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To what extent should competition law be concerned with differences in prices, terms and conditions and quality for different purchasers?

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I. The notion of discrimination in national / regional substantive competition legal framework

Nowadays, discrimination is coming into the light in many aspects of life, including economic competition. Discrimination is common in many different types of markets, whether online or offline, and among companies with market power; it usually reflects the competitive behaviour and hence has an anticompetitive purpose or effect. Discrimination certainly can be a concern, as it has an exploitative, distortionary or exclusionary effect.

Along with other violations of competition, discrimination is the subject of antitrust regulation, because it is associated with the manifestation of the seller of monopoly power and contributes to the restriction of competition and the redistribution of income from the consumer to the producer. In this regard, discrimination often refers to abuse of a dominant position, which implies the applying different prices or different conditions, restricting manufacturing, markets or technical development or significant restriction of competitive ability of other undertakings on the market. Additionally, discriminatory practices could be considered in anti-competitive agreements and mergers when a dominant company applies different conditions to equal transactions or agreements with other trading parties.

The term 'discrimination' in a general, not business, sense is defined in the Law of Ukraine “On the Framework for Prevention and Combatting Discrimination in Ukraine” (Discrimination Law) as "discrimination – a situation in which a person and/or a group of persons by their race, colour, political, religious and other beliefs, sex, age, disability, ethnic and social background, nationality, family and property, place of residence, language or other features that were, are, and may be valid or presumed (hereinafter – certain features) are subject to restrictions on the recognition, exercise or enjoyment of rights and freedoms in any form prescribed by this Law, except where such restrictions are legitimate, have an objectively justified purpose, and the ways of achieving them are both appropriate and necessary".

Moreover, the said law distinguishes between direct and indirect discrimination.

In order to define ways and means of combating discrimination in a competition framework, it is very important to observe the term "discrimination" regarding business relations, allocating its features.

Competition law contains the term 'discrimination'; however, it does not define it directly and for general purposes. Namely, the Law of Ukraine “On Protection of Economic Competition” (hereinafter – “Competition Law”) contains Article 20, which says:

"Article 20. Discrimination against competitors by business entities

Entities that have a significantly greater market impact comparatively with their small or medium sized enterprises, which are their competitors are prohibited from impeding economic activity to small or medium-sized entrepreneurs, in particular, to take actions prohibited under parts 1 and 3 of Article 19 of this Law".

"Article 19. Misuse of a market position by an entity

1. Business entities that have received permission from the relevant bodies of the AMCU for concerted actions in accordance with part one of Article 10 of this Law, economic entities whose concerted actions are permitted in accordance with Articles 7, 8 and 9 of this Law, shall not be allowed to establish business entities that are generally not applicable to other entities, or apply a different approach to different entities without objectively justified reasons.

3. The entities referred to in paragraph 1 of this article shall be prohibited to incite other undertakings to grant to any undertakings, with no objective reasons available, the privilege conditions in economic activity. Unfortunately, in practice the Antimonopoly Committee of Ukraine (hereinafter – the AMCU) practically never refers to Article 20. Obviously, it also never enforces it separately.

Theoretically, Articles 19 and 20 shall be an instrument for the AMCU to post control of undertakings obtaining permits for concerted actions or exempted accordingly to block exempts. Also, we may conclude that Article 20 may be applied as additional reasoning when charging undertakings with abuse of dominance or anticompetitive concerted actions.

As for now, the AMCU does not use Article 20; however, it is possible to revive it.

The other institute of competition law mentioning discrimination is unfair competition. Namely, the Law of Ukraine “On Protection from Unfair Competition” (hereinafter – “Unfair Competition Law”) provides:

"Article 11. Distributors` inducement to buyers` discrimination (Customer)".

Instigating suppliers to discriminate against buyers (customers) shall be understood as the buyer's (customer's) rival's actions aimed at instigating — directly or via a go-between — the supplier to give the buyer's (customer's) rival certain unjustifiable advantages over the buyer (customer)".

Thus, by combining the approaches of both documents we may distinguish the main elements of the 'discrimination' notion in competition laws:

- 1) restraints which usually are not applied to other undertakings;
- 2) different approaches to different undertakings without objective reasons;
- 3) imposing disadvantageous terms on a counterparty in comparison to other counterparties.

Analysing competition law further, it should be noted that the Competition Law describes discrimination that refers to abuse of dominant position and anticompetitive concerted actions, but it does not define the term "discrimination".

Article 6 of this Law contains a prohibition on anticompetitive concerted actions which “have led or may lead to denial, elimination or restriction of competition”. Article 6 makes no distinction between horizontal and vertical concerted actions, but does include a nonexclusive list of anticompetitive practices that constitute potential violations. The list covers price-fixing, market division, restriction of outputs or inputs, discrimination between similarly situated parties and other conduct-restraining market entry or exit, and actions designed to impede the competitive ability of other companies “without an objective basis”.

According to Article 13 of the Law of Ukraine “On Protection of Economic Competition”, there are the general standards for determining when an entity has abused its dominant position. A dominant entity’s activity is abusive when:

- a) Setting prices or conditions that could not have been established in a competitive market environment.
- b) Applying different prices or conditions to identical agreements without justifiable grounds. Imposing contractual conditions that have no connection to the subject of the agreement.
- c) Limiting production, markets or technological development in a manner that may cause harm to other companies or customers.
- d) Refusing to purchase or sell goods in the absence of other sources or distribution channels.
- e) Substantially limiting the competitiveness of other companies without justifiable grounds.
- f) Hindering market access for companies, or driving them from the market.
- g) Creating entry (exit) market barriers or removing sellers, buyers, other economic entities from the market.

It could be contended that Article 13 enumerates specific actions which are considered to be an abuse of a dominant position and are prohibited by Article 50 of the Law of Ukraine "On Protection of Economic Competition". These prohibitions provide grounds for expansive intervention by the AMC to address a broad range of conduct by dominant companies. Additionally, Article 20 of the mentioned Law says that it shall be prohibited for business entities having substantially greater market power in comparison with that of small or medium-sized entrepreneurs, being their competitors, to create barriers to economic activities of the small or medium-sized entrepreneurs.

OTHER MENTIONS OF THE TERM 'DISCRIMINATION', WHICH MAY BE APPLIED IN COMPETITION ENFORCEMENT

Public Procurement

It should be also mentioned that discriminatory practices are one the most widespread violations in public procurement. In protecting competition in the process of public procurement, there are a number of principles stipulated in Article 3 of the Law of Ukraine "On Public Procurement". One of these principles is the principle of non-discrimination of the participants. Its essence is that equal conditions of participation in procurement procedures should be established for domestic and foreign participants of all forms of ownership. In this case, according to Article 5 of the Law of Ukraine "On Public Procurement", the customer is prohibited from discriminating against potential purchasers.

By analysing the practice of the competition authority of Ukraine - the Antimonopoly Committee of Ukraine (hereinafter – the "AMCU") violations of the principle of non-discrimination are not rare. Customers quite often set strict discriminatory conditions for participants with the aim of obtaining quality goods at the most favourable price. This means that by establishing some discriminatory criteria the customer tries to secure the victory of a particular participant in public procurement. As a result, this leads to a restriction of competition during the procurement.

Economic Code

Furthermore, the Economic Code of Ukraine considers abuse of a dominant position in the market, defining it through setting discriminatory prices (rates) for the goods resulting in the infringement of consumer rights or restriction of certain customers' rights. Article 31 of the Economic Code of Ukraine denotes the features of discrimination through the meaning of discrimination of business entities by public bodies, namely:

- a) prohibition to create new companies or other entities in any economic sphere and imposition of restrictions on certain economic activities, manufacturing of certain goods for competition restriction;
- b) forcing business entities to enter into agreements prioritizing sales to certain consumers or to join economic organizations and other associations;
- c) decisions about centralized distribution of goods resulting in a monopoly at the market; prohibition of sales of the goods manufactured in one region of Ukraine to another;
- d) tax and other benefits to certain entrepreneurs that makes their position privileged in comparison with other business entities, which results in monopolization of the market in certain goods;
- e) restriction of business entities' rights to purchase and sell goods;
- f) introduction of bans or restrictions regarding certain business entities or business groups.

Article 34 of the Economic Code of Ukraine also establishes that creating obstacles to business entities in the process of competition shall be considered as a discrimination of the seller (customer).

Based on Articles 19 and 20 of the Competition Law and Article 11 of the Unfair Competition Law, we may distinguish the following elements of discrimination as viewed by a Ukrainian legislator:

- 1) restraints which usually are not applied to other undertakings;
- 2) different approach to different undertakings without objective reasons;
- 3) imposing disadvantageous terms on a counterparty and no other counterparties.

Thus, Ukrainian laws, including competition law, do not define the exact term "discrimination" directly but require dominant companies or companies which participate in concerted actions not to discriminate between customers or suppliers for equivalent transactions, as this leads to anticompetitive disadvantages and can result in the prevention, elimination or restriction of competition on the market. Additionally, Ukrainian law establishes that discrimination in any context shall be prohibited.

II. The notion of discrimination in practice by the competition authorities / courts

A. Discriminatory practices sanctioned as abuses of dominance

According to Ukrainian competition law, the AMCU is a state body with a special status with the purpose to provide state protection of competition in commercial activity and in the field of public procurement. One of the main tasks of the AMCU is to create a highly effective competitive environment, eliminating monopoly and anticompetitive concerted actions that create discriminatory practices.

In recent years, the AMCU has been attempting to reduce significantly the role of structural market indicators (market share of enterprises) in the designation of dominance, and increase the role of behavioural aspects, such as economic analysis of the market situation and the negative effects on competition and consumers. With this new approach, structural indicators only play the role of a certain procedural test, indicating a threshold, after which the economic entity in question has to prove that it is exposed to substantial competition.

Thus, if the entity's market share exceeds 35%, it has to prove that it is exposed to substantial competition, and the AMCU can counter such arguments. When the market share is 35% or less, the entity may also be considered dominant, but only if the AMCU can prove that it is not exposed to substantial competition and the entity cannot refute this, especially in cases where the market shares of its competitors are relatively small.

The AMCU feels that the use of structural indicators, as necessary rather than sufficient criterion, ensures the adequacy of its approach to the designation of a dominant position, taking into account the specificities of Ukrainian markets and the state of competition on them. As a result, mostly entities with a 50% or higher market share have been recognised as dominant in recent years. This situation is in line with the approach to the designation of a dominant position in many other countries.

Moreover, the position of each of several business entities shall be considered as a dominant position if the combined share of not more than three business entities having the largest shares in the same market exceeds 50% or the combined share of not more than five business entities having the largest shares in the same market exceeds 70%, unless they prove that they face significant competition.

It follows that the presence of a dominant position in the market is not unlawful. The actions of a business entity with a dominant position that restrict the competitiveness of other market participants, infringing their interests or the interests of consumers, are illegal and are defined as an abuse of a dominant position. Most abuses of a dominant position are revealed in the form of overpricing and discrimination of consumers and other parties of the market.

Looking at the report of the AMCU for 2018, we see that the size of the economic effect from the AMCU's imposing of fines amounted to UAH 4 billion, which is 56% more than in 2017. The calculation of this indicator is based on the OECD methodology and its quality is carefully scrutinized from the outside. In 2018, the AMCU focused on the most significant markets of economic activity, including energy, fuel, gas, pharmaceuticals, telecommunications, transport and infrastructure.

In fact, in 2018 the AMCU managed to stop 216 violations regarding abuse of a dominant position, namely:

- a) 157 competition violations regarding the actions of an economic entity occupying a monopoly (dominant) position on the market that resulted or could have resulted in the prevention, elimination or restriction of competition or in the infringement of the interests of other economic entities or consumers;
- b) 40 violations regarding the setting of such prices or other conditions for the purchase or sale of a product that would be impossible in case of the presence of substantial competition on the market;
- c) 13 violations of the application of different prices or other different conditions to equivalent agreements with economic entities, sellers or buyers without objectively justified causes.

Additionally, it should be noted that in order to stop the abovementioned violations, the AMCU took 44 decisions to impose fines on the violators and 172 recommendations for the violators' competition that provide for the removal of the causes of the violations and their facilitating conditions and, when the violations are terminated, that provide for the elimination of consequences of the violations.

Comparing with the AMCU's decisions that impose fines, the recommendations give the violators an opportunity to avoid a fine, terminating signs of violations of competition law, including discriminatory practice, that provide for the removal of causes of the violations, their facilitating conditions and consequences of the violations. According to Article 46 of the Law of Ukraine "On Protection of Economic Competition", the recommendations shall be given in the form of a letter and shall be binding, in terms of their consideration.

If the recommendations are implemented, if a violation has not caused the substantial restriction or distortion of competition, has not inflicted significant damage on private citizens or society and if the relevant measures have been

taken to eliminate the consequences of the violation, the proceedings with respect to a case sounding in a violation of the laws on the protection of economic competition shall not be initiated, whereas initiated proceedings shall be closed.

Also, the recommendations can be appealed in a national court. However, in accordance with Article 60 of the Law of Ukraine "On Protection of Economic Competition", an applicant, a defendant, or a third person may appeal against the decision of the AMCU fully or partially to the commercial court within two months from the day of receipt of the decision. So, the violator that received the AMCU's decision with a fine still has the possibility to prove its innocence in the commercial court.

Therefore, in the case of an abuse of a dominant position, the AMCU takes a decision with imposing of a fine when the actions of a violator caused the substantial restriction or distortion of competition and inflicted significant damages, discriminating against consumers or rivals in the market. If such actions did not cause the substantial restriction or distortion of competition and there is not significant discrimination against consumers or rivals, the AMCU takes the recommendations to terminate any signs of such a violation.

Looking at the size of fines, it should be pointed out that in 2018 the overall size of imposed fines by the AMCU amounted to USD 277 million. In the cases of abuses of dominant positions, the AMCU imposed a considerable fine in the amount of UAH 33 million (approximately EUR 1 040 546) to SE Ukrspyrnt for setting discriminative prices on the market for ethyl alcohol and a fine in the amount of UAH 30.1 million (approximately EUR 949 104) to PJSC Poltavaoblenergo for establishing barriers and discriminatory practice on the market of electricity transmission to local electricity networks.

Analysing "secondary line discrimination" and "primary line discrimination" sanctioned as abuses of dominance, it should be admitted that Ukrainian competition law does not distinguish between these two lines that refer to discrimination. However, in practice the AMCU receives complaints and investigates on its own both "secondary line discrimination" and "primary line discrimination".

For instance, recently the AMCU investigated the case of SE Artemsol regarding "secondary line discrimination", sanctioned as an abuse of a dominant position in the markets for the initial sale of salt for industrial processing and kitchen salt. During the investigation, the AMCU found out that SE Artemsol was selling salt directly to buyers based on sales agreements and through a dealer network based on dealership agreements.

Unlike buyers under contract of sale, during the period from January 2015 to March 2017 (inclusive) the dealers of SE Artemsol bought salt at special dealership prices, namely with a 5 per cent discount in comparable sales agreements. The reason for receiving a dealer discount was the implementation of additional obligations for the dealers. However, during the period from January 2015 to December 2016 (inclusive) some dealers systematically did not fulfil the dealer obligations and actually fulfilled the obligations equivalent to the buyers, yet these dealers received a discount of 5 per cent.

Additionally, SE Artemsol deliberately did not enter into sale agreements for salt with potential buyers and into dealership agreements with potential dealers.

Thus, SE Artemsol did apply different prices to equivalent transactions with business entities without objective reasons and created obstacles to access for buyers to the market. As a result, the AMCU defined such actions of SE Artemsol as an abuse of a dominant position and fined it UAH 13 373 052 (approximately EUR 425 439).

The AMCU considered PJSC Poltavaoblenergo as a monopolist during the period from 1 January 2017 to 21 November 2018 on the market of electricity transmission by local electricity networks within the territorial boundaries of several Ukrainian regions where the electricity networks used by PJSC Poltavaoblenergo are located.

In this case, the AMCU proved that PJSC Poltavaoblenergo created obstacles to access to electricity suppliers at unregulated tariffs. In particular, PJSC Poltavaoblenergo avoided receiving the postal communications with applications for concluding contracts for the transmission of electricity to local (local) electricity networks and the restricted access of independent suppliers to the market. As a result, this company deprived other market members of the opportunity to carry out their business in the Poltava region. Accordingly, PJSC Poltavaoblenergo's actions were recognised as discriminatory practice through the abuse of a dominant position.

Moreover, in this event, according to Article 3 of the Law of Ukraine "On the Electricity Market", the new market should operate on the principles of balancing demand and supply of electricity, fair competition, equality of rights to sell and purchase electricity, non-discriminatory pricing and tariff formation, an important role in the restructuring of the electricity market provided by the AMCU.

Thus, most abuse of dominance cases heard by the AMCU follow provisions regarding the setting of the price or another condition of purchase on a level which could not be possible in a truly competitive environment. The AMCU faces a challenge in its economic analysis not to define the “correct” or “wrong” price, but to assess the price which would have existed in a competitive environment. For this evaluation, it is necessary to find a comparable market with effective competition. Here the empirical applications can cover the spectrum from simple average price comparisons to complex econometric estimations. Given the current state of economic development within Ukraine, in some cases it is not possible to find such a market and a counterfactual market outcome, based on comparative analysis of costs, has to be defined.

The other widespread type of AMCU cases involves abuse of dominance through adding burdensome terms in contracts with some partners in contrast to others. The Law describes as an example of abuse of dominance '*applying different prices or conditions to identical agreements without justifiable grounds*'.

For instance, one of the latest AMCU decisions based on this infringement was taken in regard to a community-owned enterprise in Kharkiv (more than 2 million inhabitants), which is the only company providing technical support to elevators. The undertaking set up different prices for different types of households, charging private ones more. The undertaking pleaded guilty and got away with a roughly USD 2,000 fine and agreed to equalize tariffs.

However, the AMCU has not elaborated criteria for distinguishing between justifiable grounds and unjustifiable grounds. In other words, the AMCU cannot say where normal negotiating power ends and dominance begins. That is the problem to be solved by the competition society.

Thus, we would say that there are two types of cases the AMCU investigates regarding discrimination:

- 1) Overcharging some buyers and not others;
- 2) Negotiating more burdensome terms in contracts with some partners and not others.

B. Identification and description of discriminatory practices pertaining to an anticompetitive agreement (Article 101 TFEU and its equivalent under your national law)

Indeed, Ukrainian competition law discrimination practice could be considered through anticompetitive concerted actions (cartels) dealing with horizontal and vertical restrictions. Article 6 of the Law of Ukraine "On Protection of Economic Competition" does not distinguish between horizontal and vertical concerted actions but describes when concerted actions are anticompetitive, if they, in particular, concern:

- 1) fixing of prices or other conditions of purchase or sale of goods (resale price maintenance);
- 2) limiting production, markets, technological development or investment, as well as assuming control thereof;
- 3) dividing markets or sources of supply according to territory, type of goods, sale or purchase volumes, or classes of sellers, purchasers or consumers or otherwise;
- 4) ousting of other undertakings, buyers, sellers from the market or limitation of their access to (or exit from) the market;
- 5) application of dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
- 6) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- 7) substantial limitation of competitiveness of other undertakings on the market without objectively justifiable reasons; and
- 8) export limitations (in the case of technology transfer).

This means that if the parties of the market have some vertical concerted actions restricting production, product markets, and territory or creating some barriers to market access, such actions could be defined as geographical discrimination or product discrimination or pricing discrimination, etc.

Furthermore, it should be noted that the Resolution of the AMCU on Establishing Standard Requirements to Vertical Concerted Practices of Undertakings and Amending the Standard Requirements to Concerted Practices of the Undertakings for their General Exemption from the Requirement to Obtain Prior AMCU Clearance of 2017 (hereinafter - the “Vertical Block Exemption Regulation”) concerns vertical concerted practices establishing the provisions when such practices are anticompetitive and require the permission of the AMCU.

According to the Vertical Block Exemption Regulation, vertical concerted practices on supply and use of products are concerted practices by two or more undertakings acting at different levels of the production or supply chain, whereby

the parties purchase, sell or resell products. Vertical restraints are defined as restrictions of competition relating to vertical concerted practices on supply and use of products.

The Vertical Block Exemption Regulation generally exempts vertical restraints (save for hardcore restrictions) where the market shares of the supplier and the buyer on the market, where they respectively sell and buy contract goods or services, do not exceed 30 per cent.

At the same time, the Vertical Block Exemption Regulation establishes the provisions when such vertical concerted actions are not allowed by the AMCU and could be considered as a discriminatory practice, namely:

- 1) vertical agreements between competing undertakings (unless the vertical agreement is non-reciprocal);
- 2) hardcore vertical restraints, such as:
 - restriction of the buyer's ability to determine its sale price (except for imposing a maximum resale price or recommending a resale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure or incentives);
 - restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract products, except for:
 - restrictions of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer;
 - restriction of sales to end users by a buyer operating at the wholesale level of trade;
 - restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system; and
 - restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
 - restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;
 - restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade; and
 - restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its products;
- 3) non-compete obligations exceeding five years (or indefinite), except cases where the contract products are sold by the buyer from premises or land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer;
- 4) obligations causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services, with certain exceptions; and
- 5) obligations causing the members of a selective distribution system not to sell goods under the brands of particular competing undertakings that are the competitors of the supplier.

So, if the producer and the distributor enter into a vertical agreement restricting active sales on an exclusive territory, restricting sales of a selective distribution system or restricting of active or passive sales to end users, etc, such actions become the subject of an AMCU investigation.

Moreover, according to the report of the AMCU for 2018, the AMCU terminated 263 violations regarding anticompetitive concerted actions, including cartels, and horizontal and vertical agreements, among which 250 violations were related to the distortion of auctions, contests, or tenders, and five violations were related to the setting of prices or other conditions with respect to the purchase or sale of products. In this regard, it could be stated that in the AMCU's practice there are not a lot of discriminatory practices sanctioned as anticompetitive concerted actions.

However, the AMCU imposed a considerable fine in the amount of EUR 2 million on LLC Sanofi Aventis Ukraine. Sanofi medicinal agents are designed for treatment of arrhythmia, epilepsy, diabetes, cardiovascular and oncological diseases, etc. A significant number of them are expensive and they can all be purchased with state funds. Also, the range of Sanofi includes a number of well-known medicines under trademark, like Noshpa, Essentiale, Maalox, Cordaron, and Festal.

Terms of the contract between LLC Sanofi-Aventis Ukraine and distributors may lead to the restriction of competition on Sanofi's markets for cheaper substitutes, as well as the relevant agreements have allowed Sanofi to raise prices for medicinal products through public procurement procedures.

Successful entry into the market and promotion of generic pharmaceutical products depends not only on their production, but also on proper distribution by pharmaceutical wholesalers and distributors.

LLC Sanofi Aventis Ukraine and the largest broad-based distributors like LLC BadM and Optima-Farm Ltd, in their sale agreements, introduced specific sales and discount conditions, which stimulated the distribution of the very drugs that have long lost patent protection and have many substitutes, in particular through the sale of medical products that do not have or have a limited number of substitutes.

In taking this decision, the AMCU proceeded from the assumption that medicines are a socially significant commodity and any restriction on competition therein has a significant negative impact on the final consumer. That is, any major pharmaceutical company, such as LLC Sanofi-Aventis Ukraine and major distributors, whose purpose or consequence is to restrict competition from cheaper generic medicinal products, that is, direct substitutes, will have a significant negative social-economic effect. By protecting competition between the original drugs and their generics, the AMCU acts in accordance with the best practices of the European Commission. The extremely negative attitude to manifestations of the restriction of competition between an original and generic drug is due to the fact that, as established by the European Commission, when entering the generics market, its price is 25% lower than the price of the original medicinal product, and after the release of the generic on the market its price remains 40% lower than the original prices of the original medicinal product for two years. Also, the price of the original drug will fall by almost 20%. In addition to the impact on the price, there is a significant impact on market size and market shares of participants. Thus, under normal conditions, generics companies receive about 30% of the market volume at the end of the first year of their operating on the market of a drug, and by the end of the second year - 45% of the market.

It should be noted that during the aforementioned anticompetitive concerted actions, the share of generic drug sales to the final consumer was insignificant and did not significantly increase, despite the lower price compared to the original Sanofi products sold with high trade margins.

The Sanofi case is one in a series of similar cases the AMCU initiated against pharma companies and their distributors. In these cases, the AMCU, though charging defendants with price-fixing and excessive pricing at public procurements, adds that such alleged concerted practices put other wholesalers of the company's products (ones that are not its distributors but still trade with their products, purchasing them from distributors) in an unfavourable position. We understand that there may be several reasons why the AMCU feels uncomfortable with alleging discriminatory practice directly, and we hope that in future discrimination will be one of the central elements of AMCU investigations.

C. Discrimination in mergers analysis

The AMCU has never found a problem in any discriminatory behaviour of party to an M&A transaction, meaning that the AMCU has never looked at the M&A market as at market, where some players may be dominant and abuse their dominance to buy out some businesses.

Also, we are not aware of cases where the AMCU has not permitted non-compete agreements accompanying M&A transactions. Such non-compete agreements may potentially contain discriminatory clauses too. Perhaps, we are unaware of cases where the AMCU recommended parties delete discriminatory clauses in order to obtain permission. However, we would have known about such cases, unless they were extremely rare in practice.

The only way discrimination issues regard M&A in practice are remedies, where the AMCU permits concentration, subject to the parties' obligation not to discriminate players on adjacent markets.

III. Objective justifications to discriminatory practice

There are some opinions in the legal framework which argue that discrimination could be pro-competitive, allowing, for example, the dominant undertaking to offer its goods and services to a greater number of customers, including customers with less purchasing power. Accordingly, discrimination is not automatically an abuse and that it is necessary to assess all relevant circumstances to determine whether the conduct is capable of distorting competition.

The statement that discrimination is not necessarily abusive supports Article 627 of the Civil Code of Ukraine, which says that the parties shall be free to conclude an agreement, to select a counteragent and to determine the provisions of the agreement taking into consideration the requirements of this Code, other acts of civil legislation, customs of business turnover, requirements of rationality and justice.

The ban on discrimination does not mean that the application of varied prices or rebates with regard to a single type of goods is unfair as such or that it is disadvantageous economically. In a way, it is natural that the dominant entrepreneur already present in the market reacts in a specific way to the introduction of a new competitor to the market. Such reactions form the core of competition and it is not easy to assess (in the case of product price reductions) when an undertaking goes beyond the limits of fair competition.

For instance, the company is entitled to enter into agreements establishing some discounts or other conditions that could make its products attractive for distributors to sell on the market. As noted in the OECD Report on fidelity and discount rebates, "because fidelity discounts have potentially pro- and anti-competitive effects, and both are highly dependent on specific features of the discounts and the markets they are found in, a case by case approach to fidelity discounts seems warranted"¹. Especially some rebates are pro-competitive when they increase total output and anti-competitive when they fail to do.

It should be mentioned that Article 10 of Law of Ukraine "On Protection of Economic Competition" defines the conditions when concerted action including discrimination practice sanctioned as concerted actions could be allowed by the AMCU.

So, concerted actions are allowed if their participants prove that the concerted actions facilitate:

- the improvement of the production, purchase or sale of a product;
- technical, technological, and economic development;
- the development of small or medium-sized entrepreneurs;
- the optimisation of the export or import of products;
- the elaboration and application of unified technical conditions or standards for products;
- the rationalisation of production.

It should be also noted that concerted actions might not be authorised by the AMCU if competition is substantially restricted on the whole market or in its significant part. Additionally, The Cabinet of Ministers of Ukraine may authorise concerted actions which were not authorised by the AMCU if participants in the concerted actions prove that a positive effect produced by the restriction of competition on the public interest outweighs the negative consequences.

To sum up, according to Ukrainian competition law, some discriminatory practice might be authorised if it is proven that such practice does not restrict competition on the market and has a pro-competitive effect. However, there are no specific rules that create a bright line rule as to when discrimination is or is not permissible. Sometimes justifications to discriminatory practice create a framework, allowing companies to carry out their business on the market.

IV. Objectives justifying to prohibit discriminatory practices

According to Article 52 of the Law of Ukraine "On Protection of Economic Competition", when the AMCU has established a violation, the undertaking can be subject to a fine in the amount of up to 10 per cent of its global group-wide turnover in the year immediately preceding the year in which the fine is imposed. This means that in the case of discriminatory practices sanctioned as anti-competitive concerted actions and abuse of a dominant position, the AMCU is authorised to impose a fine on the undertaking in the amount of up to 10 per cent of its global group-wide turnover.

It should be also noted that if the undertaking obtained concentration without appropriate permission of the AMCU (if availability of such a permission is required) the fine for such an action shall be in amount of up to 5 per cent of the income of an undertaking obtained from the sales of products (goods, works, services) for the most recent accounting year.

In dominance cases, the AMCU can make a decision requesting that a dominant undertaking is divided; such division should be implemented within the time limit established by the AMCU, which should not be less than six months. The dominant undertaking's division is implemented at its discretion, provided that it will no longer hold a dominant position once the division has been finalised. The division cannot be requested if:

- from an organisational or territorial standpoint, it is impossible to separate several enterprises or structural units; or
- there are strong technological ties among several enterprises or structural units.

¹ OECD report on loyalty and fidelity discounts and rebates, DAF/COMP(2002)21 at p.

However, the AMCU adopted Recommendations on Calculation of Fines and further officially committed to apply the document in its activity. The document sets up the initial fine amounts for anti-competitive practices depending on the graveness of the violations:

- 15 per cent of the revenue of an undertaking from the sales of products (goods and services) related to the violation – for the most hardcore violations, for instance price discrimination, allocation of markets or consumers, territorial discrimination, restrictions to market entry.
- 10 per cent of the revenue of an undertaking from the sales of products (goods and services) related to the violation – for other concerted actions that qualify as the most severe violations, for instance discriminatory practice through application of different conditions to equivalent agreements or agreements providing supplementary obligations to other undertakings.

Thereafter, the basic fine may be further decreased or increased (by up to 50%) depending on aggravating and mitigating circumstances, as defined in the Recommendations on the Calculation of Fines.

Thus, the Competition Law contains a sufficient number of effective tools for eliminating infringement, including through prosecution. It is important to emphasize that the main function of the AMCU is not to fill the state treasury with big fines, but to effectively protect economic competition, including through active advocacy of competition in Ukraine.

According to AMCU statistics, abuse of a dominant position via price discrimination is the most common violation. The following example in the AMCU's practice demonstrates how significant and, therefore, effective fines can be.

Analysing the AMCU's practice, we see that recently the Ukrainian competition authority investigated the case SE Ukrspyrnt regarding price discrimination on the market of wholesale ethanol. In this case², SE Ukrspyrnt set discriminatory prices for different ethanol buyers, having a dominant position on the mentioned market. . In particular, SE Ukrspyrnt set prices on an unsystematic basis, unsystematically and opaquely established the conditions for rebates, cancelled separate conditions for the provision of discounts for individual buyers and reduced prices by various amounts at different periods. Such actions of the violator created preferential conditions for some manufacturers of alcohol and discriminative conditions for others.

In this regard, the AMCU recognised the actions of SE Urkspyrnt as an abuse of a dominant position by establishing discriminatory prices and conditions for the sale of its products to third parties. SE Urkspyrnt's actions on the market could lead to restriction of competition and infringement on the interests of other business entities (the buyers). As a result, the AMCU imposed a fine in the amount of UAH 33 million (approximately EUR 1 050 383). Additionally, the competition authority ordered SE Ukrspyrnt to eliminate the causes of the violation by developing and applying of a transparent and well-founded pricing mechanism for the wholesale of ethanol and report on its application monthly throughout the year.

In sum, in order to recognise price discrimination on the market, the AMCU should establish the following conditions:

- 1) The company has some market power to be able to price discriminate. Otherwise, it cannot succeed in charging any consumer above the competitive price. Dominance is not essential for price discrimination to occur, although it is only in situation of dominance that price discrimination may be considered abusive under Ukrainian competition law.
- 2) The company has the ability to sort consumers depending on their willingness to pay for goods or services.
- 3) The company is able to prevent or limit the resale of the goods or services in question by having consumers pay a lower price to those who pay a higher price.
- 4) The company's actions could lead to a restriction of competition and an infringement on the interests of other business entities.

Thus, Ukrainian competition law contains a fair and sufficient number of effective tools for eliminating infringement, including significant fines in the amount of 10 per cent of global group-wide turnover and in some cases even 15 per cent. However, it is important to emphasise that the main function of the AMCU is not to fill the state treasury by imposing fines, but to effectively protect economic competition.

V. Relevance of other legal "areas" to apprehend discriminatory practices?

Discrimination by public authorities

² <http://www.amc.gov.ua/amku/control/main/uk/publish/article/146488>

Though the Ukrainian economy is headed towards a free market, the vast influence of the state in the economy remains. Government interventions have decreased, yet many industries have state-owned enterprises as their major players. For example, the two biggest banks in Ukraine are state-owned.

Thus, Ukrainian laws are often dealing with protecting independent market players from those supported by public authorities.

Besides the already mentioned Article 31 of the Economic Code, we need to turn to Article 15 of the Competition Law:

"1. The anti-competitive actions of the authorities, local self-governments, administrative and economic management and control bodies are the adoption of any acts (decisions, orders, resolutions, etc.), the provision of written or oral instructions, the conclusion of agreements or any other actions or omissions of the authorities, local self-governments, administrative and economic management and control bodies (collegial body or officials) that have caused or may lead to the elimination, limitation or distortion of competition.

2. Anti-competitive actions of the authorities, local self-government, administrative and economic management and control, in particular, include:

prohibition or impediment of the creation of new businesses or the pursuit of entrepreneurship in other organizational forms in any field of activity, as well as the imposition of restrictions on the implementation of certain types of activities, for production, acquisition or sale of certain types of goods;

direct or indirect compulsion of business entities to the priority conclusion of contracts, prime delivery of goods to a certain range of consumers, or prioritize their purchase from certain sellers;

providing individuals or groups of entities with privileges or other benefits that put them at a competitive disadvantage that result in, or may lead to elimination, limitation, distortion of competition;

an action that creates adverse or discriminatory conditions for individual entities or groups of entities against a competitor;

3. Should the authorities commit anticompetitive actions, local self-government bodies, administrative and economic management and control bodies shall be prohibited and shall incur liability under the Law."

Article 15 has been, from time to time, enforced by the AMCU under the claims of companies; however, it was never a priority.

At the same time, since the Ukraine-EU Association Agreement, Ukraine has developed state aid laws, which unlike the EU's guarantee of a single market, has as its main objective to restrict the authorities from subsidizing in any form some competitors or industries, unlike the others. In this respect, we may say that state aid laws in Ukraine somewhat overlap with Article 15 of the Competition Law.

Also, some specific regulations, like the Law of Ukraine "On Public-Private Partnership", also provide for prohibition of discrimination as one of its main principles. A separate field, where the non-discrimination principle is reflected in enforcement, is public procurement, which is analysed below.

General commercial laws and discrimination

Ukraine has a duopoly of basic regulation for commercial activities. On the one hand, there is the Civil Code, succeeding German Pandect tradition. On the other hand, there is the Commercial Code, or as it should be more correctly translated – the Economic Code. The latter, though adopted in mid-2000s, is more of a Soviet-type law suitable for regulating a command rather than a market economy.

Therefore, the Economic Code barely distinguishes between contract relationship and behavioural *delicti*. For instance, the Economic Code tries to govern pricing, property regimes, and even competition. The chapter on competition, consisting 16 articles, is the clearest example of how the Economic Code is ignored, since the AMCU almost never cites any of them. However, when needed, the Economic Code may be roused from hibernation to serve a party's interests before a conservative judge (spoiler: in Ukraine, the vast majority of judges are conservative).

Besides the already mentioned Article 31, there is Article 181, which provides that if a party that has received a protocol of disagreement about the terms of a contract based on a government order, or one whose conclusion is binding on the parties under the Law, or a party executor under a contract recognized as a monopolist in a particular

market of goods (works, services), which received the divergence protocol, and will not transmit the disagreements that remain unresolved within the stated twenty-day period, the proposals of the other party are considered accepted.

Public Offers

Both the Civil and Economic Codes provide for a concept of public offer (public agreement in Ukrainian terminology). We may conclude that both laws see non-discrimination as a very important rule for a public agreement.

The Civil Code of Ukraine in its Article 633(3) says that an entrepreneur shall have no right to prefer any consumer in a public agreement unless otherwise stipulated by the law. This means that granting better conditions to a particular number of consumers in different agreements by a business entity discriminates the position of other consumers and could be considered discrimination in agreements.

The Economic Code also contains a provision on public offers, as follows:

Article 178. Public obligations of business entities

1. An entity that, in accordance with the Law and its constituent documents, is obliged to perform works, provide services or sell goods to anyone who accesses it legally, has no right to refuse to such perform works, provide services, sell goods if available, or give preference to one consumer over another, except to those that are provided for by the Law.
2. A business entity that unreasonably refuses to undertake public obligations should compensate the other party for inflicted damages in the manner specified by the Law.
3. The Cabinet of Ministers of Ukraine may, in a case specified by the Law, issue rules that are binding on parties to a public obligation, including setting or regulating prices. Commitments that do not comply with these rules or set prices are invalid.

Public Procurements

The Prozorro system through which all procurement proceedings are conducted cannot solve this problem of discrimination itself, but it provides the transparency. However, it is possible to complain to the AMCU, namely to the Permanent Administrative Board of the Antimonopoly Committee of Ukraine, in order to protect suppliers' rights. The Permanent Administrative Board of the AMCU can recognise a violation of the principle of non-discrimination by a customer and oblige him to make changes to the tender documentation or to cancel the purchase.

For example, the customer in the tender documentation for the purchase of school buses set additional technical requirements for the subject of the purchase. One of the potential purchasers appealed to the Permanent Administrative Board of the AMCU with a complaint that the requirements can only be met by the one bus under the brand ETALON. The Permanent Administrative Board of the AMCU supported the position of the applicant and ordered the customer to make changes to the tender documentation because of the violation of the non-discrimination principle.

Another example regarding the violation of the non-discrimination principle in public procurement could be the purchase of school furniture. The consumer in the tender documentation established the requirement regarding a duly certified copy of a certificate that was impossible to obtain in advance because there were unknown technical requirements for the subject of the procurement. However, one of the participants fully met the requirement related to the certificate. This means that the customer followed the aim to discriminate other participants in order to choose the participant who is suitable for the customer.

In this regard, the Permanent Administrative Board of the AMCU recognised the legitimacy of the complainant's arguments and ordered the customer to make changes to the tender documentation, eliminating the discriminatory requirements.

Given the current fact of public procurement development, the number of the cases regarding discriminatory practice is increasing. In accordance with the results of the Permanent Administrative Board of the AMCU in 2018, it could be maintained that the percentage of complaints increased by more than one and a half times compared with 2017.

It should be remarked that transparency in public procurement does not ensure the absence of violations of the non-discrimination principle. At the same time, discriminatory requirements are often established by customers not for reasons of unfair purchase, but with the purpose of avoiding the risk of unfair behaviour by the participants in a tender.

Discrimination Law

The abovementioned Discrimination Law is aimed at protecting human rights rather than business interests. However, they may be applied to business relations too. According to its Article 4,

"This Law shall apply to the relations between business entities of public and private Law, the location of which is registered on the territory of Ukraine, and also to natural persons located on the territory of Ukraine"

This Law applies to the following areas of public relations:

- Social and political activity;
- Public service and service in local self-government bodies;
- Justice;
- Employment relations, including the use of reasonable accommodation by the employer;
- Health care;
- Education;
- Social welfare protection;
- Housing relations;
- Access to goods and services;
- To other areas to public relations."

Thus, in theory, the Discrimination Law should be applied to business relations too. For example, the Discrimination Law provides that discriminated persons are entitled to pecuniary and non-pecuniary damages

Industries Regulation

Many industries' regulations also refer to non-discrimination as one of the basic principles for the respective industry's regulation. For example,

- Law of Ukraine "On Financial Services and State Regulation of Financial Services Markets", in its Article 19, lists among the aims of state regulation for the financial services market "ensuring equal opportunities for access to financial services markets and rights protection of their participants";
- Law of Ukraine "On Telecommunications" provides that one of the basic legal principles for operators is "prevention of discriminatory actions by operators and telecommunication providers with significant market advantage in the markets of telecommunications services over other entities of these markets";
- moreover, the said law provides that the national commission, while resolving disputes between telecom players, shall have as its aim "ensuring the effective competition and conditions that are non-discriminatory, equal and acceptable to both parties and beneficial to consumers";
- Law of Ukraine "On the Electricity Market" mentions non-discrimination against its basic principles three times: "non-discriminatory and transparent access to transmission and distribution systems", "non-discriminatory participation on the electricity market", "non-discriminatory pricing and tariffs that reflect cost-effective prices";
- Air Code in its Article 78 provides that "operators of airports (aerodromes) shall, on the basis of organizational and technical capabilities, be obliged to create equal conditions for airport use and the airport for the subjects of aviation activity operating at the airport, unless otherwise provided by the Law"; and more.

VI. Future of prohibition of discriminatory practices from a competition law perspective

As for now, there are no public plans, not in government the AMCU, or competition society, to develop a general framework for regulating discrimination in business. However, we believe it would be of a great use to elaborate on the criteria for determining the rather vague, as of now, line between contractual freedom and discrimination.

In the meantime, there may be developments in some sectoral regulations that will contribute to combatting discrimination. For example, the long-awaited regulation for FMCG-retail may restrict the buying power of retailers, who, though they compete strongly, tend to pressure suppliers, for whom they are the most important clients.

We believe that the issue of discrimination in competition shall be brought to the fore through the drawing of the attention of competition society. We need to find more precise criteria for discrimination in competition and make combatting discrimination one of the primary goals of the AMCU.