

Procedure for Conducting Investigation of Unfair Competition Cases in Ukraine



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The Antimonopoly Committee of Ukraine performs quasi-judicial functions during consideration of cases regarding violation of the legislation on protection of economic competition and applies sanctions which are stipulated by the law to violators while exercising of powers on protection of economic competition delegated by the state.

Consideration of cases regarding violation of the legislation on protection of economic competition has its own regulations, meaning the established procedure for conducting procedural instruments. The procedure for consideration of cases is governed by the *On Protection of Economic Competition Act of Ukraine* and the Rules of consideration of statements and cases regarding violation of legislation on protection of economic competition adopted by the Antimonopoly Committee of Ukraine of 19 April 1994 No.5 (further as — the Rules of consideration of cases).

At the present time the procedure for consideration of cases is not regulated enough and contains a number of flaws and inconsistencies which cause problems in practice. Let's consider some of them.

According to Article 36 of the *On Protection of Economic Competition Act of Ukraine* consideration of cases on violation of the legislation on protection of economic competition can be initiated upon:

1) the statement by business entities, citizens, associations, institutions, organizations regarding violation of their rights in the result of acts or omission, which are stipulated by the law as violation of the legislation on protection of economic competition;

2) submission by public authorities, local government, bodies of administrative management and control regarding violations of the legislation on protection of economic competition;

3) the own initiative of bodies of the Antimonopoly Committee of Ukraine.

In practice most cases are initiated upon a statement or own initiative of the Antimonopoly Committee of Ukraine. The *On Protection of Economic Competition Act of Ukraine* and the Rules of consideration of cases envisage the right of a person who submits a statement to submit a motion regarding possible negative consequences related to submission of a statement, and respectively consideration of a case upon the own initiative of the bodies of the Antimonopoly Committee of Ukraine.

It is necessary to note a discrepancy between the *On Protection of Economic Competition Act of Ukraine* and Rules of consideration of cases. For example, the law does not stipulate any restrictions regarding a person who can act as an applicant. However, Paragraph 17 of the Rules of consideration of cases stipulates that persons who are eligible to submit a statement

are: a defendant's business entities — competitors, suppliers or customers and other individuals and entities which can confirm a defendant's actions or negligence which may directly and adversely affect their rights, and are stipulated by the abovementioned laws as violations of the legislation on protection of economic competition.

The Draft Act *On Amendment to the on Protection of Economic Competition Act of Ukraine of 28 November 2011, No.9508* has been prepared according to the initiative of the Antimonopoly Committee of Ukraine regarding providing evidence in cases considered by the bodies of the Antimonopoly Committee of Ukraine and is aimed at improving the procedure for consideration of cases. One of the most important amendments is regarding the order of statement submission and persons participating in a case. In particular, it is proposed to set certain requirements for persons who can file statements regarding violations in the way it is stipulated in Article 17 of the Rules of consideration of cases.

The amendments also envisage a new additional basis for initiation of consideration in cases on violation of the legislation on protection of economic competition: on the basis of statement of the officials of entities, associations and organizations.

Another important innovation is the Committee's right to conduct an investigation if there is not enough data contained in a statement or if this data is

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contradictory. During an investigation the AMCU has the right to obtain explanations, request information from entities and to conduct inspections in accordance with the legislation.

The above-mentioned innovations are extremely important, as according to the applicable law the AMCU must deny an applicant the initiation of a case if there is not enough data regarding violation of the legislation in the results of consideration of a statement.

A statement on violation is considered within 30 calendar days, and if it is necessary to obtain additional information which cannot be provided by an applicant the consideration period may be extended up to 60 days, and the applicant must be informed of this in writing.

If there is sufficient evidence on violation of the legislation on protection of economic competition in a statement, a resolution

on initiation of case consideration is passed. Such resolution on initiation of case consideration is sent to a defendant within three days of its adoption.

It is necessary to note important practical aspects related to the initiation of cases on violation of the legislation on protection of economic competition. Competition law does not expressly provide the possibility of appeal against the AMCU resolution on initiation of proceedings in cases of violation. Moreover, in accordance with the established court practice a resolution of the AMCU authorities regarding initiation of consideration of a case on violation of the legislation on protection of economic competition is deemed as one that does not violate the rights and lawful interests of an entity, and so cannot be canceled by courts.

However, well known public companies may suffer loss of

business reputation even in case of disclosure of information related to initiation of investigation regarding their violation of the legislation on protection of economic competition. In our opinion it would be appropriate to amend the *On Protection of Economic Competition Act of Ukraine* and to provide the defendant's right for appealing against and canceling a resolution on initiation of a case in court if there are not enough reasons or grounds, or if the procedural form was violated, for adopting such resolution.

According to Article 39 of the *On Protection of Economic Competition Act of Ukraine* only an applicant, defendant and a third party are recognized as parties involved in a case.

A third party is a party involved in a case due to the fact that a decision may significantly affect its rights and interests. However, in practice, due to the

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specificity of considerations by the Committee, the legal status of a third party is somewhat uncertain and its involvement is rather rare. A party involved in a case has certain rights, including the right to get acquainted with case materials, submit evidence, motions and to receive copies of decisions and orders, etc.

It should be noted that Article 40 of the *On Protection of Economic Competition Act of Ukraine* defines a rather vague and limited list of rights of parties who are involved in a case, and when it comes to practice problems sometimes emerge.

The already mentioned Draft of Amendments to the *On Protection of Economic Competition Act of Ukraine* extends and specifies the rights of parties. In particular, the right to make excerpts and make photocopies from case materials is directly stipulated; there are additional rights, such as the right to be informed regarding the time and place of a case hearing, the right to be heard during proceedings, prior decision making, innovation, etc. Establishing restrictions on use of documents and investigation materials by individuals is an important innovation as well — they can use them exclusively for exercising the rights granted by the legislation on protection of economic competition.

However, there are certain flaws in the Draft. For example, the current wording of the *On Protection of Economic Competition Act of Ukraine* does not stipulate restrictions regarding the time when a person can study case materials. This limitation was set by Paragraph 16 of the Rules of consideration of cases — the right to study case materials emerges only after a party has received a copy of a submission with preliminary conclusions in the case, i.e. after completion of the actual gathering of evidence in the case. It is proposed to stipulate the said

provision in the Act. However, we believe that narrowing the right to study case materials deprives parties of the opportunity to be aware of the evidence the Committee uses during preliminary decision making and during preparation of filing a submission with preliminary conclusions, their sufficiency, identity and admissibility, the necessity of filing additional evidence by parties or absence of such necessity, etc., which ultimately reduces competitiveness, particularly a defendant's (violinist's) possibility to effectively protect his business.

Another practical problem of the procedure for consideration of cases is the lack of regulated issues of gathering and obtaining evidence in a case.

Article 41 of the *On Protection of Economic Competition Act of Ukraine* states that evidence in a case may contain any actual data established by explanations of individuals, written evidence, material evidence and expert conclusions. At the same time, the law doesn't contain any detailing provisions regarding admissibility of evidence and procedural formalities of its acquisition.

The lack of this issue's regulation is one of the main causes that affect prolongation of investigation terms. Today, the main procedural instruments used by the AMCU are: obtaining information in writing, obtaining oral or written explanations from officials and employees, inspection, seizing original documents or other evidence.

However, these instruments are not very effective due to insufficient procedural regulation. For example, the Committee's employees do not have authority to conduct searches, forced opening of premises, etc. In fact, they have access to documents which were voluntarily provided to inspectors upon their request or were promptly seized by them while these

documents were in the public domain. Application of the seizing procedure is possible if, first of all, the evidence was not provided, and, secondly, it is known what that evidence is. Neither does seizing envisage search and can be conducted only in premises (and in vehicles) of legal entities.

The issues of expert involvement and conducting examination are other drawbacks of the existing procedure. According to Article 43 of the *On Protection of Economic Competition Act of Ukraine* any person who possesses the necessary knowledge for providing conclusions may act as an expert. Of course, this uncertain status of an individual and lack of clear requirements do not increase confidence in examinations conducted during proceedings.

The already mentioned Draft amendments to the *On Protection of Economic Competition Act of Ukraine* regulate issues of gathering and obtaining evidence in detail. It is necessary to note among important innovations a clear regulation of the procedure of obtaining explanations from officials and employees of entities. The person who provides explanations is warned about responsibility for failure to, or submission, of false information to the Committee's authorities. Oral explanations are recorded in the minutes, which have an established form, signed by the AMCU official and the person who provided explanations. A person is entitled to comment protocol contents, which are subject to registration as well. It is possible to use audio and video recording of explanations.

The Draft also regulates in detail the issue of admissibility of written evidence. It is stipulated that written evidence contains, among other things, electronic databases, e-mails, files and documents stored in electronic media and comput-

ers, metadata of these documents, etc. There are grounds which envisage situations when the AMCU must receive original documents, and also the terms and procedure of their return after completion of consideration of the case on protection of economic competition.

Regulation of the issue of conducting expertise is another important change stipulated by the Draft. There are requirements for individuals who can be engaged as experts, particularly: these individuals must conform to the requirements set by the *On Forensic Expertise Act of Ukraine* and/or to the *On Scientific and Scientific and Technical Expertise Act of Ukraine*. The expert's rights and obligations which are not envisaged by the current edition of the *On Protection of Economic Competition Act of Ukraine* are clearly established in the Draft.

The Draft also settled procedures for inspecting entities. It is set that in sections are conducted on the basis of the order of the AMCU state commissioner or the head of the AMCU territorial department, which is valid for one month after its adoption. This Draft secured rights of inspection members, including: the right to freely enter premises and other property owned or used by an inspected entity, the right to demand presentation or delivery of documents and to make copies of them, to demand explanations from an entity's officers and employees, the right for unimpeded access to places of information storage (safes, computers, etc.), the right to engage specialists for assistance necessary for opening locked premises and places of storage, to seize electronic documents and media. Other practical issues of conducting inspections were regulated as well, particu-

larly the procedure of its recording, necessity of the presence of witnesses during certain actions, the obligation to explain the rights to an entity's officers and employees who are present during the inspection, etc.

Thus, the *Amendment Act to the On Protection of Economic Competition Act of Ukraine* as to providing evidence in cases considered by authorities of the Antimonopoly Committee of Ukraine of 28 November 2011 No.9508, envisages a number of important innovations aimed at improving the procedure for investigation by the Antimonopoly Committee of Ukraine of cases on violation of the legislation on protection of economic competition. At the present time the Draft was submitted to the Verkhovna Rada of Ukraine for consideration. Experts say with a high degree of probability that it will be adopted.

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