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Enforcement of Competition Rules in the Association Agreement between the EU & Ukraine

by

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CONTENTS

Abstract

This article analyzes the legal preconditions for the harmonization of Ukrainian legislation in the field of competition law with the law of the European Union. Due to its evolution, it is noticeable that competition law has been, and remains, a priority in the harmonization process of Ukrainian legislation. This paper provides a detailed analysis of competition related provisions of the Association Agreement. The latter contains norms on the obligatory approximation of substantial competition law provisions and sets out the necessity to transform their enforcement system. Special attention is paid to the analysis of state aid which currently remains unregulated in Ukraine.

Résumé

Cet article analyse les conditions juridiques préalables rélatives à l'harmonisation de la législation ukrainienne dans le domaine du droit de la concurrence avec le droit

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de l'Union européenne. En raison de son évolution, il est à noter que le droit de la concurrence a été, et demeure, une priorité dans le processus d'harmonisation de la législation ukrainienne. Cet article fournit une analyse détaillée des dispositions relatives à la concurrence de l'Accord d'association. Ce dernier contient des normes concernant le rapprochement obligatoire des dispositions substantielles de droit de la concurrence et énonce la nécessité de transformer leur système d'application. Une attention particulière est accordée à l'analyse des aides d'État, actuellement pas réglementées en Ukraine.

Classifications and key words: competition law; European Union; Ukraine; Association Agreement; Antimonopoly Committee of Ukraine; harmonization; state aid; transparency

1. Preliminary process of harmonization of Ukrainian competition law

After Ukraine declared its independence and embarked on democratic reforms in 1991, a transition is taking place from a centrally planned economy to economic liberalization, which leads to a transformation of its legal rules on the protection of competition.

As comparing with other countries with competition protection systems, UNCTAD noted that Ukraine has begun the process of competition law adoption and the formation of its implementation policy in very difficult initial conditions. Economic and political circumstances in Ukraine, as well as in other former Soviet republics, have been particularly tough. At the same time, Ukraine adopted its competition law system at the beginning of a period of rapid growth in a number of jurisdictions with competition laws throughout the world. As UNCTAD experts stressed, the journey towards an effective competition policy system in Ukraine has been arduous[1]. In the early 2000s, various market reforms and de-monopolization measures were taken, and nevertheless the economy of Ukraine still features exceptionally high levels of concentration unrelated to superior economic performance.

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

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

Nevertheless, the rules contained in the Partnership & Cooperation Agreement[2] (hereafter: PCA) signed in 1994, have a "soft law" character – the PCA did not place Ukraine under a strict obligation to harmonize its legislation. At the same time however, the special Article 51 PCA stressed that competition was one of the priorities of harmonization.

An essential condition for the functioning of a market economy is its effective legal regulation. Legal rules on competition are one of the fundamental principles of a free market economy. So competition law seems to be the core element of a free market economy, especially considering the perspective of a free trade area between Ukraine and the EU.

Due to Ukraine's integration policy, its accession to the WTO in 2008[3], entering into force of the Free Trade Agreement (hereafter: FTA) with EFTA countries in 2012[4], signing of the Association Agreement[5] with the EU (its political part was signed in March 2014, the entire Agreement was signed on 27 June 2014, and it was, simultaneous, ratified by European Parliament and Ukrainian parliament on 16 September 2014), the review and analysis of EU's competition policy is becoming increasingly important for Ukraine. Almost all these trade relations lead to the need to enforce appropriate competition transparency mechanisms. By the way, the FTA with EFTA countries also consists of strict rules on competition that aim to ensure that trade liberalization under the agreement is not hampered by practices of enterprises that may prevent, restrict or distort competition[6].

The harmonization process of Ukrainian competition law with that of the EU started in the beginning of 2000s as illustrated by the promulgation of a new Law on the Protection of Economic Competition[7] which entered into force in 2002 and was designed in light of the main principles of EU competition law. Since then, this Law was repeatedly amended to improve the national

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

[3] Law of Ukraine of 10 April 2008 No 250-VI "On ratification of Protocol of Ukraine's accession to the WTO" (Verhovna Rada Bulletin 2008, No. 23, item 213).

[4] Law of Ukraine of 07 December 2011 No 4091-VI "On ratification of Free Trade Agreement between Ukraine and Member States of EFTA" (Official Journal of Ukraine 13.01.2012, No. 1, item 9).

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

[6] Art.7 FTA with EFTA covers incompatible anticompetitive practices that shall also apply to the activities of public undertakings.

[7] Law of Ukraine of 11 January 2001 No 2210-III "On the Protection of Economic Competition" (Official Journal of Ukraine 2001, No. 7, item 51).

system for the monitoring of competition law compliance. Incidentally, almost all of the subsequent changes to this Law, as well as other acts issued by the Ukrainian competition authority – the Antimonopoly Committee of Ukraine[8] (hereafter: AMCU) were introduced because of EU competition law. This realisation is best illustrated by the Act on Immunity from Fines[9] which was adopted in Ukraine in 2012 under the general framework norm[10] of the Law on the Protection of Economic Competition. Still, Ukrainian leniency provides protection solely to the first applicant, unlike most other leniency programmes. As such, it spreads even greater uncertainty among the members of a cartel, since only one undertaking has the possibility to cooperate and to receive immunity from fines. By the way, since the issuance of the new Ukrainian leniency act, there have been no leniency applications.

2. Association Agreement between the EU & Ukraine: a new step forward

The formal termination of the PCA in 2008 led to the necessity of concluding a new cooperation agreement between its parties. Discussions on what was to become the new and enhanced agreement between Ukraine and the European Union were determined during the EU-Ukraine Paris Summit[11] where it was decided that the PCA should be followed by an association agreement. On 19 December 2011, at a summit in Kiev, Ukrainian and EU representatives

[8] The AMCU was founded in November 1993 pursuant to the AMCU Law. By legislation adopted in 2011, the AMCU became a central executive body with a special status. The AMCU is currently governed by a Chair and eight State Commissioners. The AMCU Chair is appointed by the President of Ukraine with the approval of the Parliament (Verkhovna Rada) for a term of seven years (Art. 9 of the AMCU Law). The President may dismiss the Chair with the Verkhovna Rada's approval. State Commissioners and First Deputy and Deputy-Chair are appointed by the President upon submission of the Prime Minister based on the AMCU Chair's proposals. The AMCU has 27 territorial offices with individual enforcement competences. The Chair has the power to appoint and dismiss the heads of these bodies. The OECD Peer Review on Ukraine recommended in 2008 that the State provide adequate resources to assure that the AMCU can maintain high standards of performance in accomplishing its mission. This recommendation remains to be fulfilled and its attainment is crucial for the AMCU to perform its tasks effectively – especially in light of new responsibilities likely to be taken on as part of the National Competition Programme.

[9] Act of AMCU of 25 June 2012 No 399-p "The Procedure of Exemption from the Responsibility" (Official Journal of Ukraine 2012, No. 73, item 206).

[10] As it is stated in para 5 Art.6 of Law of Ukraine "On Protection of Economic Competition".

[11] Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/102633.pdf.

announced the completion of the negotiations on the content of the Association Agreement (hereafter: AA). Officially, the AA was initialized on 30 March 2012. Afterwards, Ukrainian legislation (including its rules on competition) was continuously being amended in order to ensure future implementation of the provisions of the AA. The Association Agenda of 2009[12] (as revised in 2013[13]) is a special bilateral document which stipulates the necessary steps on future harmonization of Ukrainian legislation with EU law and covers nearly all legal spheres.

The political part of the AA specifies in its preamble that the adaptation of the Agreement contributes to the gradual economic integration and deepening of political association between the parties. The preamble stresses the leading role of a mechanism for law approximation that is necessary to create a comprehensive and deep free trade area between Ukraine and the European Union. It is noteworthy that the term "harmonization" is not used widely in the text of the AA. Used instead are the notions such as: "adaptation", "legal convergence", "recognition of international standards", "transposition" and so on. However, the vast majority of researchers use the term "harmonization" as an umbrella term in this context[14].

Comparing the current AA with Ukraine with analogue acts signed by the EU with other countries, it can be said that this is a "fourth generation agreement". It is the first of a new generation of association agreements between the EU and countries of the Eastern Partnership that covers a deep and comprehensive free trade area (DCFTA). Considering further on the "deep" and "comprehensive" character of the FTA, it can be concluded that the EU-Ukraine DCFTA is the first of a new generation of FTAs concluded by the EU which will, once in force, gradually and partially integrate the economy of Ukraine into the EU Internal Market. Its integration into the Internal

[12] Available at http://eeas.europa.eu/ukraine/docs/2010_eu_ukraine_association_agenda_en.pdf.

[13] The present version of the EU-Ukraine AA was endorsed by the EU-Ukraine Cooperation Council, Luxembourg, 24.06.2013, (available at http://eeas.europa.eu/ukraine/docs/eu_ukr_ass_agenda_24jun2013.pdf).

[14] For example, V. Muravyov, "Legal approximation: evidence from Ukraine" (2007) Law 2007/21 in M. Cremona, G. Meloni (eds) *The European Neighborhood Policy: A framework for Modernization*, *EUI Working Papers* 129136 (available at http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Cremona/TheEuropeanNeighbourhoodPolicy/PaperMuravyov.pdf); C. Hillion, "A new framework for the relation between the Union and its East-European Neighbours" (2007) Law 2007/21 [in:] M. Cremona, G. Meloni (eds) *The European Neighborhood Policy: A framework for Modernization*, *EUI Working Papers* p. 147154 (available at http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Cremona/TheEuropeanNeighbourhoodPolicy/PaperHillion.pdf); R. Petrov, P. Elsuwege, "Article 8 TEU: Towards a New Generation of Agreements with the Neighboring Countries of the European Union?" (2011) 36 *European Law Review* 688-703.

Market will take place, however, only under the condition that Ukraine approximates its legislation to the EU *acquis communautaire*.

On the other hand, the "deep" character of the DCFTA refers also to Ukraine's commitment to approximate its legislation to the *acquis communautaire* in order to achieve its economic integration with the EU Internal Market. The DCFTA contains numerous legislative approximation clauses according to which Ukraine must approximate its domestic legislation or standards to the EU *acquis*. Title IV of the Association Agreement[15] shows that the EU-Ukraine AA not only covers traditional FTA areas, such as market access for goods, but also includes public procurement, IPRs, competition, energy, etc.

2.1. Substantial aspects of the "competition clause" in the Association Agreement

The AA focuses on the main principles of an undertaking's conduct on the market that can impede, restrict or distort competition (including conduct prohibited under Article 101 (1) TFEU, abuse of a dominant position and certain concentrations that result in market dominance or a substantial restriction of competition in the market in the territory of either Party). In truth, the above mentioned provisions have already been implemented by Ukrainian legislation.

Article 1 of the AA states that the purpose of the association is "to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market […] and to support Ukrainian efforts to complete the transition into a functioning market economy also through the progressive approximation of its legislation to that of the Union". Basic principles of undistorted competition in a market economy are among key principles of a deep and comprehensive free trade agreement established in accordance with the AA's Section IV ("Trade").

Competition issues (the so called "competition clause") are included in a separate Chapter 10 of the AA (Articles 253–267 AA) that consists two sections: antitrust and mergers; and state aid. Incidentally, this division is almost identical to European law. Attached to the Association Agreement is special Annex 23 which contains a glossary of basic definitions relating to competition matters. Included in particular are terms such as "public undertakings", "exclusive rights", "services of general economic interest (SGEI)", "state monopoly of commercial character", "important project in

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

the common European interest or in the common interest of the Parties" and so on. As noted in Annex 23, this glossary is not legally binding and is used exclusively for the interpretation of the provisions of this very Association Agreement.

The AA identifies the key practices and economic transactions that could potentially adversely affect the functioning of markets and undermine the benefits of trade liberalization established between the parties. These anti-competitive practices include: a) agreements and concerted practices between undertakings, which have the purpose or effect of impeding, restricting, distorting or substantially lessening competition in the territory of either Party; b) the abuse by one or more undertakings of a dominant position in the territory of either Party; c) concentrations between undertakings, which result in monopolization or a substantial restriction of competition in the market in the territory of either Party[16].

Generally, Ukrainian legislation encompasses the fundamental principles of fair competition and prohibits the foregoing acts that are clearly enshrined in Article 42 para 3 of the Constitution of Ukraine which ensures the protection of competition in entrepreneurial activity. Types and limits of monopolies are also determined by the law. In other words, the substantial matter of Article 254 AA is reflected in current Ukrainian legislation and regulations issued by the AMCU.

In particular, Article 254 AA refers to the concepts of "anticompetitive concerted actions", which are understood as concerted actions that have led or may lead to the prevention, elimination or restriction of competition. As such, it is reflected by Article 6 of the Law on the Protection of Economic Competition. Article 254 AA speaks also of "abuse of a dominant position in the market", which refers to the acts or omissions of an entity that holds a monopolistic (dominant) position[17] in the market that have led or may lead to the prevention, elimination or restriction of competition or infringement of interests of other undertakings or consumers, which would be impossible conditions of substantial competition in the market. The national equivalent can be found in Article 13 of the Law on the Protection of Economic Competition. Finally, the AA refers to the notion of "control of concentration", which is defined in Article 22 of the Ukrainian Law.

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[16] Art. 254 AA.

[17] It is worth noting that Ukrainian legislation puts emphasis on the abuse of a "monopolistic" position instead of a "dominant" position as in EU Competition Law. This derives from Art. 13 of the Law on the Protection of Economic Competition. Unlike the EU, Ukrainian legislation follows a strict legislative line concerning a "monopolistic" position ("As monopoly (dominant) position shall be deemed a position of an undertaking, whose part on the commodity market exceeds 35 percent, unless it proves, that it experiences a considerable competition")

It is noted also that in determining the importance of the implementation of the guidelines set out in Article 254, parties to the AA must apply them in a "non-discriminatory transparent manner, respecting the principles of procedural fairness and the right to protection"[18].

The AA emphasizes however also the existence of some gaps in the harmonization process and clearly defines the requirements that must be incorporated into Ukrainian law and the terms of their performance.

A special provision of the AA is devoted to the substantial aspects of the approximation of Ukraine legislation to European competition law and the timing of its implementation into the national legal system[19]. Conventionally, these substantial requirements can be grouped according to the areas to which they relate, that is, procedural aspects of competition law enforcement, the legal regime on concerted actions, control of concentrations, the activity of state monopolies and state aid.

1. In the area of improving the *procedural aspects* of competition law enforcement, it is important to implement the principle of transparency and proper decision-making process by the AMCU and Ukrainian courts in cases concerning concerted actions and concentrations. For that reason, existing national legislation must be supplemented so as to impose upon the AMCU an obligation to publish its decisions in cases of an infringement of national competition rules as well as concentration control cases within three years from the date of the entry into force of AA[20].

The current Article 48 of the Law on the Protection of Economic Competition does not oblige the AMCU to officially publish its competition law decisions. Neither does such obligation exist in the Ukrainian Law on the AMCU[21]. Instead, this commitment derives from Article 256 para 1 of the Association Agreement, which clearly states the rule to be implemented into the Ukrainian legal system – that is – Article 30 Regulation No 1/2003 of 16 December 2002[22].

There is also a strict obligation for the AMCU to adopt and publish a document explaining the principles to be used in the setting of any pecuniary sanctions imposed for infringements of competition law. A similar document must be published explaining the principles used by the Ukrainian competition authority in the assessment of horizontal mergers.

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[18] Art. 255 AA.

[19] Art. 256 AA.

[20] para 1, 3 Art. 256 AA.

[21] Law of Ukraine "On Antimonopoly Committee of Ukraine" of 26.11.1993 No 3659-XII (Verhovna Rada Bulletin 1993 No 50, item 472).

[22] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ [2003] L 1/1).

2. A number of requirements exist on the approximation of Ukrainian legislation to EU law with respect to the mandatory implementation of *rules concerning exemptions from prohibited anticompetitive conduct for vertical agreements*. The current text of Article 10 of the Law on the Protection of Economic Competition only contains general requirements for exemptions for prohibited concerned practices[23]. At the same time, a detailed procedure for the granting of prior authorization for concerted actions is specified in a special act on the Procedure Applicable to Submissions of Applications for Authorization for Concerted Practices of Economic Entities[24] of 2002 (Procedure for Concerted Practices). As such, a block exemption system does not exist in the Ukraine at this moment. Current legislation provides for exemptions only on an individual basis by way of AMCU decisions, despite the fact that it is common practice in the EU to provide so-called "block exemptions" for certain categories of anti-competitive agreements.

The Ukrainian law does not have a Block Exemption System by way of general BER (Regulations No 330/2010[25]) for vertical agreements. Certain

[23] *Article 10 of Law of Ukraine "On Protection of Economic Competition". Concerted Actions which may be Authorized*

1. The concerted actions, provided for by Article 6 of this law, may be authorized by the appropriate bodies of the Antimonopoly Committee of Ukraine, if their participants prove, that these actions promote: the improvement production, procurement or sale of goods; technical, technological and economic development; the development of small and medium enterprises; the optimization of export or import of goods; the development and application of the uniform specifications or standards for goods; the rationalization of production.
2. The concerted actions, provided for in paragraph one of this Article, may not be authorized by the bodies of the Antimonopoly Committee of Ukraine, if the competition is significantly restricted on the whole market or in its significant part.
3. The Cabinet of Ministers of Ukraine may authorize concerted actions, which have not been authorized by the Antimonopoly Committee of Ukraine pursuant to paragraph two of this Article, if participants of concerted actions prove that the positive effect for public interests prevails over adverse consequences of competition restriction.
4. The authorization provided for in paragraph three of this Article may not be given if: participants of concerted actions apply restrictions which are not required for the implementation of the concerted actions; the restriction of competition constitutes a threat to the system of market economy.
5. It shall be prohibited to take concerted actions, provided for in this Article, until authorization has been granted by bodies of the Antimonopoly Committee of Ukraine or the Cabinet of Ministers of Ukraine.

[24] Act of AMCU of 12 February 2002 No 26-p "Regulation on the procedure for applying to the Antimonopoly Committee of Ukraine for granting permission for concerted actions of undertakings (Regulation on concerted actions)" (Official Journal of Ukraine 2002 No. 11, item 253).

[25] Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ [2010] L102/1).

types of horizontal agreements are subject to typical requirements for concerted actions of economic entities on the specialization of production, compliance with which makes these concerted actions permissible without the authorization of the Antimonopoly Committee of Ukraine. Article 256 para 3 of the Association Agreement provides a direct link to specific EU Regulations which must be implemented into the Ukrainian legal system within three years of the entry into force of the AA.

The Association Agreement also focuses on the strict necessity to fill the gap currently existing in Ukrainian legislation with respect to the lack of a block exemption system for agreements on technology transfer, which is provided in Regulation 772/2004[26] of 27 April 2004. Full implementation of such system must occur within three years after the entry into force of the AA.

3. The Association Agreement contains additional requirements for the improvement of existing national laws on *concentrations*. Thus, Article 256 para 2 AA lists specific articles of Regulation 139/2004[27] of 20 January 2004, that is, Article 1 and Article 5 (1) and (2), to be implemented into Ukrainian legislation within three years of the entry into force of the AA.

It should be noted that the practice of the AMCU under Articles 22 and 23 of the Law on the Protection of Economic Competition is significantly different from the practice of the European Commission with respect to concentration control.

According to Article 24 of the Law on the Protection of Economic Competition, a concentration is permissible only if prior clearance (authorization) of the transaction is obtained from the AMCU. Clearance is obligatory in cases stipulated in the law: if the total value of the assets or the total product sales of the participants in the concentration (with relations of control being taken into account) in the last financial year, including those abroad, exceed the sum equivalent to 12 mln EUR, while the assets (total assets) or the sales (total sales) of products, including those abroad, of at least two participants in the concentration (with relations of control being taken into account) exceed the sum equivalent to 1 mln EUR, and the assets (total assets) or the sales (total sales) of products in Ukraine only of at least one participant of the concentration (with relations of control being taken into account) exceed the sum equivalent to 1 mln EUR[28]. Clearance is also necessary if the share of the market of products of any undertaking concerned

[26] Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ [2004] L 123).

[27] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation) (OJ [2004] L 24).

[28] Art. 24 of Law of Ukraine "On Protection of Economic Competition".

in the concentration (taking into account the relationship of control) is more than 35% in the relevant market.

Requirements of the AA can completely change the financial and economic indicators of the concentration subject to mandatory "authorization" by the Ukrainian competition authority.

Looking at the EU concentration control system, the analysis of the relevant market share held by the participants in the concentration is not determinative for the EU practice. By contrast, the financial indicators used in Ukrainian competition law are different and cause an increased number of requests to the AMCU for permission to implement a concentration by medium sized entities. It can be assumed that harmonization of concentration control rules is primarily aimed at reducing the number of applications by entities requesting permission to concentrate so as to enable the Ukrainian competition authority to focus on those transactions which can actually significantly change the structure of the market in the long run.

Additionally, a formalistic approach is applied in Ukraine when assessing concentrations – less economic analysis of merger activities is undertaken than in the EU.

The Association Agreement refers to the necessity to improve the calculation mechanism of financial indicators in the national concentration control system. In Ukraine, the procedure for calculating concentration parameters, a procedure contained in an annex to the Regulation on Concentrations[29], is characterized by a detailed performance analysis and needs to be improved in accordance with Article 5 of Regulation 139/2004.

4. The Association Agreement contains also particular requirements for activities of *state monopolies* in line with the basic principles of competition law. Article 258 AA placed the Ukraine under an obligation to adjust the activities of its state monopolies of a commercial character within a period of five years from the entry into force of this Agreement. The adjustment must ensure that no discriminatory measures exist regarding the conditions under which goods are procured and marketed between natural and legal persons of the Parties. Under the enforcement practice of the AA, the priority of competition law should be clearly stated – as opposed to the current situation where the norms of the Law on Natural Monopolies[30] are seen as *lex specialis* in this context, which give a special position to those undertakings.

[29] Act of the Antimonopoly Committee of Ukraine of 19 February 2002 No 33-p «On Approval of the Procedure of applying the Antimonopoly Committee of Ukraine for prior authorization for Concentration of Undertakings (Regulation on concentration) (Official Journal of Ukraine 2002 No. 13, item. 225).

[30] The Law of Ukraine of 20 April 2000 No 1682-III "On Natural Monopolies" (Verhovna Rada Bulletin 2000 No. 3, item 238).

2.2. Improvement of competition law enforcement

All the above notwithstanding, the main practical gap between Ukraine and the EU lies in the lack of fairness and transparency in the competition law enforcement process. As a result, the text of the Association Agreement contains a whole range of competition rules, unlike other spheres of economic cooperation that are covered in detailed harmonization schemes which supplement the AA in a number of annexes.

The main difficulties lie in the process of effective enforcement of substantive competition rules in a transparent, timely and non-discriminatory manner, respecting the principles of procedural fairness and rights of defence. The main gaps are seen here in the failure to officially publish AMCU decisions and in the lack of a precise official act on calculating fines. As a result of these faults, enforcement practice lacks legal certainty. With the aim to improve transparency, Article 256 AA contains a detailed implementation scheme of specific provisions which must be incorporated into domestic competition legislation within three years of the entry into force of the Association Agreement.

As a result, current Ukrainian laws should be amended in a number of areas. Improving the decision-making process of the Ukrainian competition authority – the AMCU – is of fundamental importance. The obligation to introduce a national block exemption system for certain categories of vertical agreements and concerted practices (in accordance with Regulation 330/2010) as well as for certain technology transfer agreements (Regulation 772/2004) is the key gap that needs to be filled in Ukrainian legislation. The financial criteria applicable to the domestic concentration control system should also be changed (in convergence with the criteria under Regulation 139/2004).

2.3. State aid regulation in Ukraine: gaps and tendencies

The legislation of state aid remains the most vulnerable area. It should be noted that the issue of state aid harmonization arose in both bilateral documents preceding the Association Agreement between the EU and Ukraine: the Action Plan of 2005 as well as the Association Agenda of 2009 (as revised in 2013).

Unsurprisingly, the Association Agreement pays special attention to state aid, which remains unregulated in Ukraine. Article 262 AA states that “any aid granted by Ukraine or the Member States of the European Union through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with

the proper functioning of this Agreement insofar as it may affect trade between the Parties". Article 262 AA imposes upon Ukraine the strict obligation to adopt a special act on the system of monitoring and control of state aid schemes under Article 107 TFEU with all implementing regulations in the state aid area.

Following this analogy, the Association Agreement contains conditions under which state aid can be compatible and can be recognized as valid. Such is the treatment of state aid granted in order to provide consumers with socially important goods, on condition that such assistance is not discriminatory in relation to the place of origin of these goods; and aid given to victims of man-made emergencies and natural disasters. The above two types of state aid are considered acceptable according to Article 262 para 2 AA. The second category of exceptions allows the following types of state measures: aid meant to promote economic and social development of geographic regions in which the standard of living is low and the unemployment rate high; implementation of national programmes or solving social and economic problems of a national character; aid meant to facilitate the development of certain types of business activities or undertakings that carry out activities in certain economic areas, provided the latter does not conflict with other applicable international agreements; aid given for the maintenance and preservation of national cultural heritage whose influence on competition is negligible (para 3 Article 262 AA). In line with EU practice, the second group of exemptions is different from the first in so far as for their admissibility it is necessary not only to submit a relevant notification, but to receive an approval of the European Commission, which has exclusive authority to decide on the issue.

The Association Agreement emphasises also the necessity to introduce rules on *de minimis* state aid which does not, *a priori*, make a significant impact on trade between the Parties. Article 263 AA states that any aid below the threshold of EUR 200.000 per undertaking over three years does not need to be notified.

It is worth stressing that the state aid rules contained in the Association Agreement are to be applied in light of the interpretation criteria arising from the application of Articles 106, 107 and 93 TFEU. This includes the relevant jurisprudence of the Court of Justice of the European Union as well as relevant European secondary legislation, communications, guidelines and other administrative acts.

The Association Agreement's provisions on state aid should be implemented within five years from its entry into force. Incidentally, a draft Law on State Aid to Undertakings[31] was prepared by a group of Ukrainian and European

[31] Draft Law of Ukraine "On state aid to the undertakings" (available at http://www.amc.gov.ua/amku/control/main/uk/publish/article/95306).

experts. It was transferred to the national legislative body (Verhovna Rada) in April 2013, but it is very difficult to predict its future destiny.

The Draft Law on State Aid[32] fully reflects the requirements contained in the Association Agreement. If ultimately adopted, Article 267 AA will be fully implemented. It is expected that if the Verkhovna Rada of Ukraine approves the Draft Law, its entry into force will take place three years after its official publication, as stated in its final provisions. This term coincides with the requirements contained in the Association Agreement.

According to the Draft Law on State Aid, the Ukrainian competition authority – the AMCU – will become the body competent to receive notifications of new state aid to its beneficiaries; examine the misuse of state aid and monitor the lawfulness of granted state aid; evaluate the admissibility of state aid with respect to competition; collect and analyse information on measures to support businesses given from state or local resources, etc. (Article 8 of the Draft Law on State Aid).

The Draft Law on State Aid regulates the monitoring of state aid, the procedural aspects of notifications to the AMCU for the determination of a misuse of state aid and the procedure for its recovery.

It should be stressed with respect to the provisions of the Association Agreement (Article 267 para 3(a)) that in the first five years after the entry into force of the AA, any public aid granted by Ukraine shall be assessed taking into account the fact that the country shall be regarded as an area where the standard of living is abnormally low or where there is serious unemployment (under Article 107(3)(a) TFEU).

3. Conclusions

The paper analyzes certain areas of the approximation of Ukrainian competition law to that of the EU in accordance with the requirements of the Association Agreement. It can be concluded on this basis that the main weakness of the Ukrainian legal system is the lack of proper enforcement levels and the need to improve the transparency of decision-making procedures, including the publication of decisions issued by the national competition authority – the Antimonopoly Committee of Ukraine.

Due to the effective enforcement and implementation of prospective amendments to the competition law of Ukraine the mechanism of cooperation & coordination should be settled between national authorities. Notwithstanding

[32] Ibid.

that there is no provision in the AA concerning coordination within the International Competition Authority, Art. 259 AA stressed on the necessity of co-operation and co-ordination between their respective competition authorities to further enhance effective competition law enforcement. These forms of cooperation include the exchange of information between relevant national authorities of Ukraine, the European Union and its individual Member States. In addition, the AA focuses on the fact that such cooperation shall not prevent the authorities from taking independent decisions[33].

Consulting is the main instrument of an effective harmonization process and fostering mutual understanding of the parties in competition law enforcement – its implementation is foreseen in Article 260 AA. A process of consultation will be used during the interpretation or application of competition rules. However, this rule does not represent a firm commitment but merely the expression of the intention of the parties to provide each other with non-confidential information in order to improve the consultation process.

In particular, it should be noted that the scope of the feature according to the Association Agreement is that none of the parties to the Agreement may not resort to dispute settlement procedures of the questions referred to the field of competition[34]. The only obligation on the terms of harmonization of Ukrainian legislation in accordance with Article 256 AA may be subject to dispute settlement procedures. This means that the provisions of the Association Agreement are determined as mandatory principles of free competition in the market in terms of free trade. Prohibition of anticompetitive practices in the form of concerted actions or agreements, abuse of dominance, and the principle of concentration control *are the basic elements of the implementation of free trade*.

State aid may distort competition by giving an advantage to certain companies or industries. Since state aid is considered a separate branch of EU law and subject to strict controls, the Association Agreement pays special attention to the question of state aid.

Harmonization is a process of convergence towards the principles of another legal system. Attention is thus paid not only to the substantive content of the rules to be assimilated, but to the complex nature of its practical application also. In this respect, the Court of Justice of the European Union is of crucial importance as it interprets and explains the features of the implementation of European Union law.

To implement these commitments, Ukraine has to, within three years of the entry into force of the Association Agreement, adapt its legislation in this area with that of the EU. It must also improve its current institutional

[33] Para 2 Art. 259 AA.

[34] Art. 261 AA.

framework under the principle of fair practice & state litigation. On the other hand, with the aim to adopt fair rules on state aid (which would be a novelty for Ukrainian legislation), a control and monitoring system of state aid should be created, including the provision of relevant statistical information.

Current practice shows that there is no direct effect of EU norms in the national competition system of the Ukraine; there are also no judgments of EU Courts (or even Commission decisions) on the extraterritorial application of EU Competition norms in the Ukraine. But due to the intensification of the trade liberalization process, Ukrainian undertakings should be bound by EU "competition clauses" in accordance with the "effect on trade" & "effect on the internal market" rules.

In general, we can observe the system of implemented norms but with the inefficient system of its enforcement. This problem has the ground of formalistic approach to protect the activity on the market instead of social welfare-oriented system of competition. The special clause in the enforcement process should be stressed as a necessity of reorientation of the object of competition law as a whole mechanism of better consumer protection.