

# Counting Markets in a New Way



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**T**he question of antitrust legislation has traditionally stood out sharply for business in Ukraine. This is due to a variety of factors: both with a high propensity to monopolization and oligopoly of many key markets, which is a legacy of the Ukrainian transitional economies of the 1990s and 2000s, and with the traditional Ukrainian way of "ignoring" laws that, according to the view of business owners, impede effective work. Unfortunately, in Ukraine, partly because of the high level of corruption, the belief that "solving" the problem would be cheaper than to simply comply with all legislation still exists. The field of antitrust regulation is exceptional in this aspect, as the amounts of fines prescribed by legislation are astronomical. Despite the long-established practice of the Antimonopoly Committee of Ukraine to impose fines at a much lower level than the maximum size of a fine, they were still quite high.

This issue was standing out especially urgent when the Committee conducted investigations into cartel collusion and abuse of monopoly position in the market.

In the middle of the 2000s almost every year was noted for at least one loud and scandalous investigation with record-high fines imposed by the Antimonopoly Committee of Ukraine against violators.

The situation was complicated by the fact that most of these investigations were based on the Committee's own economic calculations and the specifics of determining market boundaries for the commodity markets involved in the investigation.

Officially, the statutory document regulating this issue was adopted in March 2002 — this is the Methodology for determining the monopoly (dominant) position of a business entity on the market. It replaced

the document adopted in 1994, which was ineffective and totally outdated by the time of the adoption of the 2002 Methodology.

At the same time, the new statutory document did not solve the problem — the norms of the Methodology were subjective, difficult to understand, allowed the possibility of a double interpretation and manipulation of data to produce different results. No wonder that the issue of determining the market share has always been one of the most criticized by the legal community.

Even the Committee itself acknowledged that the norms of the Methodology were imperfect and required further updating, especially considering the fact that since the adoption of the document no amendments to it have been made.

The traditional and key gap in the regulation of the Methodology was the ability to artificially change the boundaries of a commodity market by overstating or understating the volume of goods that the market ranges from and to. The provisions of the Methodology did not provide clear criteria for establishing the interchangeability of goods (in order to consider such goods as one market), which made it possible to interpret this issue solely at the discretion of the person who performed the calculations.

These factors led to the formation by the Committee of such "entertaining" commodity markets as, for example, the market for the provision of services for the maintenance of vehicles that are under warranty — which is economically incorrect.

In 2015-2016, the Committee altered its approach with regard to determining the amount of fines that are imposed for committing a violation. On the one hand, to provide greater transparency the principles

and methods for calculating fines were published where the number of grounds for a possible reduction in fines was reduced in comparison with the Committee's traditional approach. On the other hand, the Committee issued a statement about changing its policy, pointing to the fact that the approaches used previously by the Antimonopoly Committee of Ukraine regarding fines had, unfortunately, stopped accomplishing their penitentiary function.

Within the meaning of a significant increase in the average size of fines, the issue of determining the market share, which directly affects the correctness of conclusions drawn by the Antimonopoly Committee of Ukraine on a number of violations, has become particularly acute.

At the end of 2017, the Committee published the Draft Methodology for Market Determination for public discussion, which should also make the procedure more or less predictable. Let's look at the main innovations provided by the Draft and whether it will be able to influence the situation in this area.

First, it is important to note that the draft Methodology does not establish a procedure for calculating the market share, but contains regulations governing the procedure for determining the market involved. Thus, this document is intended to complement the existing Methodology for determining the monopoly (dominant) position of an economic entity on the market, and not to replace it.

The Draft of the new Methodology contains a few important innovations, especially regarding the definition of a commodity and territorial boundaries of the market.

In particular, Article 3 of the draft establishes a number of fairly clear and objective criteria for assessing the availability of substitution of goods. At the same time, a number of new criteria for Antimonopoly Committee of Ukraine are proposed, which were not previously applied. For example, one relates to the concept of a product substitution criterion from the point of view of an offer, based on the technical, marketing, administrative ability of the producer to start producing goods (to enter the market) in the event that the prices for such goods vary significantly.

Also, an important innovation is the consolidation of clear rules for the sep-



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Antika Law Firm has been providing legal services to corporate and private clients since 2010. During this time the firm has achieved a competitive advantage on the legal market, has been recognized by reputable international and Ukrainian guides such as The Legal 500 EMEA, Chambers Global, Chambers Europe, IFLR1000 Energy and Infrastructure, IFLR1000 Financial and Corporate, Best Lawyers, Ukrainian Law Firms, Top 50 Law Firms of Ukraine, Client Choice, The Top 100 Best Lawyers in Ukraine.

The firm received Legal Award 2012 in the nomination of "Law Firm — Breakthrough of the Year". The Firm was a finalist of the Legal Awards 2013 in the field of Antitrust, Litigation and Real Estate, in 2014-2016 — in the field of Energy.

Antika's team includes 15 highly-qualified lawyers, who have significant experience of various fields of legal practice.

The key practices of the firm include corporate, M&A, Banking and Finance, Arbitration, Energy, Antitrust, Private Clients, Land & Real Estate, Competition Law, Dispute Resolution, Legal expertise, Infrastructure and Logistics, PPP & Government relation.

The firm's main principles are high quality legal services provided in a timely fashion, strict confidentiality and a bespoke approach to every client's project. Having a good understanding of today's challenging business requirements and a deep knowledge of legal environment we bring an innovative, creative and practical problem-solving approach to all of our work.

The firm's clients are Ukrainian and international companies doing business in various industries including telecommunications, heavy, chemical, food, automotive industries, subsoil use, complex development, real estate and construction, wholesale and retail, media and sports, banks and financial services market. The following are representative clients: AWT Bavaria, Cadogan Petroleum, Chornomornaftogaz, Esan Eczacıbaşı Industrial Raw Materials, Energobank, Ghelamco, Heitman, Henkel Ukraine, Henkel Bautechnik Ukraine, Ibis Group of Companies, Imperial Tobacco, International Resources Group, Lantmannen Axa, Nadra Ukrayny, Nasosenergomash, ViDi Group, Ukrnafta. The firm also advises the World Bank, the European Bank for Reconstruction and Development, USAID, TACIS, UNDP, KfW, NEFCO on energy efficiency, utility and other projects being implemented in Ukraine.

The firm's partners possess many years of experience in providing business law advice. They are the members of national and international professional legal organizations, in particular the International Bar Association.

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ation of markets at different stages of inventory turnover (for example, wholesale to importers, wholesale to distributors, retail sales to consumers). The Draft Methodology clearly states that such stages of turnover should be separate markets and each specific unit of goods can be counted only once. Even though these rules seem obvious, they were not previously clearly established — which provided additional opportunities to manipulate data on the total volume of the market.

Another important innovation of the Methodology was the fixation of two methods of analyzing the substitution of goods in the market: a hypothetical monopolist test and a price elasticity test.

According to the hypothetical monopolist test, the smallest group of goods is established, in relation to which the hypothetical monopolist can steadily support a price increase (from 5 to 10%). After establishing such a minimum group of goods, such a group is considered a commodity market.

The price elasticity test verifies the correctness of determining the substitution of goods based on the elasticity coefficient — the ratio of the percentage change in demand to the percentage change in price. If the indicated coefficient is greater than uni-

ty, this means the availability of substitute goods, since buyers can easily switch to the use of another product even with insignificant price variations. If smaller it means the goods have no substitutes.

The Draft Methodology also establishes a number of important principles with respect to the procedure for calculating the size of the market. Thus, for example, the draft has a list of sources that can be used to obtain information on the sales volume of goods on the market.

It has been officially established for the first time that in addition to the data of the State Statistics Service of Ukraine and other governmental authorities, the research data of independent organizations is permitted for use. Furthermore, the Methodology does not prioritize one source over another — which is very important.

Another important innovation which also established in the Methodology is the regulations, which determine in what cases the calculation of the total market size and market share is carried out in natural indices (for identical or similar goods) and in monetary terms (for non-uniform goods and goods with uneven pricing).

Nowadays, this choice is actually made from the availability of one or another statistic, and not based on which calculation is more correct.

In general, the current text of the draft Methodology is an important and progressive document that should bring at least elements of stability to a very acute and controversial issue of determining the company's market share on the market.

The document is certainly is not the universal remedy — since it still contains many evaluation categories and subjective approaches.

On the other hand, it is clear that given the hundreds of thousands of different nuances affecting the calculation of a share in a particular market it is virtually impossible to create uniform universal rules.

That is why the competitive body should keep a certain window of opportunity for itself, options for adapting regulations to the peculiarities of a specific market — it is precisely this practice that the antimonopoly authorities of Europe, the United States, and other developed countries use.

It should also be noted that the Draft Methodology is now being discussed publicly, which will allow the Committee to seriously revise it.

Considering that the Antimonopoly Committee of Ukraine has always taken into account the comments and remarks of the legal community and specialists when drafting normative documents, there is reason for optimism.