

**Competition related extracts from the 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**

[...]

CHAPTER 10

COMPETITION

SECTION 1

ANTITRUST AND MERGERS

ARTICLE 253

Definitions

For the purposes of this Section:

1. "competition authority" means:

- (a) for the EU Party, the European Commission; and
- (b) for Ukraine the Anti-Monopoly Committee of Ukraine.

2. "competition laws" means:

(a) for the EU Party, Articles 101, 102 and 106 of the Treaty on the Functioning of the European Union, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation), and their implementing regulations and amendments;

(b) for Ukraine, Law N° 2210-III of 11 January 2001 (with amendments) and its implementing regulations and amendments. In the event of conflict between a provision of Law N° 2210-III and another substantive provision on competition Ukraine shall ensure that the former shall prevail to the extent of the conflict; as well as

(c) any changes that the abovementioned instruments may undergo after the entry into force of this Agreement.

3. Terms used in this Section are further explained in Annex XXIII.

ARTICLE 254

Principles

The Parties recognise the importance of free and undistorted competition in their trade relations. The Parties acknowledge that anti-competitive business practices and transactions have the potential to distort the proper functioning of markets and generally undermine the benefits of trade

liberalisation. They therefore agree that the following practices and transactions, as specified in their respective competition laws, are inconsistent with this Agreement, in so far as they may affect trade between the Parties:

(a) agreements, concerted practices and decisions by associations of undertakings, which have the object 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; or;

(c) concentrations between undertakings, which result in monopolization or a substantial restriction of competition in the market in the territory of either Party.

## ARTICLE 255

### Implementation

1. The EU Party and Ukraine shall maintain competition laws which effectively address the practices and transactions referred to in Article 254(a) (b) and (c).

2. The Parties shall maintain authorities responsible, and appropriately equipped, for the effective enforcement of the competition laws set out in paragraph 1 of this Article.

3. The Parties recognise the importance of applying their respective competition laws in a transparent, timely and non-discriminatory manner, respecting the principles of procedural fairness and rights of defence. Each Party in particular shall ensure that:

(a) before a competition authority of one of the Parties imposes a sanction or remedy against any natural or legal person for violating its competition law, it affords the person the right to be heard and to present evidence within a reasonable time to be defined in the respective competition laws of the Parties after it has communicated to the natural or legal person concerned its provisional conclusions as to the existence of the violation; and

(b) a court or other independent tribunal established under that Party's laws imposes or, at the person's request, reviews any such sanction or remedy.

4. Upon request of a Party, each Party shall make available to the other Party public information concerning enforcement activities of its competition laws and legislation related to the obligations covered by this Section.

5. The competition authority shall adopt and publish a document explaining the principles to be used in the setting of any pecuniary sanctions imposed for infringements of the competition laws.

6. The competition authority shall adopt and publish a document explaining the principles used in the assessment of horizontal mergers.

## ARTICLE 256

### Approximation of law and enforcement practice

Ukraine shall approximate its competition laws and enforcement practices to the part of the EU *acquis* as set out below:

1. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

Timetable: Article 30 of the Regulation shall be implemented within three years of the entry into force of this Agreement.

2. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation).

Timetable: Articles 1 and Article 5(1) and (2) of the Regulation shall be implemented within three years of the entry into force of this Agreement.

Article 20 shall be implemented within three years of the entry into force of this Agreement.

3. Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

Timetable: Articles 1, 2, 3, 4, 6, 7 and 8 of the Regulation shall be implemented within three years of the entry into force of this Agreement.

4. Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81 (3) of the Treaty to categories of technology transfer agreements.

Timetable: Articles 1, 2, 3, 4, 5, 6, 7 and 8 of the Regulation shall be implemented within three years of the entry into force of this Agreement.

#### ARTICLE 257

##### Public enterprises and enterprises entrusted with special or exclusive rights

1. With respect to public enterprises and enterprises entrusted with special or exclusive rights:

(a) neither Party shall enact or maintain in force any measure contrary to the principles contained in Articles 254 and Article 258(1) of this Agreement; and

(b) the Parties shall ensure that such enterprises are subject to the competition laws referred to in Article 253(2) of this Agreement

insofar as the application of the above-mentioned competition laws and principles does not obstruct the performance, in law or in fact, of the particular tasks assigned to the enterprises in question.

2. Nothing in the previous paragraph shall be construed as preventing a Party from establishing or maintaining a public enterprise, entrusting enterprises with special or exclusive rights or maintaining such rights.

#### ARTICLE 258

## State monopolies

1. Each Party shall adjust state monopolies of a commercial character within five years of the entry into force of this Agreement, so as to ensure that no discriminatory measures regarding the conditions under which goods are procured and marketed exist between natural and legal persons of the Parties.
2. Nothing in this Article shall prejudice the rights and obligations of the Parties under Chapter 8 (Public Procurement) of Title IV of this Agreement.
3. Nothing in paragraph 1 shall be construed as preventing a Party from establishing or maintaining a state monopoly.

## ARTICLE 259

### Exchange of information and enforcement cooperation

1. The Parties recognise the importance of co-operation and co-ordination between their respective competition authorities to further enhance effective competition law enforcement, and to fulfil the objectives of this Agreement through the promotion of competition and the curtailment of anti-competitive business conduct or anti-competitive transactions.
2. To this end, the competition authority of a Party may inform the competition authority of the other Party of its willingness to cooperate with respect to enforcement activity. This cooperation shall not prevent the Parties from taking independent decisions.
3. With a view to facilitating the effective application of their respective competition laws, the competition authorities of the Parties may exchange information including on legislation and enforcement activities, within the limits imposed by their respective legislations and taking into account their essential interests.

## ARTICLE 260

### Consultations

1. Each Party shall, at the request of the other Party, enter into consultations regarding representations made by the other Party, to foster mutual understanding or to address specific matters that arise under this Section. The requesting Party shall indicate how the matter affects trade between the Parties.
2. The Parties shall promptly discuss, at the request of either Party, any questions arising from the interpretation or application of this Section.
3. To facilitate discussion of the matter that is the subject of the consultations, each Party shall endeavour to provide relevant non-confidential information to the other Party, within the limits imposed by their respective legislations and taking into account their essential interests.

## ARTICLE 261

No Party may have recourse to dispute settlement under Chapter 14 (Dispute Settlement) of Title IV of this Agreement with respect to any issue arising under this Section, with the exception of Article 256 of this Agreement.

## SECTION 2

### STATE AID

#### ARTICLE 262

##### General principles

1. Any aid granted by Ukraine or the Member States of the European Union through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the proper functioning of this Agreement insofar as it may affect trade between the Parties.

2. However, the following shall be compatible with the proper functioning of this agreement:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences.

3. Moreover, the following may be considered to be compatible with the proper functioning of this Agreement:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project in the common European interest<sup>1</sup> or to remedy a serious disturbance in the economy of one of the Member States of the European Union or Ukraine;

(c) aid to facilitate the development of certain economic activities or of certain economic areas where such aid does not adversely affect trading conditions contrary to the interests of the Parties;

(d) aid to promote culture and heritage conservation where such aid does not adversely affect trading conditions contrary to the interests of the Parties;

(e) aid to achieve objectives allowed under the EU horizontal block exemption regulations and horizontal and sectoral state aid rules granted in line with the conditions set out therein;

(f) aid for investment to comply with the mandatory standards of the EU directives listed in Annex XXIX to Chapter 6 (Environment) of Title V of this Agreement, within the implementation period provided for therein, and involving adaptation of plant and equipment to meet the new requirements, can be authorised up to the level of 40 % gross of the eligible costs.

4. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Section, in so far as the application of such rules does not obstruct the performance, in law or in

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<sup>1</sup> For the purposes of this provision, the common European interest shall encompass the common interest of the Parties.

fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Parties.

Terms used in this Section are further explained in Annex XXIII.

## ARTICLE 263

### Transparency

1. Each Party shall ensure transparency in the area of state aid. To this end, each Party shall notify annually to the other Party the total amount, types and the sectoral distribution of state aid which may affect trade between the Parties. Respective notifications should contain information concerning the objective, form, the amount or budget, the granting authority and where possible the recipient of the aid. For the purposes of this Article, any aid below the threshold of EUR 200.000 per undertaking over a period of three years does not need to be notified. Such notification is deemed to have been provided if it is sent to the other Party, or if the relevant information is made available on a publicly accessible internet website, by 31 December of the subsequent calendar year.

2. Upon request by a Party, the other Party shall provide further information on any state aid scheme and particular individual cases of state aid affecting trade between the Parties. The Parties shall exchange this information taking into account the limitations imposed by the requirements of professional and business secrecy.

3. The Parties shall ensure that financial relations between public authorities and public undertakings are transparent, so that the following emerge clearly:

(a) public funds made available directly or indirectly (for example through the intermediary of public undertakings or financial institutions) by public authorities to the public undertakings concerned;

(b) the use to which these public funds are actually put into.

4. The Parties shall moreover ensure that the financial and organisational structure of any undertaking that enjoys a special or exclusive right granted by Ukraine or the Member States of the European Union or is entrusted with the operation of a service of general economic interest, that receives public service compensation in any form whatsoever in relation to such service, is correctly reflected in separate accounts, so that the following emerge clearly:

(a) the costs and revenues associated with all products or services in respect of which a special or exclusive right is granted to an undertaking or all services of general economic interest with which an undertaking is entrusted and, on the other hand, each other separate product or service in respect of which the undertaking is active;

(b) full details of the methods by which costs and revenues are assigned or allocated to different activities. These methods shall operate on the basis of accounting principles of causality, objectivity, transparency and consistency, according to internationally recognised accounting methodologies such as activity based costing, and be based on audited data.

5. Each Party shall ensure that the provisions of this Article are applied within five years of the entry into force of this Agreement.

## ARTICLE 264

### Interpretation

The Parties agree that they will apply Article 262, Article 263(3) or Article 263(4) of this Agreement using as sources of interpretation the criteria arising from the application of Articles 106, 107 and 93 of the Treaty on the Functioning of the European Union, including the relevant jurisprudence of the Court of Justice of the European Union, as well as relevant secondary legislation, frameworks, guidelines and other administrative acts in force in the European Union.

## ARTICLE 265

### Relationship with WTO

These provisions are without prejudice to the right of the Parties to apply trade remedies or other appropriate action against a subsidy or have recourse to dispute settlement in accordance with the relevant WTO provisions.

## ARTICLE 266

### Scope

The provisions of this Section shall apply to goods and to those services which have been listed in Annex XVI to Chapter 6 (Establishment, Trade in Services and Electronic Commerce) of Title IV of this Agreement, in accordance with the mutually agreed decision on market access, with the exception of subsidies to products covered by Annex 1 to the WTO Agreement on Agriculture and other subsidies covered by the Agreement on Agriculture.

## ARTICLE 267

### Domestic system of state aid control

To comply with the obligations of Articles 262 to 266 of this Agreement:

1. Ukraine shall in particular adopt national state aid legislation, and establish an operationally independent authority which is entrusted with the powers necessary for the full application of Article 262 of this Agreement within three years of the entry into force of this Agreement. This authority shall have, *inter alia*, the powers to authorise state aid schemes and individual aid grants in conformity with the criteria referred to in Articles 262 and 264 of this Agreement as well as the powers to order the recovery of state aid that has been unlawfully granted. Any new aid granted in Ukraine must be consistent with the provisions of Articles 262 and 264 of this Agreement within one year of the date of establishment of the authority.

2. Ukraine shall establish, within five years of the entry into force of this Agreement, a comprehensive inventory of aid schemes instituted before the establishment of the authority referred to in paragraph 1 and shall align such aid schemes with the criteria referred to in Articles 262 and 264 of this Agreement within a period of no more than seven years from the entry into force of this Agreement.

3. (a) For the purposes of applying Article 262 of this Agreement, the Parties recognise that during the first five years after the entry into force of this Agreement, any public aid granted by Ukraine shall be assessed taking into account the fact that Ukraine shall be regarded as an area

identical to those areas of the European Union described in Article 107(3)(a) of the Treaty on the Functioning of the European Union.

(b) Within four years of the entry into force of this Agreement, Ukraine shall submit to the European Commission its gross domestic product per capita figures harmonised at NUTS II level. The authority referred to in paragraph 1 of this Article and the European Commission shall then jointly evaluate the eligibility of the regions of Ukraine as well as the maximum aid intensities in relation thereto in order to draw up the regional aid map on the basis of the relevant EU guidelines.



## ANNEX XXIII TO CHAPTER 10

### GLOSSARY OF TERMS

The following glossary is intended to illustrate the meaning of certain terms used in Chapter 10 (Competition) of Title IV of this Agreement. This glossary is not legally binding and remains without prejudice to the provisions included in this Chapter.

(a) Areas where the standard of living is abnormally low or where there is serious underemployment: These are areas where the economic situation is extremely unfavourable in relation to the European Union as a whole. This condition is fulfilled if a region or a sub-national geographical administrative entity, with an average population of approximately 800,000 to 3,000,000 inhabitants, has a per capita gross domestic product (GDP), measured in purchasing power standards (PPS), of less than 75 % of the Union average.

(b) Serious disturbance: The disturbance in question must affect the whole of the economy of the Party concerned, or one of its Member States. A disturbance is deemed not to be serious for the purposes of this section if it is limited to one of the Parties' regions or parts of their territories.

(c) Service of general economic interest ("SGEI"): This means economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there was no public intervention. The activity must exhibit special characteristics as compared with the general economic interest of other economic activities.

(d) Public undertakings: Any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

(e) Exclusive rights: These are rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a service or undertake an activity within a given geographical area.

(f) Special rights: These are rights that are granted by a Member State to a limited number of undertakings which, within a given geographical area, and otherwise than according to objective, proportional and non-discriminatory criteria,

— limit to two or more the number of such undertakings authorised to provide a service or undertake an activity, or

— designate several competing undertakings as being authorised to provide a service or undertake an activity, or

— confer on any undertaking or undertakings any legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same service or to operate the same activity in the same geographical area under substantially equivalent conditions.

(g) Important project in the common European interest or in the common interest of the Parties: A project is important and in the common European interest or in the common interest of the Parties only if

(i) the aid concerns a project which is clearly defined regarding the terms of its implementation including its participants as well as its objectives;

(ii) the project must be in the common European interest in the sense that the advantage achieved by the objective of the project must not be limited to one Member State or the Member States implementing it, but must extend to the EU as a whole

or,

it must be in the common interest of the Parties, in the sense that the advantage achieved by the objective of the project must extend to both Parties;

(iii) the project must be of great importance with respect to its character and its volume: it must be a meaningful project with regard to its objectives and a project of a substantial size.

(h) State monopoly of commercial character: State monopolies of a commercial character are monopolies through which the national, regional or local authorities or other public bodies of any kind of a Party are in a position, in law or in fact, to supervise, determine or appreciably influence, either directly or indirectly, imports or exports between the Parties. The provisions in this Agreement regarding State monopolies of a commercial character apply likewise to monopolies delegated by the Parties.