Ukraine

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General

1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

- The Law 'On the Protection of Economic Competition' of 11 January 2001 (the Competition Law); and
- The Regulation of the Antimonopoly Committee of Ukraine 'On the Procedure of Determining a Monopoly (Dominant) Market Position' No.49-R of 5 March 2002 (the Regulation on the Monopoly Market Position)

2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

No. Liability for abuse of dominance requires that an undertaking holds a dominant position in a relevant market. In other words, unlike article 2 of the US Sherman Act, the provisions of the Competition Law dealing with abuse of dominance do not cover an undertaking's pre-dominant conduct adopted with a view of ousting competition in order to become dominant (such as 'monopolising' practices). However, as mentioned in question 4, certain anti-competitive conduct of non-dominant undertakings acting in concert can amount to 'anti-competitive concerted practices' which are prohibited by the Antimonopoly Committee of Ukraine (the AMC).

3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

With the main aim of the previous legislation – the demonopolisation of stately-owned entities with a natural dominant position – fairly successfully achieved, the Competition Law has as its main objective the protection of economic competition. In other words, the prevention and elimination of any market conduct that may lead to the distortion of economic competition. This includes preventing any abuses of market power (dominant position), which can have negative effects on competition or 'the interests of undertakings and consumers' (article 4 of the Competition Law). Thus, the legislation is also concerned with consumer welfare, although not as explicitly as its European counterpart.

4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

No. However, it should be mentioned that certain conduct of market players in the context of contractual relations (such as distribution agreements) may, as provided by article 6 of the Competition Law, amount to 'anti-competitive concerted practices'. Resorting to anti-competitive concerted practices is strictly prohibited, although they may, under certain circumstances, be approved by the AMC following a successful application from the parties involved. The approval procedure is specified in the AMC Regulation 'On the Procedure for Submission of Applications to the Antimonopoly Committee of Ukraine for the Approval of the Concerted Practices of Undertakings' (the Regulation on Concerted Practices).

5 Sector-specific control

Is dominance regulated according to sector?

Market dominance is not dependent on any specific industry sector, rather it is a concept applied equally to all markets of Ukraine. Having said that, there are certain markets where a natural monopoly position is tolerated (as provided by the Law 'On Natural Monopolies' of 20 April 2000), including:

- pipeline transportation of oil and oil products;
- pipeline transportation of natural gas and petroleum gas and distribution thereof;
- storage of natural gas in the amounts exceeding the level set by the licence terms;
- pipeline transportation of other substances;
- transmission and distribution of electricity;
- use of railway tracks, controller services, stations and other infrastructure facilities pertinent to the railway transport of general use;
- air traffic control;
- centralised water supply and sewerage;
- transportation of thermal energy; and
- specialised services of transportation terminals, ports, airports, the list of which is determined by the Cabinet of Ministers of Ukraine.

Nevertheless, any abuse of dominance in all markets of all industry sectors entails the same legal consequences on the breaching party.

6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

Please refer to question 5.

7 Enforcement record

How frequently is the legislation used in practice?

In the previous year, there was an increase in the number of monopolised markets as the number of competitors noticeably reduced. The number of Competition Law violations grew, while those in the form of abuse of monopoly (dominant) position remained the most common. Therefore, in an attempt to prevent further violations, the AMC has adopted a more aggressive stance by increasing the level

of fines, raising them twofold in comparison to 2008 and by a factor of 2.3 in comparison to 2007 levels. There has also been an increase in the number of uncovered violations by the AMC, with a total of 3,271 detected, including 1,063 (32 per cent) abuses of a monopoly (dominant) position. Common types of abuse include unfair price fixing (without economic justification) and infringements of consumers' as well as other undertakings' rights and interests.

8 Economics

What is the role of economics in the application of the dominance provisions?

The principles of economic theory have only just started to play an important role in the application of dominance provisions – a situation which is somewhat behind European standards. The AMC will only resort to economic experts if, for whatever reason, it cannot adequately establish the existence of a dominant position. Similarly, the AMC can argue dominance even if the market share threshold (more than 35 per cent) is not exceeded. Furthermore, undertakings subject to investigations can also rely on their own economic experts or on such bodies as the Ministry of Statistics of Ukraine in order to ascertain whether the AMC correctly applied the economic formula under the Regulation on the Monopoly Market Position when establishing market dominance. Effectively, undertakings can rely on economic theory to challenge their presumed dominance. In summary, a formalistic approach prevails, but economic analysis may be relevant in some cases where the undertakings appropriately use it to prove that they are not, in fact, dominant on the relevant market.

9 Scope of application of dominance provisions

To whom do the dominance provisions apply? To what extent do they apply to public entities?

The dominance provisions apply to 'business entities' (often translated into English as 'undertakings') which are quite broadly defined by article 1 of the Competition Law to include any legal entity or natural person that engages in commercial activity, including (similar to the position in the EU) public entities, such as government bodies engaging in commercial activity. More specifically, 'bodies of power, bodies of local self-government, and bodies of administrative management and control' are all caught by the provisions. Effectively, this means that practically every government entity in Ukraine's executive branch below the highest executive organs of power, including the ministries, bodies regulating natural monopolies, privatisation bodies as well as the Supreme Council of the Autonomous Republic of Crimea can be scrutinised by the provisions of the Competition Law and is answerable to the AMC. The provisions also extend to 'associations' which include any union of legal entities or natural persons – including, for example, labour unions, but only to the extent that they engage in commercial activities.

10 Definition of dominance

How is dominance defined?

Article 12.1 of the Competition Law defines dominance as a market position where the undertaking either is the only firm in the market; or faces insignificant competition as a result of some special privileges it enjoys or because other firms are constrained by entry barriers, unavailability of inputs or distribution systems, or other factors. The Competition Law establishes a rebuttable presumption that a firm with a market share exceeding 35 per cent is dominant (article 12.2 thereof). A successful rebuttal can be advanced if the firm proves that in fact it experiences substantial competition. Undertakings with market shares at or below 35 per cent may also be deemed dominant if they do not face significant competition, especially if their competitors are rather small-sized (article 12.3 of the Competition Law). The Competition Law also provides for the possibility of collective dominance (as further discussed in question 13).

11 Market definition

What is the test for market definition?

The Regulation on the Monopoly Market Position provides guidelines on defining a relevant market, applying the same rules and principles for both merger control and abuse of dominance purposes. The guidelines are based on the conventional market definition theory and largely amount to a copy of the EU's approach (before the SSNIP test was introduced).

Products that are considered interchangeable or substitutable are deemed to fall within the brackets of the same product market. In particular, the Regulation on the Monopoly Market Position provides that interchangeable products include those products that, in the eyes of sellers (suppliers, producers) and buyers (consumers, users), have features of one (similar) product (product group), including:

- a similarity of purpose, consumer characteristics, terms of use etc;
- a similarity of physical, technical, operational properties and characteristics, quality indicators etc;
- the presence of a joint group of consumers of the product (product group);
- an absence of significant price difference; and
- a similarity in terms of their manufacturing (ie, the ability of the producers to offer new products instead of the existing ones).

In other words, when deciding whether certain products belong to the same product market, it should be possible for a consumer to, within the relevant product market and under the same conditions, switch from one of those products to another.

According to the Regulation on the Monopoly Market Position, the relevant geographic market can be Ukraine-wide or regional (meaning a particular region (*oblast*) or smaller) of Ukraine), without providing for the possibility of defining the market wider (eg, as worldwide or even Europe-wide). The relevant geographic market consists of the minimal territory outside of which, in the eyes of consumers, it is impossible or inappropriate to purchase the product (product group) belonging to the relevant product market. Any geographic market that is smaller than the national market of Ukraine is viewed as regional. With respect to merger control rules, the same test for market definition, as provided by the Regulation on the Monopoly Market Position, is used.

12 Market-share threshold

Is there a market-share threshold above which a company will be presumed to be dominant?

As mentioned in question 10, a market-share threshold above 35 per cent leads to a presumption of dominance that can be rebutted only if the implicated undertaking is able to establish that the market in question is actually a very competitive one. In addition, no statutory provisions establish a per se dominance based on the undertaking's market share.

13 Collective dominance

Is collective dominance covered by the legislation? If so, how is it defined?

Similarly to its European counterpart, the Competition Law, namely article 12.4, stipulates that two or more firms can be jointly dominant (and, consequently, each is considered individually dominant) if they engage in no substantial competition against one another in the relevant market; and there are no other firms in the market other than the dominant group or the competition from such other firms is insignificant. The AMC will inevitably presume the existence of an oligopoly where the market share of three (or fewer) largest firms is more than 50 per cent, or if five (or fewer) largest firms have more than 70 per cent of the relevant product market.

In order to rebut the presumption of collective dominance, the burden of proof is on the oligopoly firms to satisfy the AMC officials by establishing that there is substantial competition between them and that there are other firms operating in the relevant market that exert significant competitive pressure on them and therefore prevent them from abusing their collective dominant position.

A noteworthy case of abuse of collective dominance is the *Boryspol Airport* case in 2009, which resulted in a 265 million Ukrainian hryvnia fine being imposed on CJS Krebo, Ukrtatnafta, LUK-Avia Oil (active on the aeroplane fuel market) and the state-owned Boryspil International Airport operating on the market for special airport services. The prices charged by the undertakings lacked economic justification and were therefore deemed as excessive by the AMC. The defendants subsequently attempted to challenge the AMC's decision by bringing a case before the High Commercial Court, which subsequently upheld the AMC's ruling and ordered the undertakings to pay the fines.

14 Dominant purchasers

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

Dominant purchasers also fall within the ambit of the Competition Law. Namely, article 13 refers to 'the imposition of such prices or other different conditions for the purchase or sale of goods'. Thus, in order to find that a particular purchaser is abusing its dominant position, the onus is on the AMC to demonstrate that the suppliers are incapable of switching to other purchasers (thus establishing that the purchaser in question has market dominance) and that the dominant purchaser is imposing such conditions 'that would be impossible to sustain in a substantially competitive market' (article 13 of the Competition Law).

Abuse in general

15 Definition

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

The Competition Law follows the effects-based approach when defining abusive market conduct of dominant firms. Namely, article 13.2.1 stipulates that abuse amounts to any conduct 'which has led or may lead to the denial, elimination or restriction of competition'. Practices capable of anti-competitive harm are broad in scope and, following a statutory amendment to the Competition Law (which came into force in 2005) include 'infringement of interests of other business entities or consumers that would be impossible in a market with substantial competition'. The legislator passed the amendment with the aim of catching scenarios where the absence of alternative suppliers or customers leaves business firms or consumers dependent on, and vulnerable to abuse by, the dominant firm.

Article 13.2.2 of the Competition Law provides a non-exclusive list of market conduct deemed to constitute abuse. Unlike its European counterpart, the Competition Law does not explicitly refer to 'unfair' prices but to those that 'would be impossible to sustain in a substantially competitive market' and not to limitations solely prejudicial 'to consumers', but to limitations prejudicial 'to business entities or consumers'. However, although the language is slightly different to that used under article 102 of the Treaty on the Functioning of the EU (TFEU), in essence, the following conduct is generally considered to be abusive per se by the Competition Law:

(a) the imposition of unfair prices or conditions that would be impossible to sustain in a substantially competitive market;
(b) the imposition of additional obligations which have nothing in common with the subject matter of the contract in question (with the purpose of catching tying);
(c) the limitation of production, distribution or technological development;
(d) the erection of entry or exit barriers;
(e) the refusal to deal and supply; and
(f) conduct amounting to substantial restriction of competitiveness of other undertakings without an objective justification.

The conduct capable of amounting to an abuse of dominance described immediately above (under bullet point (f)) is rather wide and effectively shifts the burden of proof on the undertaking to rebut the presumption that the conduct in question is anti-competitive. It is a powerful weapon in the AMC's arsenal.

16 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

As described in question 15, the concept of abuse under the Competition Law extends both to exploitative (ie, the imposition of unfair prices or conditions) and exclusionary practices (ie, the refusal to deal and supply).

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

There is a strict pre-condition that, for article 13 of the Competition Law to apply, the undertaking in question must primarily achieve market dominance, as stipulated under article 12. In other words, a dominant undertaking in one market cannot be prosecuted for abusing its dominant position by projecting its market power onto a different (although adjacent) market on which it is not dominant.

18 Defences

What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?

Undertakings alleged to have abused their dominant positions can mount a successful defence if they demonstrate that their market conduct does not have any 'significant' anti-competitive effect. The possibility of invoking efficiency gains (whether on the market or the consumers) is not envisaged by the Competition Law.

Specific forms of abuse

19 Price and non-price discrimination

Price and non-price discrimination falls within the ambit of the Competition Law, namely article 13, which explicitly prohibits the imposition of unfair prices or conditions (article 13.2.1) and the imposition of additional obligations to equivalent transactions (article 13.2.2). Any such conduct is per se prohibited. A provision of article 13 that also catches such discrimination is a form of conduct that results in 'the substantial restriction of competitiveness of other undertakings without an objective justification'. Its scope is rather wide, but at least, similarly to the provisions of article 102 TFEU, it provides the implicated undertaking with an opportunity to justify its market behaviour.

In 2011, the AMC imposed a fine on Gerc, a company engaged in online acceptance and tracking of credit card payment services, for abusing its dominant position. Namely, the company set different prices for its customers for essentially the same services without any objective justification.

20 Exploitative prices or terms of supply

Exploitative prices or terms and conditions of supply are also explicitly covered by the provisions of the Competition Law, namely, those that 'would be impossible to sustain in a substantially competitive market' amount to a per se abuse of dominance (article 13.2.1). This is in stark contrast to some other jurisdictions (the proponents of the Chicago School such as the US for instance) where a company with a legally acquired monopoly position is 'awarded' by being allowed to set monopoly prices.

In 2010, the AMC found that Kyivshljahmist, a public utility enterprise, held a dominant position in the telecommunication networks market. It resorted to a six-fold price increase that would otherwise be impossible to sustain in a market of effective competition. Since it could not provide an objective justification, its conduct was found to be abusive and a fine was imposed.

21 Rebate schemes

Rebate schemes can, for example, amount to 'the imposition of different prices to equivalent transactions without an objective justification' (article 13.2.2) and thus be prohibited per se by the AMC. In 2009, the sea port authority of Yuzhni was condemned for abusing its dominant position in the market of loading and unloading services provided to shipowners (cargo owners). The port authority granted individualised rebate schemes to its customers which the AMC officials found to be anti-competitive and consequently imposed a fine.

22 Predatory pricing

Although a clause in article 13.2.2 seemingly excludes predatory pricing by only referring to those prices that would be 'impossible to sustain in a competitive market' (since the sustainability of predatory pricing does not necessarily depend on market competitiveness), this does not create a gap in Ukraine's law. Predatory pricing is implicitly covered by other clauses of article 13 that cover conduct capable of substantially restricting the competitive capacity of another undertaking without an objective justification, or creating market entry or exit barriers or eliminating an undertaking from the market.

In 2011, the AMC imposed a fine on OJSC Kyivhlib for abusing its dominant position. The company attempted to drive out its competition by undercutting its prices to certain distributors. AMC officials found that such conduct had the effect of creating unequal conditions for participants of the bread sale market and could lead to the restriction of competition. Kyivhlib admitted the wrongdoing and has undertaken to pay the penalty.

23 Price squeezes

Price squeezes where an undertaking attempts to foreclose rivals in either the upstream or downstream market can amount to an abuse of dominant position if the imposition of such prices 'would be impossible to sustain in a substantially competitive market' (article 13.2.1 of the Competition Law).

24 Refusals to deal and access to essential facilities

Partial or full refusals to deal and supply when there are no alternative sources of supply are explicitly covered by article 13.2.2 of the Competition Law and therefore any such conduct resorted to by a dominant firm would be deemed as abusive per se. One such refusal to deal case involved Hostmaster, the sole accredited Internet domain name registrar in Ukraine with a consequent dominant position in the market for the administration and technical support of internet domains '.ua' and '.com.ua'. The company refused to deal with an undertaking that had intentions of offering domain administration and technical support which the AMC condemned. Another case occurred in 2004 when the AMC imposed a fine on the Yalta Port Authority for abusing its dominant position when it prevented a ship, operated by Transservis, from unloading its cargo. In 2008, the AMC imposed a fine on Alians-Nafta for abusing its dominant position on the oil retail trade market when it refused to supply oil to certain parts of the Sumskaya region of Ukraine. The company was the sole market participant in the region and so naturally there were no alternative suppliers.

The AMC has also taken an aggressive stance towards anti-competitive refusals of access to essential facilities, particularly in energy markets. The owner of the electricity distribution network in the capital, Kyivenergo, was condemned for abusing its dominant position. In 2006, the company, which sells electricity at non-tariffed prices, refused to contract with competing electricity producers, thereby denying them access to its electricity network. It was subsequently forced to change its anti-competitive conduct at the instruction of AMC officials.

25 Exclusive dealing, non-compete provisions and single branding

Such conduct could amount to an abuse of dominant position if it could be characterised as an imposition of such conditions for the purchase and sale of the relevant product that 'would be impossible to sustain in a substantially competitive market' (article 13.2.1 of the Competition Law). The AMC officials relied on the very same provision of the Competition Law when they condemned Mykolaiv-Gaz for including exclusive dealing provisions in agreements it entered into with customers when connecting them to gas transmission networks. It is worth mentioning that the AMC has adopted a rather aggressive stance towards exclusive dealing. Its officials can even use exclusive dealing to construe an inevitable and indirect proof of dominance. In particular, if, after conducting the test for market definition as provided by the Regulation on the Monopoly Market Position, the AMC officials are not able to, with definite certainty, establish the existence of a dominant position on a particular market, an undertaking's ability to force another to accept exclusive dealing provisions of an agreement will generally amount to evidence that such an undertaking indeed holds a dominant position.

Although non-compete provisions can amount to an abuse of dominant position, the AMC is more likely to see them as anti-competitive concerted actions (especially taking into consideration the fact that in such case there would be no need to establish the existence of a dominant position). For example, supply or distribution agreements containing non-compete provisions in the form of an incentive scheme or an obligation, which cause the buyer not to manufacture, purchase, sell or resell products which compete with the contract products or to purchase a minimum amount of the contract products from the supplier, are likely to attract the attention of the AMC. Indeed, in some cases, non-compete restrictions regarding supply and use of goods may not be in violation of the Competition Law because they may fall under one of the block exemptions (for small and medium-sized businesses, as based on their market share, or in case of vertical agreements), as provided by article 8 of the Competition Law.

26 Tying and leveraging

The imposition of unfair prices or conditions (including the imposition of additional obligations which have nothing in common with the subject matter of the contract in question) inevitably catches the scenario where an undertaking makes the sale of its product conditional upon the purchase of another product – thereby tying the two together. One such case occurred in 2006 when the AMC imposed a 100,000 Ukrainian hryvnia fine on the European Consulting Agency (the provider of government procurement information on the internet) for abusing its dominant position by charging fees which included those for other services that were not the subject matter of the contract originally entered into.

27 Limiting production, markets or technical development

The limitation of production and technological development is explicitly covered by article 13 of the Competition Law. The same goes for the limitation of markets which is covered by two clauses of the same article: the one prohibiting conduct that leads to 'the substantial restriction of competitiveness of other undertakings without an objective justification'; and the one referring to putting up entry or exit barriers. Thus, actions leading to the limitation of production, markets or technical development are considered to be abusive per se.

28 Abuse of intellectual property rights

Although abuse of intellectual property rights is not explicitly covered by the provisions of the Competition Law, the indirect prohibition of abusing one's dominant position by denying access to such rights can, nevertheless, be construed. Namely, article 13.2.1 (establishing conditions that would otherwise be impossible to sustain in a competitive market) and 13.2.6 (conduct leading to the substantial restriction of competitiveness of other undertakings without an objective justification) can be resorted to ensure fair access to intellectual property rights. Thus, any actions leading to the abuse thereof would be prohibited per se.

29 Abuse of government process

In a hypothetical situation, if an undertaking is attempting to enter into the relevant market and the dominant firm puts up entry barriers by groundlessly alleging that the new entrant did not properly obtain the required intellectual property rights, this could, at least in theory, amount to an abuse of government process. Although we are unaware of any precedents, it may be possible to widely construe article 13.1 to mean the prohibition of any conduct 'which has led or may lead to denial, elimination or restriction of competition, in particular … the infringement of interests of other undertakings or consumers that would be impossible in a market with substantial competition'. Thus, although resorting to normal judicial process, a dominant undertaking may be deemed abusive if it brings a groundless claim (eg, 'frivolous patent litigation') which merely harasses the potential entrant. At the same time, one should bear in mind that the doctrine of abuse of rights is not well developed in Ukraine and it may be difficult to prove that otherwise lawful behaviour should be treated by the AMC as a violation of Ukrainian competition law.

30 'Structural abuses' – mergers and acquisitions as exclusionary practices

Mergers and acquisitions involving dominant firms are not regulated by the provisions of the Competition Law relating to the abuse of dominance but rather to those dealing with merger control rules.

31 Other types of abuse

The provisions of the Competition Law do not provide for an exhaustive list of conduct that may constitute an abuse of a dominant position. In fact, the scope of such anti-competitive conduct is very wide indeed, due to a broad-encompassing clause of article 13 which prohibits actions that lead to 'the substantial restriction of competitiveness of other undertakings without an objective justification'.

Enforcement proceedings

32 Prohibition of abusive practices

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

Abusive practices are strictly and explicitly prohibited by the Competition Law. In addition to imposing fines, the AMC is, under article 53 of the Competition Law, empowered to take remedial actions such as ordering a compulsory split of an undertaking abusing its dominant position, provided that the separation of the entity along structural or territorial lines is practicable and there are no tight technological links between the several undertakings involving intrafirm purchases of more than 30 per cent of their total output. The AMC has so far not resorted to article 53 powers.

33 Enforcement authorities

Which authorities are responsible for enforcement and what powers of investigation do they have?

Under article 4.4 and article 7 of the Competition Law, the AMC is solely and exclusively responsible for enforcing 'the legislation on the protection of economic competition', which includes the Competition Law, the Law on the Antimonopoly Committee of Ukraine of 1993 and the Law on Protection against Unfair Competition of 1996, including the regulations implementing those laws (article 3.1 of the Competition Law). In addition, the above-mentioned competition laws envisage the possibility for undertakings and 'individuals engaged in the production, sale or purchase of products and in other economic activity' (article 1 of the Competition Law) to appeal to the commercial courts (with the High Commercial Court being the highest body of judiciary) in order to seek redress for harm suffered due to anti-competitive conduct resorted to by a dominant firm.

The AMC takes investigations very seriously. It has vast investigative powers affording it with the authority to:

- request the submission of any relevant information (including financial and business secrets) from the relevant parties;
- seek expert opinion; and
- seize material and written evidence, such as objects, documents or other information carriers amounting to evidence or sources of evidence in connection with the alleged violation of the Competition Law.

34 Sanctions and remedies

What sanctions and remedies may they impose?

Pursuant to article 52 of the Competition Law, abuse of a dominant position entails a fine imposed by the AMC in an amount of up to 10 per cent of the gross worldwide income (sales) of the relevant undertaking. This gross income figure is determined as the cumulative income (turnover) of the relevant undertaking, including all its related entities. So far, the highest fine for abuse of dominance was imposed in 2009. CJS Krebo, Ukrtatnafta, LUK-Avia Oil (active on the aeroplane fuel market) and the state-owned Boryspil International Airport were fined 265 million Ukrainian hryvnia for abusing their collective dominance in the aeroplane fuel market. Compulsory split-offs are also envisaged (as discussed in question 32).

35 Impact on contracts

What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

Contracts entered into by dominant parties in breach of the Competition Law are not automatically void, but the AMC may try to, through the judicial process, invalidate a contract which has anti-competitive provisions. We are not aware of any precedents when the

AMC has attempted to resort to this remedy. Instead of challenging the validity of a contract, the AMC may impose an obligation on the culpable undertaking to cease its violation, albeit affording it with an absolute freedom to do so in whatever way it sees fit – whether by taking out the anti-competitive provision or amending the contract accordingly to ensure that it does not restrict economic competition. In summary, only the courts have a right to invalidate agreements.

36 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

Private enforcement in abuse of dominance is not envisaged by the legislation.

37 Availability of damages

Do companies harmed by abusive practices have a claim for damages?

Undertakings and 'individuals engaged in the production, sale or purchase of products and in other economic activity' (article 1 of the Competition Law) have the possibility of appealing to the commercial courts (with the High Commercial Court being the highest specialised judicial body acting as a cassation appeal instance for such cases) in order to seek redress for harm suffered due to anti-competitive conduct employed by a dominant firm. We are, however, unaware of any such damages ever having been granted by the commercial courts.

Update and trends

In its recent report, the AMC highlighted that, overall, economic completion has worsened. The year of 2010 saw an increase in the number of monopolised markets as the number of their competitive counterparts noticeably reduced. The number of competition law violations grew, the most common of which were in the form of abuse of monopoly (dominant) position. Therefore, in an attempt to prevent further violations, the AMC has adopted a more aggressive stance by increasing the level of fines.

With respect to future developments, it is worth mentioning that the economic theory is likely to play an increasingly important role. In addition, discussions are currently taking place aimed at exploring the possibility of amending the Competition Law in order to provide for a rebuttable presumption of dominance in cases where an undertaking has a 50 per cent market share, rather than the current threshold of 35 per cent.

It is also worth mentioning that the AMC has placed the following industry sectors on its 'top-priority' list:

- pharmaceuticals;
- transport (land, sea and air);
- public utility services;
- elementary foodstuffs; and
- oil and gas.

38 Recent enforcement action

What is the most recent high-profile dominance case?

This year, the AMC prosecuted Dniproazot for abusing its dominant position in the national market for the purchase and sale of sodium hypochlorite. Namely, the company set excessive prices, such that would otherwise be unsustainable in a competitive market. The AMC officials were particularly concerned that the conduct would have an anti-competitive effect on the market of public water supply. Dniproazot was fined approximately €10.5 million.

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