




Problematic aspects of AMCU activity in wartime conditions

PH.D., TROFIMENKO DARIA

SIMON KUZNETS KHARKIV NATIONAL UNIVERSITY OF ECONOMICS





At the beginning of the full-scale invasion of the Russian army on the territory of Ukraine, the Antimonopoly Committee of Ukraine (hereinafter - the Committee) found itself in difficult conditions, which had the logical consequence of suspending the performance of some of the Committee's functions.

On the basis of the order of the AMCU dated 03.03.2022 No. 1-rp «On some issues of organizing the activities of the Antimonopoly Committee of Ukraine under martial law» before the termination or cancellation of martial law, the review was stopped:

1. Obtaining AMCU permits for concentration and concerted actions

On March 30, 2022, the Committee provided advisory clarifications No. 1-yr "On some issues related to the submission and consideration of applications for granting permission for concerted actions, the concentration of economic entities during the period of martial law, the uniform application of the provisions of Articles 26 and 27, paragraph three of the second part of Article 52 of the Law of Ukraine «On the Protection of Economic Competition» to violations of the legislation on the protection of economic competition, provided for in clauses 5, 12 of Article 50 of this Law, committed during martial law" (which contained significant practical provisions regarding the possibilities and actions of economic entities in martial law conditions regarding obtaining a concentration permit or agreed actions.


- 
- applications and cases on granting permission for concerted actions, concentration;
 - statement of violation of legislation on the protection of economic competition;
 - statement on protection of rights/unfair competition;
 - a statement on the provision of preliminary conclusions regarding concerted actions, concentration;
 - application for verification/revision of AMCU decisions;
 - notices, applications and cases on state aid, letters on providing explanations on the application of legislation in the field of state aid;
 - complaints about violations of legislation in the field of public procurement.



But in just a few months, the Committee adapted its work to wartime conditions and was able to resume the performance of most of the functions that were put on a temporary pause from the beginning of March 2022.

At the same time, such areas of activity of the Committee as control over concentrations and concerted actions, admissibility of state aid, appeal of violations in the field of public procurement, underwent changes.


Taking into account the fact that in the period from 30.03.2022 to 09.06.2022 consideration of all applications and cases for granting permission for concerted actions, concentration of business entities, as well as applications for providing preliminary conclusions regarding concerted actions, concentration of entities was stopped management, the decisions regarding which were not made as of 25.02.2022, during the period of martial law, it was allowed to submit a shortened list of documents and information in applications for permission for concerted actions, concentration. The application and the necessary attachments had to be submitted no later than 15 calendar days before the moment of concentration or concerted actions in writing to the Committee's mailing address or to the Committee's e-mail using electronic digital signatures of the applicants.



However, as of June 9, 2022, by Order No. 7-rp, consideration of all applications for granting permission for concerted actions, concentration of economic entities, preliminary conclusions on these issues, as well as cases of concentration and concerted actions submitted to the Committee, decisions on which was not accepted on 02/25/2022 and which was stopped on the basis of the Committee's order dated 03/03/2022 No. 1-rp was renewed.

Further consideration of applications and cases that were stopped on the basis of Order 1-rp took place in accordance with the Law of Ukraine «On the Protection of Economic Competition», the Regulation on Concentration, the Regulation on Concerted Actions and legislation.

By Order No. 7-rp, the Committee canceled the possibility to submit a shortened list of documents attached to applications for permission for concentration and concerted actions, simplified the procedure for their submission.



From 06/20/2022, the consideration of applications and cases for granting permission for concerted actions, concentration of business entities was carried out in accordance with the requirements of Section VI of the Law of Ukraine «On the Protection of Economic Competition», the Regulation on Concentration and the Regulation on Concerted Actions.

Analysis of the AMCU Report for 2022 shows that even in the conditions of martial law for business, the issue of obtaining permits for concentration and concerted actions has not lost its importance. So, last year the Committee considered 530 applications in the process of controlling the concentration of business entities (in contrast, in 2021 – 879 applications). At the same time, of these, 19 preliminary conclusions were issued in the process of controlling the concentration of business entities and 379 permits for the concentration of business entities. In addition, the Committee's bodies received 46 applications for permission for concerted actions by economic entities, of which 32 permits for concerted actions were granted.

2. State assistance under martial law

On April 13, 2022, amendments to the Law «On State Aid to Business Entities» entered into force, which simplified the procedure for obtaining state aid by economic entities, namely in the part of fulfilling the requirements related to the activities of the AMCU.


According to the current legislation, state aid is recognized as support in any form to business entities at the expense of state or local resources, which distorts or threatens to distort economic competition, creating advantages for the production of certain types of goods or the conduct of certain types of economic activity. Prior to the introduction of martial law in Ukraine, providers of state aid (in particular, state authorities, local self-government bodies) were obliged to submit state aid notices to the State Administration of Ukraine (in particular, if the aggregate amount of state aid to one economic entity, regardless of its form and sources exceeded for any three-year period the amount equivalent to 200 thousand euros) and could not provide such assistance until receiving the corresponding decision of the AMCU.

Understanding the difficult situation of economic entities in the conditions of martial law, which were on the verge of survival, it was recognized that any state aid provided during martial law is permissible.

Since during the martial law and immediately after its end, the economy of Ukraine will need significant assistance from the state (in particular, compensations, benefits, subsidies, etc.), and the activities of the AMCU are currently complicated, the requirements stipulated by the Law for recipients and providers of state assistance have been suspended.

Thus, providers of state aid are currently exempted from the obligation to:

- to notify about new state aid and proposals for changes to the conditions of current state aid, if such state aid is provided during martial law and within one year after its termination or cancellation;
- provide information on current state assistance provided during martial law and within one year after its termination or cancellation.



In case of approval by the provider of state aid during martial law of the normative legal act on the basis of which state aid is provided or may be provided, such state aid is admissible for competition. The aid provided within a year after the termination or abolition of martial law must meet the goals defined by the Law «On State Aid to Business Entities» (in particular, be of a social nature, contribute to socio-economic development, etc.).


It is important that information on current state assistance provided during the period of martial law and during the year after the termination or cancellation of martial law is submitted by April 1 of the following year after the year in which the martial law is terminated or canceled.

During January-February 2022, the bodies of the Committee made 17 decisions, 16 of them essentially in the field of state aid.

3. Appealing violations in the field of public procurement under martial law


With the adoption of the resolution of the CMU dated 12.10.2022 «On approval of the specifics of public procurement of goods, works and services for customers provided for by the Law on Public Procurement for the period of the legal regime of martial law in Ukraine and within 90 days from the date of its termination or cancellation» the number of competitive tenders was simplified to the application of a single procedure of open tenders.

Currently, this phenomenon regarding the conduct of competitive procurement procedures has been called «Ukrainian bidding». Other procedures that were defined in the Law «On Public Procurement» (in particular, bidding with limited participation, competitive dialogue, so-called "Euro-tendering") from 10.21.2022 are not applied during the period of martial law in Ukraine and 90 days after its end. To date, open auctions are conducted without the use of an electronic auction. Consideration of tender offers is carried out after the stage of preparation of tender offers, their disclosure and the auction.



The updated procedure of open tenders significantly expands for customers and participants the possibilities of operational procurement in conditions of martial law, but at the same time it performs the most important function - it ensures transparency and the right of participants to observe the principles of competition and protect their right to a non-discriminatory approach by customers during their participation in tenders.

According to the Law «On Public Procurement», AMCU is the appeals body in the field of public procurement. As an appeals body, the AMCU forms a permanent administrative panel to review complaints about violations of legislation in the field of public procurement with the aim of impartial and effective protection of the rights and legitimate interests of persons involved in procurement procedures.



In 2021, the AMCU received 14,828 complaints regarding the appeal of public procurement, but in 2022, a significant decrease in this indicator was observed. Yes, only 3,865 complaints were received in 2022. However, despite numerous challenges, AMCU was able to satisfy most of them, rejecting only 848 complaints.

In addition, 226 new cases of collusion in public procurement, tenders and auctions were opened in 2022 and more than 200 investigations were initiated, which may also lead to the opening of proceedings in the future.

Conclusion: the state of war and the requirements of the war economy create new challenges for the state as a whole and its individual institutions. AMKU was no exception and managed to quickly adapt to changes and new circumstances, continuing to ensure uninterrupted work in all its areas, contributing to the formation of an effective competitive environment in the markets of Ukraine.

The practice of the competition department's activities under martial law proves that the mechanisms of practical application of the tasks and goals of the body are flexible and sufficiently adaptable to today's conditions.

Today, the state is in an active stage of legislative reform, the main task of which is to support business processes in Ukraine and provide an opportunity for the economy not only to survive, but also to recover in the shortest possible time. At the same time, the protection of competition is a constitutionally enshrined principle of ensuring freedom of entrepreneurship in Ukraine, the implementation of which is impossible without the existence of an effective state institution whose main task is to ensure a competitive environment, even in wartime conditions.