

Competition in Ukraine: Fair Business in Ukraine From a Competition Perspective?

While in many jurisdictions fair competition is safeguarded by consumer protection agencies, in Ukraine significant powers are allocated to the competition authority – the Antimonopoly Committee of Ukraine (the "AMC"). Investigations of any dishonest or fraudulent practices that may unfairly distort competition constitute about 16% of all cases handled by the AMC. In 2013, 1,259 violations of unfair competition laws were investigated by the AMC.



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The Law of Ukraine “On Protection Against Unfair Competition” (the "Competition Law"), adopted in 1996, distinguishes among the following main types of violations: (i) actions that are contrary to honest practices and involve illegal use of intellectual property or business reputation of another undertaking, e.g., parasitic copying; (ii) restrictive and discriminatory practices, e.g., dissemination of false or misleading information; and (iii) unlawful collection, disclosure, and use of trade secrets.

Traditionally, the AMC pays primary attention to restrictive and discriminatory practices. According to the Annual Report of the AMC for 2013, 85% of all unfair-competition cases reviewed by the AMC last year were related to dissemination of misleading information by market players, primarily in the course of advertising and promotional campaigns. The authority is convinced that dissemination of misleading information is one of the most destructive types of unfair competition, and fraudulently influences the end choice of consumers to purchase a particular product.

For example, in 2013 the regulator prosecuted Nestle Ukraine LLC for failing to indicate the duration of a sales promotion offered on one of its product lines. The AMC also applied sanctions on several other global market players for indicating the dates of a promotion only on the internal side of the label and for having products available in stores after the promotion period had expired.

The maximum fine in the unfair competition area was imposed by the AMC on a local pharmaceutical company which indicated in its advertising campaign that 9 out of 10 Ukrainians chose its drug. No market studies could confirm the accurateness of this statement.

Last year, the AMC concentrated its efforts on the foods and consumer goods markets. These socially important markets will likely continue to be the AMC's focus in 2014 and beyond.

In addition, a new trend in the prosecution of unfair-competition violations by the AMC has emerged: The AMC has started paying more attention to parasitic copying, which includes using a name, trademark, advertising materials, product-packaging design, or any other unique identifier of another undertaking. Along with restrictive and discriminatory practices, parasitic copying allows an undertaking to gain unlawful advantage

over competitors, resulting in significant losses for good-faith market players. In the modern world, intellectual property is one of the key assets that ensure success in a competitive market. Its protection requires coordinated efforts from both from consumer protection agencies and from competition authorities. Despite the fact that the AMC has limited experience in investigating parasitic copying, it has proven to be an effective instrument to fight off the abusers.

As far as the sanction list is concerned, the AMC is empowered to apply a broad spectrum of penalties for unfair business practices, including seizing infringing products or recalling them from the market. Yet fines remain the most common sanction applied by the AMC. In principle, they may reach up to 5% of the violator's gross worldwide income (sales) for the fiscal year preceding the year in which the fine is imposed. As a practical matter, the highest fine imposed by the AMC for unfair competition so far approached USD 1 million (it was imposed in 2012). Since then, the AMC has expressed its intention to increase the amount of fines for any competition-law violations. However, the maximum fine imposed for unfair competition in 2013 was only about USD 115,000.

In the context of the AMC's declared intention to make its fines-policy stricter, it is of key importance for businesses to understand the procedure of fine calculation, which has not been made public. This is one of the main issues raised by the business and legal communities before the AMC to date. Following numerous requests and pleas, the AMC has prepared and internally adopted a methodology. The document is expected to shed some light on how the fines are being calculated and eliminate uncertainties within the business and legal communities, making the procedure more transparent. Due to some internal resistance, it is very difficult to predict when the AMC will publicly release this methodology.

In light of the current political situation in Ukraine, the leadership of the AMC is undergoing substantial changes. The majority of the commissioners of the AMC are likely to be replaced. Yet one can hope that the new appointees will continue the AMC's efforts in combating unfair competition and will apply the best practices available from other jurisdictions.

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