossible because of the underdeveloped stock market and limited information.

The evaluation of efficacy of competition policy is rather complicated for Ukraine. The system of state statistics does not allow implementing an analysis of markets, including the level of their monopolization and concentration. It is impossible to calculate such important measures as the Herfindahl-Hirschman index, or the n -firm concentration ratio using the data provided by the state organs of statistics. The AMC uses such measures as the quantity of markets where monopolies operate, the quantity of economic entities that occupy monopoly position, and the ratio of the number of monopolistic structures to the total number of enterprises operating in a branch. Also, annual reports of the AMC do not contain the branch structure of the terminated

violations. All these deficiencies make the evaluation of the effectiveness of competition policy in Ukraine extremely difficult to assess.

The transparency of the decision-making process of the AMC is another important issue. The decisions of the Committee are not published, and are not generally available for public. The annual reports are available from the AMC's web-site and contain some examples of the cases reviewed in the corresponding year, but the information is not enough for a thorough assessment. Increasing the transparency is highly advisable as it can improve the independence of the Committee and alleviate the pressure of the Government.

Enforcement of legislation is an important part of the implementation of antitrust policy. Enterprises and their managers, as well as state officers, shall be held responsible for committing violations. The imposition of fines was not a goal for the AMC, but a means of enhancing the enforcement of the antimonopoly legislation, and preventing and terminating the violations. The AMC rarely used the maximum fines,²⁶ usually taking into consideration the severity of the violation, the effect it had on competition, the damage it caused, and the financial conditions of an enterprise. The AMC punished not only legal, but also natural persons. Managers of enterprises and state officers can be personally fined for violating antimonopoly legislation. Nevertheless, administrative proceedings can be instituted against natural persons only within two months of the date of committing the violation. This condition limits the use of administrative influence,²⁷ because it is practically impossible to reveal a violation and investigate a case within such a period. It is advisable to improve these norms to make the decision-makers more responsible for their actions.

Another way of assessing the activities of the AMC is an examination of the quantity of cases appealed in court. The share of decisions and resolutions issued by the AMC that were appealed and reconsidered by courts varied around 2% of the total quantity of decisions. Decisions repealed by courts usually constituted less than 0.5% of all decisions and resolutions. Thus, it is possible to conclude that in an overwhelming majority of cases the AMC strictly followed the law and acted within its authority.

The examination of the cases of violations of antimonopoly legislation in 1994-2002 suggests the following: the most frequent type of violations was abuse of dominant position. Natural monopolies controlled by the state were present in almost every other case, and branch ministries often helped these monopolies "to survive in market conditions." Moreover, the large number of cases of monopoly abuse reflected the high level of entry barriers that were often set up by administrative regulations. The situation where state organs were engaged in economic activities also led to numerous abuses,

²⁶ The maximum fine was 5% of the revenue, and since March 2002 – 10%.

and anti-competitive actions of state organs were the second largest group of the violations. These facts suggest that, in general, the AMC was fighting against the consequences without fighting against the causes. The Committee cannot force the Government to establish the organs that, according to the law, have to supervise natural monopolies. It cannot initiate an administrative reform that would enhance the level of legal knowledge in state organs, making them obedient to the law, and prohibit economic activities of state organs. Thus, the AMC is able only to detect and terminate violations, but not to prevent them.

The number of the cases of anti-competitive concerted actions was low compared to the other violations mentioned above. One explanation of this can be the insignificant number of restrictive agreements taking place in the economy. But it is also possible that focusing mostly on the cases of monopoly abuse and state discrimination, the Committee can fail to detect anti-competitive concerted actions, given the fact that they are quite difficult to prove. Thus, the AMC lacks experience in this field and its methods of detecting such violations need improvement.

Several points should be made on the implementation of the Law on the Protection of Economic Competition that came into force in March 2002. The law introduced general definitions of the abuse of monopoly position, anti-competitive concerted actions and anti-competitive actions of state organs, and prohibited them explicitly. The AMC started to implement these general clauses widely in 2002, which led to an increase in the number of violations terminated compared to previous years. The generalization of the terms was needed and justified. At the same time, the structure of the caseload in 2002 and the approach of the AMC towards the examination of cases did not change, which confirms the point made above that the Committee was mainly engaged in detecting and terminating violations, but not in preventing them.

The set of tasks of the Committee was constructed in such a way that it also covered the areas lacking relevant legislation or regulatory bodies, e.g. the regulation of natural monopolies, the control over observance of legislation by state organs, the defense of intellectual property rights and commercial secrets, etc. This fact can be related to the process of transition itself. Hopefully, with the development of legislation and the court system in Ukraine, the AMC will be able to concentrate more on its primary tasks, and thus to enhance the effect of its activities.

Structural regulation was also an important task for the Committee. The AMC quite actively participated in the processes of de-monopolization and privatization, especially in the course of mass privatization. At the same time, its policy towards economic concentration was often inconsistent, which can be partly due to a lack of

²⁷ For example, in 1998 courts imposed administrative fines on basis of the applications of the AMC only in 9% of the cases of anti-competitive concerted actions, and in 5.3% of the cases of abuse of monopoly position.

experience and partly due to numerous conflicts with other state organs including the Government. Analysis of the caseload suggests that participation of the AMC in the structural reforms was dependent on the type of branch, and in some branches it was quite limited because of interference with the interests of the Government.

To summarize, the AMC was quite successful in detecting and terminating the violations of antimonopoly legislation. At the same time, it generally failed in preventing them, which can be illustrated by the constant growth and the stable structure of the violations. The Committee contributed a lot to de-monopolization and privatization, particularly in the areas where it did not interfere with other state policies. The main reason for this was the place of the AMC within the system of the bodies of state power, its inability to induce and influence other reforms implemented by the Government, and to encourage the adoption of necessary laws by the Parliament. In general, the development of competition policy in Ukraine included the establishment of rules and appropriate procedures, as well as of institutional framework. At the same time, the competition policy in Ukraine generally failed to become the central component of the economic policy of the state.

Ukraine faces similar problems on its path to market economy as do other transition countries. This includes the implementation of competition policy. For example, Fingleton et al (1996) also mention political independence of competition authorities, their role in privatization, the need for clear and understandable guidelines, improvement of procedures, resolution of conflicts with industrial and trade policies, as important issues for Hungary, Poland, the Czech Republic and Slovakia. It is clear that competition policy alone cannot provide sufficient conditions for the rapid growth of an economy. It can assist in building the competitive environment in that economy, and in fact, should do so. Nevertheless, competition policy is just a part of economic policy implemented by the government, and different policies should be consistent one with another. This harmony is what Ukraine generally lacks as compared to more successful transition countries.

The views expressed in this report accurately reflect the personal views of the undersigned consulting analyst(s) about the subject. In addition, the undersigned consulting analyst(s) has not and will not receive any compensation for providing specific recommendation or view in this report. Yevgeniy Stotyka

References

- Akimova, I., and Scherbakov, A. (2002): *Competition and Technical Efficiency of Ukrainian Manufacturing Enterprises*. Kiev. Institute for Economic Research and Policy Consulting. Working Paper No 17.
- AMC (1994-2003) Annual Report. The Antimonopoly Committee of Ukraine.
- D'Anieri, P., Kravchuk, R., and Kuzio, T. (1999): *Politics and Society in Ukraine*. Westview Press.
- Duso, T., Neven, D., and Röller, L.-H. (2003): *The Political Economy of European Merger Control: Evidence using Stock Market Data*. CEPR. Working Paper No 40.
- Dutz, M. A., and Vagliasindi, M. (1999): *Competition Policy Implementation in Transition Economies: an Empirical Assessment*. EBRD. Working Paper No 47.
- EIU (1996): The Economist Intelligence Unit. *Country Profile: Ukraine*. (<http://db.eiu.com/>).
- EIU (2002): The Economist Intelligence Unit. *Country Profile: Ukraine*. (<http://db.eiu.com/>).
- Estrin, S., and Cave, M. (1993): *Competition and Competition Policy: A Comparative Analysis of Central and Eastern Europe*. London, New York. Pinter.
- Fingleton, J., Fox, E., Neven, D., and Seabright, P. (1996): *Competition Policy and the Transformation of Central Europe*. London, CEPR.
- International Monetary Fund (1997): *Ukraine – Recent Economic Developments*. Staff Country Report, No 97/109.
- North, D.C. (1981): *Structure and Change in Economic History*. New York. Norton
- Ordober J, Pittman, R., and Clyde, P. (1994): *Competition Policy for Natural Monopolies in a Developing Market Economy*. Economics of Transition. Vol. 2. No. 3.
- Pittman, R. (1998): *Competition Law in Central and Eastern Europe: Five Years Later*. The Antitrust Bulletin. Spring 1998.
- Schaffer, M. E. (1993): *Regulation, Competition Policy and Economic Growth in Transition Economies*, in: Estrin, S. and M. Cave (1993), *Competition and Competition Policy: A Comparative Analysis of Central and Eastern Europe*. London, New York. Pinter.
- Stockmann K. (1993): *Competition Policy in Transition: The Issues*, in: Estrin, S. and M. Cave (1993), *Competition and Competition Policy: A Comparative Analysis of Central and Eastern Europe*. London, New York. Pinter.
- Sturm, R., Dieringer J., and Muller, M. M. (2001): *Rediscovering Competition: Competition Policy in East Central Europe in Comparative Perspective*. Budapest. HVGORAC.
- Török, A. (2003): *EU Accession and the Evolution and Design of Competition Policy: the Case of Hungary*. Manuscript.

Yacheistova, N. (2000): *Competition Policy in Countries in Transition – Legal Basis and Practical Experience*. New York. Geneva. UNCTAD.

Zerkalo Nedeli (1997a): If you cannot defeat a cartel, give it a hug. *Zerkalo Nedeli*, 11 (128)

Zerkalo Nedeli (1997b): Interview with the Head of Custom Office. *Zerkalo Nedeli*, 25 (142)

Zerkalo Nedeli (1998): Interview with the Head of the AMC. *Zerkalo Nedeli*, 48 (217)

Zon, H. van (2000): *The Political Economy of Independent Ukraine*. London. Macmillan Press Ltd.