

# OECD REVIEWS OF COMPETITION LAW AND POLICY: UKRAINE 2016

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## Highlights from the report on the implementation of previous recommendations

Every competition authority can benefit from discussions with its peers in other countries. Ukraine is no exception which is why the Antimonopoly Committee of Ukraine (AMC) asked the OECD to undertake a review of the status of the recommendations found in past peer reviews undertaken by the OECD (2008) and UNCTAD (2013). The intention of this peer review is to provide the AMC with a roadmap to align Ukraine's competition law and policy with international standards and best practice.

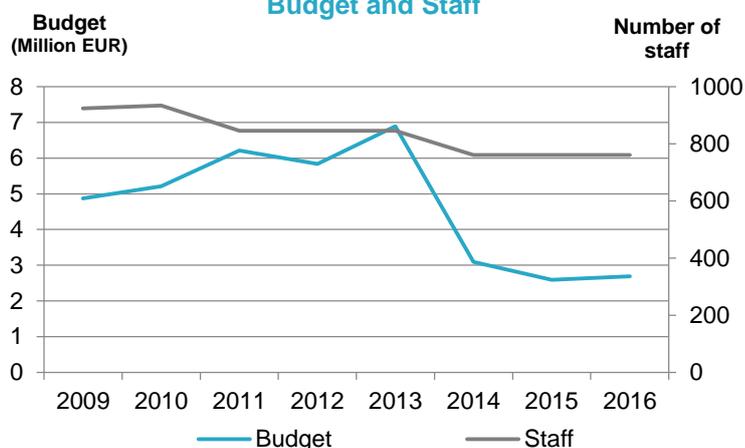
This Review finds that many of the key recommendations of previous reviews have not been implemented and identifies a significant number of necessary reforms. Only a substantial, sustained commitment by Ukraine and external partners can put the AMC in a position to excel given the daunting obstacles to reform that it faces. It is an effort worth undertaking. A strong competition law and policy framework will spur Ukraine's economic progress helping to drive and provide a sustainable basis for investment and business activity.

Key recommendations, aimed at the AMC's resources, powers and operation will, if implemented, provide a realistic path to success. In most cases, successful reforms will need action, both from the government of Ukraine and the AMC.

### Resources and Institutional Design

The first critical step is to increase the AMC's resources. The primary responsibility here lies with the government, which must align the AMC's budget with its importance to the economy. The expected gains from stronger competition justify additional outlays. Without such an investment, there is little possibility that the AMC can fulfil its existing duties, much less the expanded role envisioned in this Review. A budget coherent with its mandate would mean that the AMC could recruit and retain talented staff, its most important asset. In the short term, relatively small increases in funds, for example, to upgrade the AMC's computer and communications systems, would boost effectiveness and efficiency dramatically.

**Antimonopoly Committee of Ukraine**  
**Budget and Staff**



By optimising existing resources, the AMC could perceive immediate benefits. Refining its strategic planning and project selection methods will go a long way to ensuring that the agency gets the most from its human resources and each Hrivna it spends. With its current discretionary powers along with additional authority from the government, the AMC could already introduce a regional office structure better suited to the tasks and enforcement priorities of the AMC.

Foreign governments and donors are now, and plan to continue, providing technical assistance projects. These projects are a remarkable opportunity to build capacity. It is vital that the AMC and its foreign partners seek to apply these proffered resources effectively and efficiently. Consultations and exercises should convey practical knowhow which is coherent with best international practices.

The effective use of resources and offers of technical assistance depend heavily on the management abilities and expertise of AMC leadership. The AMC now enjoys a capable, committed, leadership, which is taking steps to concentrate the agency's enforcement on priority areas. To sustain this quality of leadership in the years ahead, Ukraine should consider amending its appointment and dismissal rules to ensure the selection of capable officials – especially the chair and state commissioners – and to avoid the loss of continuity that comes if the entire board, or most of the board, departs the AMC at the same time.

## Investigation and Enforcement Powers

The incentive to comply with the law is a function, principally, of two variables. Will prosecutors detect misconduct, and what punishments will be imposed for violations? Ukraine's competition law framework lags badly behind its peer institutions on both accounts. For the AMC to be a truly effective law enforcement body, its powers require significant enhancements.

The chief priority must be to increase the AMC's investigatory powers. The prosecution of hard core cartels is at the top of the agenda of most competition authorities but prosecution requires effective detection tools. The AMC's capacity to collect evidence is strikingly weak when measured against international standards. Legislative reforms are necessary to allow the AMC to seize documents from business premises, and to conduct interviews of business officials, without first obtaining the consent of the enterprise under investigation. The inspection of private residences should also be included in the investigation powers. Most competition systems at a similar stage of development – 20 to 25 years after the law's enactment – have given such powers to their enforcement agencies.

In addition, Ukraine's leniency policy should be adjusted to allow the AMC to reduce fines for parties beyond the first leniency applicant. Many jurisdictions allow reductions for subsequent applicants in order to strengthen their capacity to

gather useful evidence, reduce investigation time and encourage compliance with the law.

A number of jurisdictions have concluded that imposing punishments on individuals, rather than only on business entities, offers a valuable tool to deter violations. Individual responsibility can sharpen the incentive of business decision makers to comply with the law in a way that corporate fines cannot. Ukraine could amend its legislation to allow the AMC to impose administrative liability for infringements directly on both individuals as well as firms.

Nominal fines, even large levies, can be futile if business managers realise that they can easily avoid payment. Existing law and practice in Ukraine give firms considerable leeway to evade penalties by liquidating their existing corporate form and recreating a new enterprise, or simply by changing the name of the undertaking. The introduction of the concept of parental liability as applied in the EU could help to end this problem.

Fines are only one element of a larger remedial portfolio that most competition systems can draw upon to cure infringements and motivate firms to comply with the law. The AMC currently lacks the authority to obtain orders to stop anti-competitive conduct pending the completion of an investigation or case. This deprives the agency, in a relatively small but important set of cases, to obtain interim relief to block the continuation of harmful behaviour. Adding the power to obtain interim relief in the form of injunctions would constitute an important enhancement of the AMC's remedial powers.

Networked enforcement across jurisdictions furnishes individual competition authorities with a valuable tool to improve the detection and prosecution of competition law infringements within their own borders. State-of-the-art agencies have the authority to co-operate with their foreign peers in sharing information and co-ordinating investigations. Consistent with the OECD's Recommendations concerning Effective Action against Hard Core Cartels and concerning International Co-operation on Competition Investigations and Proceedings, the AMC should be given express authority to exchange information and co-operate with foreign agencies.

## Operations

The effectiveness of the AMC's operations is also a function of its own organisation and management. This Review identifies a number of areas where the AMC, without recourse to new legislation, can achieve better results.

Many of the Review recommendations urge the AMC to extend reforms that already are underway. As noted above, the AMC should intensify its efforts to strengthen the system for setting priorities and use this system to select cases and advocacy projects that deliver the best value for Ukraine's economy. These priority-setting and project selection mechanisms demand a continuation of efforts – through hiring and internal training – to employ economic analysis more fully in the investigation of apparent competitive problems and the development of cases. The enhancement of the priority-setting process requires one important contribution from the government: legislation that gives the AMC more discretion to determine which matters it will investigate and which cases it will prosecute.

A second set of internal operations reforms encourages the AMC to press ahead with existing efforts to improve the performance of routine law enforcement tasks. In particular, to further improve the efficiency of its merger review process, information demands should be streamlined and opportunities should be increased for affected parties to consult with case handlers and managers about pending matters at different stages of the proceedings.

Merger control reform is closely linked to recommended reforms regarding transparency. The AMC has already made admirable progress in improving the transparency of its operations. However, efficiency concerns and perceived legitimacy would benefit from still more openness, for example, through agency guidelines on its enforcement policies, processes, and decisions in specific matters. Expanding programmes that provide guidance about AMC enforcement priorities and its interpretation of the law will help business to understand procedures, as well as its role and responsibilities in adhering to and implementing Ukraine's competition law.

Again, building on existing reforms, the AMC should strengthen its commitment to an improved evaluation regime. The perceived imperative to handle the next case sometimes obscures the value of looking at past experience to see if there is a way to improve future cases. The AMC needs to incorporate in its working methods a reflex of ongoing evaluation of completed matters and existing procedures. The results could assist in i) deploying resources more effectively by determining what approaches yield the best results; and, ii) in improving operational efficiency by spotting areas in which internal delays can be reduced.

The AMC's operational effectiveness is also predicated on the interaction with and performance of review courts and other government bodies. This Review recommends that Ukraine should consider adopting new legislation to clarify the jurisdiction of the courts before which competition law cases may be heard, and to allow some specialisation within the existing framework of the courts to permit a designated group of judges to decide competition cases. There would be value in a government-wide review of public procurement aimed at improving co-ordination between the AMC and public procurement authorities. More training of public procurement officials and better co-ordination with the AMC would help ensure that public procurement officials once alerted to possible anomalies, inform the AMC immediately.

Many obstacles to competition in Ukraine reside in public policies – statutes, regulations, customs, and practices – that discourage new business entry or the expansion of existing enterprises. The AMC can make a strong contribution to Ukraine's economic performance by helping to identify and address anti-competitive barriers using instruments such as the OECD's Competition Assessment Toolkit. As a first step, the AMC would need to reinforce, and where appropriate, formalise co-operation with other relevant government bodies in order to ensure a receptive audience. Taking an active role in competition assessment and the promotion of pro-competitive reforms are logical complements to the enforcement of prohibitions on anti-competitive practices by private firms.

## Key Recommendations

1. **Increase the AMC's financial resources and institutional autonomy** coherent with its mandate and importance to Ukraine's economy. Upgrade technical infrastructure.
2. **Give the AMC the power to seize documents** from business premises; conduct interviews of business officials, without prior consent of the firm; inspect private residences.
3. **Extend the leniency programme** beyond the first applicant.
4. **Introduce individual as well as parental liability.**
5. **Make AMC decisions directly enforceable** to increase effectiveness and deterrence
6. **Allow interim injunctions** pending the completion of investigations.
7. **Promote specialisation of competition law courts or judges.**
8. **Improve AMC priority setting and project selection** mechanisms and invest the AMC with more power to choose cases.
9. **Prioritise enforcement action against hard-core cartels.**
10. **Favour structural merger commitments** and implement effective monitoring.
11. **Increase AMC transparency**, through agency guidelines and communication of AMC enforcement priorities and its interpretation of the law.
12. **Strengthen the evaluation regime** and apply lessons learned to future cases.
13. **Train public procurement officials** to better prevent and detect bid rigging and coordinate with the AMC.
14. **Position the AMC as a competition advocate** within government by i) strengthening relations with other agencies and bodies; ii) developing AMC expertise in competition assessment.

## Peer Reviews of Competition Law and Policy

OECD peer reviews have proved to be a valuable tool for countries to reform and strengthen their competition frameworks.

The mechanisms of peer reviews vary, but they are founded upon the willingness of a country to submit its laws and policies to substantive questioning by other peers.

The process provides valuable insights into the country under study, getting to the heart of ways in which each country deals with competition and regulatory issues, from the soundness of its competition laws to the structure and effectiveness of its competition institutions.

Furthermore, these reviews incorporate recommendations for changes in government policy.

Argentina (2006)

Brazil (2010, 2005)

Chile (2004)

Colombia (2009)

Costa Rica (2014)

Czech Republic (2008)

Denmark (2015)

El Salvador (2008)

European Union (2005)

Honduras (2011)

Kazakhstan (2016)

Latin America  
(2006, 2007, 2012)

Mexico (2004)

Panama (2010)

Peru (2004)

Romania (2014)

Russia (2004)

South Africa (2003)

Chinese Taipei  
(2006)

Turkey (2005)

Ukraine (2008)

Access all reviews at  
[www.oecd.org/daf/competition](http://www.oecd.org/daf/competition)