

Smyrnova K. Comparative analysis of ‘competition rules chapters’ in different EU Association Agreements

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**COMPARATIVE ANALYSIS OF ‘COMPETITION RULES
CHAPTERS’ IN DIFFERENT EU ASSOCIATION AGREEMENTS**

In the field of competition law, attempts to reach a multilateral agreement go back to the first half of the previous century. Nevertheless, while they are still active, no consensus has been reached on a binding relevant agreement. Nowadays International co-operation in competition enforcement tends to be one of the primary strategic themes. Globalization, the increasing significance of emerging economies, the borderless nature of the growing digital economy, and the proliferation of competition regimes have caused a significant increase in the complexity of cross-border competition law enforcement co-operation. That is why agreements on competition are the crucial point in achieving the abovementioned aims.

At the end of the 1990s, competition policy becomes part of international economic relations, de facto, as evidenced by the appearance of bilateral agreements (mainly inter) on cooperation for the protection of competition. These agreements not only capture the general principles, but also address the practical

issues.

The lack of uniform standards for the competition as seen in the regulation of different aspects. If the area of prohibition of anticompetitive agreements and concerted practices, there is consensus in the legal regulation bans "hard" cartels, in other respects, such a consensus at the level of national regulation no. It is proved that competition policy is subject to legal multilateral and bilateral cooperation more.

In particular, the EU has concluded several agreements on bilateral cooperation with some third countries (which, in particular, the U.S., Canada, Japan, Korea and Brazil) to optimize the information and concrete evidence of cartels, which are located outside the EU, however, causing loss of the EU anti-competitive activities. For example, by virtue of the provisions of the agreements between the EU and the U.S. to cooperate in matters of disclosure cartels in 1991 and 1998 agreements (first generation), the European Commission and antitrust U.S. agencies such as the Ministry of Justice and the Federal Trade Commission exchanged between any significant information on the cartel agreement, which they learned, and which may affect the interests of either the U.S. or the EU, and help each other enforcement activity.

In fact, there are three distinct types of agreements which are devoted to or contain competition provisions, something that validates the argument that international law has been increasingly fragmented with the conclusion of various types of agreements, some of which also establish dispute settlement mechanisms. These categories include:

- bilateral enforcement cooperation agreements,
- bilateral regional trade agreements which include competition provisions,
- plurilateral regional trade agreements which include competition rules.

Bilateral competition agreements are entered into by competition agencies in order to enhance the relationship between the signatories. There are several types of bilateral agreements, allowing more or less intense forms of co-operation. Some

are binding international agreements signed by governments, although they may not include dispute settlement provisions. These agreements do not amend domestic laws including those that prohibit the sharing of confidential business information without the provider's consent. Non-binding memoranda of understanding (MOUs) between agencies or countries amount to «best endeavours» agreements between competition agencies. Some of these executive agreements formalise existing working relationships, or they may mark a new level of engagement between competition agencies.

Regional Trade Agreements. Several types of agreements include provisions that can serve as a legal basis for competition enforcement co-operation. There are currently Regional Trade Agreements (RTAs) in force listed on the World Trade Organization's website, of which contains competition provisions. In the competition enforcement sphere, there are a number of well-known RTAs, including the EU, COMESA, WAEMU, CARICOM, ASEAN, NAFTA, MERCOSUR, and the Andean Community. RTAs are no longer strictly based on geographic location, and they can be agreed bilaterally between individual countries (Free Trade Agreements, FTAs), between one country and a group of countries, or within regions or blocs of countries (multilateral agreements).

International co-operation is a policy priority for a vast majority of competition agencies; the globalization of markets, and consequently of anti-competitive increasing and enhanced co-operation in enforcement. Among the various existing legal instruments that can be used by competition agencies to co-operate with other agencies – both competition and non-competition specific – bilateral competition agreements and confidentiality waivers are the instruments available to the largest number of agencies. Co-operation-specific national law provisions closely follow as the next most commonly available legal instrument.

Competition-specific instruments such as multilateral competition agreements were indicated as most relevant for co-operation, while non-competition-specific agreements (bilateral or multilateral) were perceived as least

relevant. In terms of «frequency» of use of the available instruments, national law provisions, confidentiality waivers, letters rotatory and bilateral competition agreements are the instruments that respondents indicated were most frequently used in international co-operation.

Obviously, competition agreements may have a significant effect on the particular application of national competition rules. On the other hand, due to the economic globalization the number of multinational firms has been increased, and this in turn has increased the number of anticompetitive practices and the need of various agreements on competition. Hence, it is impossible to create a unite agreement because of different legislations in States. So the main purpose is to co-operate effectively and efficiently, it is imperative that the co-operating parties have a good knowledge of their respective substantive and procedural rules, and understand the differences in their legal systems and any existing limitations or constraints and the agreements on competition is one of the means of reaching it.

As comparing with other countries with competition protection systems, UNCTAD noted that Ukraine has begun the process of competition law adoption and the formation of its implementation policy in very difficult initial conditions. Economic and political circumstances in Ukraine, as well as in other former Soviet republics, have been particularly tough. At the same time Ukraine adopted its competition law system at the beginning of a period of rapid growth in the number of jurisdictions with competition laws throughout the world. As UNCTAD experts stressed the journey towards an effective competition policy system in Ukraine has been arduous¹. In the early 2000s, various market reforms and de-monopolization measures were taken. Despite various market reforms and de-monopolization measures, Ukraine's economy still features exceptionally high levels of concentration unrelated to superior economic performance.

The process of harmonization of national legislation with the EU law was & remains one of the key areas of cooperation between Ukraine and the EU.

¹ See Voluntary Peer Review of Competition Law and Policy: Ukraine Overview, UNCTAD, 2013 // http://unctad.org/en/PublicationsLibrary/ditcclp2013d3_overview_en.pdf

Harmonization defines the conditions for further deepening of economic and sectorial cooperation and creates legal preconditions for the next stage of European economic integration. Nevertheless, the rules contained in the Partnership & Cooperation Agreement¹ (PCA) signed in 1994, has ‘soft law’ character – the PCA did not place Ukraine under a strict obligation to harmonization its legislation. At the same time however, the special Article 51 PCA stressed that competition was one of the priorities of harmonization. The EU-Ukraine Association Agreement (AA)² ratified in September 2014 replaces the PCA as the basic legal framework of EU-Ukraine relations (Art. 479 EU-Ukraine AA). Upon its entry into force the Association Agreement is considered as a part of national legislation (ch. 1, Art. 9 of the Constitution of Ukraine³) and in case of conflict with the norms of current legislation is subject to priority application (ch. 2, Art. 19 of the Law of Ukraine "On international agreements of Ukraine").

Due to Ukraine’s integration policy, its accession to the WTO in 2008⁴, entering into force of the Free Trade Agreement with EFTA countries in 2012⁵, signing & ratification of the Association Agreement⁶ with the EU, the open free trade areas opened their doors for Ukraine. Due to this fact the most important issue related to liberalized trade is competition rules that become increasingly crucial for Ukraine.

¹ The Partnership and Cooperation Agreement between EC & its Member States & Ukraine was concluded in 1994 and entered into force in March 1998. The PCA formed the legal basis of EU-Ukraine relations, providing for cooperation in a wide range of areas. It was concluded for the term of 10 years, but Art. 101 PCA provided the process of its automatic prolongation in case of denunciation notice absence.

² Association Agreement between the European Union and its Member States, of the one part, and Ukraine of the other part (*OJ*, 2014, L 161).

³ Article 9 of the Ukrainian Constitution of 1996 provides that: “International treaties in force, consented by the Verkhovna Rada of Ukraine [Ukrainian Parliament] as binding, shall be an integral part of the national legislation of Ukraine. Conclusion of international treaties, contravening the Constitution of Ukraine, shall be possible only after introducing relevant amendments to the Constitution of Ukraine”.

⁴ Law of Ukraine “On ratification of Protocol of Ukraine’s accession to the WTO” dated 10.04.2008 No 250-VI // Verhovna Rada Bulletin. – 2008. - № 23. – P. 213

⁵ Law of Ukraine “On ratification of Free Trade Agreement between Ukraine and Member States of EFTA” dated 07.12.2011 No 4091-VI // Official Journal of Ukraine. - 13.01.2012. - № 1. - P. 9.

⁶ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part // *OJ L 161* 29.5.2014. – P.3- 2137.

Comparing the current Association Agreement with Ukraine with analogue acts signed by the EU with others countries, it can be said that this is a ‘fourth generation agreement’. It is the first of a new generation of Association Agreements between the EU and countries of the Eastern Partnership that covers a deep and comprehensive free trade area (DCFTA). Considering further on the ‘deep’ and ‘comprehensive’ character of the FTA, it can be concluded that the EU-Ukraine DCFTA is the first of a new generation of FTAs concluded by the EU which will, once in force, gradually and partially integrate the economy of Ukraine into the EU Internal Market. Its integration into the Internal Market will take place, however, only under the condition that Ukraine approximates its legislation to the EU *acquis communautaire*.

On the other hand, the ‘deep’ character of the DCFTA refers also to Ukraine’s commitment to approximate its legislation to the *acquis communautaire* in order to achieve its economic integration with the EU Internal Market. The DCFTA contains numerous legislative approximation clauses according to which Ukraine must approximate its domestic legislation or standards to the EU *acquis*. Title IV of the Association Agreement shows that the EU-Ukraine AA not only covers traditional FTA areas, such as market access for goods, but also includes public procurement, IPR, competition, energy, etc.

The EU-Ukraine, EU-Georgia and EU-Moldova FTAs were announced as being the first in a series of so-called Deep and Comprehensive Free Trade Agreements (DCFTAs)¹. Within this category, the competition chapters are nevertheless very diverse².

The competition chapter in the DCFTA with Georgia is very superficial³. Cooperation provisions are not foreseen. Principles governing anti-competitive business practices and state interventions as well as subsidies provide that parties

¹ European Commission, The EU’s Association Agreements with Georgia, the Republic of Moldova and Ukraine, Brussels, 23 Jun. 2014, MEMO/14/430.

² Demedts V. Which Future for Competition in the Global Trade System: Competition Chapters in FTAs // Journal of World Trade. – 2015. - 49, no. 3. - P. 407–436.

³ Art. 203-209 EU-Georgia DCFTA

should maintain comprehensive and effective competition laws, and implement such legislation via a functioning authority, respecting the principles of transparency, non-discrimination, procedural fairness and respect for the rights of defence. Some provisions deal with the regulation of state monopolies, state enterprises and enterprises entrusted with special or exclusive rights, mainly requiring transparency. One provision regulates subsidies, which is not excluded from the DSM, in contrast to the rest of the competition chapter. There is no prejudice to the rights and obligations in the WTO agreement, and parties should ‘take into account the limitations imposed by the requirements of professional and business secrecy in their respective jurisdictions’¹.

The EU-Moldova DCFTA’s competition chapter is comprised of two sections, one dealing with antitrust and mergers, and one revolving around state aid². Again the obligation of maintaining competition laws and operational authorities is included. The provision on the implementation of competition laws emphasizes the independence of the competition authorities, a feature that is not present in any of the other DCFTAs. Again, state monopolies, public undertakings and undertakings entrusted with special or exclusive rights are regulated, in the sense that they should be subject to competition laws. Furthermore, cooperation and exchange of information is foreseen. However, the relevant provision is rather weak, merely stating that ‘each competition authority may inform the other competition authority of its willingness to cooperate with respect to the enforcement activity of any of the Parties’³. Exchange of non-confidential information is allowed, subject to the confidentiality laws of each party and limited by the national requirements of professional and business secrecy. The entire section is excluded from dispute settlement. The section on state aid does not apply to fisheries and agriculture. The assessment of state aid is regulated, referring back to Article 107 TFEU, and the parties are to establish and maintain state aid

¹ Art. 209 EU-Georgia DCFTA

² Art. 333-344 EU-Moldova DCFTA

³ Art. 337 EU-Moldova DCFTA

legislation and an authority, thereby adhering to the transparency-principle. Again parties should ‘take into account’ limitations following from professional and business secrecy obligations, and a rather unique review clause is included.

Finally, the DCFTA with Ukraine is somewhat particular. The competition chapter is much longer and is again divided in two sections¹: antitrust and mergers; and state aid.

The first section on antitrust and mergers traditionally elaborates on the importance of regulating anti-competitive behaviour, and indicates the practices that are considered inconsistent with the agreement. The AA focuses on the main principles of an undertaking’s conduct on the market that can impede, restrict or distort competition (including conduct prohibited under Article 101 (1) TFEU, abuse of a dominant position and certain concentrations that result in monopolization or a substantial restriction of competition in the market in the territory of either Party). The Association Agreement identifies the key practices and economic transactions that could potentially adversely affect the functioning of markets and undermine the benefits of trade liberalization established between the parties. These anti-competitive practices include: a) agreements and concerted practices between undertakings, which have the purpose or effect of impeding, restricting, distorting or substantially lessening competition in the territory of either Party; b) the abuse by one or more undertakings of a dominant position in the territory of either Party; c) concentrations between undertakings, which result in monopolization or a substantial restriction of competition in the market in the territory of either Party².

What is characteristic of the EU-Ukraine DCFTA is the provision on approximation of law and enforcement practice, with strict deadlines and hard obligations. Parties should exchange information and cooperate on enforcement matters, although the obligations are again particularly weak, stating that ‘the competition authority of a Party may inform the competition authority of the other

¹ Art. 253-267 EU-Ukraine DCFTA

² Article 254 AA

Party of its willingness to cooperate with respect to enforcement activity. This cooperation shall not prevent the Parties from taking independent decisions¹. The agreement foresees that the parties should consult each other, but this is not regulated in detail, nor is it mandatory.

The EU-Ukraine AA pays special attention to state aid, which remains unregulated in Ukraine. The principle of transparency is again central, and this time is made tangible via concrete obligations. Articles 106, 107 and 93 TFEU shall serve as sources of interpretation. Finally, concrete changes to the domestic system of state aid control are required and listed in the agreement.

What sets the EU-Ukraine DCFTA apart from the other DCFTAs is that Ukraine will align its competition law and enforcement practice to that of the EU acquis in a number of fields. As a result, there are actual substantive requirements for the domestic regime. This type of commitment cannot be found in other post-Global-Europe FTAs. What is remarkable is that the scope of the EU acquis to which Ukraine should approximate its laws is not included in an annex but in the main text of the agreement. This of course has consequences for the procedure to change this content. A formal treaty change will be required, which is rigid and burdensome. Furthermore, Ukraine commits itself to adopting a system of control of state aid similar to that in the EU and inspired by TFEU articles, including an independent authority. The level of detail in these provisions can also be considered quite novel.

The DCFTA is one of the most ambitious bilateral agreements that the EU has ever negotiated with a trading partner and should offer Ukraine a framework for modernization of bilateral trade and investment relations and a model for economic development.

In general, the EU in its free trade agreements appear to favor relatively detailed provisions requiring the parties to prohibit specific anti-competitive practices to the extent they affect trade between the parties, as well as regulate state aid and enterprises entrusted with special or exclusive rights. These provisions

¹ Art. 259(2) EU-Ukraine DCFTA

replicate Articles 101, 102, 106, and 107 TFEU. Moreover, these FTAs increasingly tend to include competition-specific public service exemptions.

As regards the provisions of three AAs analyzed here, they are more in common, especially if to talk about the structure and articles of the respective sections. Although, there are some differences. The most apparent one is between Ukrainian AA on the one side and Georgian and Moldavian AAs on the other side. Notwithstanding a number of absent provisions in the latter two, Georgian and Moldavian AAs are more similar. Ukrainian AA is details oriented. Specifically, it provides for more principles and their application, possibility for consultations. What is more, it gives the exhaustive list of EU instruments to be implemented by Ukraine in order to harmonize its legislation with that of the EU.

What should be taken into account is the WTO-related provisions in Georgian AA. The reference to WTO covered agreements (SCMA and DSU) and WTO obligations itself is very important. This is because of the potential of the arising disputes with regard to the states' obligations under WTO and FTA agreements. Currently, there is a dispute in WTO (Peru-Agriculture) with regard to this issue. In order to avoid any potential disputes it is advisable for Ukraine to include provisions that preclude of any conflict of laws between Ukraine's obligations under different trade agreements also in the section regarding competition (although it is present in other parts of Ukrainian AA). In Ukrainian AA anti-competitive practices (*e.g.*, cartels, abuse of dominant position, anti-competitive mergers) are subject to enforcement actions. Moreover, the competition law will apply to state-controlled enterprises to ensure the level playing field. Ukraine will have to implement EU competition rules as provided in the Commission Regulation (EU) No 330/210. Parties also agreed to conquer distortions of competition caused by subsidies. The EU and Ukraine will annually report the amount and sectoral distribution of subsidies. All sectors liberalized by DCFTA are subject to rules on subsidies, except for agriculture and fisheries.

LITERATURE

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