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Ukraine - Peer Review of Competition Law and Policy 2008

Introduction

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An OECD Peer Review

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Foreword

This report¹ was the basis of a two hour and a half peer review in the OECD Global Forum on Competition (GFC) on 21 February 2008. It assesses the development and application of competition law and policy in Ukraine, focusing on activities over the previous five years (2003-07). The report concludes that Ukraine has a comprehensive and well-designed competition law and, in the AMC, an effectively managed and well-regarded agency to enforce it. The report also identifies an array of problems confronting Ukraine in the competition law arena, and makes various remedial proposals, including recommendations dealing with the AMC's budget allocation, autonomy, investigative tools, transparency, enforcement priorities, and relationships with other law enforcement agencies. Additional recommendations in the report focus on the competition law's merger notification requirements and procedures, state aid legislation, penalties for unlawful conduct and penalty collection procedures, competition advocacy, harmonization with the European Union's competition laws, and the elimination of conflicting provisions in Ukraine's Commercial Code.

The report's analysis and recommendations are timely because effective implementation of national competition policy is an important element of a continuing effort by Ukraine to integrate with western markets.

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Competition Law and Policy in Ukraine

Box 1. EXECUTIVE SUMMARY

Ukrainian competition policy dates to February 1992, shortly after independence from the Soviet Union, when the country's first competition law was adopted as part of the effort to establish a market-based economy. The Antimonopoly Committee of Ukraine (AMC), created in 1993 to enforce the competition statute, now has responsibility for two laws that evolved from the original competition legislation. The 2001 Law on the Protection of Economic Competition is the principal vehicle for competition law enforcement in Ukraine, while the 1996 Law on Protection against Unfair Competition deals with conduct by one company intended to exploit or injure the competitive vitality of a competing enterprise.

The Competition Law is modelled on statutes adopted in European competition law regimes, and its adoption and enforcement are part of a continuing effort by Ukraine to integrate with western markets. In particular, Ukraine is seeking admission to the European Community, which requires that applicants for membership implement an effective competition law system.

This Report assesses the development and application of competition law and policy in Ukraine, focusing on activities over the past five years (2003-07). It concludes that Ukraine has a comprehensive and well-designed competition law enforced by an effectively managed and well-regarded agency. The AMC is vested with a broad array of law enforcement and advocacy powers and has a wide jurisdictional reach, covering virtually every business entity operating in Ukraine and virtually every executive branch agency below the highest organs of power. The agency is thus effectively positioned to advance competition policy objectives, and deserves praise for the record it has compiled in realising that potential.

Particular strengths of the AMC include its dedication to fair and responsive operations, its commitment to vigorous outreach, and its traditional status as an autonomous agency secure from interference by other government bodies. The agency is widely regarded as stable, well administered, and free from corruption. While not all agree with every action that the AMC takes, there is a consensus view that the Committee strives diligently to serve the objectives of the competition law.

The weaknesses in Ukraine's competition system arise in part from deficiencies in certain aspects of Ukraine's system of government that result in heavy demands on the AMC's attention and resources. The agency's reputation as one of Ukraine's best agencies has brought responsibilities to its agenda that it did not previously bear, such as administering

certain functions of the public procurement system. More fundamentally, a significant part of the AMC's caseload burden would be reduced if courts dealt effectively with disputes between business entities over claims of unfair competitive methods; if privatisation proceedings were carried out with greater attention to the creation of multiple competing entities; if regulatory bodies controlled monopoly enterprises more astutely; and if market systems affecting entry, exit, and investment inputs operated more efficiently.

The AMC must also contend with certain existing legislation (such as the Ukrainian Commercial Code) that conflicts with the competition laws, and with the failure to enact certain other legislation (such as control mechanisms for state aid) which must be adopted if Ukraine is to meet international norms for competition policy systems. Difficulties are also presented by public prosecutors who are unfamiliar with the complexities of investigating anticompetitive conduct, and by judges schooled in a civil law tradition who do not readily focus on the economic dynamics of the cases before them.

Other significant weaknesses are associated with deficiencies in the AMC's statutory authority and operating policies. The Committee does not have the full statutory equipment necessary to deal with cartels and it also needs to strengthen cooperative relations with other law enforcement agencies. The Competition Law's merger notification requirements conflict substantially with accepted international standards. Further, although the AMC is one of Ukraine's most transparent agencies, it could articulate its decisions and policies more fully to facilitate understanding and compliance by the private sector.

The Report also considers two features of Ukraine's competition law regime that are sometimes viewed as weaknesses, but concludes that such a characterisation is not warranted. The first of these is the reservation to the Cabinet of Ministers of authority to grant permission for concerted actions and concentrations that the AMC has refused to allow. The second is the assignment to the AMC of both operational and law enforcement functions with respect to public procurement.

The Report makes proposals designed to address the full array of competition law and policy issues confronting Ukraine today, including recommendations dealing with the AMC's budget allocation, autonomy, investigative tools, transparency, enforcement priorities, and relationships with other law enforcement agencies. Other recommendations focus on the competition law's merger notification requirements and procedures, state aid legislation, penalties and remedies for unlawful conduct, competition advocacy, harmonization with the European Union's competition laws, and amendment of the Commercial Code.

1. Competition Policy in Ukraine: foundations and context

This report assesses the development and application of competition law and policy in Ukraine. The analysis begins with a brief description of the background in which competition policy has developed and the context in which it presently operates.

Ukraine declared independence from the Soviet Union in August 1991. The following decade was marked by recession and inflation as the country

struggled to establish a market economy. Real GDP fell by 60% from 1990 to 1999. Stabilisation was finally achieved in 2000, and since then GDP has increased by more than 7% annually. The OECD's 2007 Economic Survey of Ukraine concluded that, although the country has developed substantial momentum and has considerable room for continued growth, some of the factors underlying its recent experience are transitory, and recommended that Ukraine reduce market entry and (especially) exit barriers, eliminate unnecessary regulation and subsidies to inefficient businesses, and promote further privatisation¹.

Privatisation has been an ongoing process in Ukraine for 15 years. By the end of 2005, the private sector represented 85 percent of industrial output and 74 percent of employees. Nonetheless, government entities owned nearly half of the country's capital stock. The political volatility that has gripped Ukraine in recent years has not fostered progress on this front. Privatisation revenues that were 3.1% of GDP in 2004 and 5.1% in 2005 dropped to 0.1% in 2006. Planned privatisations of ownership stakes in Ukrtelekom (the fixed-line telephone monopoly) and the Odessa Portside Plant (ammonia and nitrogen fertilisers) were suspended by the government in 2007. With the change in government resulting from the snap parliamentary elections in September 2007, privatisation activity is expected to resume in 2008.

Economy-wide, many market sectors in Ukraine reflect structural conditions inhospitable to vigorous competition. Firms operating in sectors characterised by monopoly, single-firm dominance, or oligopoly were estimated to account for about 45 % of total economic output for 2004 (including 9% in markets with outright monopolies and 22% in markets dominated by a single firm with a market share of 35% or more). Conditions in regional markets were often even less competitive. Many of the sectors with weak competition are in heavy industry or infrastructure (such as mining, motor fuels, and telephony), where capital requirements pose high entry barriers.

Ukraine's first competition law "On Limiting Monopolisation and Preventing Unfair Competition in Entrepreneurial Activity" was adopted during the formative days of the state in February 1992, along with many other laws designed to facilitate and control private commercial activity. The law focused on abuse of dominance, discrimination among business entities by state agencies, and methods of "unfair competition" employed by one business entity against another. Provisions relating to concerted actions and mergers were included, but were not well developed.

The 1992 law did not establish a competition enforcement agency. The Antimonopoly Committee of Ukraine (AMC) was created by an organic law

enacted in 1993 (the “AMC Law”). In 1996, the unfair competition provisions in the competition law were expanded and transferred to a separate Law on Protection against Unfair Competition (the “Unfair Competition Law”). By 2001, the inadequacies of the 1992 competition law had become glaring enough to warrant its repeal and the adoption of the current Law on the Protection of Economic Competition, (the “Competition Law”).

Effective since March 2002, the Competition Law is modelled on statutes adopted in European competition law regimes, and reflects Ukraine’s interest in integrating with western markets. This same interest has prompted extensive modifications in many other parts of Ukraine’s legal system, all intended to satisfy requirements for accession to the World Trade Organisation and, thereafter, the European Union. An application for WTO membership was initiated in 1993 and was finally granted in February 2008.

With respect to the EU, a “Partnership and Cooperation Agreement” (“PCA”), signed in 1994 between the European Community and Ukraine, became effective in March 1998. The PCA requires that Ukraine gradually approximate its legal regime to that of the Community with respect to competition law issues, among others. Ukrainian efforts to facilitate integration with the EU intensified after the Orange Revolution. Thus, in February 2005, Ukraine adopted a three-year “Action Plan” to implement the PCA, and obtained EU agreement to commence negotiations on a Free Trade Area and an expanded PCA once Ukraine achieves WTO membership.

2. Substantive issues: content of the competition law

Ukraine’s Constitution (Art. 42) guarantees “the right to engage in entrepreneurial activity,” ensures “the protection of competition in entrepreneurial activity,” and bars “abuse of a monopolistic position in the market, the unlawful restriction of competition, and unfair competition.” A separate provision in the same Article declares that “the State protects the rights of consumers.” According to the Competition Law’s Preamble, its objective is to “establish the legal fundamentals for support and protection of economic competition and the restriction of monopoly,” and thus “to assure effective operation of the economy on the basis of development of competitive relations.” Article 1 of the Law defines “economic competition” as a state of “rivalry between business entities” such that no one firm can dictate market conditions and that both consumers and businesses have a choice among sellers and purchasers.

The substantive prohibitions in the Competition Law are grouped into five categories, directed to: (1) concerted actions, (2) abuse of dominance, (3) concentrations, (4) certain “restricting and discriminating” activities of business entities and associations, and (5) anticompetitive actions of government bodies.

2.1 Concerted Actions

The Competition Law treats concerted actions in Articles 5 through 11, and defines them to include agreements and “any other concerted competitive behaviour” by business entities, as well as decisions made by associations (Art. 5)². “Business entities” are defined broadly in Article 1 to include any legal entity or natural person that engages in commercial activity, as well as any government body to the extent that it engages in such activity³. “Associations” are any union of legal entities or natural persons. Labour unions are covered by the law to the extent that they engage in commercial activity⁴.

Article 6 contains the prohibition of anticompetitive concerted actions, which are “acts which have led or may lead to denial, elimination or restriction of competition.”⁵ As in Article 81 of the EU Treaty, Article 4 makes no distinction between horizontal and vertical conduct, but does include a non-exclusive list of anticompetitive practices that constitute potential violations. The list covers the five Article 81 provisions (using virtually identical language to specify price fixing, market division, restriction of outputs or inputs, discrimination between similarly situated parties, and tying) and adds bid rigging, boycotts and other conduct restraining market entry or exit, and actions designed to impede the competitive ability of other firms “without an objective basis.”

Articles 7, 8 and 9 create conditional exemptions from the prohibition in Article 6 to protect concerted actions of small and middle-size enterprises (“SMEs”), contracts concerning the supply and use of commodities, and agreements for the transfer of intellectual property rights⁶. The SME exemption in Article 7 is limited to agreements for the joint procurement of commodities that do not substantially restrict competition and that enhance the competitive ability of the participating firms. SMEs are defined to include firms whose sales or assets in the previous fiscal year do not exceed EUR 500,000.

Article 8 provides expressly that vertical “supply and use” agreements may lawfully include exclusive dealing, tying, and resale price clauses (including minimum resale price maintenance) unless the agreement leads to monopoly or a substantial restriction of competition, limits access to the market by other firms, or causes an “economically unsubstantiated” increase

in price or a deficit in the supply of a commodity. Transfers of intellectual property rights are more lightly limited by Article 9, which permits any restrictions or requirements that do not exceed the scope of the underlying right, including specifically limitations on output and sales territories and minimum production requirements.

In some circumstances, the Competition Law allows the AMC to permit conduct that would otherwise violate Article 6. Under Article 10, the Committee is empowered, upon application by interested parties, to issue individual exemptions that excuse the participants in the specified conduct from liability. The criteria under Article 10 for granting individual exemptions are similar, but not identical, to those established for the similar exemption in Article 81(3) of the EU law. The EU requires that the agreement lead to improvements in production or distribution, or to the promotion of technology or economic progress, while conferring a fair share of the benefits on consumers; yet not potentially eliminate competition in a significant part of the market or be more restrictive than necessary to achieve its beneficial objectives. Article 10 includes the requirement for improvement in production or distribution, or the promotion of technology, and the condition against elimination of competition, but says nothing about the consumers' share of benefits or less restrictive alternatives. Article 10 also expands and elaborates upon the range of acceptable justifications, listing the development of SMEs, optimisation of export or import trade, development and application of uniform standards, and "rationalisation" of production by the introduction of innovative operational methods.

In granting an Article 10 exemption, the AMC may impose conditions and requirements designed to eliminate or mitigate negative effects of the proposed conduct (Art. 31.2), and may either specify that the exemption is indefinite or establish a limited term, which ordinarily should not exceed five years. Article 10 also includes a provision (discussed later in this report) under which the Cabinet of Ministers of Ukraine may grant permission on public interest grounds for the applicants to engage in conduct that the AMC has refused to permit.

The Article 10 exemption system was congruent with EU procedures at the time that the Competition Law was enacted. The May 2004 changes in the EU's enforcement structure, however, eliminated case-specific exemptions under Article 81(3). The AMC considers that elimination of its individual exemption system would be premature at this time, given the relative inexperience of many business entities in Ukraine with the competition laws.⁷

Article 11 of the Competition Law creates the equivalent of the EU's block exemption system, providing that the AMC may issue "standard

requirements” for concerted actions covered by Articles 7 through 10. The AMC is empowered to declare that conduct in compliance with such standard requirements will be deemed lawful and that the participants need not apply for an individual Article 10 exemption.

The AMC has issued two block exemptions, one directed broadly to commercial agreements by business entities, the other directly more narrowly to the issues presented by formation of associations. The first, Regulation 27 (2002), covers concerted actions of all kinds, including arrangements involving firms with horizontal, vertical, and conglomerate relationships, or any combination thereof⁸. The basic exemptions are established in chapter 2 of the regulation, which provides that the *creation* of a new business entity or association is permitted in any case unless the aggregate sales or turnover of the participating entities exceed the standard threshold amounts specified in the regulation (section 2.1). Permission is required where the previous year’s aggregate worldwide asset value or turnover of all the participants exceeds EUR 12 million, and (1) at least two participants have a worldwide asset value or turnover that exceeds EUR one million each, and (2) the asset value or turnover in Ukraine of at least one participant exceeds EUR one million (section 2.3).

The introduction of concerted arrangements among *existing* business entities is permitted in any case where aggregate sales or turnover fall below the standard thresholds and the aggregate market share of the participating entities does not exceed 5 percent of the relevant market (section 2.1). If the aggregate sales or turnover criterion is met but the 5 percent aggregate market share is not, then the proposed concerted action may still be permitted, provided that the conditions in sections 2.2 and 2.4 are satisfied. Section 2.4 provides that the concerted action may not entail horizontal price fixing; horizontal or vertical allocation of markets, sellers or buyers; or horizontal or vertical *non-price* restrictions on sales or purchases to or from third parties. Notably, this formulation does not exclude vertical price fixing (including resale maintenance) from protection if the other requirements are met. The conditions set by Section 2.2 are that:

- none of the participants has a dominant position in the relevant market or any exclusive rights or authority granted to it by a government entity, natural monopoly, or other monopoly entity;
- in the case of a concerted action that entails any horizontal restraints, the aggregate market share of the participants is less than 15 percent; and
- in the case of a concerted action that does not entail horizontal restraints, the aggregate market share of the participants is less than 20 percent.

Where a participant in a concerted action is a member of a control group, Regulation 27 requires that all calculations of asset values, turnover, and market shares be based on the cumulative total for the entire group (section 4.2).

Chapter 3 of the Regulation provides that no permission is required for certain specialised concerted actions, including (1) creation or accession of members to a self-regulatory organisation in the securities market that operates in accordance with the requirements established by the State Commission for Securities and Stock Market; (2) creation of a partial joint venture among entities in a control relationship; (3) accession of members to an association the creation of which was previously permitted by the AMC; (4) creation of a business entity or association, provided that the commercial independence of the participants is not affected and that the action does not increase coordination or decrease competition among the participants; and (5) disaffiliation of entities participating in an association or commercial partnership.

With respect to vertical concerted actions, Regulation 27 is supplemented by the provisions in Article 8 of the Competition Law, exempting certain actions involving supply and use agreements. As described above, Article 8 protects vertical agreements affecting distribution of commodities without imposing any market share thresholds or limits on turnover or assets. At the same time, the scope of Article 8 is constrained by language that excludes agreements leading to a monopoly or a substantial restriction of competition, limiting access to the market by other firms, or causing an “economically unsubstantiated” increase in price or deficit in the supply of a commodity. Article 8 thus protects distribution agreements that fall outside the shelter of Regulation 27, but only if the agreements entail none of the forbidden effects. Conversely, where the firms participating in a vertical agreement meet all of the size, market share, and other conditions in sections 2.2, 2.3, and 2.4 of Regulation 27, the AMC presumes that agreement does not entail any of the effects forbidden under Article 8.

The second block exemption, Regulation 511 (2006), applies to the creation of associations where such concerted action is not otherwise automatically permitted by Regulation 27. Under this Regulation, associations are exempt from the requirement to obtain the AMC’s permission if the association’s organic documents contain appropriate provisions controlling the admission and expulsion of association members, the association’s scope of operations, and its involvement in the business activities of its members. Specifically, association membership must be open to all qualified business entities on a non-discriminatory basis, and members may not be expelled except for legitimate cause. The association itself may not engage in commercial activity, distribute profits to members,

or receive revenue through means other than donations and membership fees. Most importantly, the association must not attempt to exercise any “decisive influence” over the business activities of its members or seek to coordinate their competitive behaviour. The Regulation expressly bars coordinating action with respect to various subjects (including prices, production volumes, credit terms, allocation of customers or market territories, purchase of excess production, and appointment of joint sales agents) and provides an exclusive list of activities with respect to which coordination is permitted.

The system of exemptions established by Articles 7, 8, and 9 of the Competition Law and Regulations 27 and 511 is roughly similar to the exemptions in the EU system, but Ukraine employs different thresholds, excludes different forms of conduct from the scope of its exemptions, and articulates its regulations using generally less detailed language.⁹ The differences reflect both the distinctions in size and structure between the Ukrainian and EU economies, and the earlier evolutionary stage of Ukraine’s competition law regime. Where concerted action is protected by an EU block exemption that has no Ukrainian counterpart, the AMC’s policy is to consider carefully the applicability of the exemption’s rationale to the specific conduct and market circumstances at issue before taking any enforcement action. Business entities covered by an EU exemption who wish complete assurance of protection from prosecution by the AMC may apply for permission under Article 10 of the Competition Law. The AMC has recently completed a project to draft standard requirements for two block exemptions relating specifically to vertical distribution and to production specialisation agreements. Preparation of a draft regulation for technology transfer agreements is scheduled for 2008.

Discussion of the AMC’s enforcement experience over the past five years with respect to concerted actions appears below in separate parts, to distinguish horizontal and vertical actions. It may be noted here, however, that as a class, concerted actions represented about 4% of the AMC’s caseload from 2003 to 2007.

With respect to applications under Article 10 for permission to engage in concerted actions, the AMC resolved 355 such applications over the past five years¹⁰. About 70 percent of them involved horizontal actions, while the remaining 30 percent related to vertical practices. Of the 355 applications resolved, 303 were approved without conditions, 45 were approved with conditions, and 7 (all involving horizontal conduct) were rejected. Further information about the treatment of such applications appears below, likewise in separate parts to distinguish horizontal and vertical actions.

2.1.1 *Horizontal concerted actions*

As described in the previous section, some horizontal concerted actions are protected from prosecution by statutory exemptions, by individual exemptions issued by the AMC or the Cabinet of Ministers, or by block exemptions. Enforcement of Article 6 with respect to horizontal collusion is also affected by a 2005 amendment to the Competition Law that includes a special provision targeted to parallel actions. Under Article 6.3, similar conduct by business entities that restrains or can restrain competition may be deemed unlawful “where analysis of the situation in the relevant product market demonstrates that no objective reasons for such actions (or inactivity) exist.” The provision does not create a presumption that conscious parallelism entails concerted action, but does permit finding an infringement where economic analysis concludes that no reason other than collusion can explain the behaviour observed.

The AMC has employed Article 6.3 on 15 occasions during the two years since its enactment. For example, in 2005 the AMC examined a pattern of similar price increases by eight large sugar wholesalers. The cumulative market share of the eight companies was only about 27%, but the remainder of the market was highly fragmented, with no other firm holding more than a 1.5% share. The dynamics of supply and demand provided no explanation for the price increases initiated by the large wholesalers, and the other firms in the market had insufficient capacity to constrain the leaders. The AMC concluded that the price pattern could not be explained except as the result of concerted action, and fined the companies UAH 17.2 million (EUR 2.85 million)¹¹. The case is presently on appeal before the Supreme Economic Court.

For the years 2003 to 2007, horizontal violations represented about 70 percent of all AMC concerted action cases. Major categories of horizontal cases were price-fixing, market division, and restricting other business entities from access to the market. The principal market sectors affected included oil and other petroleum products, farm and food products (grain, flour, bread, and milk), telecommunication services, and certain types of minerals extracted by mining. Typical horizontal cases included a 2002 enforcement action against fourteen motor petrol and diesel fuel retailers in Kharkiv who had each ceded control over their retail prices to the same wholesaler. The participants were fined UAH 58,780 (EUR 9280). In 2002-2003, six major telecommunication operators agreed to set charges for international calls made over the Internet equal to the rates set by state tariffs for international calls over switched networks. The participants paid the fine imposed. In 2007, the AMC concluded an action against the members of the Wholesale Coal Market Association for establishing an agreement with 32 coal-mining companies whereby coal supply sources

were allocated among the wholesalers and a price schedule was set for sales of coal to energy-generating companies. Fines imposed in that case totalled UAH 914,500 (EUR 127,390).

Enforcement activity with respect to bid rigging has increased during the past few years. In 2005, the AMC prosecuted and fined five companies for collusive bidding on a land use project development in the Cherkassy region. The companies had submitted proposals differing from one another by exactly one hryvnia and had failed to provide any cost data to support the prices bid. More recently, in conjunction with statutory amendments assigning certain government procurement control functions to the AMC, the agency's activities in the bid rigging area have increased further. In 2007, two companies that bid on providing summer recreational services to children in Crimea were found to have made a side agreement stipulating that the winning bidder would hire the other as a sub-contractor on the project. Fines were imposed on both parties.

With respect to applications under Article 10 for permission to engage in horizontal concerted actions, in the past 5 years the AMC has rejected seven such applications (four in 2003, one in 2005, and two in 2007). In 2003, the AMCU refused to permit creation of an association to control fishing in the Khadjibeiski sector of the Black Sea on the grounds that the association intended to limit its membership to the fishing enterprises that participated in its creation.

The application rejected in 2005 involved an attempt to consolidate into a joint association all of the firms (each state-owned) involved in the maintenance and repair of "Antonov" airplanes manufactured in Ukraine. The proposed association did not constitute a concentration, and was therefore reviewed under the concerted actions application process. The Committee rejected the application because its practical effect would have been to eliminate all competition in the affected market. The Cabinet of Ministers subsequently granted permission for the association on public interest grounds, concluding that it would facilitate the development of technical repair expertise and thereby help make Antonov airplanes more competitive in the world market.

2.1.2 Vertical concerted actions

As with horizontal concerted actions, some vertical agreements are protected by exemptions. Indeed, the wider sweep of the statutory and block exemptions respecting vertical practices provides safe harbour to a large portion of vertical arrangements. Vertical cases represented about 30% of all AMC concerted action cases for the past five years. Major categories of vertical cases were price-fixing and actions restricting other business entities

from access to the market. The AMC has brought very few cases involving price discrimination or tying. The principal market sectors involved in vertical cases included food items, fuel, and certain raw materials for manufacturing.

Under Article 8 of the Competition Law, vertical price fixing is unlawful only if it leads to an “economically unsubstantiated price” or a deficit in the supply of the affected product. Further, as noted above, where the firms participating in a vertical agreement meet all of the size, market share, and other conditions in sections 2.2, 2.3, and 2.4 of Regulation 27, the AMC presumes that agreement does not entail any of the effects forbidden under Article 8. Consequently, even minimum resale price agreements are permitted if they either meet the conditions of Article 8 or fall within the protection of the block exemption. During the past five years, the AMC did not bring any cases against conventional resale price maintenance schemes employed by a manufacturer to prevent free-riding on retailer point-of-sale services. No such cases brought to the Committee’s attention involved the anticompetitive effects forbidden under Article 8. Nonetheless, more than half of the AMC’s vertical concerted action cases deal with price-fixing. A 2007 case involved an agreement between a bakery and a distributor that prevented the bakery from making direct sales to retailers at prices lower than those charged to retailers by the distributor. In this case, the distributor was also affiliated with a second bakery that competed with the first. The parties were penalised in the amount of UAH 8,500 (EUR 1,290).

With respect to cases against vertical restrictions that impair the market access of other business entities and restrict competition in the distribution of a product, examples include a recent prosecution involving agreements between Ukrgaz-Energo, a monopoly supplier of imported natural gas, and Naftogaz Ukrainy, the state-owned gas distributor. The agreements prohibited Naftogaz Ukrainy from re-selling gas purchased from Ukrgaz-Energo to any Ukrainian customers other than those on a list specified in the agreements. The AMC imposed a fine of UAH 600,000 (EUR 88,180).

A peculiar type of anticompetitive vertical practice in Ukraine involves a manufacturer purchasing an input from an upstream supplier at a deliberately inflated price. Typically, this occurs where the manufacturer is a monopolist subject to tariff regulation based on costs plus a fixed-percentage profit margin. The inflated input cost can be passed directly through to consumers and the manufacturer enjoys higher profits. For example, in 2003, “Sumy-TEKO,” the only central heating system operator in Shostka (Sumy Region), concluded a natural gas supply agreement with “Sumygazbud” at a price that was significantly higher than that charged by other gas suppliers. The consequence was higher tariff charges to industrial customers for heating and steam. Indeed, Sumy-Teko’s largest customer

bore a loss of approximately UAH 755,000 (EUR 125,920). The AMC prosecuted Sumygazbud for concluding an anticompetitive vertical agreement with Sumy-Teko and prosecuted Sumy-Teko's inflated charges to its customers as an abuse of dominance. Sumy-Teko reduced future tariff charges to compensate for the damages that its conduct had inflicted.

With respect to applications under Article 10 for permission to engage in concerted actions, about 30 percent of the 354 applications resolved by the AMC over the past five years related to vertical practices. All such applications were approved without conditions.

2.2 Abuse of Dominance

Liability for unlawful abuse of dominance necessarily requires that a business entity hold a dominant position in a relevant market. Article 12.1 defines dominance as a position held by a firm such that it either (1) is the only firm in the market, or (2) faces insignificant competition because it enjoys special privileges or because other firms are constrained by entry barriers, unavailability of inputs or distribution systems, or other factors. The law establishes a rebuttable presumption that a firm with a market share exceeding 35 percent is dominant (Art. 12.2). Rebuttal is accomplished if the firm proves that it in fact experiences substantial competition. Firms with market shares at or below 35 per cent may also be deemed dominant if they do not face significant competition, especially where other competing firms in the same market are small (Art. 12.3).

By comparison, Article 82 of the EU law does not contain an express definition of dominance or presumptions concerning it. In EU practice, a rebuttable presumption ordinarily sets in for market shares ranging from 40 to 50 per cent. Ukraine's divergence from the EU approach reflects the fact that Article 12 borrows heavily from Article 19 of the German Competition Law, which establishes a presumption of dominance where a firm has a third of the market.

EU law also applies to joint dominance, but again establishes no definitions or presumptions. Article 12.4 of Ukraine's Competition Law provides that two or more firms are jointly dominant (and, consequently, that each is considered individually dominant) if (1) they engage in no substantial competition between themselves in a given market, and (2) one of the two conditions in Article 12.1 obtains (that is, there are no other firms in the market besides the dominant group, or any other competition in the market is insignificant). A rebuttable presumption of joint dominance is established by Article 12.5 where either the market share of the three (or fewer) largest firms exceeds 50 percent or the share of the five (or fewer) largest firms exceeds 70 percent. The counterpart provision in the German

Law sets the same two presumptions at one-half and two-thirds of the market, respectively. The joint dominance presumptions in Article 12.5 are rebuttable if the firms disprove the existence of the elements of Article 12.4, which in practical effect requires a showing that (1) there is substantial competition between the allegedly dominant firms in the relevant market, and (2) there are other firms in the market that offer significant competition to the firms in the allegedly dominant group.

Article 13.3 prohibits abuse of dominance and Article 13.1 defines it (using the same language employed in Article 6 for concerted actions) as any conduct “which has led or may lead to denial, elimination or restriction of competition.” A further clause, added in 2005, extends the list of actual or potential qualifying consequences to include the “infringement of interests of other business entities or consumers that would be impossible in a market with substantial competition.” This clause is designed to cover situations where the absence of alternative suppliers or customers leaves business firms or consumers dependent upon, and thus vulnerable to exploitation by, the dominant firm.

Like EU Article 82, Article 13.2 provides a non-exclusive list of activities deemed to constitute abuse. Four of the seven clauses refer to the four items found in the EU list (imposing unfair prices or conditions; limiting production, distribution or technological development; discrimination; and tying), although the language used in some clauses is different. Thus, the Competition Law refers not to “unfair” prices but to prices that “would be impossible to sustain in a substantially competitive market;” and not to limitations prejudicial “to consumers,” but to limitations prejudicial “to business entities or consumers.”

The alteration of the price clause in Article 13.2 to cover only prices “impossible to sustain in a competitive market” excludes predatory pricing, the sustainability of which does not necessarily depend on market competitiveness. This does not, however, create a gap in Ukraine’s law, because predatory pricing can be addressed under one of the three additional abuse of dominance clauses that have been added. Specifically, predatory prices may fall under the clauses covering conduct that (1) substantially restricts the competitive capacity of another business entity without an objective justification, or (2) creates market entry or exit barriers or eliminates a business entity from a market. The third additional clause, covering refusals to deal in circumstances where alternative sources or outlets are unavailable, covers exclusive dealing arrangements.

There are no block exemptions or other provisions that protect abusive conduct by a dominant firm. The AMC has issued two regulations that are relevant in applying the abuse of dominance provisions (and in other

contexts as well). The first, Regulation No. 49 (2002), provides practical guidance on how to determine whether the statutory elements of a dominant or jointly dominant position, as defined in Article 12, exist in a particular market. The second, Regulation No. 24 (2004) provides guidelines on defining a relevant market. The analytic method presented for defining markets reflects conventional market definition theory and comports with the EU's approach¹².

Abuse of dominance cases represented about 50 percent of the AMC's caseload from 2003 to 2007, and constituted the single largest class of violations. Major categories included abusively high prices (58%) and price discrimination (11%). Another seven percent involved monopolists who also operated in contiguous downstream markets that were competitive or potentially competitive and who sought to prevent entry in those markets by denying access to essential network facilities. Many cases arose in monopolistic infrastructure sectors such as gas and energy distribution, central heating and water supply, rail transport, landline telecommunications, and fee-based services provided by government bodies. There were no predatory pricing cases during the past five years.

As noted, the Competition Law contemplates that a dominant market position can be held by a single firm or by several firms jointly. More than 95 percent of all dominance cases brought by the AMC involved single firm dominance. Examples of single-firm abusive pricing cases during the 2003-2007 period include a 2003 action against glass manufacturer "Proletariy," a dominant firm in the market for polished glass. Proletariy increased its price more than 11%, with the result that company profits increased from 47 percent of revenues to 66 percent. This margin exceeded average profitability in the sheet glass market by nearly 200 percent, and profitability in the glass industry generally by nearly 40 percent. Also in 2007, the AMC fined Ukrtatnafta UAH 500,000 (EUR 73,170) for improperly increasing the domestic price for aviation fuel. The firm, a monopoly supplier to the domestic market, charged Ukrainian customers UAH 400 more per ton of fuel than it charged to customers in competitive export markets. In a 2005 pricing case, the Western Union Company, in response to AMC recommendations, decreased the prices charged for money transfers inbound to Ukraine from Spain, Italy, Portugal, Poland, and the Czech Republic by amounts ranging from 60 to 80.4 per cent of the previous charge.

The prevailing view in fully-developed competitive economies is that prosecuting a dominant firm merely for charging monopolistic prices is usually unwise, because it constitutes punishing a firm for the rational exercise of market power. Moreover, inefficient monopolists that set high charges are especially likely to attract new entrants. Thus, the EU's

competition authorities do not normally prosecute dominant firms for charging “high” prices, even though Article 82 expressly mentions “unfair” selling prices as an example of abuse. The AMC believes that economic conditions in Ukraine provide sound reasons for devoting enforcement attention to abusively high prices by dominant firms. Where natural monopolies and fee-paid state services are involved, there is no prospect that entry will occur to undercut high prices, and existing tariff control systems do not yet work well enough to resolve the problem. In other markets, such as those for foodstuffs, entry may eventually occur, but high prices for commodities like bread cannot be sustained politically for the period of time that would be required. In yet other sectors, the Ukrainian capital investment market does not function with sufficient efficiency to support new entry.

A significant number of AMC dominance cases against single firms over the past five years have involved business entities (often state-owned) that are natural monopolies subject to tariff regulation. The AMC has found that such firms frequently charge the tariff price for services without meeting the quality or quantity terms specified by the tariff. The Committee considers such conduct to be unlawful under Article 13 because it impairs the interests of customers in a way that would be impossible in a competitive market. For example, in 2003, the AMC found that the central heating enterprise in Kharkiv did not maintain the required heat transfer temperature in its system, but nonetheless charged the full service price. Similarly, the water-and-sewage enterprise in Kerch (Crimea) supplied water only intermittently, but also charged full price. In cases like these, the AMC recommends that the overcharge amounts be returned to affected consumers by reducing future tariff charges. For the five year period, the total amount of compensation paid through such settlements in utility cases was UAH 180.4 million (EUR 27.9 million).

Besides cases involving firms that failed to supply the quantity or quality of service specified in the applicable tariff, the AMC has also filed abuse of dominance cases involving monopoly entities that distorted the tariff formulation process by including illegitimate charges in the tariff cost basis. For example, in 2004, the AMC charged that the L’viv Regional Administration of Land Management had unlawfully included value-added tax in the tariff basis for its services in providing documentation to confirm land ownership. Similarly, in 2007, the AMC charged that the Kakhovskiy General Supply Channel, a supplier of water services, improperly included in its costs a set of expenses that had been previously reimbursed with government funds.

Other Article 13 cases have entailed more conventional types of exclusionary conduct. A refusal to deal case involved the firm

"Hostmaster," which is the sole accredited Internet domain name registrar in Ukraine and thereby holds a monopoly position in the market for the administration and technical support of the Internet domains "UA" and "COM.UA." Hostmaster refused to contract with another firm that wished to compete in offering domain administration and technical support. The AMC required that such contracts be permitted. Anticompetitive refusals of access to essential facilities were also detected and terminated by the AMC in various energy markets. In Kyiv city, for example, the enterprise Kyivenergo owns the electricity distribution network and also sells electric power at non-tariffed prices in competition with other electric energy producers. In 2006, Kyivenergo refused to contract with other producers for delivery of electricity over its network. It subsequently reversed that position at the AMC's recommendation.

An AMC case involving unjustified contract provisions was brought against Ukgasenergo, a monopolist in the natural gas market. The firm had formed gas supply agreements with metallurgy plants that prohibited any resale of the gas, permitted termination of the contracts without adequate advance notice, and imposed a penalty payable to Ukgasenergo if the customer obstructed an audit by a state agency. The AMC concluded that these provisions impaired the customers' competitive posture without any justification. Ukgasenergo complied with the AMC's recommendation that the clauses be eliminated.

A tying case was brought in 2006 against the European Consulting Agency, which held a monopoly position in providing government procurement information on the Internet. The AMC charged that the firm offered access to the information only in the form of contracts that entailed fees for other services, and imposed a fine of UAH100,000 (EUR 15,650). Again in 2007, the same firm was charged with employing its dominant position to impede creation of an alternative system for Internet access to procurement information and was fined UAH 875,000 (EUR 126,000).

The AMC's legal capacity to address abuse by a dominant firm extends beyond the usual authority to impose fines and order alterations in conduct. Under Article 53 of the Competition Law, the Committee may also direct compulsory division of the firm, provided that (1) separation of the entity along structural or territorial lines is practicable and (2) there are no tight technological links between the firm's subsidiary units that involve intra-firm purchases of more than 30 per cent of a subsidiary's output. The AMC has not employed Article 53 during the previous five years¹³.

Turning to the AMC's enforcement experience with respect to joint dominance, less than 5 percent of dominance cases involve multiple defendants. This reflects the fact that the definition of joint dominance

under Article 12 applies only where the members of the allegedly dominant group engage in no substantial competition among themselves, and where there either are no other firms in the market besides the dominant group, or any other competition in the market is insignificant. Most joint dominance cases focus on abusively high prices charged by firms in tight oligopoly markets where the product is homogeneous and non-price competition is insignificant. For example, in 2007, the AMC brought a joint dominance case against the two firms that provided aviation fuel to airlines at Kyiv's Boryspil airport. The two firms held an aggregate 99 percent market share and priced their fuel products identically at levels that the AMC found could not be sustained in a competitive market. The Committee imposed fines totalling UAH 150,000 (EUR 20,830).

In some circumstances, the AMC will charge both collusion and joint dominance in the same case, as it did in a 2003 proceeding against "Sentosa" and "Avias," two retail gasoline chains in the Dnipropetrovsk region. The combined market shares for the two firms ranged above 50 per cent for various retail products, while the shares of the other firms in the market were comparatively small. The investigation showed that the two firms had charged identical prices and made price changes simultaneously (within an hour of each other), although they had not used the same suppliers and had different costs. At the same time, the prices charged by other competing firms in the same market varied both in amount and in the time and frequency of price changes. It was further determined that the firms had contracted to transfer fuel to one another for retail sale and to allow cross-utilisation of charge cards by their customers. The Committee found both collusion and joint abuse of dominance and fined the firms UAH 98 million (EUR 16 million). At the time, this was (and still is) the largest fine imposed in the AMC's history.

The AMC's decision was appealed to the economic courts. In the first round, both the court of first instance and the appeals court focused on the formal contractual agreements between the firms and held that the evidence of collusion was insufficient. The Supreme Economic Court remanded for additional proceedings, but the first instance court again reached the same conclusion. The AMC was finally able to persuade the appeals court that collusion could be shown by the conduct of the parties, without regard to the terms of the contract, and that there was no plausible explanation other than collusion for the simultaneous price increases. Both the appeals court and the Supreme Economic Court ultimately concluded that the defendants had engaged in both unlawful collusion and abuse of a jointly dominant position. The courts affirmed the imposition of penalties totalling 80 million, but the AMC's subsequent collection attempts were thwarted by the bankruptcies of both defendants.

2.3 Concentrations

The Competition Law establishes an advance application system for concentrations that satisfy the threshold filing requirements. Prior to obtaining permission from the AMC, parties to a covered concentration are prohibited from consummating the transaction or taking any action that could restrict competition between the parties or prevent restoration of their previous independent positions (Art. 24.5)¹⁴.

A concentration is defined by Article 22 to include:

- a merger or affiliation of business entities;
- acquisition of control over a business entity, including through (a) purchase or management of the target entity's assets, or (b) election or appointment of the chairman, deputy chairman, or more than half of the members of the target entity's supervisory board, such that the same individuals hold equivalent positions in both the target entity and a different entity;
- establishment of a full-function joint venture; and
- acquisition of 25 or 50 percent of the stock in the target entity¹⁵.

The filing thresholds, established in Article 24, apply if either

- the previous year's aggregate worldwide asset value or turnover of the participants exceeded EUR 12 million, and (a) at least two participants had a worldwide asset value or turnover of over EUR one million each, and (b) the asset value or turnover in Ukraine of at least one participant exceeded EUR one million; or
- the individual or aggregate market share of the participants in either the affected market or an adjoining market exceeds 35 per cent.

Article 24 also imposes the important requirement that, where a participant is a member of a control group, then all calculations of asset value, turnover, and market share must be based on the cumulative total for the entire group. Under Article 23, the "participants" in a concentration include the entities involved in the transaction and any natural persons and legal entities linked to them by control relationships, as defined in Article 1 of the Competition Law. Article 1, in turn, defines "control" comprehensively to mean "decisive influence" exercised directly or indirectly over an entity by one or more "associated" natural or legal persons¹⁶.

Competition law practitioners and the business community in Ukraine are highly critical of the notification thresholds on the grounds that they do not require a sufficient local nexus with Ukraine and do not effectively focus

on transactions likely to pose competitive concerns. Critics assert that all of the monetary levels set for assets and turnover are too low, and should be increased substantially (one recommended a 500% increase). Many complaints are also directed to the clause dealing with assets and turnover in Ukraine, on two grounds. The first is that the clause applies to either the acquiring or the acquired entity, and therefore captures transactions in which the acquired entity has no Ukrainian presence at all. The second is that, in an acquisition of a Ukrainian subsidiary operation, the assets and turnover of the subsidiary's entire control group are counted toward the threshold, rather than only those of the subsidiary being acquired. Finally, the clause establishing the market share test is criticised because it obliges applicants to develop a necessarily subjective definition of the relevant market. At present, the AMC's response to these complaints involves evaluation of proposals to increase the threshold amounts in Article 24.1.

Applications for approval of concentrations are evaluated according to the standard established in Article 25 of the Competition Law, which provides that permission shall be granted if such approval "does not lead to monopolisation or to substantial restriction of competition in the whole market or in a considerable part thereof." This test aligns with the EU's standard, as reflected in the merger regulation (No. 139/2004) adopted in May 2004. The EU prohibits mergers or acquisitions that "would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position" (Art. 2(3)). Unlike the EU law, however, the Competition Law establishes market share presumptions for dominance, and the AMC employs these presumptions in assessing concentrations¹⁷. This means that merger analysis in Ukraine focuses heavily on determining whether a proposed transaction will create "structural preconditions" for monopolisation. Thus, if a merged entity's market share will exceed 35 percent, the AMC refers to the definition of market dominance in Article 12.2 and presumes that unlawful dominance will result unless the acquiring party demonstrates that it will face substantial competition in the post-merger market sufficient to avoid rejection under Article 25¹⁸.

Although Article 25 refers both to monopolisation and to the substantial restriction of competition as bases for rejecting proposed concentrations, the AMC's analysis is limited primarily to assessing the risk of anticompetitive unilateral effects arising from dominance. The Committee regards the task of proving a substantial restriction of competition in the form of horizontal coordinated effects to be highly problematic. Also, the AMC construes the evaluation standard in Article 25 to forestall arguments claiming that an otherwise anticompetitive concentration should be approved because of its efficiency benefits or because the target is a failing firm. As in the case of

Article 10 with respect to concerted actions, Article 25 includes a provision under which the Council of Ministers of Ukraine may grant permission on public interest grounds to consummate a concentration that the AMC has refused to allow. Applicants who wish to assert efficiency and failing firm defences must therefore do so by petitioning the Cabinet of Ministers.

As noted previously, the AMC has issued guidelines on defining a relevant market (Regulation No. 24 (2004)) and for determining the existence of a dominant position (Regulation No. 49 (2002)), which include instructions on calculating market shares and concentration ratios. The AMC has not, however, issued merger guidelines explaining its method of analysing applications to permit concentrations. This is another point of criticism among practitioners, who also note that the AMC's merger decisions contain scant analytic explication and, even as to market definition, do little more than describe the market that the AMC has employed.

An AMC decision on the merits of a concentration may deny approval, grant approval without conditions, or impose conditions (including divestiture of structural elements). The decision may also require coordination or modification of the constituent documents establishing partnerships and associations (Art. 31).

The application procedure for concentrations meeting the filing thresholds is fully applicable under the Competition Law to privatisation proceedings. Ukraine's privatisation regulations specify that participants in an open bidding privatisation proceeding must submit an Article 26 application to the AMC not later than 8 days before the deadline for submission of bids.

The following table summarises the AMC's concentration review activity over the past five years. The data for structural conditions refer to orders requiring some form of divestiture, while the data for conduct conditions refer to orders restricting the post-merger conduct of the acquiring party.

Table 1. Applications to Permit Concentrations¹⁹

Year	Applications examined	Permitted without conditions	Permitted with conditions		Prohibited
			Structure	Conduct	
2007	723	715	0	4	4
2006	507	500	0	5	2
2005	359	352	0	6	1
2004	421	419	0	0	2
2003	329	326	0	3	0
Total	2339	2312	0	18	9

As shown in the table, the AMC resolved 2339 permit applications from 2003 to 2005 and approved 98.8% of them without conditions²⁰. No structural conditions were imposed in any of the cases, and conduct restrictions were employed in less than one percent of the determinations made. Proposed merger applications were rejected in nine cases (less than 0.5 percent of all applications examined).

In 2004, the AMC blocked the merger of two construction firms in Kyiv that had an aggregate share of 100 percent in the market for concrete panel construction. Each of the firms had a separate market share greater than 35 percent, and the Committee found that high entry barriers associated with capital investment requirements and the need for on-site specialised equipment and technical expertise made competition from a third party unlikely. In the same year, AMC refused to permit an acquisition by Sarmat, the third-largest beer brewing enterprise in Ukraine, of controlling shares in Obolon, the fourth-largest brewery. The market was a tight oligopoly with a four-firm concentration ratio exceeding 90 percent, and the AMC concluded that competition could be substantially impaired even though the aggregate share of the merged entity fell below 35 percent.

A concentration stopped in 2007 involved a vertical merger between a group of local natural monopoly providers of heat and water supply and a municipal agency that held a monopoly over management of housing facilities in the town of Slavuta (Khmelnitsky region). Permitting the merger would have constrained the availability of vital inputs and thus created a barrier to entry by a competing entity in the market for housing facility management.

Three of the nine mergers rejected by the AMC involved attempts to consolidate all of the state-owned firms operating in a particular market. In each of the three cases, the Cabinet of Ministers subsequently exercised its authority to permit the proposed consolidation on public interest grounds. In

2006, the Committee blocked the creation of State Corporation “Ukrmorport,” which was to consist of all 20 state-owned commercial seaports in Ukraine. The state-owned ports, which competed both among themselves and with Ukraine’s private sector ports, held an aggregate share of 40 percent in the national market for port mooring and cargo handling services, and thus met the structural preconditions for market dominance. The Cabinet of Ministers permitted the consolidation with the expectation that, by acting jointly, the firms could more effectively modernise by upgrading their cargo handling equipment and improving technical expertise. Such improvements were expected to increase the competitiveness of Ukrainian seaports, attract more cargo, and stimulate creation and preservation of jobs in the affected regions. A year later, however, the Cabinet revoked the approval, concluding that its previous decision had been improvident.

In 2007, the Committee revisited the integration of all the firms (each state-owned) engaged in maintenance and repair of “Antonov” airplanes. As described previously, in 2005 the AMC had rejected a concerted actions proposal to create an “association” for the firms. The Cabinet of Ministers had subsequently permitted formation of the association on the grounds that it would facilitate the development of technical repair expertise in a way that would make Antonov airplanes more competitive in the world market. The expected benefits were not realised, however, and the firms therefore sought full integration into the State Aircraft Manufacturing Concern “Ukraine Aviation.” Again, the AMC rejected the proposal because it would create a monopoly, and the Cabinet again permitted the transaction for the same public interest reasons it had cited previously.

The AMC also rejected in 2007 a proposal to create the State Concern “Ukrtoif,” which would have combined all nine state enterprises operating in the market for production of peat. The aggregate market share of the participating enterprises was 90 percent. The Cabinet subsequently permitted the merger so that the firms could share financial resources for technical re-equipment, expansion of capacity, and land re-cultivation.

Although the table shows that no structural conditions were imposed during the years 2003 to 2007, this is because the data reflect only provisions contained in final permit application decisions issued by the AMC. In five cases during the period, acquiring firms agreed to implement divestitures ahead of the AMC’s decision permitting the underlying transaction. Conduct conditions were imposed in 20 cases (about half of them in privatisation proceedings), typically in situations involving vertical acquisitions of critical inputs or distribution channels. The conditions were designed to assure that competitors of the acquiring firm could maintain access to necessary goods or resources. For example, the transportation

company "Ukrmetallurgtrans," in conjunction with its acquisition of a mining facility, was required in 2003 to offer other mining enterprises a non-discriminatory standard contract for the transportation of raw materials used for mining and smelting. Most applications were approved without conditions, such as the 2007 application by the shipbuilding and ship repair enterprise "Khersonski" to acquire the ship repair firm "Chernomorskii." The AMC found that substantial competition existed in both the shipbuilding and ship repair markets, and approved the merger because the market share of the merged entity was not significant in either market.

Over the past five years, the AMC examined about 120 permit applications involving privatisation concentrations. Conditions were imposed in several cases, but most were approved without caveats. For example, in 2007 the AMC examined the proposed acquisition by the firm "Silikon" of a controlling interest in the state-owned enterprise "Zavod napivprovodnikiv." Silikon, which is principally involved in the production and sale of silica monocrystal alloyed in the form of cake, exports all of its output. The AMC determined that Zavod's facilities could be used to produce silica monocrystal cake but had been leased in recent years for other purposes. Finding no prospect of market dominance, the Committee approved the transaction.

2.4 *Restricting and Discriminating Activities*

Section IV of the Competition Law contains four miscellaneous articles (Articles 18 to 21) that are based in large part on Sections 20 and 21 of the German Competition Law. Although all of the articles deal with unilateral conduct, they do not replicate the abuse of dominance provisions in Articles 12 and 13 because they do not require a showing of market dominance to establish a violation.

Under Article 18.1, business entities and associations are prohibited from **inducing** other entities to violate the competition laws or to aid and abet such violations, while Article 18.2 prohibits **coercing** other entities to engage in concerted acts or concentrations against their will. The language in the German counterpart provisions (Sections 21.2 and 21.3) suggests that "inducing" includes promising or granting advantages, while "coercing" includes threatening or causing harm, and this is the interpretation that the AMC has also adopted²¹.

Article 19.1 is directed to business entities that have received permission from the AMC under Article 10 to engage in concerted actions otherwise prohibited by Article 6, or that are engaged in concerted activities protected by Articles 7 (SMEs), 8 (supply and use contracts), or 9 (transfers of intellectual property rights). Such firms are prohibited (in language much

like that in Germany's Section 20.1) from restricting the participation of other business entities in commercial activities ordinarily open to them, or from treating some business differently than others without an objective justification.

Article 19.2, the only provision in Section IV without a German counterpart, is directed at business entities that have been granted permission by the Cabinet of Ministers to engage in concerted activities that the AMC refused to permit under Article 10. Such firms are prohibited, without regard to whether they hold a dominant position in the relevant market, from engaging in conduct that would constitute an abuse of dominance under Article 13.

Article 19.3, like Article 19.1, is directed to business entities that have received permission for concerted activity under Article 10 or that are operating within the scope of Articles 7, 8 and 9. In language similar to Germany's Article 20.3, such firms are prohibited from inducing other business entities to grant unjustified advantages to any other business entity²².

Article 19.4 is based on Article 20.2 of the German Law and applies the prohibitions of Articles 19.1 and 19.3 to any business entity upon which SMEs purchasers are "dependent" for the supply or delivery of commodities. The Article also specifies that a SME seller is deemed to be dependent on a buyer if the buyer receives special discounts not accorded to other buyers.

Article 20 deals with market circumstances similar to those addressed by Germany's Section 20.4, in that both provisions focus on constraining the conduct of business entities that have "significantly more market power" than the SMEs they face as competitors. The German provision is worded to protect the SMEs from pricing below cost, while Ukraine's Article 20 protects SMEs generally from any conduct obstructing their economic activity, and particularly from any conduct violating Articles 19.1 and 19.3.

Finally, Article 21.1, like Article 20.6 in Germany, prohibits associations from refusing to admit a firm to membership without justification, if such a denial places the firm at a competitive disadvantage. The prohibition applies to non-profit associations that are organised to unite all firms in a certain market or territory, and whose creation and operations do not otherwise lead to unlawful concentration or concerted activity (Art. 21.2).

Only seven cases under these four Articles were concluded from 2003 to 2007, representing less than one percent of all AMC violation cases. Six of the cases involved the inducement provisions in Article 18, while one

entailed discriminatory association conduct under Article 21. In 2004, for example, the AMC applied Article 18 to the activities of the Ukrainian Cooperation Workers Union in Mykolayiv, which operated an ancillary commercial enterprise providing Xerox copying services. The Union circulated a letter to other copying service firms in the area, proposing a simultaneous price increase and asserting that most other companies intended to comply. The letter was followed by phone calls from the Union reminding other firms about the date set for the increase to take effect. The AMC charged the Union with a violation of Article 18.1 for inducing other entities to infringe the competition laws, and assessed a penalty.

In 2005, a heat supply services enterprise in Donetsk entered an agreement with the Donetsk Bureau of Engineering Inventory according to which the Bureau would refuse to provide documents confirming land titles to persons who had outstanding debts to the heating enterprise. Since the Bureau was the only entity lawfully enabled to provide confirmation of land titles, its participation in the agreement was considered to be an unlawful abuse of dominance. The action of heat supplier in arranging the contract was prosecuted as an inducement under Article 18, and a penalty was assessed.

The AMC notes that the absence of cases under Articles 19 and 20 arises principally from the restricted circumstances in which those provisions apply. In particular, as the AMC construes Article 19.4, an abuse of economic dependence case against a purchaser can be pursued only in circumstances where the SME seller has given special discounts to the purchaser that are not accorded to other purchasers. The AMC is considering the possibility of amending Article 19.4 to specify that economic dependence may be found wherever a firm has no reasonable prospect of resorting to other enterprises for any necessary commodity or service.

2.5 *Anticompetitive Actions of Government Bodies*

The three articles in Section III of the Competition Law (Articles 15, 16, and 17) vest the AMC with extraordinary authority to control anti-competitive behaviour by government agencies. The statutory prohibitions apply to “bodies of power, bodies of local self-government, and bodies of administrative management and control.” As defined in Article 1, “bodies of power and bodies of local self government” include virtually every government entity in Ukraine’s executive branch below the highest organs of power. The ministries, bodies regulating natural monopolies, privatisation bodies, and the Supreme Council of the Autonomous Republic of Crimea are all covered. Falling outside the AMC’s law enforcement

scope are such entities as the Parliament, the President, the Cabinet of Ministers, the courts, the National Bank of Ukraine, and the Public Prosecutor²³.

Under Article 15, government bodies are prohibited from taking any action (whether by entering agreements, declining to act, or issuing orders, regulations, or instructions) where such acts “have led or may lead to denial, elimination or distortion of competition.” Article 15.2 provides a non-exhaustive list of anticompetitive conduct by government agencies, including actions that

- obstruct the formation of new business entities or restrict commercial activity in particular markets;
- coerce firms to join associations, participate in sectoral or regional communities, or undertake concerted actions or concentrations in other forms;
- coerce firms to enter priority contracts, or favour certain buyers or sellers with high priority purchases or sales;
- attempt to centralise distribution of commodities or to divide and allocate markets by commodity, territory, or customer class;
- prohibit (or impose volume restrictions on) the sale of commodities across regional lines;
- grant benefits or other advantages that favour a firm or group of firms over others, such that competition is restricted or distorted;
- place one firm at a disadvantage in competing with other firms; or
- restrict the independence of business entities, other than as provided by law, in determining such matters as prices, profit distribution, purchases and sales of commodities, and future business plans.

The prohibitions in Article 15 are supplemented by Articles 16 and 17. The former bars government agencies from delegating their authority to business entities, associations, or other enterprises if such action leads or may lead to the denial or distortion of competition. The latter forbids acts or omissions by government agencies that induce other bodies, business entities, or officials to violate the competition laws or to facilitate or legitimise such violations.

Article 15 is a powerful weapon. If a government agency issues an anticompetitive regulation or decision, the AMC may commence a case and thereafter issue an order requiring the agency to rescind or alter the

regulation or decision and terminate any agreements with outside parties made pursuant to it

During the past five years, cases under Articles 15 to 17 represented about 22 percent of the AMC's caseload, the second largest category after abuse of dominance. The two most common forms of violation were granting benefits to business entities that advantaged them over other firms (Art. 15.2(6)) and inducing or legitimising violations of the competition laws (Art. 17). From year to year, those two categories represented from 40 to 50 percent of all violations by government bodies. Restricting the independence of business entities (Art. 15.2(8)) and imposing unfavourably discriminatory conditions on an entity (Art. 15.2(7)) each represented about 12 percent of violations. The general prohibition in Article 15.1 against government actions that may eliminate or distort competition accounted for another 15 percent of violations.

Violations under Article 15.2(6), involving government benefits that advantage certain firms, fall into two sub-categories. The first entails direct grant of benefits such as tax relief or reduced fees²⁴, while the second arises from conferring special or exclusive rights. A case example of the first type is a 2003 decision by the Ternopil local self-government to establish a user fee for exterior advertising sites that was twice as high for advertisers from outside the Ternopil region than for those located within it. An example of the second type is a 2003 joint decision by Ministries of Transport and of Public Health to adopt a regulation requiring consignors of foodstuffs and food raw materials to pay for the disinfection of empty rail carriages that were provided for transportations of such freight. The regulation specified that only a limited number of enterprises were permitted to conduct disinfection operations, despite the availability of a large number of experienced operators. The AMC recommended that the regulation be modified to permit disinfection by any enterprise that met applicable normative requirements.

Cases under Article 17, involving "legitimation" of competition law violations, arise most frequently in the context of approvals by local self-government bodies of illegitimately high tariffs for utility services. Many municipal governments have authority to control the tariffs of local monopoly enterprises such as heat supply and water and sewerage services. Approval of tariffs distorted by improper cost accounting enables monopoly enterprises to abuse their dominant position and improperly legitimises a violation. Thus, in 2003, the AMC charged the Odessa city council with approval of water supply tariffs that included overestimated costs for system water losses. The city appealed to the courts, but the AMC's decision was upheld.

Unlawful government interference with the independence of business entities under Article 15.2(8) typically involves attempts to control business sales activities. Thus, in 2003, during a price crisis for grain products, government bodies in several regions and in the Autonomous Republic of Crimea issued regulations designed to restrict or prohibit sales of grain to purchasers outside the region. The AMC recommended the rescission of such anti-competitive restrictions.

Government actions disfavouring a business entity in violation of Article 15.2(7) have arisen in a variety of contexts. In 2005, the National Energy Regulation Commission approved a proposal by the national association of electric energy generating companies that favoured companies using anthracite coal to produce power. Such firms were given preference in selling power to the national energy grid, in contrast to firms that used other fuels to generate power. Four of the five producers in the association were state-owned entities that used anthracite coal. The fifth firm was a private enterprise that used gasified coal for production. The AMC obliged the Energy Commission to terminate the preference.

2.6 *Unfair Competition*

The Law on Protection against Unfair Competition, which became effective January 1, 1997, contains a revised and expanded version of the unfair competition prohibitions that appeared in Ukraine's original 1992 competition law. The Unfair Competition Law is intended to "establish, develop, and secure fair competition practices in commercial market activities." Article 1 defines unfair competition in general terms as actions "which contradict the rules, market, and other practices in business activity." The language is taken from the Paris Convention for the Protection of Industrial Property, to which Ukraine is a signatory²⁵.

Title 2 of the Unfair Competition Law deals principally with the unlawful exploitation by one business entity of another firm's reputation. Its first three articles (4 through 6), prohibit any person from improperly employing another firm's name, trademark, advertising materials, or similar identifier so as to cause confusion between the activities or products of the perpetrator and those of the other firm (Art. 4); removing the manufacturer's mark from a product and selling it under the perpetrator's mark (Art. 5); and causing confusion by copying the exterior appearance of another firm's product (Art. 6). The Title's final provision, in Article 7, bars comparative advertising unless the comparison made is supported by reliable, objective, and relevant facts.

The first seven of Title 3's eight articles deal with gaining an unlawful competitive advantage by (1) disseminating false, inaccurate, or incomplete

information that injures the reputation of another firm (Art. 8); (2) tying (Art. 9); (3) inducing third parties to boycott, terminate a contract with, or discriminate to the detriment of a competitor (Arts. 10 to 12); and (4) bribing a company's employee to interfere with the implementation of a contract between a competitor and the company, so as to disadvantage the competitor (Arts. 13 and 14). Title 3's final provision, in Article 15, provides that an unlawful competitive advantage over another firm can also be gained in consequence of violating a law other than the Unfair Competition Law. An Article 15 case may be brought only where there is a predicate finding of liability by the authority responsible for enforcing the other law.

Title 4 focuses on protection of commercial secrets. The first three articles prohibit the illicit acquisition (Art. 16), unauthorised disclosure (Art. 17), or inducement to improper disclosure (Art. 18) of a commercial secret, where such acquisition or disclosure is or could be injurious to the company affected. The final provision, Article 19, forbids the unlawful use of a commercial secret in the course of business planning or production.

A final provision appears in Article 33 as part of the procedural provisions in Title 6 of the Law. Under that Article, business trade groups that develop a code of ethics must have the code approved by the AMC before implementing it. Failure to do so, however, is neither defined as an act of unfair competition nor subjected to any penalty.

During the past five years, unfair competition cases represented less than 3 percent of the AMC's total caseload. Most of the unfair competition violations (about 56 percent) involved creating confusion with respect to a competitor under Article 1 or the unlawful exploitation of another firm's reputation under Article 4, particularly by using another firm's mark or product packaging. The other two principal categories of cases involved gaining an unlawful advantage under Article 15 (20 percent) and making assertions discrediting a competitor under Article 8 (17 percent). Tying cases under Article 9 are rare (about 2 percent of cases), because most tying violations are committed by a dominant firm and the AMC prefers to address such conduct under Article 13 of the Competition Law.

A typical Article 1 case involved the marketing of dog and cat food by Bono-Ukraine, a subsidiary of the Czech firm KSK Bono. Bono-Ukraine's products were sold under the "Super Balance" brand name, but in packaging with colours closely similar to those used for packaging the well-known "Pedigree" and "Whiskas" brands marketed by Mars, Inc. The AMC concluded that the packaging could confuse purchasers and imposed a penalty of UAH 85,000 (EUR 12,143) on Bono-Ukraine and UAH 1700 (EUR 243) on KSK Bono. AMC cases during the past five years against the

improper use of trademarks under Article 4 involved such world-wide brands as Martini (2003), Mercedes-Benz (2003 and 2005), Pepsi (2003), Renault (2004), and Raffaello (2005).

In a 2006 case involving injury to the reputation of another firm under Article 8, the AMC charged that Imunogen-Ukraine LLC, a supplier of “Grippol” anti-flu vaccine, had sent letters to certain health protection bodies falsely discrediting Bereg-Servis, a rival supplier of the same product. Imunogen’s letters asserted that the Grippol vaccine imported into Ukraine by Bereg-Servis did not meet quality control standards and could threaten the life and health of consumers. An investigation showed that Imunogen did not have any substantiated grounds for such statements. Imunogen complied with the AMC’s recommendation that it recant the false information.

In an Article 15 case involving an unlawful competitive advantage gained by violating a law of than the Unfair Competition Law, the AMC imposed a penalty on “Slavia-Auto,” a firm which operated a regional passenger transportation service in the city of Zhytomyr. Slavia-Auto was advantaged over its competitors because, as found by the regional road transport authority, it had not obtained the license required to offer such commercial transportation services.

Based on its experience in enforcing the Unfair Competition Law, the AMC prepared a package of proposed amendments that was submitted to Parliament in June 2007 and is presently under consideration. The proposals would clarify the prohibitions in Articles 4, 10 through 14, and 17; eliminate Article 9’s prohibition on tying; and adjust certain procedures to accord with the procedures applicable for Competition Law cases. One further amendment in the AMC’s package arises from the fact that, although the Unfair Competition Law covers dissemination of misleading information by a firm about its competitor, it does not address dissemination of misleading information by a firm about itself. The amendment package therefore includes a new article (Article 15), which defines unfair competition more broadly to include gaining a competitive advantage by the dissemination of misleading information.

2.7 Public Procurement

The AMC has always had responsibility for ensuring enforcement of the competition laws with respect to government purchases of goods and services. It has brought cases over the years against bid rigging and other anticompetitive activities relating to procurement, and has also played a competition advocacy role in the development of the legislation and regulations that control the procurement process.

The AMC was vested with a formal statutory role in administering the procurement process in March 2006, when it was assigned some of the functions that had previously been the responsibility of the Department of Coordination of State Procurement (“DCSP”) in the Ministry of Economy. Effective March 2007, the AMC’s role was adjusted further as a result of amendments adopted in December 2006. Under the current law, the AMC’s procurement responsibilities include:

- the administration of audits on agency compliance with the procurement laws;
- the preparation of protocols reporting the details of administrative infractions detected by AMC personnel during audits of procurement proceedings, and the referral of serious cases of malfeasance to other law enforcement bodies, as appropriate;
- submission to the Cabinet of Ministers of proposals for the designation of the lead agency in multi-agency procurements;
- enforcement of the competition laws applicable to procurement proceedings, with particular focus on bid rigging and similar distortions of procurement processes; and
- cooperation with other government agencies in Ukraine to prevent corruption of procurement processes, and with other nations and international agencies in the field of procurement generally.

The AMC also has a significant role in the activities of the Interdepartmental Commission on Public Procurement, which has responsibility for, among other things, examining claims concerning tender violations by procuring agencies, authorising agencies to employ restricted tendering and single-source procurement procedures, and removing members of agency tender committees who have engaged in misconduct. An AMC commissioner holds one of the eleven seats on the Interdepartmental Commission, and the AMC is charged with providing the Commission with “organisational and methodological” support, which means that AMC personnel serve as the Commission’s Secretariat and prepare the necessary documents and analyses for consideration at Commission meetings. In the period from the imposition of procurement responsibilities on the AMC in March 2006 through the end of 2007, AMC personnel examined more than 7400 procurement application packages, audited more than 3000 purchase procedures, referred 150 cases involving serious violations to law enforcement authorities, and prepared analyses for the Interdepartmental Commission on Public Procurement concerning more than 2700 requests to permit restricted tendering and single-source procurements.

In March 2007, the AMC established the State Purchases Department to handle the agency's procurement duties. At the Committee's request, the Parliament provided the AMC with a supplemental appropriation of UAH 7.13 million (EUR 1.03 million) for fiscal year 2007 to fund the Department, which employs 40 personnel. The AMC's experience is that its actual resource expenditures for procurement-related activities have exceeded its budget request by several multiples. The assignment of procurement functions to the AMC has raised concern among some observers about the wisdom of combining operational and auditing functions in the same body, and about the resource capacity of the AMC to undertake such additional duties.

In September 2007, the Cabinet of Ministers submitted to the President of Ukraine a proposal for further revision of the procurement law that would reduce the AMC's role in the administration of the procurement system and re-establish the Ministry of Economy as the principal administrative agency for procurement procedures. The AMC's official position is that it would prefer to restrict its procurement responsibilities to the following areas: (1) enforcement of the competition laws applicable to procurement proceedings, (2) administration of audits on agency compliance with the procurement laws, and referral of cases of malfeasance to the appropriate law enforcement bodies, (3) submission to the Cabinet of Ministers and the Accounting Chamber of semi-annual reports on procurement activities by government agencies, and (4) cooperation with other Ukrainian government agencies to prevent corruption of procurement processes, and with other nations and international agencies in the field of procurement generally.

2.8 *State Aid*

Article 51 of the Partnership and Cooperation Agreement (PCA) between Ukraine and the EU obliges Ukraine to ensure that its legislation "will be gradually made compatible with that of the Community" in various areas, including specifically with respect to "rules of competition." In addition, Article 49 separately establishes a number of commitments designed to prevent anticompetitive conduct from distorting commerce between Ukraine and the EU. Specifically, the parties agree that they will (1) enact and enforce laws addressing restrictions on competition by enterprises within their respective jurisdictions, (2) refrain from favouring certain firms or sectors by granting State aid that would distort competition between the EU and Ukraine, and (3) eliminate any measures distorting competition that involve state-owned entities or entities to which that state has granted monopoly rights (subject to the proviso that such requirement will not be enforced to "obstruct the performance, in law or fact, of the particular tasks assigned to such undertakings").

These commitments mirror EU Treaty Articles 81, 82, 86 and 87. Articles 81 and 82 are, of course, the provisions dealing with concerted actions and abuse of dominance, and also provide the basis for the regulations affecting concentrations. Article 86 provides that EU member states, in conjunction with granting special or exclusive rights to public or private undertakings, may “neither enact or maintain in force any measure contrary to the rules contained in this Treaty,” including specifically the rules in Articles 81 or 82. Article 87, dealing with state aid, bars member states from granting assistance that “distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.”

Ukraine considers that its competition law regime meets the requirements of Articles 49 and 51 of the PCA, except for the state aid provisions in EU Article 87. The competition rules in EU Articles 81 and 82 are reflected directly in Ukraine’s Competition Law. With respect to EU Article 86, the AMC advises that none of the undertakings to which Ukraine has granted special or exclusive rights has been exempted from the Competition Law, even in the case of enterprises that operate services of general economic interest within the meaning of Article 86(2).

As to state aid, many agencies of the Ukrainian government are presently involved in administering state aid programs, but the AMC is the only agency with authority to assess and interdict aid on the basis of its prospective anticompetitive effect. The mechanism for control by the AMC rests on Article 20 of the AMC Law and Article 15.2 of the Competition Law. The former provision requires government agencies to obtain AMC approval of any draft resolutions and other decisions that may affect competition. As described previously, Article 15 prohibits anticompetitive government actions, including specifically actions granting “benefits or other advantages” that favour a firm or group of firms over others, such that competition is restricted or distorted. Thus, if an anticompetitive state aid proposal is presented to the AMC for review, and if the aid involved constitutes an anticompetitive “benefit or other advantage” within the meaning of Article 15, the AMC will be able to prevent the aid from being disbursed by denying approval. If implementation of the aid program begins before the AMC becomes aware of it, the Committee may be able to commence an action under Article 15 against the state body involved and ultimately enter an order requiring the agency to cancel implementation. That remedy, however, will be insufficient if the aid has already been disbursed, because the AMC’s order under Article 15 runs only against the agency, and there is no provision in the law that would permit recovery from the aid recipient. Further, some forms of aid are not easily characterised as a

‘benefit or other advantage’ and, in any event, not all aid proposals are presented to the AMC for review.

In 2004, Ukraine’s Parliament considered and rejected a proposed state aid control law based closely on the EU’s aid legislation. In 2007, a proposal that was developed as an amendment to the Competition Law, but that did not assure recovery of unlawfully granted aid and lacked provisions constituting full compliance with the EU’s notification requirements, also failed to win passage. The AMC has now prepared a new proposal for consideration by the Parliament in 2008 that (1) adopts a broad definition of “state aid;” (2) establishes an effective system for identifying aid proposals, assuring advance AMC examination, and reporting on approved aid grants; and (3) enables recovery from recipients of unlawfully granted aid.

2.9 Consumer Protection

As noted previously, the Ukrainian Constitution provides the “the State protects the rights of consumers” (Art. 42). A Law on Consumer Rights Protection was adopted in May 1991, even before Ukraine’s declaration of independence, and a Law on Advertising followed in 1996. Principal responsibility for enforcing both laws is assigned to the State Committee for Technical Regulation and Consumer Policy. The Committee, like the AMC, is a central executive body with special status.

The Consumer Rights Law protects only consumers who are natural persons and thus does not cover business entities. Its provisions address a wide range of topics relating to consumer rights, including product labelling, safety, warranties, standard contract terms, service agreements, returns, and recalls. It also prohibits “unfair business practices,” which include, among other things, acts defined by other laws as constituting “unfair competition” (Art. 19). The jurisdictional provision in the Law (Article 27) effectively gives the AMC exclusive enforcement responsibility for all conduct arising under the Consumer Rights Law that also constitutes a violation of the Unfair Competition Law.

The Law on Advertising differs from the Consumer Rights Law in that it protects not only natural persons, but also businesses and other legal entities. The Law deals with unfair or deceptive claims or omissions in advertising media. Article 11 provides that claims involving comparative advertising “shall be regulated by the legislation of Ukraine on the protection against unfair competition,” and Article 26 gives the AMC exclusive enforcement responsibility for all conduct arising under the Advertising Law that also constitutes a violation of the Unfair Competition Law. This includes not only comparative advertising, but also (for example) advertising by a business entity that discredits another firm within the meaning of Article 8

of the Unfair Competition Law. The AMC and the Committee for Technical Regulation and Consumer Policy cooperate closely, exchanging information about complaints received and coordinating investigations of advertising cases where the determination of which agency has jurisdiction cannot be made at the outset.

3. Institutional issues: Enforcement structures and practices

3.1 *Competition Policy Institutions*

The Anti-monopoly Committee of Ukraine (AMC) is designated as a “state body with special status.” The elements of its special status include the statutory procedures controlling the appointment and removal of the agency’s officers, its insulation from control by the executive branch of the government, its statutory role in formulation of national competition policy, and certain guarantees respecting the status and salary of its officers and employees (AMC Law Art. 1).

The Committee as a plenary body consists of the chairman and ten commissioners. The method of appointing and removing the chairman and other commissioners of the AMC is established in the Ukrainian Constitution. As originally adopted in 1996, the Constitution provided that the AMC’s chairman would be appointed and dismissed by the President of Ukraine with the consent of the Parliament, while the other commissioners would be appointed and dismissed by the President on recommendation of the Prime Minister, based on proposals by the AMC’s Chairman. One feature of the Orange Revolution in late 2004 was the adoption of constitutional amendments that reduced the power of the President and moved the system of government closer to a parliamentary model, with a strong Prime Minister elected by the majority coalition in Ukraine’s Parliament. The amendments, which became effective January 1, 2006, shifted authority for appointing AMC officers from the President to the Prime Minister. Under the present system, the chairman is appointed by the Parliament upon recommendation of the Prime Minister, while the other commissioners are appointed and dismissed by the Cabinet of Ministers upon recommendation of the Prime Minister, based on proposals by the AMC’s chairman (Constitution Arts. 85 and 116). The power to dismiss of the chairman now lies exclusively with the Parliament and does not depend upon a recommendation of either the Prime Minister or the President.

According to some observers, the transfer to the Prime Minister of control over the appointment process for the agency’s chairman and commissioners is undesirable because it links the AMC too closely to the

executive branch. In the Ukrainian political system, the President is not considered part of the executive branch, and is therefore usually regarded as the more appropriate appointing authority for members of autonomous agencies. The AMC has raised the idea of transferring appointment authority back to the President, but has made no headway on that point. The advent of a new government may provide an opportunity to revisit the issue.

The chairman serves for a seven year term, and may not be reappointed for more than two terms consecutively. Involuntary dismissal is permitted only for reasons of health or in case of commission of a crime. Commissioners likewise serve seven year terms, but with no prohibition on multiple terms²⁶. Involuntary dismissal of commissioners is permitted only for ill health, the commission of a crime, or a gross dereliction of official duties. Two “first deputy” commissioners and three “deputy” commissioners are appointed and dismissed from among the commissioners by the Cabinet of Ministers upon recommendation of the Prime Minister, based on proposals by the AMC’s chairman. Article 11 of the AMC Law provides that all commissioners should ordinarily have an education in law or economics and at least five years of relevant work experience during the ten year period prior to their appointment. The present complement of commissioners at the AMC includes six lawyers and three economists (one of them the chairman). Of the other two commissioners, one has a background in engineering and previously served as a member of the Committee, while the other has a background in business. Five of the commissioners are former member of the AMC’s staff.

Various provisions in the AMC Law and the Competition Law provide for the exercise of agency authority by subordinate officers and entities, including “administrative boards.”²⁷ Such boards at the headquarters level consist of three state commissioners or a combination of state commissioners and heads of regional offices. Regional boards consist of the regional office head and two members drawn from among the regional office’s staff or, with the chairman’s permission, from among officials of the Committee. The quorum for the Committee and any board is a majority of the members, and action is taken by a majority of the members present. In circumstances where the full Committee reviews the decision of a board, a quorum is a majority of the commissioners other than those who participated in making the decision under review.

The AMC is headquartered in Kyiv. The AMC Law authorises the establishment of 27 regional offices, one for each of the 24 Ukrainian oblasts and one each for the Autonomous Republic of Crimea, the city of Kyiv, and the city of Sevastopol. Regional office heads and their deputies are appointed and dismissed by the Chairman. The AMC Law expressly

bars any agreement with state and local authorities respecting appointments of regional officers (Art. 12).

The AMC Law accords the Committee broad institutional autonomy. Article 19 provides that the AMC shall be guided in its functions only by the laws on competition and shall be independent from national and local government bodies and their officials, business entities, political parties, and other associations of individuals. Any interference with or attempt to influence AMC personnel in the performance of their duties is forbidden. Although Article 2 states that the AMC shall “be subordinate” to the President of Ukraine, the President has no authority to direct AMC business.

3.2 Competition Law Enforcement

3.2.1 Advisory opinions

The Competition Law provides two formal mechanisms by which entities can obtain advice from the AMC about the legal status of specific forms of conduct. Under Article 14, business entities may provide information about either joint or unilateral conduct to the AMC and receive an opinion concerning the applicability of Articles 6, 10, or 13, as appropriate²⁸. Article 14 opinions are limited in scope and do not address, for example, whether obtaining protection for concerted action under Article 10 would require an application for permission or would arise from an existing block exemption. A business entity seeking an AMC opinion on the latter questions may invoke a different procedure provided under article 29 of the Competition Law, as discussed next. From 2003 to 2007, the AMC issued 57 opinions under Article 14, all of which involved concerted actions.

The second method for obtaining advice is provided by Article 29 of the Competition Law, under which any prospective applicant contemplating a concerted action or concentration may request “preliminary conclusions” from the AMC about the permissibility of the conduct²⁹. The documentation necessary to support such a request is substantially less than that required for a formal Article 26 permit application. If the Article 29 application includes sufficient information to formulate a response, the AMC will advise whether the concerted action or concentration requires permission and, if so, whether an application for permission is likely to be approved or rejected. The statute requires the AMC to respond to Article 29 applications within one month. An AMC opinion concluding that approval is required but is likely to be granted does not excuse the applicant from subsequently filing a formal application for permission³⁰. Article 29 is most commonly employed when business entities wish to obtain the AMC’s confirmation of their own

conclusion that a particular concentration does not require AMC approval. Over the past five years, the AMC decided 549 applications under Article 29, of which 422 (77 percent) involved concentrations and 127 involved concerted actions.

3.2.2 *Applications to permit concentrations and concerted actions*

The procedures for processing applications to permit concerted actions and concentrations are set out in Section VII of the Competition Law and elaborated by AMC Regulation No. 26 (2002) for concerted actions and Regulation No. 33 (2002) for concentrations. Article 26 of the Competition Law provides for initiation of the approval process by submission of an application form and supplementary documents. In the case of applications to approve concentrations, the documents submitted must include information about the contemplated transaction and all of its “participants,” which means that the documentation requirement applies to every member of the control group for each entity involved in the transaction³¹. Regulation 33 provides that each such entity must provide corporate documents, financial statements, and information for every market in which the firm operates (including production and market share data and the identities of principal suppliers, customers, and competitors). In the case of a hostile tender offer, where the target entity refuses to provide the necessary information, the applicant may request the AMC to order production.

The breadth of the documentation requirements as they apply to all members of the control group is a point of complaint among practitioners, who argue that information should be demanded only from the transaction participants, their parent companies, and any other affiliated entities operating in the relevant markets affected by the transaction. In practice, applicants in cases involving large control groups file fewer documents than the regulation requires, and then negotiate with the AMC to accept the truncated filing³². The AMC, of course, has the upper hand in such negotiations, and there are always some applicants who feel overburdened by the outcome.

An application is deemed to have been accepted for review by the fifteenth day after filing, unless the AMC has notified the applicant that the submission is deficient (Art. 26.2). Upon acceptance, the AMC may publish certain information about the application for purposes of soliciting comment from third parties (Reg. 33, section 4.2.8). Thereafter, the Committee has thirty 30 days to determine whether to commence a case. If no case is commenced by the 30 day deadline, the application is deemed to be approved.

A formal case may be commenced if the AMC detects reasons for prohibiting the concentration or if complicated study or expert consultation is necessary (Art. 30). The order initiating the case may be published within five days, again for the purpose of obtaining information from third parties (Reg. 33, section 4.3). The applicant is notified and may be required to submit additional information and respond orally to interrogatories. During the proceeding, the AMC may also require information from third parties, add third parties to the proceeding if their rights or interests may be affected by the case, appoint an expert consultant, and hold oral hearings.

Consideration of the case may not exceed a three month period that begins when the applicant submits the required information (including any expert opinions). The term is suspended if the case cannot be resolved without awaiting the outcome of a related proceeding. If the three month period elapses without a decision by the AMC, the application is deemed to be approved. Practitioners report that they sometimes receive AMC information requests that, in the practitioners' view, have been issued simply to stop the clock (typically in circumstances where the agency has received more concentration permit applications than it can handle within the deadline periods).

The AMC may close the case without a decision on the merits if the applicant petitions to revoke the application or terminate the proceeding, or fails to provide requested information. Before issuing a decision denying approval, the AMC may advise the applicants of the grounds for denial and invite rebuttal (Reg. 33, section 4.8). An applicant may also propose conditions that it is willing to accept in order to obtain the AMC's approval. Information about the Committee's final decision on the application is provided to the applicant and may be published in the official government journal or otherwise made public.

Applications to permit concerted actions follow the same process employed for concentration applications except that, after the application is accepted, the AMC has three months rather than 30 days to determine whether to open a formal case³³. Once opened, a concerted action case is subject to the same three month deadline applicable to concentration cases.

Although an AMC determination to deny permission for a concerted action or a concentration is subject to judicial review, the Competition Law establishes another option for parties who believe that their proposed conduct should be permitted even if they are not prepared to argue that the AMC's decision was incorrect under the Law. Articles 10.3 and 25.2 provide that the parties may petition the Cabinet of Ministers, within 30 days after the AMC's decision, for permission to engage in the concerted action or concentration on the grounds that there will be public interest

benefits sufficient to outweigh the negative effects of restricted competition. The statute provides that the Cabinet may not grant such permission if the proposed conduct entails restrictions that are unnecessary to implement or achieve the conduct's purpose, or if the resulting restriction on competition "constitutes a threat to the market economy system."³⁴

The procedures for Cabinet review of such petitions for permission are established in Article 33 of the Competition Law and supplemented by Cabinet regulation³⁵. An application for permission must include a detailed justification for the proposal, including "a feasibility study for the anticipated positive effects with corresponding calculations of social, economic, and other effects." Upon receipt of a valid petition, the Ministry of Economy convenes a commission of independent experts to appraise the positive and negative consequences of the conduct proposed. Notice of the petition is published and any public comments received are provided to the expert commission. The commission's decision is presented to the Cabinet, along with a recommended disposition prepared by the Ministry.

The Cabinet must then make a "reasoned decision" whether to grant or deny the petition³⁶. If the Cabinet determines to grant permission, it may impose conditions and requirements designed to eliminate or mitigate the negative effects of the proposed conduct. Such conditions may not, however, "be aimed at exerting permanent control" over the underlying activity. Implementation of the Cabinet's order is assigned to the AMC, assisted by the Ministry³⁷. The two agencies monitor the petitioner's subsequent activity to assure that the conditions of the permit are met and to assess the degree to which the projected benefits are achieved in comparison to the negative effects realised. Misconduct by the petitioner, or failure to reach the projected benefits, can lead to modification or retraction of the Cabinet's permission.

The authority for the Cabinet of Ministers to grant permission in cases involving previous denials by the AMC has been in effect since early 2002. Since that time, the Cabinet has granted permission in four cases, one involving concerted action and the others involving concentrations. The cases were described previously in this report. Some observers, particularly in the international competition community, have expressed concern that the mechanism for Cabinet permission represents a serious impairment of the AMC's authority and autonomy. The AMC disagrees, noting that the public interest considerations evaluated by the Cabinet are not within the Committee's statutory authority to address.

3.2.3 *Violation cases*

To detect violations of the competition laws, the AMC Law authorises the agency to conduct “compliance checks” of business and government entities, either in person at the premises of the target entity or by written questionnaire (Art. 7, part 1, item (4)). On-site inspections may be either scheduled or unannounced. During investigations, the agency can invoke AMC Law Article 22-1, which requires economic entities, associations, government bodies, other legal entities, and individuals to provide, on demand by the AMC, documents and other information media (including confidential data), written explanations, and oral responses to interrogatories³⁸. Refusal to submit information demanded by the AMC, or the submission of incomplete or inaccurate information, constitutes an unlawful act under the Competition Law³⁹. The AMC reviews complaints, past enforcement experience, news reports, and other publicly available information in determining what markets to investigate.

The Competition Law contains provisions for a leniency program intended to facilitate detection of unlawful concerted actions. Under Article 6.5, the first firm to notify the AMC of a concerted action of which the agency was previously unaware is excused from any penalty. The provision does not protect a firm that instigated the violation, and applies only if the firm has ceased its participation in the unlawful activity and provided to the AMC all the relevant information in its possession. Thus far, no notifications under the leniency program have been submitted.

If a complaint or preliminary investigation reveals problematic conduct, the agency has two methods available for resolving the matter without commencing a formal proceeding. The first can be employed where the information available to the AMC reveals that competition has been impaired in some way but is insufficient (without further inquiry) to establish whether a violation of the Competition Law has occurred. In such circumstances, the AMC may employ Article 7, part 3, item (5) of the AMC Law. That provision authorises the Committee to make “binding recommendations” to business entities, associations, and government agencies at the ministry level and below, urging the implementation of measures to promote competition, limit monopoly, prevent violations of the competition laws, and terminate “actions or inactivity, which may have an adverse effect on competition.” The recommendation is “binding” because the recipient is required by law to consider the recommendation and either accept it or provide a reasoned basis for refusal. The AMC employs this authority frequently, most often in a non-law enforcement context to make recommendations relating to the promotion of competition. The authority to recommend termination of actions or inactivity having an adverse competitive effect is, however, used in some situations⁴⁰. For example,

where heat and water utility enterprises have delivered services inferior to those required under the applicable tariff, the AMC recommends that the enterprises provide rebates to the affected consumers if they have not already done so⁴¹.

The second method applies where the AMC believes that a violation has occurred. Under Article 46 of the Competition Law, the Committee may issue a letter to the prospective defendant recommending termination of the unlawful conduct (and its causes) and proposing acts to remediate the conduct's adverse effects. The letter's recipient is required to consider such recommendations and provide a response to the AMC within 10 days (or such longer term set by the agency). If the defendant agrees to the recommendations, the matter may then be closed without initiation of a case. By its terms, Article 46 applies only in cases where the violation has not led to substantial distortion of competition, nor caused significant losses to individual persons or the public, and where appropriate measures have been taken to eliminate the consequences of the violation (Art. 46.3). In the past five years, the AMC accepted 8912 settlements under article 46 before initiation of a case. The pattern of settlements, by type of violation, is shown in the following table

Table 2. Cases Resolved under Article 46 before Initiation of Formal Proceedings⁴²

Type of Violation	Competition Law Article 46
Concerted actions	338
Abuse of dominance	5089
Government action	2982
Unfair competition	310
Other	193
Total	8912

Where an Article 46 settlement is not appropriate because the violation has led to substantial distortion of competition or caused significant losses to individual persons or the public, a defendant may nonetheless wish to facilitate resolution of an AMC violation case by voluntarily compensating victims for damages inflicted. If a formal case has not yet been initiated under Article 37, the AMC will consider such a payment in deciding whether case initiation is warranted. Where a case has already been initiated, the AMC will still issue an Article 48 decision against the defendant, but may take account of the damages payment in determining the size of the penalty imposed.

If an investigation results in evidence of a violation and no settlement is obtained, the AMC may initiate a formal case. Under Competition Law Article 36, a case may be commenced either on the AMC's own initiative or in response to complaints received from adversely affected business entities, associations, individuals, or from any government entity. Of the 6065 cases commenced under Article 37 during the past five years, 1956 (32%) arose from complaints by business entities, individuals, associations, and government bodies; and 4109 (68%) were initiated by the AMC on its own initiative⁴³. By regulation, the AMC commits itself to resolving complaints within 30 days of receipt, either by initiating a case or by dismissal⁴⁴. The period may be extended to 60 days if evaluating the complaint requires the AMC to obtain additional information that the complainant cannot provide. No other deadlines apply to the processing of violation cases. Under the Law, initiation of a case is proper "in the event of detecting a violation of the competition laws, including the consequences of such violation" (Art. 37.1), although the AMC has the option to reject a complaint if the acts at issue "have no tangible effect on the conditions of market competition" (Art. 36.2)⁴⁵.

Once a case is commenced, a notice is sent to the defendant and the complainant within the following three days. Under Article 44, additional investigatory powers become available to the AMC, including seizure of evidence from business premises and vehicles (or arrest of such materials if seizure is not possible).⁴⁶ The utility of the AMC's seizure authority under Article 44 is severely constrained because it does not include power to conduct a search of business premises. In practical effect, in order to "seize" evidence, the AMC must know that a particular item of evidence exists and be able to specify where it is located. AMC personnel inspecting a business premises may not simply examine whatever documents can be found in desks, cabinets, safes, and file rooms. Other investigate methods such as wiretapping, video surveillance, remote sound recording, and interception of telecommunications data are reserved for investigation of criminal conduct and are therefore not available to the AMC because competition law violations do not constitute criminal offences.⁴⁷ Article 44 also provides that the AMC may seize evidence from a personal residence if so authorised by court order. At present, however, the AMC cannot invoke this provision because implementation procedures have never been enacted by Parliament.

Although other government agencies, including the police, are required to assist the AMC as necessary in executing its investigative functions (Art. 45), the Committee's experience in this area is varied. In general, the AMC's territorial offices have been relatively successful in developing effective cooperative arrangements with local law enforcement authorities,

and territorial offices have enjoyed good local cooperation in concerted action cases involving retail products like bread, milk, and gasoline. In contrast, the headquarters offices in Kyiv have been relatively less successful in promoting cooperation at the national level with the State Security Service and the Interior Ministry, and AMC investigations have sometimes failed as a result.

As a violation case advances, additional defendants may be added to the proceeding by order of the Committee, and other parties may likewise be added if the decision of the case may substantially affect their rights or interests. The AMC may also hold oral hearings at which interested parties present arguments and explanations⁴⁸. Case participants have the right to access the case file (except for restricted information or data the disclosure of which would damage other parties) and to submit evidence, arguments, and petitions for expert consultations (Art. 40). On its own initiative or upon application by a party, the AMC may direct the appointment of an expert to provide advice in a case⁴⁹.

During a violation proceeding, an affected business entity, whether or not a party in the case, may petition the AMC under Article 47 of the Competition Law to issue “preliminary decisions” to “avert the negative and irreparable consequences” of unlawful acts. Such injunctive orders may require the defendant to cease or undertake specified actions “where urgent performance is required based on the rights and interests of other parties.” The defendant may appeal the order to an economic court within 15 days of issuance. If the AMC ultimately concludes the case without a determination that the defendant violated the law, the defendant may then seek indemnification in an economic court from the other party for losses sustained in consequence of the injunction. Similar authority applies in cases under Article 29 of the Unfair Competition Law.

From 2003 to 2007, there was only one case processed at AMC headquarters in which a party applied to the AMC for injunctive relief under either Article 47 or Article 29⁵⁰. In 2003, in response to a complaint, the AMC initiated a case against Bilosvit–Uman, a firm engaged in marketing a fermented milk product named “Lactoniya.” The advertising for Lactoniya claimed that it was fermented without the use of active bacteria, and thus was safer and superior to milk products fermented in the traditional manner. The complainant invoked both Article 47 and Article 29 and obtained an order from the Committee prohibiting broadcast of the advertisements during pendency of the AMC’s proceeding. Bilosvit-Uman sought judicial review, but the AMC’s order was affirmed by the court. The AMC ultimately concluded that the advertising was unlawful under the Unfair Competition Law, and imposed a penalty on Bilosvit-Uman of UAH 200,000 (EUR 29,717).

Once a violation proceeding is concluded, the AMC issues a decision that either closes the case or finds a violation and directs various actions⁵¹. The AMC may order termination of the unlawful conduct, remediation of the consequences of the violation, division of an entity holding a dominant position, and mandatory publication by the defendant at its expense of information about the case (including the full text of the decision) (Art. 48). The order may also block transfer of securities, and cancel a concerted actions permit where the permit holder has violated Article 19⁵². In cases finding violations of the competition laws by government agencies, the AMC may require the agency to cancel or change actions or decisions previously adopted and terminate anticompetitive agreements with other parties⁵³. For most violations, the Committee may also impose a monetary penalty, as discussed further below.

In an Unfair Competition case, Article 30 provides that the AMC may order termination of the unlawful conduct, and may also impose a monetary penalty as described below. Further, on its own initiative or on application by a victim, the AMC can order seizure of goods that are unlawfully marked or that are copies of the victim's products. In cases where the defendant has disseminated false information injurious to another firm, the AMC may require a public retraction by the perpetrator. Finally, in cases involving government agencies, the AMC may order the agency to cancel or change actions or decisions previously adopted and terminate unlawful agreements with other parties (Art. 30).

As noted previously, the AMC can invoke Article 46 to settle cases in appropriate circumstances before formal initiation of case proceeding. After a case is initiated, settlement is still possible under Article 46, which provides that the underlying case shall then be closed. In recent years, the AMC accepted 48 post-initiation settlements under Article 46.

The outcomes over the past five years of formally-initiated cases in which the AMC found an infringement are summarised in the following table by type of violation. During the same five year period, 302 cases were resolved by a finding that no infringement could be proven (representing about 5% of all cases examined).

Table 3. Violation cases resolved after initiation of formal proceedings⁵⁴

Type of Case	Article 46 settlement	Litigated decision	Total
Concerted actions	21	149	170
Abuse of dominance	18	2218	2236
Government Action	3	508	511
Unfair Competition	3	332	335
Other	3	2418	2421
Total	48	5625	5673

As can be seen, once a formal case is initiated, settlement under Article 46 is rare, involving less than 1% of cases. This is principally the result of the provisions in Article 46 that restrict its availability. If a case is not settled pre-complaint, and is serious enough to warrant initiation of formal proceedings, it typically involves a substantial distortion of competition or has caused significant losses to individual persons or the public, and thus is disqualified from Article 46 treatment.

The question of how much analytic content the AMC's violation decisions must have is a matter of debate. Article 59 of the Competition Law lists the bases upon which an AMC decision may be invalidated as (1) failure to prove facts or clarify circumstances critical to decision of the case, (2) inconsistency between the facts and circumstances proven and the conclusions reached, and (3) violation or improper application of the rules of substantive or procedural law. The AMC's regulation on case procedures provides that an agency decision must include a statement of the facts established and the legal provisions applied, and an "explanation of motives."⁵⁵ Practitioners complain that AMC decisions lack sufficient analytic content to serve as precedent for future cases or to provide useful guidance to the private sector in complying with the competition laws.

3.2.4 Penalties

Article 50 of the Competition Law lists all of the actions that constitute legal violations, while Article 52 provides a complementary list of the maximum monetary penalties associated with those violations. Some of the violations are established in Article 50 itself, and do not appear elsewhere in the Competition Law. The highest maximum penalty, applicable to violations involving anticompetitive concerted actions, abuse of dominance, and non-performance of an AMC order, is the greater of 10 percent of the

defendant's sales revenue in the previous fiscal year or triple the illegally obtained profit. Sales revenues for this purpose are calculated with reference to all firms or persons in the defendant's control group that participated in or benefited from the violation involved. Where revenue cannot be determined, the alternative maximum is stated as 20,000 "non-taxable minimum subsistence incomes" or ("MSI"). At present, the minimum subsistence income is set at UAH 17, so that the alternative maximum is UAH 340,000 (EUR 45,945).

For second-tier violations such as engaging in unlawful anticompetitive actions or concentrations without permission, non-performance of conditions imposed on permitted concerted actions and concentrations, coercion under Article 18.2, and conduct barred under Articles 19 and 20, the maximum penalty is five percent of sales revenue (alternatively, 10,000 MSI (UAH 170,000, EUR 22,970)). For third-tier violations involving inducement under Article 18.1, refusal to submit information demanded by the AMC, submission of incomplete or inaccurate information, obstruction of evidence collection in AMC investigations, and economic retaliation against a complainant, the maximum penalty is one percent of sales revenue (alternatively, 2,000 MSI (UAH 17,000, EUR 2300))⁵⁶. For violations of the Unfair Competition Law, Articles 21 and 22 of that Law impose a maximum monetary penalty of 3 percent of sales revenue on business entity defendants (alternatively, 5,000 MSI (UAH 85,000, EUR 11,485)), and a maximum of 2,000 MSI (UAH 34,000, EUR 4595) on defendants not constituted as business entities.

Practitioners observe that AMC decisions imposing fines do not discuss the analysis underlying the penalty amount selected. The AMC has said only that, in determining fine amounts, it takes into account the effects of the violation, the amount of profit illegitimately received, the defendant's financial position, the defendant's conduct after it was appraised of the violation (including whether the defendant has voluntarily compensated victims for damages caused), and whether the defendant is a recidivist.⁵⁷ Penalties imposed over the past five years totalled UAH 144.8 million (EUR 23.6 million) and are shown by type of case in the following table.

Table 4. Penalties imposed under the Competition Law and Unfair Competition Law, by Type of Case⁵⁸

Type of Case	Penalties Imposed	
	UAH (million)	EUR (million)
Concerted actions	82.3	13.5
Abuse of dominance	50.2	8.2
Unfair Competition	1.2	0.2
Other	11.1	1.8
Total	144.8	23.6

The competition laws also include provisions for the imposition of administrative penalties. Competition Law Article 54.2 imposes administrative liability on government officials (not agencies) who fail to comply with an AMC order, refuse to submit required information to the AMC (or submit incomplete or inaccurate information), or obstruct evidence collection by AMC officers. Similarly, Article 54.3 imposes administrative liability on employees of business entities for obstruction of AMC investigations. And for violations of the Unfair Competition Law, Article 23 of that Law imposes administrative liability on natural persons who act as entrepreneurs but who are not constituted as legal entities (Art. 23).

These provisions do not specify the amount of the administrative penalty; that task is accomplished in Ukraine's Code on Administrative Offences. Under Article 166⁴ of that Code, a maximum penalty of 7 MSI (UAH 119, EUR 16) may be imposed on both government officials and business employees who fail to comply with an AMC order or refuse to submit required information. For violations of the Unfair Competition Law, Article 164³ of the Code imposes a penalty on natural persons acting as entrepreneurs in an amount from 5 to 44 MSI (UAH 85 to 750, EUR 11 to 101). The Code does not specify a penalty for government officials or business employees who obstruct AMC investigations.

Article 7 of the AMC Law contemplates that the Committee itself will conduct trials to assess administrative penalties. Although implementing procedures necessary to permit such trials were proposed to the Parliament in 2006, they have never been adopted. Consequently, to obtain imposition of an administrative penalty, the AMC must petition the general jurisdiction court in the geographic area where the offence was committed. The applicable procedures are specified in the Code, and provide that the court must process the case within 15 days after it is commenced. The Code also requires that any court order imposing an administrative penalty must be issued by the court no later than two months after the date of the offence or,

where the offence is continuing, after the date on which the AMC made its “finding” that the violation had occurred. Some courts construe the “finding” date to be the date on which the AMC commences its formal case, whereas others consider it to be the date on which the Committee enters its final decision. The latter interpretation is preferred by the AMC and appears the more logical, but the point remains unsettled in the law. In any event, the general jurisdiction courts have crowded dockets and some AMC petitions seeking administrative penalties fail because the presiding court does not act within the required time. Over the past five years, administrative penalties totalling UAH 13,300 (EUR 2078) were imposed by courts as a result of petitions by the AMC claiming violations of Articles 166⁴ and 164³ of the Code⁵⁹.

The AMC expects to submit a revised package of amendments to the Code on Administrative Offences for consideration in 2008 that will include appropriate procedures for AMC administrative penalty trials and also establish or modify the monetary administrative penalties assessed for certain offences. Specifically, a fine of 20 to 50 MSI (UAH 340 to 850, EUR 45 to 112) would be imposed on government officials for failure to comply with an AMC order, and a fine of 10 to 30 MSI (UAH 170 to 510, EUR 22 to 67) for refusal to submit required information to the AMC (or for submission of incomplete or inaccurate information). A fine also in the amount of 10 to 30 MSI would be imposed on government officials and business employees for obstructing evidence collection by the AMC. As to violations of the Unfair Competition Law, the AMC’s draft package eliminates administrative liability under Article 164³ of the Code and replaces it with a provision authorising the AMC to impose a penalty on natural persons acting as entrepreneurs in an amount up to 5 % of annual income.

3.2.5 *Review of Decisions*

Decisions by the AMC or its subordinate bodies in violation cases and in permit application proceedings may, in certain circumstances, be re-examined by the AMC body that made the decision. Article 58 of the Competition Law authorises such re-examination on application of any person or on the deciding body’s own initiative. In the past five years, there were 12 cases of re-examination under Article 58.

Decisions by subordinate bodies of the AMC in violation cases, and in proceedings on applications to permit concerted actions (but not concentrations), may be reviewed by superior AMC bodies. Article 57 provides that such review may be commenced by order of the AMC based on the agency’s own initiative or on an application of a party to the

proceeding, filed within two months of the decision. The statute does not limit the grounds upon which such a review may be commenced. In the past five years, there were 6 cases of review under Article 57⁶⁰.

With respect to judicial review, Article 124 of the Ukrainian Constitution provides that the jurisdiction of the courts “extends to all legal relations that arise in the State.” Courts may therefore hear an appeal from any government action or decision that infringes the rights of a party. Article 60 of the Competition Law specifies that an appeal must be filed within two months of the AMC decision at issue, while Article 32 of the Unfair Competition Law provides a thirty day period for appeals of decision made under that statute. The agency decisions subject to review under these provisions are final decisions in violation cases and in application proceedings to permit concerted actions and concentrations. An appeal may be lodged by the defendant, the applicant in a permission proceeding, or any other person (including the complainant in a violation case) who was granted status as a third party in the proceeding.

At present, Ukraine’s civil judicial system is divided into three jurisdictional branches, consisting of general, economic, and administrative courts. The general courts have jurisdiction over cases involving natural persons, the economic courts have jurisdiction over cases involving business entities and commerce, while the administrative courts have jurisdiction over cases involving government agencies. This would seem to place AMC cases in the administrative courts, but the point is uncertain because the Competition Law provides expressly that appeals of AMC decisions shall lie with “the economic court” (Art. 60). The AMC would prefer that its cases remain in the economic courts and has sought a determination on the point from the Supreme Court of Ukraine. No resolution of the issue has yet been reached.

An appeal begins in the economic court of first instance, and is ordinarily heard by a single judge. In a complex matter, the parties may request that the case be heard by a panel of three judges. Decisions by the court of first instance may be appealed to an economic appeals court and thereafter to the Supreme Economic Court. For both levels of appeal beyond the first instance, cases are ordinarily heard by a panel of three judges. In exceptional cases, a further appeal is possible to the Supreme Court of Ukraine, which has jurisdiction over cases arising from the supreme courts of the three jurisdictional branches. Cases in the Supreme Court of Ukraine are heard by the entire court of nine judges⁶¹.

The Supreme Economic Court has four chambers, one of which specialises in cases involving intellectual property and competition law. The judges assigned to this chamber consider that they are qualified to

address substantive competition law questions, and observe that the courts in Ukraine have now had many years of experience with AMC cases.

The frequency with which AMC decisions in permit application proceedings and violation cases are appealed under Articles 60 and 32 is shown below. Over the five year period, appeals were filed against approximately 11% of all decisions rendered. Only one appeal involved a permit application decision; the remainder involved appeals of violation case decisions.

Table 5. AMC Decisions Appealed under Articles 60 and 32

Year	Decisions subject to appeal	Decisions appealed
2007	1425	148
2006	1200	144
2005	1555	115
2004	1113	132
2003	1277	157
Total	6570	696

As noted previously, Article 59 of the Competition Law provides that an AMC decision may be invalidated for (1) failure to prove facts or determine circumstances critical to resolution of the case, (2) inconsistency between the facts and circumstances proven and the conclusions reached, and (3) violation or improper application of the rules of substantive or procedural law. A provision in the suffix to Article 7 of the AMC Law specifies that “no state authority” other than the AMC may exercise certain powers, including specifically the power to define a commodity market and to determine whether a firm holds a dominant market position (Art. 7, part 1, item (11)). The AMC reads this to mean that courts may not make independent determinations defining the relevant market or declaring market dominance. This interpretation was upheld by the Supreme Economic Court in 2005. Thus, the role of the courts is to assure that the AMC, in reaching its conclusions, has followed appropriate procedures and properly made all of the findings necessary to support the ultimate result. Courts have, for example, overturned AMC decisions that failed to specify contours of the relevant market as required by AMC Regulation No. 49 (2002), which contains guidelines on determining the existence of a dominant market position.

The outcomes of judicial review proceedings under Articles 60 and 32 are summarised below. About 83% of decisions were affirmed, while 17% were reversed in full or in part.

Table 6. Judicial Review of AMC Decisions under Articles 60 and 32

Year	Appeals resolved			Total
	Affirmed	Reversed in part	Reversed in full	
2007	124	4	6	134
2006	121	3	14	138
2005	84	6	13	103
2004	100	2	14	116
2003	64	8	33	105
Total	493	23	80	596

In most of the cases involving full or partial reversals, the courts concluded that, under Article 59 of the Competition Law, the Committee had failed to determine or prove circumstances critical to resolution of the particular case. Other cases decided against the AMC involved continuing efforts by the courts to develop standards for applying the 2005 amendment to the Competition Law that added Article 6.3. As previously described, that provision permits similar conduct by business entities to be treated as unlawful collusion where market analysis “demonstrates that no objective reasons for such actions (or inactivity) exist.”

When a petition for judicial review is filed, Article 60.4 of the Competition Law specifies the effect of the appeal’s initiation on the legal force of the underlying AMC decision. The Committee’s order is stayed automatically upon appeal where the decision (1) finds a violation of the Competition Law or the Unfair Competition Law, (2) is issued upon review or re-examination under Articles 57 or 58 of an earlier agency decision, or (3) is the subject of an appeal from a decision of a lower economic court. The law further provides, however, that in circumstances where a stay would ordinarily apply, the AMC may issue a contrary determination “for the purpose of protecting the public interest or preventing negative or averting irreparable injury to affected business entities” (Art. 48.3). Such a determination may be made by the AMC upon its own initiative or upon application by a party participating in the case. If the AMC makes such a determination, then the decision is not stayed unless the court, “for sufficient reasons,” enters an order providing otherwise (Art. 60.5). To date, the Committee has never issued a determination to stop the automatic stay of its order from taking effect⁶².

Initiating an appeal also affects the defendant's obligation to pay monetary penalties imposed by the AMC. Under Article 56.5 of the Competition Law, if a penalty is not paid within two months of the decision imposing it, a daily fine in the amount of 1.5 percent of the penalty begins to accumulate, up to a maximum equal to the original penalty (Art. 56.5). The same Article provides, however, that the accumulation of such fines is suspended during the AMC's review or re-examination of the decision under Articles 57 or 58, or during any judicial review proceedings. Similarly, under the Unfair Competition Law, penalties imposed must be paid within 30 days or begin to accumulate a daily fine in the amount of 1 percent of the penalty (Art. 31). The Unfair Competition Law does not specify a maximum fine or provide that fine accumulation is suspended during judicial review, but the AMC considers that the terms of Competition Law Article 56 are equally applicable on those points.

The issuance by the AMC of a final decision subject to review under Articles 60 or 32 is not the only occasion on which judicial intervention in AMC proceedings can occur, although appeals during the processing of a case are rarely accepted. As noted previously, the Ukrainian Constitution guarantees the right to judicial review to any party injured by a government action or decision. For example, complainants who are dissatisfied with an AMC decision rejecting their complaints as inadequately supported may file an appeal, and have sometimes won decisions from the courts reversing the Committee's decision. An attempt by the Committee to exercise its investigative authority outside its jurisdiction or for an improper purpose would likewise trigger judicial intervention, although such a case has never arisen in practice.

On the other hand, the courts will not intrude in an ongoing AMC proceeding until the alleged infringement is ripe for review. Thus, a defendant may not appeal the AMC's decision to commence a formal proceeding under Article 37, because courts have held that the defendant's rights are not impaired unless and until the Committee finds that the defendant committed a violation. Similarly, review of procedural errors allegedly made by the Committee during a case will be reserved until the agency's final decision is rendered. Even then, as provided in Article 59.2 of the Competition Law, review will occur only if the alleged error has caused an incorrect decision on the merits.

3.2.6 *Execution of decisions*

If a defendant or permit applicant in an AMC case fails to comply with prohibitions or conduct requirements imposed by the AMC's decision, the Committee has two enforcement options, which it may pursue individually

or simultaneously. It may commence a new case of its own, on the grounds that Article 50.4 of the Competition Law provides that non-compliance with a previous AMC decision is itself unlawful conduct. Such a case would result in a second AMC order imposing penalties for violating the original order and renewing that order's prohibitions and requirements. Alternatively, the AMC may petition a court under Article 25 of the AMC Law to obtain a judicial order terminating the violation or requiring the party to perform the required actions. Court orders in Ukraine are executed by the State Executive Service, a component agency of the Ministry of Justice. The AMC therefore transmits any court orders it obtains to that body for action⁶³.

In practice, where a business entity fails to comply with an AMC decision, the Committee both seeks a court enforcement order and initiates a violation case under Article 50.4 of the Competition Law. Where the non-complying defendant is a government agency, the Committee seeks a court enforcement order and also files a petition seeking administrative penalties under Article 166⁴ of the Ukrainian Code on Administrative Violations.

Courts typically issue enforcement orders when so requested by the Committee, although some courts have refused on the grounds that the Committee's order did not specify in sufficient detail what remedial action that defendant was required to take. The AMC considers that these decisions were incorrect because agency remedial orders are deliberately drafted to give the defendant flexibility in determining how to proceed in correcting a violation.

In cases where penalties imposed by AMC orders have not been paid, the AMC's only enforcement option is to commence an action in court under Article 25 of the AMC Law for a judicial order requiring payment of the penalty and of any fine accumulated due to non-payment⁶⁴. In the event of continued non-payment, the court order so obtained is referred to the State Executive Service for collection. In the period from 2003 to 2007, the AMC applied to courts for penalty orders in more than 650 cases, and obtained more than 490 enforceable orders. The following table shows (1) penalties imposed by the AMC over the past five years for violations of the Competition Law and the Unfair Competition Law, and (2) amounts collected during the same period for such penalties and for fines accumulated due to late or non-payment. Collected amounts include those received by the State Executive Service in executing judicial orders obtained by the AMC under Article 25 of the AMC Law.

Table 7. Penalties imposed and collected under the Competition Law and Unfair Competition Law⁶⁵

Year	Penalties imposed		Penalties collected	
	UAH (million)	EUR (million)	UAH (million)	EUR (million)
2007	11.6	1.7	5.9	0.9
2006	23.5	3.7	3.5	0.6
2005	4.0	0.6	2.3	0.4
2004	2.9	0.5	1.7	0.3
2003	102.8	17.1	1.9	0.3
Total	144.8	23.6	15.3	2.5

The table shows that only about 10% of penalties assessed have been collected. The AMC notes that one reason for this result is that several cases involving very large penalties remain in the uncollected category. Another reason is that all significant penalties are appealed to the courts, and appellate procedures often take several years to complete because court dockets are crowded. During appeals, the obligation to pay penalties is suspended, and defendants sometimes exploit the delay by declaring bankruptcy (as in the Sentosa-Avias case) or by taking other actions to protect assets from collection. In addition, court orders delivered to the State Executive Service for collection often suffer further long delays because that agency likewise has a heavy workload.

3.2.7 *Accessibility of Decisions*

One further aspect of the enforcement process that deserves mention is the accessibility of AMC decisions. The AMC Law establishes transparency as one of the basic principles guiding the agency in performing its duties (Art. 4), and the AMC is widely regarded as one of the most transparent government bodies in Ukraine. Although the AMC Law authorises the agency to publish official journals and digests of its decisions (Art. 7, part 3, item (18)), there is no provision requiring such publication and the AMC does not in fact maintain an official journal. The Competition Law provides that the AMC “may publish” information about decisions in permit application cases (Art. 31.6), and may require the defendant in violation cases to publish, at its own expense, information about the AMC’s decision (including the decision in full text)(Art. 48). Information summarising Committee decisions in both permit application cases and violation cases is posted on the agency’s website and distributed to the news media. In some violation cases decided in AMC regional offices that have

limited budgets, the defendant is required to publish summary information about the decision at its own expense.

For such AMC actions as the provision of advisory opinions under Articles 14 and 29, no disclosure is made on the AMC's website or elsewhere. The AMC's view is that disclosure of Article 29 preliminary conclusions respecting permit applications is unnecessary because, if a formal permit application is subsequently filed, the AMC's decision on that application will be disclosed. In contrast, if a formal application is not filed (typically because the AMC concludes that no application is necessary), then there are no implications for market competition that warrant publication of the decision. Similarly, if an Article 14 advisory opinion concludes that the contemplated action is unlawful, and the applicant foregoes the action, then there are no implications for market competition. If the applicant undertakes unlawful action, the subsequent enforcement decision will be public.

3.3 Other Enforcement Methods

The Competition Law assigns to the AMC responsibility for enforcing “the legislation on the protection of economic competition” (Art. 4.4), which is defined to include the Competition Law, the Unfair Competition Law, the AMC Law, and the regulations implementing those laws (Art. 3.1). The AMC Law provides further that no state authority other than the AMC may consider and resolve applications and violation cases under the competition laws so defined (Art. 7). While the AMC therefore has exclusive control over applications and violation cases, the competition laws include two provisions that authorise business entities and others to seek indemnification for harm suffered due to anticompetitive actions. There are also other laws that cover some of the same conduct that falls under the competition laws.

The indemnification provisions appear in Article 55 of the Competition Law and Article 24 of the Unfair Competition Law. The former provides that persons injured “due to violation” of the competition laws may seek indemnification in an economic court from the perpetrator. For certain violations (including anticompetitive concerted actions, concentrations, and abuse of dominance, and others such as retaliation for complaining to the AMC), Article 55.2 provides for double damages. Similarly, Article 24 of the Unfair Competition Law provides that persons damaged as a result of actions violating that Law may seek reparations in court. An unresolved issue is whether actions under Articles 55 and 24 require a threshold AMC determination that there has been a violation of the underlying law. The AMC's position is that such a determination is necessary, but the courts have split on the question. The AMC does not track or maintain data about

indemnification cases, but notes that the available information suggests that a major issue in such cases is the calculation of damage amounts.

Article 61 of the Competition Law provides that economic courts, “at the request of the AMC,” shall inform the Committee about cases involving issues to be resolved on the basis of the competition laws. The AMC is entitled to participate as a third party in such cases if the court’s decision could affect the agency’s enforcement rights and obligations. As originally drafted, Article 61 imposed an unqualified duty on courts to notify the AMC whenever a competition law issue arose. The clause requiring a request from the AMC was inserted during the legislative process. As a result, the AMC can invoke Article 61 only if the presiding court voluntarily notifies the agency or if the AMC learns of the case from one of the parties or some other source. During the past five years, the AMC participated as a third party in ten cases.

For certain offences, and particularly for those arising under the Unfair Competition Law, a party seeking indemnification for damages may file an action under some other law (such as the Trademark Law) that covers similar conduct but does not require an initial determination by the AMC or another government agency. Some courts nevertheless refer such cases to the AMC for a determination of illegality.

There are only a few overlaps between the competition laws and the criminal laws, most of which relate to conduct involving the Unfair Competition Law. Article 228 of the Criminal Code is the sole criminal provision dealing with concerted acts. It prohibits coercion to commit anticompetitive concerted acts and imposes on violators a prison term of from three to seven years (seven to twelve for recidivists). In late 2007, the AMC initiated discussions within the government about expanding criminal liability under the competition laws to include hard core cartel conduct, but was unsuccessful in obtaining support for such a proposal.

Unlawful use of a trademark or firm name is prohibited under Article 229 of the Criminal Code if such use causes “substantial material harm.” The Criminal Code also establishes criminal liability for the unlawful acquisition or unauthorized disclosure of commercial secrets. The AMC refers cases to criminal law enforcement authorities when it encounters evidence of criminal violations, but does not track the number or outcome of such referrals.

The final and most notorious overlap between and the competition laws and other laws involves the Commercial Code of Ukraine, which was enacted in early 2003 and came into force on January 1, 2004. The Code, which is intended to establish a comprehensive legal system for commercial conduct, includes a chapter containing prohibitions on anticompetitive

conduct. In significant part, the prohibitions resurrect outmoded provisions from Ukraine's original 1992 competition law. The many defects of the Code include the imposition of a flat ban on anticompetitive concerted actions, with no provision for conduct to be permitted by the AMC or any other agency; and a requirement that advance AMC approval be obtained before obtaining control on any business entity, without regard to the size of the firms involved. Several attempts have been made to enact legislation eliminating the features of the Code that conflict with the Competition Law, but none has succeeded. The Cabinet of Ministers has placed a further attempt on its agenda. In the meantime, the AMC relies exclusively upon the Competition Law, and argues to courts that the Competition Law, as a more specialised (albeit previously enacted) statute, should be preferred to the Code whenever a conflict arises in application. Thus far, no court has invalidated an AMC action based on Commercial Code provisions that conflicted with the competition laws.

3.4 *International aspects of enforcement*

Article 2.2 of the Competition Law adopts a conventional extraterritorial effects test, providing that the Law's prohibitions apply to activities "which influence or may influence the economic competition in the territory of Ukraine." In AMC proceedings, foreign firms are treated no differently than domestic firms.

The AMC is committed to promoting international cooperation in competition law enforcement. The AMC Law authorises the Committee to participate in international projects and programs and to cooperate on matters relating to competition law and policy with international organisations, competition agencies of other nations, and non-governmental organisations. Article 22-2 of the AMC Law expressly empowers the agency to share information, including confidential data, with the competition agencies of other nations, provided that the information will be used only for proper purposes and will not otherwise be disclosed. The AMC may also request and receive such information from other agencies.

The AMC has entered into numerous bilateral and multilateral cooperative arrangements and participates in a variety of international organisations relating to competition policy. The AMC has bilateral agreements with the Russian Federation, Georgia, Azerbaijan, Armenia, Latvia, Slovakia, Hungary and Bulgaria that provide for (1) notification respecting anticompetitive conduct or enforcement activities in one country that affect the interests of the other; (2) exchange of information about particular business entities involved in enforcement investigations and cases (subject to applicable confidentiality restrictions); and (3) joint coordination

of enforcement activities in cases where the parties are investigating the same firm, conduct, or transaction. Some of these agreements also include a provision whereby one party may request the other party to investigate conduct occurring within its geographic jurisdiction if the conduct affects markets in the requesting party's jurisdiction. Less comprehensive agreements, involving joint consultations about general policy topics and the exchange of analytical and technical expertise, have been concluded between the AMC and Belarus, Bulgaria, the Czech Republic, France, Hungary, Lithuania, and Poland.

With respect to multilateral cooperation, Ukraine is a signatory to the "Agreement of the Commonwealth of Independent States on Pursuing Coordinated Antimonopoly Policy." The other parties to the Agreement are the eleven regular members of the CIS (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Ukraine, and Uzbekistan)⁶⁶. The Agreement provides for cooperation among the parties and the exchange of information about product markets, monopoly business entities, investigative techniques, and approaches to and results of de-monopolisation programs. The Agreement also establishes an Interstate Council on Antimonopoly Policy ("ICAP") to facilitate implementation of its terms. ICAP's duties are to develop criteria and methods of assessment for monopolistic activities and unfair competition, harmonise national competition laws, refine rules and procedures for investigating anti-competitive conduct, facilitate coordinated actions among the parties, and develop resolutions to settle disputed matters.

The AMC has also been an active participant in the competition policy projects of voluntary international organisations, including the United Nations Conference for Trade and Development (UNCTAD), the Organisation for Economic Cooperation and Development (OECD), and the International Competition Network (ICN). The AMC's recent involvement in these activities has been curtailed due to an insufficient number of agency personnel with a good command of English. The language facility problem has affected not only AMC involvement in international organisations, but has also constrained the AMC's ability to consult with competition agencies in Europe and the United States with respect to investigations and cases. As a practical matter, law enforcement cooperation with other competition agencies is limited to CIS nations, where language issues are not presented.

Ukraine's international trade laws relating to dumping, subsidies, and other forms of unfair import practices are enforced in proceedings conducted by the Interdepartmental Commission for International Trade, headed by the Ministry of Economy. The AMC has a seat on the Commission and advises that body about the effect on domestic competition of the practices examined.

3.5 *Agency's resources, actions, and implied priorities*

The AMC is funded from the state budget according to a special line item appropriation by Parliament. Funds received in the form of fees for processing permit applications and advisory opinions are deposited into a fund employed to reimburse the costs of logistical support, publications, employee training, and similar expenses incurred by the AMC. Fines and penalties collected in AMC cases are deposited as state budget revenues.

By law, the Chairman's salary is set equivalent to the salary of a minister, while the salaries of first deputies are set equivalent to first deputy ministers, and salaries of other deputies and of the remaining commissioners are set equivalent to deputy ministers (AMC Law Art. 27.2). The chairman, deputies, and commissioners are guaranteed state employment at their former salary rate for at least one year after their term of office expires.

The chairman determines the structure and size of the AMC's workforce within the limits imposed by the agency's budget appropriation and in accordance with salary rates set by the Cabinet of Ministers. The AMC Law provides that agency employees directly engaged in law enforcement activities will receive a 30 percent salary bonus, as well as special state-funded life, health, and personal property insurance for losses sustained in the line of duty.

AMC budget requests to the Parliament are reviewed by the Finance Ministry and Ministry of Economy before transmittal, but the AMC can lobby Parliament if it believes that undue reductions have been made by the Executive branch. In past years, Parliament has generally met the AMC's requests. One concern noted by the AMC with respect to its 2008 budget, however, is that the Parliament has suspended the application of AMC Law Article 27.2, which couples the compensation rate for AMC commissioners, officers, and staff to the comparable rates for ministry personnel. Some practitioners in the legal community suggest that the AMC is systemically understaffed in the face of its heavy caseload, and that this condition leads to several problems. One such problem is what practitioners perceive as the periodic inability of the AMC's staff to complete review of concentration applications within the allotted time. Another is what practitioners characterise as the AMC's sometimes superficial examination of cases, caused by focusing on form rather than undertaking a more time-consuming examination of the underlying competitive dynamics. The AMC's view is that, since 2006, its investigative capacity has been adversely affected by the burden of its additional responsibilities relating to public procurement⁶⁷. The Committee believes that additional resources are required if the agency is to maintain high standards of performance in accomplishing its mission.

Recent budget allocations and staffing levels are shown in the following table. The budget increase of UAH 16.3 million UAH from 2006 to 2007 includes the special allowance, previously described, of UAH 7.1 million UAH for the AMC's additional public procurement functions.

Table 8. Trends in Competition Policy Resources⁶⁸

Year	Budget Allowance UAH (million)	Budget Allowance EUR (million)	Fees Received UAH (million)	Fees Received EUR (million)	Number of Personnel		
					Head-quarters	Regional offices	Total
2007	44.9	6.5	4.2	0.61	264	590	854
2006	28.6	4.5	3.5	0.55	214	591	805
2005	21.6	3.4	2.8	0.43	192	590	782
2004	15.5	2.3	3.0	0.45	187	582	769
2003	21.2	3.5	1.8	0.30	182	581	763

As the previous table shows, the AMC presently has 854 regular employees on board⁶⁹. Of these, about 200 hold professional positions. Professional employees are required to have a degree in law or economics. Economists represent two-thirds of the professional workforce; lawyers the other third. About a third of professional employees have a second degree in a technical field, and 14 hold doctorates.

Agency output reflected in case enforcement activity over the past five years is shown in the following table.

Table 9. Trends in Competition Law Enforcement Actions

Year	Cases opened	Cases Resolved			Pending (year end)
		Violation	No violation	Total	
2007	1478	1424	23	1447	422
2006	1125	1166	38	1204	391
2005	1102	1004	39	1043	470
2004	1262	1090	118	1208	411
2003	1098	996	84	1080	357
Total	6065	5680	302	5982	n/a

4. Limits of competition policy: Exemptions and special regulatory regimes

A striking feature of Ukraine's competition policy regime is the breadth of the AMC's jurisdiction. The Competition Law applies to all entities engaged in commercial activity, including business entities owned by the state, with only a limited exception for certain SMEs. All executive government agencies, except for those at the highest level, are also subject to the Law and may be prosecuted for exercising authority in an anticompetitive manner⁷⁰.

Nonetheless, some commercial activity in Ukraine is beyond the direct law enforcement jurisdiction of the AMC because of regulatory systems adopted by the Parliament and the Cabinet of Ministers. Where such systems lawfully require business entities to charge certain prices, engage in certain contracts, or refrain from certain actions, the resulting conduct is effectively immune from attack under the competition laws. As to these regulatory systems, the AMC plays a competition advocacy role, as described in the next section of this report.

Ukraine's regulatory regimes fall into three categories. The first involves markets designated as "natural monopolies" by Ukrainian law, which are deemed to have inherent structural features requiring continual regulation. The second involves regulation of monopoly-like features of markets that are otherwise competitive. The third category involves temporary price control systems, typically applied to basic commodity markets (particularly foodstuffs) that are generally competitive but that have been affected by some form of external shock that constrains supply.

As to the first type, Ukraine's Law on Natural Monopolies, enacted in 2000, defines "natural monopoly" as a market in which demand is relatively inelastic and where, due to falling marginal costs, production is most efficiently undertaken by a single firm. The Law applies specifically to Ukraine's infrastructure monopolies in transmission and distribution of electricity; pipeline transportation of oil, natural gas, and other substances; rail transport; water, heat, and sewer utilities; air traffic control; and certain specialised port, airport, and transport terminal services⁷¹. Telecommunications was on the statutory list until 2003, when the Law on Telecommunications established separate regulatory provisions for that sector and created a National Commission for Communications Regulation⁷².

The Law contemplates that national sectoral regulatory agencies will be created to handle licensing, price regulation, network access, and other aspects of business activity in the designated natural monopoly markets.⁷³

In appropriate circumstances, such as in the case of local heat and water supply utilities, regulatory agencies may be constituted at the local level. At the national level, only the Communications Commission and the National Energy Regulation Commission have been established, leaving regulation of rail transport in the hands of the Ministry for Transport and Communications until legislation creating a transportation commission is adopted.

The second type of regulatory system applies on a continuing basis to monopoly-like features of markets that are otherwise competitive. This category covers certain regulatory agencies in Ukraine (outside the sectors designated as natural monopolies) that have limited authority to regulate prices for a specific feature of the market they oversee. For example, the Securities Commission is vested with legal authority to set maximum prices (with the AMC's approval) for certain depository and registry services associated with the securities market.

The third type of regulatory system involves temporary price controls in basic commodity markets. Some controls of this kind are implemented periodically by decree of the Cabinet of Ministers and apply nationally. Other controls are implemented on a local basis. During 2007 for example, local authorities were authorised to regulate profit margins for flour and bread producers and wholesale prices for flour, meat, and dairy products.

Although such regulatory regimes constrain the AMC's authority with respect to certain kinds of conduct by the regulated firms, the AMC is not ousted entirely. As described previously, the AMC is not prevented from bringing abuse of dominance charges against a regulated entity that manipulates the tariff control system. In addition, the AMC's authority over concentrations in natural monopoly markets is not affected. The laws applicable to several sectors (including the banking, financial services, media, and power industries) provide regulators with authority to control concentrations among firms operating in the sector, but this authority is always supplementary to the AMC's. Thus, if the concentration is disapproved by the AMC, it will likewise be prohibited by the sector regulator. If the AMC approves the concentration, however, the regulator may still prohibit it. Sector laws typically require that regulatory agencies promote competition to the extent possible. Under AMC Law Article 21, all government agencies are required to report violations of the competition laws to the AMC.

5. Competition advocacy

Competition advocacy by the AMC has two dimensions. The first reflects the agency's role as a consultant to the government concerning legislation, regulations, and other actions that implicate competition policy. The second reflects the agency's actions in the society at large as a proponent for increased public recognition and acceptance of competition principles.

5.1 *Intra-government policy advocacy*

Articles 7, 20, and 20-1 of the AMC Law vest the Committee with comprehensive authority to engage in competition advocacy at all levels of government. Most dramatic is Article 20.4, a provision added to the AMC Law in 2003 to control the government bodies that are also subject to the prohibitions on anticompetitive actions contained in Article 15 of the Competition Law. Under Article 20.4, all government "bodies of power, bodies of local self-government, and bodies of administrative management and control" are required to obtain AMC approval for any "draft regulations and other decisions which may affect competition." This requirement applies broadly to any agency action "that may result in prevention, elimination, restriction or distortion of the competition in relevant markets," as well as to certain specific agency actions, such as the establishment of a business entity⁷⁴.

The requirement in Article 20.4 for AMC approval of proposed regulations does not apply to regulations to be issued by the Cabinet of Ministers, but AMC Law Article 7, part 3(3) provides the AMC with authority to "coordinate" draft regulations of the President and the Cabinet that may affect competition. Under Cabinet Order No. 950 (2007), any government ministry or agency that develops a draft regulation for submission to the Cabinet must, if the proposal affects competition, obtain and consider the AMC's views. Any unresolved AMC objections must be transmitted to the Cabinet for consideration. The same procedures also apply under Order No. 950 to the development of government legislative proposals for submission to Parliament.

The AMC does not maintain statistics segregating its activities under Article 20.4 from those under Cabinet Order No. 950. The following table shows the AMC's record during the past five years under both provisions.

Table 10. AMC Review of Draft Government Regulations, Legislation, and Other Resolutions

Year	Items examined	Approved without conditions	Approved with conditions	Rejected
2007	1641	1141	246	254
2006	2220	1207	583	430
2005	1934	1552	254	128
2004	1759	1353	252	154
2003	1836	1422	291	123
Total	9390	6675	1626	1089

Because agencies recognise that AMC approval will be required before a proposed regulation or other action can be implemented lawfully, the AMC is often invited to participate at the initial drafting phase of regulatory projects. Consequently, many of the regulations classified in the table as “approved without conditions” received AMC attention before they were formally submitted for AMC review.

The most common reasons cited by the AMC for rejecting or imposing conditions on the approval of draft resolutions and regulations are that they establish conditions favouring state-owned enterprises over their private competitors, grant a single firm exclusive rights in a market that could operate on a competitive basis, or delegate some form of regulatory authority affecting one market to a state-owned company operating in an adjacent market.

Draft Cabinet resolutions examined by the AMC under Order No. 950 included proposals altering the list of strategic enterprises, introducing tariff monitoring in the agricultural sector, and improving oversight of state property management. The AMC itself can also propose regulations to be issued by the Cabinet, and has done so on several occasions, including submission of a 2007 proposal for a Cabinet regulation establishing a national regulation commission for natural monopolies in the transportation sector. The AMC and the Ministry of Transport could not reach consensus on this matter, and the differences between the two agencies regarding the draft resolution were therefore recorded and sent to the Cabinet for consideration.

The AMC has no authority of its own to submit legislative proposals directly to the Parliament, because the Ukrainian Constitution (Art. 93) limits the right of legislative initiative to Parliamentary deputies, the President, and the Cabinet of Ministers. Under Article 20-1.3 of the AMC

Law, however, the agency may submit, directly to parliamentary committees, proposed amendments to pending legislation “on matters that are within [the AMC’s] competence.”⁷⁵ For example, the AMC commented to Parliament on a pending law that imposed constraints on the authority of government agencies to investigate and prosecute private firms for unlawful conduct. The AMC observed that the existing competition laws effectively addressed all of the same issues and that including the AMC under the new law would raise conflicts and unnecessarily hinder effective law enforcement. The Committee’s concerns were recognised and the AMC was removed from the law’s coverage.

There are two other important competition advocacy provisions in Article 7 of the AMC Law that share the similar characteristic of empowering the AMC to issue “binding recommendations” to government agencies at the ministry level and below. Such recommendations are deemed to be “binding” because the recipient is required by law to consider the recommendation and either accept it or provide a reasoned basis for refusal. As with Article 20.4, the AMC’s authority under these two provisions with respect to the higher offices of the President and the Cabinet is simply to make recommendations, with the recipient under no obligation to respond.

The first of these provisions appears in Article 7, part 3, item (5), and authorises the AMC to make binding recommendations for the implementation of measures (1) to limit monopoly, develop business activities and competition, and prevent violations of the competition laws, and (2) to terminate “actions or inactivity, which may have an adverse effect on competition.” The second provision, in Article 7, part 3, item (14), similarly authorises the AMC to make binding recommendations for the amendment of previously-adopted government regulations “which do not comply” with the competition laws or which “create difficulties to development of competition due to their ambiguous interpretation.”⁷⁶ In referring to government actions or regulations that “adversely affect competition” or “do not comply with the competition laws,” these provisions do not intend to cover actions that constitute an outright violation of the competition laws. Rather, the provisions are designed to address actions that threaten competition without unlawfully impairing it. Thus, items (5) and (14) provide the AMC with advocacy tools for use in situations where the initiation of a law enforcement action is not warranted or appropriate. The AMC has employed its authority under items (5) and (14) to make binding recommendations concerning potentially anticompetitive features of various government actions, including regulations of the Ministry of Transport affecting air transportation services, tender conditions established by the Republic of Crimea for selecting

regional bus system operators, and policies of the Kyiv regional administration relating to outdoor advertising in the city of Kyiv⁷⁷.

The AMC also acts as a competition advocate in the field of strategic planning. Article 20.2 of the AMC Law authorises the AMC “to cooperate” with agencies at all levels of government on matters relating to economic competition and de-monopolisation. Article 20.1, in turn, requires that government agencies participate with the AMC in developing and implementing specific programs to promote competition and economic development. Additional provisions in Articles 20-1.4 and 20-1.5 of the AMC Law authorise the AMC to develop and present to the Cabinet of Ministers proposals for “priorities and areas of competition policy for a certain period,” and to submit reports to the Cabinet on the implementation of previously adopted priorities. According to statements by the staffs of the President’s office and the Cabinet of Ministers, the importance and indispensability of competition policy under these statutory provisions is universally recognised and is reflected in the fact that every government program has an element featuring competition policy goals⁷⁸.

Overall, the AMC’s activities as a competition advocate are well regarded by the ministries and agencies with which the AMC interacts, and the AMC’s recommendations are considered to reflect a sound understanding of the regulatory context at issue, even where the recipient agency disagrees with the AMC’s position⁷⁹.

5.2 Public advocacy

The AMC recognises that a critical feature of its mission is to act as a proponent of competition policy in the society at large, and it has developed a variety of programs to advance public recognition and understanding. One important form of advocacy involves outreach to the business, legal, and academic communities. AMC representatives frequently participate in conferences, meetings, and round-table discussions with trade and professional groups, including large trade associations like the Union of Entrepreneurships, the European Business Association, and the Chamber of Commerce, and smaller, sector-specific groups, such as coal and coke producers, metal manufacturers, oil traders, transport and forwarding firms, insurers, and mobile telecommunications operators. The AMC also offers seminars for private sector lawyers on such topics as the process for submitting concentration permit applications. In academia, AMC personnel regularly lecture to classes at the Kyiv National University of Trade and Economy and participate in University seminars. AMC statistics show that, on average, agency officials and staff participate in more than 4,000 outreach events annually

Other means by which the agency communicates with the public include the AMC's website and materials published in print. The website (www.amc.gov.ua) provides information about the AMC's history, organisation, and authority, and also includes the text of the agency's statutes and regulations, annual reports, information about decisions in permit application and violation cases, and some court decisions. Other parts of the site provide information about the Committee's members, the procedures for filing a complaint or a permit application, proposed amendments to the competition laws, and the rationale for promoting competition policy. The site has versions in Ukrainian, Russian, and English⁸⁰. The AMC also publishes a 23-page leaflet entitled "Competition Leads to Prosperity," which provides basic information about the AMC and the competition laws, as well as instructions on how to file a complaint. The AMC's magazine "Competition," containing news and articles of interest to the competition policy community, is published six times annually.

With respect to media relations, the AMC's public relations office issues press releases on Committee decisions and activities and convenes press conferences. The AMC's cases and other activities are regularly covered in both national and regional media, including newspapers, television, radio, and the Internet. On average, about 100 stories concerning the agency appear each month, most of them reporting on recent AMC decisions. Coverage of AMC decisions in concentration cases is largely limited to the national media, as local coverage typically focuses on AMC concerted action and abuse of dominance cases affecting consumer goods and utilities.

The AMC and the competition laws are well known among large businesses in Ukraine, and most business entities of any size are at least aware of the AMC's existence and functions. Many consumers have also heard of the AMC, due to the media coverage of commodity and utility cases. A field survey conducted in 2005 showed that the AMC's recognition factor among members of the general public stood at an impressive 90 percent.

6. Conclusions and Policy Options

6.1 *Current strengths and weaknesses*

The central strength of Ukraine's competition regime is a comprehensive and well-designed competition law and, in the AMC, an effectively managed and well-regarded agency to implement it. Ukraine's competition statutes vest the AMC with a broad array of law enforcement and advocacy powers for improving the competitiveness of the Ukrainian

economy, notably including authority to interdict anticompetitive conduct by government agencies and a mandated role in reviewing proposed government regulations that affect competition. The jurisdictional reach of the AMC's enforcement authority is wide, covering virtually every business entity operating in Ukraine and virtually every executive branch agency below the highest organs of power. The AMC is thus positioned as a potent agent for advancing competition policy objectives, and it deserves praise for the record it has compiled in realising that potential.

The leading bodies of government in Ukraine assert that they recognise the importance of competition policy generally and the AMC specifically. The business community considers the AMC to be one of the best agencies in Ukrainian government and accords it high respect as an agency that exercises its authority judiciously. The agency is widely regarded as stable, well administered, and free from corruption. While not all agree with every action that the AMC takes, there is a consensus view that the Committee strives diligently to serve the objectives of the competition law.

Particular strengths of the AMC include a dedication to fair and responsive operations. Also important is the agency's commitment to vigorous outreach, both to carry its message to the government, the business community, academia, and the public generally, and also to obtain input from constituencies affected by the agency's operations. The Committee's traditional status as an autonomous agency secure from interference by other government bodies likewise contributes significantly to its efficacy, and constitutes another strength.

The weaknesses in Ukraine's competition regime arise in part from difficulties that the AMC confronts in discharging the numerous and diverse responsibilities that crowd its docket. While it probably goes too far to say the AMC is a victim of its own success, its reputation as one of Ukraine's best agencies has brought additional responsibilities to its agenda. The assignment of responsibility for administering certain functions of the public procurement system is an example. The AMC's responsibilities are also increased indirectly because the competition laws are employed to address problems in other parts of Ukraine's system of government.

For example, fewer cases would be handled by the AMC under the Unfair Competition Law if companies victimised by trademark infringement and similar offences took their complaints to the courts rather than to the AMC. They often do not, however, because they perceive the courts as slow and unresponsive compared to the AMC. Similarly, the AMC's abuse of dominance caseload would be less if the privatisation processes in earlier years had been carried out with more attention to the importance of dividing monopoly state enterprises into multiple private competitors. Similarly, the

capacity of firms to maintain a dominant position in the post-privatisation environment (and hence the number of markets subject to abusive dominance) would be lower if Ukraine's economic system facilitated entry and exit of firms more efficiently and if the market for investment funds, both foreign and domestic, operated more effectively. In market sectors where dominant enterprises endure because of natural monopoly conditions, substantial AMC enforcement resources are expended to prosecute abusive conduct that would not occur if Ukraine's sector regulatory systems were well functioning. All of these diverse demands on the AMC's attention and resources challenge the agency in its efforts to maintain high standards of performance in accomplishing its mission.

The AMC must also contend with certain problems attributable to Ukraine's Parliament (the Verkhovna Rada), which has enacted some legislation (such as the Commercial Code) that is inconsistent with the competition laws, and failed to enact other legislation (such as control mechanisms for state aid) that is necessary if Ukraine is to meet international norms for competition policy implementation. Difficulties are likewise presented by public prosecutors who are unfamiliar with, and resistant to involvement in, the complexities of investigating anticompetitive conduct; and by judges schooled in a civil law tradition who do not readily focus on the economic dynamics of the cases before them. The positive side to these problems is that none of them arises from any overt hostility to the competition laws, but rather reflect the difficulties of introducing a competition regime into a culture long accustomed to a profoundly different method of governing commercial conduct. Moreover, the government's desire for EU accession provides a helpful incentive for improving the competition framework and eliminating hindrances to its effective operation.

Other significant weaknesses are associated with deficiencies in the AMC's statutory authority and operating policies. The Committee does not have the full statutory equipment necessary to deal with cartels and it also needs to strengthen cooperative relations with other law enforcement agencies. The Competition Law's merger notification requirements conflict substantially with accepted international standards. Further, although the AMC is one of Ukraine's most transparent agencies, it could articulate its decisions and policies more fully to facilitate understanding and compliance by the private sector.

It is appropriate to consider here two further features of Ukraine's competition law regime that are sometimes viewed as weaknesses, but that do not appear to warrant such a characterisation. The first of these is the reservation to the Cabinet of Ministers of authority to grant permission for concerted actions or concentrations that the AMC has refused to allow. This authority does not enable the Cabinet to overrule AMC conclusions that a

particular proposal is anticompetitive, but it does permit the Cabinet to decide that a proposal will have public interest benefits sufficient to trump competition policy objections.

The issue is whether the existence of this authority should be considered as a serious impairment either of the AMC's autonomy or of the integrity of Ukraine's competition law regime. It is not an infringement of the AMC's autonomy because, as the AMC itself has observed, action by the Cabinet of Ministers to permit conduct rejected by the AMC does not entail any intrusion into the AMC's scope of authority or any reversal of determinations that the AMC has jurisdiction to make.

Nor does the mere existence of the Cabinet's authority to grant permission for certain conduct rejected by the AMC constitute an illegitimate infringement of the competition regime's integrity. Every sovereign nation reserves the authority, by express statute or otherwise, to subordinate competition policy to other public policy objectives. No competition enforcement agency in the world is empowered to make decisions that are absolutely immune from repeal or modification by higher bodies in government. If by no other method, a national parliament can always enact legislation tailored to overturn a decision made by a competition agency⁸¹.

The question in evaluating a competition regime is not whether authority exists to subordinate competition policy objectives, but whether decisions invoking that authority are made in an orderly and transparent manner and based on reasons commonly recognised as legitimate. One difficulty with systems in which decisions to subordinate competition policy are made by the legislature is that legislative processes are notoriously non-transparent. In Ukraine, it is certainly possible that the Parliament could interfere in competition cases, but that has not happened, and the statutory scheme created by Parliament vests explicit authority for subordination in the Cabinet of Ministers. This approach is not unprecedented, as it follows Germany's law with respect to ministerial authority to subordinate competition agency decisions⁸². In fact, the Germany vests authority at an even lower executive level than does Ukraine, because the German Minister of Economics and Labour is authorised to make decisions in competition law cases without involving any other ministers.

Further, as described previously, the Ukrainian system hedges the Cabinet's authority with a variety of requirements and constraints (including the right of third parties to seek judicial review), that are designed to assure transparency and prevent decisions motivated by simple political expediency. Actual experience in Ukraine since the ministerial review system was initiated in 2002 involves only four instances in which the

Cabinet granted permission over an AMC denial. Two of those cases involved sequential proposals for consolidation of the same parties, so that the true count falls to three. While the wisdom of the Cabinet's decisions in those cases could be debated, it is worth noting that all three involved consolidations of state-owned firms that in some other countries would not have been subject to the competition law at all. Arguably, Ukraine's scheme of ministerial review deserves not criticism, but praise as a well-crafted method for integrating non-competition objectives with a competition enforcement system.

The second alleged deficiency in the Ukrainian competition regime relates to the assignment of procurement functions to the AMC. The concern focuses on the institutional undesirability of combining in one agency both operational and law enforcement functions with respect to a particular government function like procurement. An adjunct concern in the AMC's case is that the agency's reputation would suffer if, for any reason (including inadequacy of resources) the AMC fails to perform its assigned duties effectively or falls prey to corrupting influences as a consequence of involvement in procurement proceedings.

There is little debate that the prime role of a competition agency with respect to government procurement is to interdict bid-rigging and other distortions of the procurement process and to promote the use of competitive procurement techniques. Likewise, standard principles of government organisation suggest that assigning a government agency to perform both law enforcement and operational functions with respect to the same activity is undesirable. On the other hand, the competition agencies in several OECD member countries (such as Germany and Denmark) have been made responsible both for interdicting collusion in bidding processes and for handling procurement process appeals, and have performed those roles without apparent ill effects.

In any event, the theoretical objections to AMC involvement in procurement are of largely academic interest at this point. The agency has been discharging its procurement functions for a sufficient length of time to reveal any systemic maladies. The only notable problem is a resource deficiency arising from the AMC's misestimate of how many employees would be necessary to handle the additional work. The recommendations in the next portion of this report deal with that issue.

The following recommendations, designed to address the full array of competition law and policy issues confronting Ukraine today, are presented in two groups. The first deals with recommendations for action by bodies of the government other than the AMC, while the second group involves changes that the AMC can implement.

6.2 *Recommendations*

- *To the National Government*

6.2.1 *Provide adequate resources to assure that the AMC can maintain high standards of performance in accomplishing its mission*

The AMC has been adequately funded in the past and has employed those resources effectively to develop a strong agency with a capable staff and an excellent reputation. Now is not the time to put that accumulated institutional capital at risk. Either the AMC's operational procurement functions should be reassigned elsewhere or the agency's budget allocation should be increased commensurately.

Further, the compensation system for AMC officers and staff should be designed and funded to attract and retain personnel with the necessary legal and economic expertise. Sound enforcement of competition laws requires sophisticated skills, and the capacity for inept enforcement to injure the national economy counsels against constriction of the personnel budget. The previous policy of coupling the AMC's personnel compensation rates to those of the ministries, as reflected in AMC Law Article 27.2, should be re-instated.

6.2.2 *Assure the autonomy of the AMC*

The high degree of discretion involved in enforcing competition laws, and the grave effects that inept enforcement can have both on the companies involved and on the economic sector affected, have led most countries to establish their competition agencies as autonomous, multi-member commissions free from direct control by either the legislative or executive branches of government. Further, the method of appointing agency commissioners is typically structured so that the government's prevailing political party does not have complete control of the process. The Ukrainian approach fit the conventional pattern until the constitutional amendments of 2004 took effect. The AMC Chairman is now appointed by the Parliament on the Prime Minister's recommendation, and the other commissioners are appointed by the Cabinet of Ministers, likewise on the Prime Minister's recommendation. Since the Prime Minister is selected by the majority coalition in Parliament, the current appointment process offers little security against politicisation of appointments. The better approach would be to re-institute some form of the previous system, under which the AMC Chairman was appointed by the President with the consent of the Parliament, and the

other commissioners were appointed by the President on recommendation by the Prime Minister.

6.2.3 Enact an effective system for controlling anticompetitive state aid

March 2008 will mark the tenth anniversary since the Partnership and Cooperation Agreement between Ukraine and the European Community took effect. That agreement commits Ukraine to meeting the EU's standards for controlling state aid. Even if the government is unwilling at this time to come into full compliance with EU standards, it should at least take the incremental step of enacting some version of the AMC's present legislative proposal.

6.2.4 Modify the merger notification thresholds in Article 24 of the Competition Law, in accordance with AMC recommendations

The AMC recognises that the merger notification provisions in Article 24 of the Competition Law require modification and has a project underway to prepare appropriate statutory amendments. Recommendations relating to that project are discussed further below. Once the AMC has completed its analysis and developed a specific proposal, Parliament should take action promptly to consider and adopt the necessary amendments.

6.2.5 Establish effective penalties for hard core collusion

The only provision in Ukraine's Criminal Code dealing with conduct violating the Competition Law is Article 228, which prohibits coercion to commit anticompetitive concerted acts. A number of competition law enforcement agencies have found that interdiction of hard core horizontal collusion is improved by exposing corporate officers to criminal penalties. Such liability both deters the formation of cartels and encourages participants in existing cartels to submit notifications under leniency programs, such as that established by Article 6.5 in Ukraine's Competition Law⁸³.

The AMC considers that criminal liability would be a useful addition to its enforcement arsenal, but its recent attempt to interest the government in imposing criminal sanctions on hard core cartel conduct was unsuccessful. The present climate may not be conducive to progress on this point. On the other hand, it may be possible to make a less dramatic incremental change, such as by introducing criminal penalties for recidivism. This approach should satisfy opponents of criminal penalties who assert that many business

people do not realise that collusion is unlawful, much less criminal. The objective is to gain acceptance for the proposition that deliberate collusion with competitors to restrain competition is unacceptable conduct, and that it does as least as much harm as corporate fraud and other forms of commercial misconduct that are already treated as criminal⁸⁴.

6.2.6 *Improve regulatory systems for natural monopolies*

Ukraine's fundamental approach to regulation of infrastructure networks, as reflected in the Law on Natural Monopolies, conforms to conventional theory. Execution, however, needs renewed effort. The AMC has been very active in this field as a competition advocate, and has repeatedly pointed out the actions needed, including especially the establishment of a regulatory commission for the transportation sector.

One of the issues associated with the establishment of regulatory commissions under the Natural Monopolies Law is the method of appointing commissioners. As in the case of the AMC, the constitutional amendments of 2004 have complicated the political dynamics of the appointment process. This problem, too, should be addressed, with the objective of assuring the autonomy of sector regulatory agencies.

6.2.7 *Authorise the AMC to seek court injunctions against competition law violations during the pendency of AMC proceedings*

Article 25 of the AMC Law specifies the various claims that the AMC can present to the courts for purposes of obtaining a judicial enforcement order. Although the list includes a reference to "terminating violations" of the competition laws, this reference applies only in circumstances where the AMC has rendered a final decision finding an infringement. Article 25 should be expanded to permit an application by the AMC for a judicial injunction against anticompetitive conduct during the pendency of the AMC's case. Such an injunction would be appropriate where the agency submits evidence adequate to show that a violation is likely in progress and that delay in terminating the anticompetitive conduct is likely to make effective relief impossible or cause serious harm to the public interest.

6.2.8 *Modify procedures for collecting monetary penalties imposed by the AMC*

Only about 10% of the penalties assessed by the AMC during the past five years have been paid. In part, the collection record is poor because all significant penalties are appealed to the courts, and the initiation of an

appeal suspends the obligation to pay penalties until judicial proceedings are completed. This creates an incentive for defendants to engage in lengthy appellate proceedings without regard to the merits of the appeal, simply to delay payment of the penalty.

To discourage such conduct, Ukraine should modify its procedural rules to provide that, if a defendant ultimately loses its appeal, it must pay a market interest rate on the penalty amount for the period between the original payment due date and the actual payment date. Procedures should also be modified to require that a defendant initiating an appeal must post a bond in the amount of the fine. If the appeal is ultimately lost, the bond provides assurance that the fine will be collected without any further delay.

Another problem with the collection process is that, where a penalty remains unpaid, the AMC must petition a court for an order requiring payment and then refer the order to the State Executive Service (“SES”) for execution. The AMC should be authorised to transmit its penalty orders directly to the SES for execution, just as Article 30 of the Unfair Competition Law now provides for execution by the SES of Committee decisions ordering the seizure of unlawfully marked goods.

Finally, the government should initiate a project to reform and streamline the process by which the SES collects unpaid penalties that have imposed in enforcement proceedings by the AMC or any other government agency or court⁸⁵.

6.2.9 Strengthen the AMC’s investigative authority to permit searches of business premises and, where approved by a court, searches and seizures of evidence from personal residences

The AMC’s existing authority to seize evidence under Article 44 of the Competition Law does not enable it to search business premises for evidence of competition law violations. Particularly where the target of an investigation is surreptitious horizontal collusion, the AMC does not have the tools necessary to enforce the law. The consensus view of enforcement authorities throughout the world is that unannounced searches of business premises are a critically important method for detecting cartels. Further, although Article 44 provides that the AMC may seize evidence from a personal residence upon authorisation by court order, this authority cannot be employed because judicial implementation procedures have not been enacted by Parliament.

Appropriate legislation should be adopted to vest the AMC with search authority for business premises and, when approved by court order, both search and seizure authority for personal residences. Other investigate

powers should be provided to the AMC to the limits permitted for civil investigations under the Ukrainian Constitution. If criminal penalties are imposed for hard core competition violations, as recommended elsewhere in this report, then the full array of investigative methods allowed in criminal prosecutions should be extended to qualified AMC investigations.

6.2.10 Amend the Unfair Competition Law as the AMC proposes

The AMC, based on its experience in enforcing the Unfair Competition Law, has proposed several amendments designed to improve or clarify various provision of that statute. The amendments, which should be adopted, would (1) provide that Article 4's reference to "priority" over a particular name or mark refers to priority in commercial use; (2) eliminate Article 9's prohibition on tying; (3) specify that Article 17's prohibition on injurious disclosure of a company's commercial secrets applies to persons who have access to the information under a contractual agreement; (4) clarify the scope of the prohibitions in Articles 10 through 14; (5) adjust the procedures in violation cases to accord with the procedures applicable to Competition Law cases; and (6) adopt a new article defining "unfair competition" to include the dissemination of misleading information that results in gaining a competitive advantage.

6.2.11 Adopt procedures enabling the AMC to conduct trials for the purpose of imposing administrative penalties

Article 7 of the AMC Law provides that the Committee itself may conduct trials to impose administrative penalties, but the Parliament has never adopted the necessary implementing procedures for this authority. Consequently, to impose an administrative penalty, the AMC must petition a general jurisdiction court under procedures established in the Code on Administrative Offences. The AMC's experience under the Code is unsatisfactory, because the courts too often fail to act within the short time periods set by the Code. Parliament should adopt the implementing procedures that have been drafted by the AMC, so that the agency can impose administrative penalties under Article 7 as originally contemplated.

6.2.12 Establish or increase administrative penalties for violations of the competition laws

Articles 54.2 of the Competition Law imposes personal administrative liability on government officials who fail to comply with an AMC order, refuse to submit required information to the AMC (or submit incomplete or inaccurate information), or obstruct evidence collection by AMC officers.

Similarly, Article 54.3 imposes personal administrative liability on employees of business entities for obstruction of AMC investigations. The Code on Administrative Offences, however, sets a notably low monetary amount (UAH 119, EUR 16) as the *maximum* penalty to be imposed on a government official who fails to comply with an AMC order or refuses to submit required information, and specifies no penalty at all for government officials or business employees who obstruct AMC investigations.

The AMC expects to submit to Parliament a package of Code amendments that will specify a fine of 20 to 50 MSI (UAH 340 to 850, EUR 46 to 115) for government officials who fail to comply with an AMC order, and a fine of 10 to 30 MSI (UAH 170 to 510, EUR 23 to 70) for such officials who refuse to submit required information to the AMC (or who submit incomplete or inaccurate information). A fine also in the amount of 10 to 30 MSI would be imposed on both government officials and business employees for obstructing evidence collection by the AMC. These are modest penalties that the Parliament should enact.

In addition, consideration should be given to establishing administrative monetary penalties for government officials responsible for agency actions violating certain other competition law provisions that now carry no penalty. Specifically, penalties should be established for violations of Articles 15, 16, and 17 of the Competition Law (relating to anticompetitive agency orders and decisions, unlawful delegation of agency authority, and agency actions inducing or legitimising violations of the competition laws by others), and for violations of Article 20.4 of the AMC Law (failing to submit to the AMC for approval a proposed agency regulation affecting competition)⁸⁶.

Finally, if Parliament is unwilling at present to establish criminal penalties for hard core violations of the competition laws, consideration should be given to adopting administrative monetary penalties for business officials who are responsible for such violations. The prospect of even a relatively modest personal penalty, and the adverse publicity that would accompany it, may be sufficient to deter violations or trigger disclosures under the leniency provisions in Article 6.5 of the Competition Law.

6.2.13 Temporarily restrict private damage actions to cases in which the AMC has found a violation

The indemnification provisions in Article 55 of the Competition Law and Article 24 of the Unfair Competition Law permit persons injured “due to violation” of the competition laws to seek damages from the perpetrator in an economic court. For certain violations (including anticompetitive concerted actions, concentrations, and abuse of dominance), Article 55.2 provides for double damages. Courts have split on the question of whether

such damage actions require a threshold AMC determination finding a violation of the underlying law.

Independent private damage actions can be a useful supplementary method for enforcing the competition laws, but they pose a danger as well. Courts hearing such cases without the benefit of a prior determination by the enforcement agency may develop inapt interpretations of the competition laws. In mature competition law systems, this risk is not a substantial concern. In systems such as Ukraine's, however, where judicial expertise is still under development, the better course is to require that private actions await a determination by the AMC⁸⁷.

6.2.14 Require private parties who raise competition law issues in court cases to notify the AMC

Article 61 of the Competition Law presently requires that economic courts, "at the request of the AMC," shall inform the Committee about cases involving issues to be resolved on the basis of the competition laws. The AMC is entitled to participate as a third party in such cases if the court's decision could affect the agency's enforcement rights and obligations. As originally drafted, Article 61 imposed an unqualified duty on courts to notify the AMC whenever a competition law issue arose. The clause requiring a request from the AMC was inserted during the legislative process. As a result, the AMC can invoke Article 61 only if the presiding court voluntarily notifies the agency or if the AMC learns of the case from one of the parties or some other source.

The competition laws of Ukraine are still at a formative stage in the courts, and it is important for the AMC to participate as a party in proceedings that result in judicial interpretations of competition law provisions. There may be some concern, however, that imposing a requirement on courts to submit notifications to another government agency, such as the AMC, is inappropriate and inconsistent with the courts' dignity as a separate branch of government. A practical solution is to require by law that any party who raises an issue under the competition laws in a court proceeding must so notify the AMC. This requirement could be enforced by providing that a failure to deliver such a notice would render unenforceable any court decision made in the defaulting party's favour⁸⁸.

6.2.15 Amend the Commercial Code to eliminate conflicts between it and the competition laws enforced by the AMC

Quite apart from the annoyance that the Commercial Code causes to the AMC's enforcement activities, the inconsistencies introduced into Ukraine's

legal system by the Code create uncertainty for business enterprises and do nothing to attract foreign investment. The offending provisions in the Code serve no useful purpose and should be eliminated.

- *To the AMC*

6.2.16 Develop proposed legislation modifying the merger notification thresholds to focus effectively on transactions likely to pose competitive concerns

The filing thresholds established in Article 24 presently require notification of proposed concentrations to the AMC if either:

- the previous year's aggregate worldwide asset value or turnover of the participants exceeded EUR 12 million, and (a) at least two participants had a worldwide asset value or turnover of over EUR one million each, and (b) the asset value or turnover in Ukraine of at least one participant exceeded EUR one million; or
- the individual or aggregate market share of the participants in either the affected market or an adjoining market exceeds 35 per cent.

Article 24 also provides that if a participant in a concentration is a member of a control group, then all calculations of asset value, turnover, and market share must be based on the cumulative total for the entire group.

These standards have been criticised by practitioners and the business community because they require notification of many transactions that are highly unlikely to pose any risk to competition in Ukraine. The standards do not, in fact, conform to commonly accepted principles for merger notification systems.

Considering the requirements based on asset and turnover values, two notable flaws are apparent. First, the clause dealing with assets and turnover in Ukraine applies to either the acquiring or the acquired entity, and therefore captures transactions in which the acquired entity has no Ukrainian presence at all. The international antitrust community concurs that structuring a notification requirement in this manner is inappropriate because it offers no assurance of a sufficient local nexus with the reviewing country. The International Competition Network, in its *Recommended Practices for Merger Notification Procedures*, states that notification "should not be required solely on the basis of the acquiring firm's local activities, for example, by reference to a combined local sales or assets test which may be satisfied by the acquiring person alone irrespective of any local activity by the business to be acquired."⁸⁹

The second flaw is that, in an acquisition of a Ukrainian subsidiary operation, the assets and turnover of the subsidiary's entire control group are counted toward the threshold, rather than only those of the subsidiary being acquired. Again in this context, the ICN recommends that notification thresholds should focus on the entities that are involved in the transaction, and that "in particular, the relevant sales and/or assets of the acquired party should generally be limited to the sales and/or assets of the business(es) being acquired."⁹⁰

Criticism has also been directed at the other basis specified in Article 24 for requiring notification, which entails a market share test. Applying such a test obliges applicants to develop a necessarily subjective definition of the relevant market. The consensus view in the antitrust community is that notification requirements should be keyed to standards that are objectively quantifiable. The ICN specifically concludes that a market share test is "not appropriate for use in making the initial determination as to whether a transaction is notifiable."⁹¹

Critics further assert that all three monetary amounts specified in Article 24.1 are too low, and have the effect of requiring unnecessary notifications. The amounts in question are the EUR 12 million threshold for aggregate worldwide assets or turnover, the EUR one million threshold for worldwide assets or turnover of at least two participants, and the EUR one million threshold for Ukrainian assets or turnover of at least one participant.

The ICN does not attempt to recommend monetary threshold amounts. Nonetheless, in a comment relevant to the EUR 12 million aggregate worldwide threshold, the ICN notes that any thresholds based on the worldwide activities of the parties should be "ancillary" to thresholds based on revenues or assets in the jurisdiction concerned⁹². In a separate comment relevant to Ukraine's EUR one million thresholds, the ICN observes that "many jurisdictions require significant local activities by each of at least two parties to the transaction as a predicate for notification." This is desirable, in the ICN's view, because "the likelihood of adverse effects from transactions in which only one party has the requisite nexus is sufficiently remote that the burdens associated with a notification requirement are normally not warranted." If reliance is placed on the local business of the acquired entity alone, then the ICN urges that the requisite threshold "be sufficiently high so as to ensure that notification will not be required for transactions lacking a potentially material effect on the local economy."⁹³

It is, of course, impossible to devise a system of notification thresholds that reliably captures every problematic transaction while excluding all others. Nonetheless, notification systems should be structured carefully to avoid (as the ICN puts it) "unnecessary transaction costs and commitment of

competition agency resources without any corresponding enforcement benefit.”⁹⁴ The task requires a survey of past notification filings to determine how high the threshold limits could have been raised without excluding transactions that proved to be problematic. Thereafter, consultations with other competition agencies could provide guidance about modifying the notification standards to achieve the desired results.

6.2.17 Increase transparency of decisions to provide more guidance and predictability to the bar and the private sector

Transparency is an important feature of decision-making by competition agencies because the private sector needs a clear understanding of legal constraints if it is to engage in efficient business planning. Moreover, the prospects for achieving a high degree of compliance with the competition law depend heavily on the advice provided by competition law practitioners to their business sector clients, and reliable advice cannot be provided if the enforcement policies are unpredictable. The ICN has also spoken on this issue in comments that, although directed to merger application proceedings, are equally applicable to conduct violation cases. Specifically, the ICN recommends that

A reasoned explanation should be provided for decisions to challenge, block or condition the clearance of a transaction, and for clearance decisions that set a precedent or represent a shift in enforcement policy or practice. . . . What matters is that the available information should allow the public to monitor consistency, predictability, and fairness in the application of the merger review process⁹⁵.

AMC decisions are not now sufficiently detailed to allow monitoring for consistency, predictability, and fairness. Further, only “summary information” about Committee determinations in permit application cases and violation cases is made available to the general public. By devoting more effort to the preparation of thorough and well-reasoned decisions, and making the full text of its decisions available on the public record, the AMC can sharpen its analytic processes, position itself more favourably when its decisions are reviewed in court, and provide valuable guidance to the bar and to the private sector generally.

6.2.18 Issue merger guidelines to increase the transparency of the AMC’s analytical approach in reviewing concentrations

The previous recommendation urged the AMC to prepare more detailed decisions in violation and permit application cases so that the private sector could more reliably predict how various kinds of conduct and transactions

will be assessed by the Committee. Another effective method by which a competition enforcement agency can increase transparency and predictability is to develop and release analytic guidelines. The AMC's existing regulations on market definition and determination of market dominance are, in effect, guidelines on those two topics, and its block exemptions on concerted actions and the formation of associations likewise provide some guidance in those areas. One significant area of AMC practice for which no guidance has been released is the analysis of concentrations in permit application proceedings. While the market definition and dominance regulations shed light on merger evaluation, other aspects of the AMC's competitive effects analysis remain unexplained.

The development of merger guidelines is a project that many competition agencies have undertaken, and there is a wealth of source material available for the AMC to utilise. The ICN, for example, issued a Merger Guidelines Workbook in 2006 that could serve as a template. Developing guidelines for concentration applications would also provide an opportunity for the AMC to consider whether there are practical means by which the evaluation of coordinated effects could be introduced into the merger evaluation process.

6.2.19 Issue guidelines on the imposition of monetary penalties for violations of the competition laws

Another area of AMC practice for which there is little transparency is the imposition of monetary penalties for violations of the competition laws. The AMC is vested with discretion to impose any penalty amount up to the maximum specified for the violation at issue. Guidelines for calculating fines are useful not only on the general grounds of promoting transparency, but also to insure impartiality. The EU has issued guidelines on setting fines and expressly cited the promotion of impartiality as a prime rationale for their development⁹⁶.

The development of such guidelines would also provide an opportunity for the AMC to articulate its policy for determining base amount penalties. The AMC, as other competition enforcement agencies, does not routinely impose the maximum possible penalty on defendants in violation cases. Having a standard method for calculating the base amount penalty gives the agency a point at which to start its analysis. The EU guidelines, for example, provide that the base penalty amount in a given case will range up to 30% of the sales revenues derived from the goods or services to which the infringement relates (sec. 21), with selection of a specific percentage depending on such factors as the nature and geographic scope of the infringement and the combined market share of the participating entities

(sec. 22). The base amount is multiplied by the number of years for which the infringement has been in effect (sec 24), and may be supplemented further by a deterrence factor (sec. 25). The resulting figure is then adjusted to reach the final penalty amount by taking account of various aggravating and mitigating factors, such as recidivism and cooperation with the investigation. Such an approach to calculating penalties would not only promote consistency, but also provide the AMC with a basis for responding if (as sometimes now happens) its penalty assessment in a particular case is criticised as being too low⁹⁷.

6.2.20 Consider releasing information about preliminary opinions issued under Articles 14 and 29 of the Competition Law

At present, the AMC releases no information about advisory opinions issued under either Article 14 (concerning the legality of particular actions) or Article 29 (concerning the necessity for a permit application for a particular concerted action or concentration). The AMC's view is that the public does not need to know about such opinions because the parties involved either do not undertake the conduct at issue, or the conduct is examined in a subsequent AMC proceeding for which a decision will be publicly released. This position misses the point that AMC advisory opinions can be just as instructive when they conclude that no issue of anticompetitive conduct is presented as they are when they conclude the opposite. The AMC has noted concerns about confidentiality issues associated with the release of advisory opinions, but such concerns can ordinarily be addressed by delaying release of the opinion or by redacting information identifying the applicant.

6.2.21 Consider invoking Article 48.3 so that, in appropriate cases, AMC orders terminating anticompetitive conduct will not be stayed automatically for the duration of judicial review proceedings

In cases where the AMC has found a violation of the competition laws and the defendant has filed a petition for judicial review, the AMC's order terminating the anticompetitive conduct is automatically stayed for the duration of the appeal process. Article 48.3 of the Competition Law provides, however, that the AMC may prevent a stay from taking effect by issuing a contrary order "for the purpose of protecting the public interest or preventing negative or averting irreparable injury to affected business entities." The Committee has never invoked this authority. In every proceeding where a violation is found and an appeal is filed, the AMC should assess whether the statutory standard is met and, if so, issue the appropriate determination. Judicial appeals can last for years, and there is

no reason why the ill effects of anticompetitive conduct should be tolerated for extended periods when the enforcement agency has an available remedy.

6.2.22 Adjust case enforcement priorities to correct the imbalance between abuse of dominance and horizontal concerted actions

About half of the AMC's present caseload involves abuse of dominance violations, while only four percent involves concerted actions, and less than three percent entails horizontal concerted actions. The prevailing view among competition law theorists is that horizontal concerted actions are the most pernicious form of anticompetitive behaviour by business entities and should therefore be the prime focus of enforcement efforts.

As discussed previously, there are various reasons that can be cited to justify the AMC's current attention to abuse of dominance cases. Nonetheless, the passage of time and the further evolution of Ukraine's economy should eventually diminish the number of markets in which dominant firms can successfully constrain competition. The AMC should therefore begin to increase its investigative activities devoted to horizontal concerted actions.⁹⁸ In assessing possible investigative targets, the Committee should pay particular attention to government procurement proceedings and other market situations and sectors that the AMC's experience has shown are especially vulnerable to collusion.⁹⁹

6.2.23 Continue harmonising the Ukrainian competition law regime with that of the EU, including the development of additional block exemptions

The AMC has already completed draft block exemptions for vertical distribution agreements and production specialisation agreements, and expects to develop a draft regulation for technology transfer agreements during 2008. These draft regulations should be posted for public comment before they are promulgated, so that affected parties can have an opportunity to identify omissions or problematic features for further consideration by the AMC. In particular, the AMC should assure that the vertical distribution exemption effectively addresses the issues commonly raised by franchise agreements¹⁰⁰.

6.2.24 Improve cooperation with other Ukrainian law enforcement agencies

The AMC has had a mixed experience in cooperating with other Ukrainian law enforcement agencies to investigate anticompetitive conduct,

with better results at the regional level than at headquarters. This topic may be suitable for a project by the CIS Interstate Council on Antimonopoly Policy (ICAP), to examine how cooperative investigations are managed in other CIS jurisdictions. In any event, the importance to the AMC of receiving effective assistance from agencies such as the State Security Service and the Interior Ministry warrants expending effort to improve the existing situation.

6.2.25 Continue serving as a competition advocate to other parts of the government, with particular focus on increasing the understanding of competition policy principles among judges, prosecutors, and other law enforcement and regulatory agency personnel

The AMC devotes substantial resources to reviewing draft regulations, legislation, and resolutions developed by other government agencies. Consideration should be given to methods by which the competition policy expertise of personnel at other government agencies could be increased. The objective would be to reduce the necessity for extensive AMC involvement in the development of particular agency proposals affecting competition. The AMC already offers seminars designed to educate government personnel about the principles of competition policy, but this program could be expanded and enhanced. It might be desirable for the Cabinet of Ministers to require that every government agency designate an attorney as the agency's "competition policy officer." The persons thus designated would attend an intensive training course administered by the AMC, and then be responsible for monitoring agency activities, including both ongoing programs and new regulatory proposals, that affect competition. Such officers in law enforcement agencies could serve as the contact point for developing cooperative procedures to be employed in AMC investigations.

Competition policy training by AMC personnel is not appropriate, however, for judges who expect to render decisions in cases where the AMC is a litigant. Other countries have found that judges are most comfortable attending seminars in which the principal instructors are experienced judges from other jurisdictions. Technical assistance programs sometimes offer such training for judges, and this might also be a topic appropriate for a project administered through ICAP.

6.2.26 *Exercise due care in demanding documentation in concentration permit application proceedings*

The concentration notification provisions in the Competition Law, and in the associated application procedures in Regulation 33, require the production of extensive documentation from all the parties participating directly in the transaction and from all other persons and entities with whom the participants are in a control relationship. Strict application of these requirements can oblige the parties to submit documents respecting large numbers of affiliated entities that have no involvement in the relevant markets affected by the transaction. The AMC provides an opportunity for permit applicants to negotiate reductions in the scope of required documentation in such circumstances. Because applicants involved in these negotiations have little choice but to accept the AMC's determinations, it is important that AMC personnel exercise due regard for the costs imposed by documentation requirements and avoid demanding any more documents than are truly required for effective review of a transaction's competitive implications. In this respect, it is again appropriate to recognise the ICN's recommendations, which provide that the documentation demanded in conjunction with an initial merger notification should be limited to that necessary for determining whether the transaction (1) meets the notification thresholds and (2) raises any competitive issues warranting further investigation¹⁰¹.

6.2.27 *Continue existing programs to:*

- expand cooperation with international competition organisations and competition agencies of other nations, and develop the staff's foreign language capacity so as to facilitate consultations with European and American competition authorities;¹⁰²
- increase the recognition and acceptance of competition principles in society at large, as an advocate for the development of a competition culture in Ukraine; and
- enhance the investigative and analytic skills of agency staff (including regional office personnel) through training programs, the exchange of personnel with other competition agencies, and other available means.

The AMC presently has operating programs in each of these areas. All are important to the advancement of competition law and policy in Ukraine and deserve continued support.

NOTES

- ¹ The economic data in this section of the report are drawn largely from the OECD *Economic Survey*, available at www.oecd.org.
- ² Also treated as a concerted action is the creation of a business entity that coordinates competitive relations either between the founding entities, or between them and the new entity (Art. 5.1(2)). This provision is intended as the counterpart to a similar provision in Article 2.4 of the EU merger regulation (Reg. 139/2004) dealing with partial-function joint ventures.
- ³ Natural persons purchasing for final consumption are excluded from the definition of “business entity.”
- ⁴ Human labour, however, is not a “commodity” for purposes of the competition laws, and agreements among labour union members about wage rates do not fall under the AMC’s jurisdiction.
- ⁵ There is no practical difference between the prohibition in Article 6 of actions which “have led or may lead” to an anticompetitive effect and the comparable language in EU Article 81(1) referring to actions that have anticompetitive restrictions as their “object or effect.” The AMC construes “may lead” to include the same intended consequences covered by the EU reference to “object.”
- ⁶ Articles 7, 8 and 9 were modeled after similar provisions contained in the German Law against Restrictions of Competition, as it read at the time that the Ukrainian law was drafted. Those provisions have since been deleted from the German statute.
- ⁷ In 2004, the EU also eliminated its “negative clearance” system, which enabled parties to obtain a declaration that there were no grounds for prosecution of an action under Article 81(1) or Article 82. Ukraine has never had a comparable negative clearance procedure. The AMC issues advisory opinions under Article 14 of the Competition Law, as discussed later in this report, but such opinions do not purport to grant “clearance” from prosecution.
- ⁸ Regulation 27 applies to the creation of business entities only to the extent that the formation does not constitute a “concentration” controlled under the merger notification and approval provisions in Articles 22 and 24 of Competition Law, discussed later.

- ⁹ The AMC does not, however, have any sector-specific block exemptions comparable to those issued by the EU for motor vehicle distribution and servicing agreements (Reg. No. 1400/2002) and for joint actions among insurance companies (Reg. No. 358/2003). The AMC does not consider that conditions in those two sectors presently warrant development of such exemptions.
- ¹⁰ The total number of applications received was 425, but 70 of them were withdrawn or remained unexamined for other reasons.
- ¹¹ Throughout this report, the penalty amount imposed in a particular case is expressed both in hryvnia (the Ukrainian currency unit), denoted as UAH, and in euros, denoted as EUR. The amount in EUR is calculated based on the exchange rate in effect at the time that the penalty was imposed. The hryvnia has weakened gradually against the Euro over the past five years. A Euro converted to about 5.7 hryvnia in December 2002 and 7.4 hryvnia in December 2007.
- ¹² See EU Notice C372/03 (1997) on market definition.
- ¹³ Compulsory division has been required only once in the AMC's history, in a 1994 case prosecuted under the prior competition law.
- ¹⁴ AMC Regulation No. 33 (2002) specifies the procedures for processing concentration permit applications.
- ¹⁵ Acquisition of stock by a dealer for re-sale is excluded from the definition, provided that the dealer does not exercise the voting rights and disposes of the stock within a one-year period (unless extended by the AMC). Also excluded are transactions made within a single control group, acquisitions made pursuant to an official order in a liquidation proceeding, and the creation of a new business entity that coordinates competitive relations either between the founding entities, or between them and the new entity. As noted previously, creating an entity of the latter kind is treated as a concerted action under Article 5.
- ¹⁶ Persons are "associated" if they conduct business or exert control jointly, and Article 1 also specifies that, for natural persons, "associated" persons include spouses, children, parents, and siblings. The definition of control includes a non-exhaustive list of means by which "decisive influence" can arise, including essentially the same circumstances that constitute acquisition of control for purposes of defining a concentration.
- ¹⁷ This is another aspect of competition law in which Ukraine follows the German example. See Germany's Competition Law Section 19(3), creating market share presumptions for market dominance, and Section 36(1), establishing a presumption against concentrations expected to produce or strengthen a dominant position.

- 18 The AMC does not, however, routinely presume that market dominance will result from a concentration where the post-merger market shares meet the tests for joint dominance in Article 12.5 (which presumes dominance where either the market share of the three (or fewer) largest firms exceeds 50 percent or the share of the five (or fewer) largest firms exceeds 70 percent). There is internal debate at the AMC about the applicability of Article 12.5 in concentration cases.
- 19 Table includes mergers examined in privatisation proceedings.
- 20 The total number of merger permit applications received was 3318, but 979 of them were withdrawn or remained unexamined for other reasons.
- 21 Article 50 item (17) extends the scope of the prohibition in Article 18.1 by prohibiting any person from **providing recommendations** encouraging other entities to violate the competition laws or to aid and abet such violations.
- 22 Article 48 of the Competition Law empowers the AMC to cancel a concerted action permit granted under Article 10 if the permit holder violates Article 19.
- 23 “Bodies of administrative management and control,” as defined in Article 1, are economic agents and other entities that exercise management and control functions lawfully delegated to them by bodies of power or bodies of local self-government. Such management functions could include, for example, the implementation of a technical innovation project or an investment program in a particular sector or geographic area.
- 24 This provision enables the AMC to examine some government actions that may constitute anticompetitive state aid within the meaning of EU Treaty Article 87. The reach of the AMC under Article 15 is limited, however, because the Competition Law does not extend to acts taken directly by Parliament or the Cabinet of Ministers.
- 25 Article 10 bis, section (2) of the Paris Convention provides that “any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.” Section (3) is a non-exhaustive list of prohibited conduct, including (i) any acts creating confusion with the establishment, goods, or commercial activities of a competitor; (ii) false allegations discrediting a competitor; and (iii) misleading assertions about the nature, manufacturing process, characteristics, suitability, or quantity of particular products.
- 26 By comparison, the term of office for the President of Ukraine and for members of Parliament is five years.

- 27 Throughout this report, references made to actions or decisions taken by
“the AMC” of “the Committee” should be understood as denoting an
action taken either by the AMC in plenary session or by a subordinate
body or officer acting pursuant to delegated authority.
- 28 Article 14 applications require payment of a fee in the amount of UAH
1360 (EUR 180).
- 29 Article 29 applications also require payment of a fee in the amount of
UAH 1360 (EUR 180)
- 30 Paying the fee for such an opinion does, however, result in a subsequent
reduction of the concentration application filing fee to UAH 3740 (EUR
505) and of the concerted action filing fee to UAH 1190 (EUR 160)
- 31 An application fee of 5100 UAH (EUR 690) is required for applications
to permit concentrations.
- 32 Regulation 33, section 3.13 authorises the presiding AMC commissioner
to reduce the documentary filing requirements.
- 33 An application fee of 2550 UAH (EUR 345) is required for applications
to permit concerted actions.
- 34 The provisions for granting permission based on supervening public
interest considerations are modeled after similar provisions contained in
the German Law against Restrictions of Competition, as it read at the time
that the Competition Law was drafted. At present, Section 42 of
Germany’s competition law retains only a provision authorising
ministerial approval on public interest grounds for otherwise
anticompetitive concentrations.
- 35 Cabinet of Ministers Order No. 219 (2002).}
- 36 Cabinet decisions under Article 33 are subject to judicial review on
application by an affected business entity.
- 37 AMC Regulation No. 283 (2003) establishes implementation procedures.
- 38 Under Article 22-1 of the AMC Law, confidential information received
by the AMC may be used only for lawful purposes, and agency personnel
are subject to prosecution for unauthorised disclosure.
- 39 Article 50, items (13), (14), and (15).
- 40 The Committee does not maintain statistics showing how many
recommendations under Article 7, part 3, item (5) were issued to
terminate actions having an adverse effect on competition.
- 41 Heat and water utility enterprises have been required since 1997 to
provide rebates for inferior service under a Cabinet of Ministers
regulation (No. 1497). The Cabinet did not, however, specify how

rebates were to be calculated until 2006. Through 2005, the AMC treated the failure to calculate and issue rebates as an act that impaired competition and thus warranted issuance of a binding recommendation under Article 7. If a utility company failed to comply with a recommendation to rebate utility overcharges, the AMC's practice was to conduct further investigation and, as appropriate, issue a settlement recommendation under Article 46 of the Competition Law (discussed below). If the enterprise was still recalcitrant, a formal case under Article 13 of the Competition Law for abuse of dominance would be initiated.

- 42 For purposes of this table (and for all other tables in this report that categorise competition law violations), the "concerted actions" category includes unlawful concerted actions under Article 6.4 of the Competition Law, failure to perform a condition imposed on a permit for a concerted action, and unlawful restricting activities by associations under Article 21.1 of the Competition Law. The "abuse of dominance" category includes violations of Article 13.3 of the Competition Law; "government action" includes violations of Articles 15.3, 16, and 17 of the Competition Law; "unfair competition" includes violations of the Unfair Competition Law; and "Other" includes all other violations specified in Article 50 of the Competition Law.
- 43 If an applicant believes that it may suffer adverse consequences from the disclosure of its identity, it may request the AMC to initiate the case on the agency's own initiative (Art. 35.1).
- 44 Regulation 5 (1994), section 19. The procedures for processing complaints and violation cases are set out in Section VII of the Competition Law, elaborated by AMC Regulation No. 5 (1994).
- 45 The AMC received a total of 26,239 complaints from outside sources during the years 2003 to 2007, of which 1956 (7.5%) resulted in the initiation of cases under Article 37.
- 46 Seizure entails physical removal from the premises, whereas arrest entails leaving the evidence in place but sealing it and prohibiting access or use by persons other than authorised law enforcement officials.
- 47 Article 31 of the Ukrainian Constitution (Art. 31) provides that wiretapping may be employed only for the purposes of preventing crime or investigating a criminal case.
- 48 Article 23-1 AMC Law authorises the AMC to convene hearings and provides that third parties may be heard unless the complainant or the defendant raise valid objections.
- 49 The defendant, if found liable for violation of the law, is charged for any expert expenses incurred by a third party. If the AMC appoints an expert

on its on initiative, the expenses of the expert are paid from the fees received by the AMC for processing permit applications.

50 Several cases involving injunctive relief were processed at the AMC's regional offices, but the agency does not maintain statistics for such proceedings.

51 The grounds upon which the AMC may close a case include failure to prove a violation, lack of legal jurisdiction over the case, absence of the defendant, previous consideration of the same case, and settlement of the case under Article 46 (Art. 49).

52 In an abuse of dominance case, compulsory division is subject to the conditions in Article 53, as discussed previously. In a merger case where the parties failed to file for advance permission, the AMC can order divestiture under the Article 48 clause that refers to remediation of a violation.

53 The AMC Law provides that the AMC may make recommendations to government agencies, which they must consider, respecting the termination of licenses held by a defendant found to have violated the competition laws, and may also request the appropriate ministry to prohibit the defendant from engaging in export-import transactions (Article 7, part 1, item (13))

54 Earlier in this report, abuse of dominance cases and cases involving anticompetitive government actions were reported as constituting about 50 percent and 22 percent of the AMC's caseload. The proportions shown in this table are considerably less because the data presented in this table are limited to formal violation cases. The higher percentages mentioned previously take account of cases that were settled under Article 46 before formal initiation occurred. During the five year period, large numbers of Article 46 settlements were entered in both abuse of dominance cases (over 5000) and anticompetitive government action cases (nearly 3000).

55 Regulation No. 5 (1994), section 33.

56 Article 52 establishes no penalty for discriminatory restrictions on membership imposed by associations in violation of Article 21 or on recommendations inducing anticompetitive acts in violation of Article 50, item (17). Nor are penalties established for violations involving government agencies under Articles 15, 16, and 17, even though Article 15.3 expressly provides that anticompetitive conduct by government bodies "shall be prohibited and entail responsibility pursuant to law."

57 It is pertinent to note, however, that the AMC has never invoked the clause in Article 52 authorising imposition of a penalty equal to triple the amount of the defendant's illegally obtained profit.

- 58 Euro amounts were calculated in accordance with the average annual conversion rates published by the National Bank of Ukraine. Penalty totals by year were as follows (UAH million): 102.8 (2003), 2.9 (2004), 4.0 (2005), 23.5 (2006), and 11.6 (2007). The high amounts for the years 2003 and 2006 are due to the UAH 97.7 million penalty assessed in the 2003 Sentosa-Avias retail gasoline case and the UAH 17.2 million penalty imposed in the 2006 wholesale sugar cartel case, both of which cases are described earlier in this report.
- 59 Amounts by year were as follows (UAH thousand): 0.5 (2007), 1.9 (2006), 4.1 (2005), 5.1 (2004), and 1.7 (2003). Petitions based on Article 166⁴ accounted for about 75% of the total.
- 60 As described below, whether a decision has been re-examined or reviewed under either Article 57 or Article 58 has implications for the procedures applicable to the decision if it is subsequently appealed to a court.
- 61 There is also a Supreme Constitutional Court in Ukraine that has exclusive jurisdiction to resolve constitutional issues. To date, no issues relating to the competition laws have been considered by that court.
- 62 Under Article 60.4, the reviewing economic court, on its own initiative, may decide to stop the automatic stay from taking effect, but this also has never occurred.
- 63 There is one circumstance in which the AMC may transmit its own order directly to the State Executive Service for execution without obtaining a court order. Under Article 30 of the Unfair Competition Law, the Committee's decisions under Article 25, ordering the seizure of unlawfully marked goods or goods that are copies of the victim's products, are to be executed "in accordance with the procedure established for the execution of court decisions."
- 64 Non-payment of a penalty or fine does not constitute a failure to comply with an AMC order and thus does not violate Article 50.4 of the Competition Law.
- 65 Euro amounts in the table were calculated in accordance with the average annual conversion rates published by the National Bank of Ukraine. Of the total amount collected, the portion attributable to fines imposed for late payment of penalties under Article 56.5 of the Competition Law and Article 31 of the Unfair Competition Law was UAH 961,152 (EUR 139,297). This table does not include data relating to the imposition or collection of administrative penalties assessed by courts as a result of petitions by the AMC for violations of Articles 166⁴ and 164³ of the Code on Administrative Offences. As described previously, the total of such penalties imposed over the previous five years was UAH 13,300 (EUR

2078). Collection of such penalties is the responsibility of the State Executive Service, which does not consistently report collection results to the AMC.

66 Turkmenistan, which discontinued regular CIS membership in August 2005 and became an associate member, is not a signatory to the amended Agreement.

67 The AMC adds the observations that (1) delay in reviewing concentration applications is frequently caused by inadequate submissions by the applicants, and (2) what may appear to be superficial examination of markets is due to the fact that the agency recently examined the same market in conjunction with a previous application.

68 “Fees received” denotes fee payments made to the AMC under Article 34 of the Competition Law in conjunction with permit applications for concerted actions and concentrations, requests for preliminary opinions under Articles 14 and 29, and miscellaneous services. “Number of Personnel” denotes the number of employees on the agency’s roster as of January 1 of the listed year. Euro amounts were calculated in accordance with the average annual conversion rates published by the National Bank of Ukraine.

69 Present authorised strength for the AMC is 964; 300 at headquarters and 664 in the branch offices.

70 Article 3.3 of the Competition Law provides that the creation of special rules for applying the competition laws to a particular market sector can be accomplished only by amending the Competition Law itself.

71 Airlines and trucking are not on the statutory list because Ukraine does not regulate prices for air transportation or for freight transportation by truck.

72 The Natural Monopolies Law requires the AMC to compile and maintain a list of the business entities operating in the designated natural monopoly markets. About 2,300 companies were listed in 2007.

73 The Law also empowers the regulatory agencies to license and control certain aspects of economic activity by firms operating in markets “contiguous” to natural monopoly markets. Contiguous markets are defined as those in which business entities cannot operate without using the products or services of entities in an adjoining natural monopoly market.

74 There is no penalty under Article 20.4 for failing to submit a regulation to the AMC for approval, and agencies sometimes neglect this obligation, deliberately or otherwise. To detect such instances, the AMC periodically inspects the regulatory output of other agencies. Where offending

regulations have already been issued, the AMC may also be alerted by complaints from affected business entities. An agency that has issued an anticompetitive regulation without AMC approval can be found in violation of Competition Law Article 15, which prohibits agencies from taking actions that eliminate or distort competition.

75 Under Article 20-1.1, the AMC is required to submit an annual report on its activities to the Parliament. Article 20-1.2 provides that the Parliament shall review the report and “hear reports and statements” from the AMC.

76 The precise language in item (14) provides that the AMC may give “instructions” to agencies for the amendment of existing regulations, but the AMC construes this language to mean “binding recommendations.”

77 From 2003 to 2007, the AMC issued a total of 8182 binding recommendations under Article 7, part 3, item (5). No statistics are maintained for the number of binding recommendations issued under Article 7, part 3, item (14).

78 Whenever the Cabinet of Ministers considers matters that involve recommendations made by the AMC, the Committee’s chairman participates in the discussion as provided by the AMC Law. Under Article 9 of that Law, the chairman has the right to participate in Cabinet meetings and cast an advisory vote.

79 The Transportation Ministry, which has clashed with the AMC over establishment of a tariff regulation agency for railroads, nonetheless gives the AMC an “A” for the quality of its competition advocacy work.

80 The English version has an abbreviated set of materials and is not regularly updated.

81 For an example in the United States, see the 1980 Soft Drink Interbrand Competition Act, codified at 15 U.S.C. sections 3501-3503 (1988), which overturned a decision of the US Federal Trade Commission finding that the assignment of exclusive geographic territories to soft drink bottlers was anticompetitive.

82 See Section 42 of the German Competition Law.

83 Under Article 6.5, the first person to notify the AMC of a concerted action of which the agency was previously unaware is excused from any monetary penalty under Article 52 of the Competition Law. Given the absence of criminal penalties, the fact that no notifications have yet been submitted under Article 6.55 is not surprising.

84 If criminal penalties are eventually instituted, the legislation should include a provision specifying that persons excused from penalties under Article 6.5 are also excused from criminal penalties. The AMC should note that effective operation of a leniency program requires an

implementing regulation dealing with various procedural issues, such as the extension of confidential treatment to incriminating information provided by notifying parties who do not qualify for leniency because they are not the first parties to appear. Similarly, the AMC should also consider proposing that Article 6.5 be modified to protect notifying firms from double damages in private indemnification proceedings brought under Article 55, and to provide lesser forms of protection (such as reduced penalties) for parties who are not the first to notify.

85 For statistical reporting purposes, the AMC should develop a method for tracking the results of actions by the State Executive Service to collect AMC penalties.

86 The AMC might also consider proposing to the Cabinet of Ministers a system under which violations of this kind could be censured by a formal letter of reprimand from the Prime Minister to the responsible agency official.

87 Legislation amending the indemnification provisions to this effect could specify a future date on which the requirement for a predicate AMC decision would lapse.

88 Such a requirement would effectively insure, for example, that the AMC receives notice of private indemnification actions under Article 55 of the Competition Law.

89 International Competition Network, Merger Working Group, Merger Notification and Procedures Subgroup, Recommended Practices for Merger Notification Procedures [hereafter ICN Merger Notification Procedures], § IC, comment 3, available at: <http://www.internationalcompetitionnetwork.org/mnprepractices.pdf>.

90 ICN Merger Notification Procedures, § IB, comment 3. Article 5.2 of the EU merger regulation (No. 139/2004) follows exactly this approach, providing that “Where the concentration consists of the acquisition of parts [of an enterprise], . . . only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller or sellers.”

91 ICN Merger Notification Procedures, § IIB, comment 1. See also OECD, Recommendation of the Council Concerning Merger Review (March 23, 2005) [hereafter OECD Merger Review Recommendation] §IA1.2(2), available at <http://www.oecd.org/competition> (stating that notification criteria should be “clear and objective”).

92 ICN Merger Notification Procedures, § IB, comment 2.

93 ICN Merger Notification Procedures, § IC, comment 2.

- ⁹⁴ ICN Merger Notification Procedures, § IB, comment 1. See also OECD Merger Review Recommendation § IA1.2 (countries should “assert jurisdiction only over those mergers that have an appropriate nexus”).
- ⁹⁵ ICN Merger Notification Procedures, §VIII C, comment 2. Similarly, the OECD has urged member countries to “ensure that the rules, policies, practices and procedures involved in the merger review process are transparent and publicly available, including by publishing reasoned explanations for decisions to challenge, block or formally condition the clearance of a merger.” OECD Merger Review Recommendation, §IA2.
- ⁹⁶ See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02).
- ⁹⁷ The guidelines should cover not only penalties assessed against business entities, but also administrative monetary penalties imposed on individuals.
- ⁹⁸ The efficacy of such efforts could be enhanced by increasing the AMC’s investigative powers and the penalties associated with cartel agreements, as recommended elsewhere in this report.
- ⁹⁹ On a related point, it has been suggested by some observers that the AMC, in conjunction with redirecting its attention from dominant firms to anticompetitive concerted actions, should change its name from the “Antimonopoly Committee” to the “Competition Protection Committee” or a similar formulation.
- ¹⁰⁰ In addition to block exemptions, the EU has also issued various guidelines that the AMC should consider for development of Ukrainian counterparts. Besides guidelines for concentrations (covering both horizontal and non-horizontal transactions) and for imposition of penalties, there are also EU guidelines on horizontal cooperation agreements, vertical restraints, technology transfer agreements, and the application of Article 81(3).
- ¹⁰¹ ICN Merger Notification Procedures, § VA. Given Ukraine’s current merger notification thresholds, Comment 2 to the ICN’s recommendation is especially relevant. It states: “Jurisdictions that review transactions of limited value, transactions with limited local nexus, or large numbers of transactions due to low jurisdictional thresholds should be particularly sensitive to any disproportionate burdens arising from the breadth of their initial filing requirements.”
- ¹⁰² Improved language capacity would also better enable the AMC to maintain the English version of its website.

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