

FOOD & BEVERAGES

Newsletter

COMPETITION / ANTITRUST

Kyiv, June 2015



Hot topic:

FOOD MARKET:

NEWS OF ANTIMONOPOLY REGULATION

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This publication is not a legal advice and provides only general information about development trends in the antitrust regulation and practice of its application in Ukraine. In order to avoid any risks prior to making any decisions related to information contained in this publication, please, seek legal counsel.

FOOD MARKET

NEWS OF ANTIMONOPOLY REGULATION

Dear Ladies and Gentlemen,

In line with the policy of supporting our existing and potential clients at all stages of their activities in Ukraine, we would like to draw your attention to:

- practice of the Antimonopoly Committee of Ukraine (AMCU);
- news of AMCU.

PRACTICE OF AMCU

1. UNFAIR COMPETITION (DISSEMINATION OF MISLEADING INFORMATION)

1.1. Territorial Office of AMCU in Kyiv region **imposed a fine** for unfair competition on a company that stated “mineral water” on price tags and receipts for drinking water despite manufacturer’s information on the label saying it was drinking water for everyday consumption. The fine amounted to **UAH 10 thousand**. Setting the fine, AMCU considered that the defendant did not obstruct the investigation, cooperated by establishment of actual circumstances of the case, acknowledged and ceased the violation.

1.2. Territorial Offices of AMCU **gave their recommendations** due to actions qualified as dissemination of misleading information to the following business entities:

- a dairy product manufacturer that indicated on the butter package “**100% cream**” which, as established by AMCU, might give consumers the idea that this butter has advantages compared to similar products of other manufacturers.
- 2 meat product manufacturers that, according to AMCU, misused the well-known names for the traditional assortment of first class raw smoked sausages “Zernistaya”, “Servelat”, “Sudzhuk” manufactured according to conventional technology pursuant to requirements of Ukrainian national standards, namely:
 - GSTU 4427:2005 “Raw smoked and dry-cured sausages. General technical specification”;
 - GSTU 4433:2005 “Fried sausages. General technical specification”;
 - GSTU 4435:2005 “Semi-smoked sausages. General technical specification”;
 - GSTU 4436:2005 “Cooked sausages, wieners, links, meat loafs”.

These regulatory documents prohibit, in particular, assigning traditional names to sausages of new assortment.

As the above-mentioned manufacturers used names of the traditional sausage assortment for the new types of first class sausages manufactured according to technical specifications, the Territorial Office of AMCU in Poltava region recommended the manufacturers to cease the violation. One of the manufacturers suspended the manufacture of the product and undertook to monitor the rules for naming the products to prevent violations.

- a dairy product manufacturer that indicated on the butter package *“natural 100% product”*. AMCU's office found that such description might give consumers the idea that there is not-natural butter which would contradict requirements of Ukrainian national standards for butter manufacture. The manufacturer ceased the violation.

2. ANTICOMPETITIVE CONCERTED ACTIONS (BID RIGGING, PRICE FIXING)

2.1. Territorial Offices of AMCU **fined** the following business entities for anticompetitive concerted actions:

- two entrepreneurs that concerted their bids during procurement of catering services (hospital food) in December 2013 – January 2014 carried out by “Berdyansk City Hospital”, the municipal institution of the Berdyansk City Council. The fine totalled **UAH 40 thousand**.
- 4 dairy product manufacturers that simultaneously reduced milk purchase prices in spring 2014. The fine totalled **UAH 41 thousand**.

2.2. Territorial Office of AMCU in Khmelnytsky **recommended** 4 dairy product manufacturers to cease anticompetitive concerted actions. AMCU's Office found that in August-October 2014 manufacturers simultaneously and without any economic feasibility set equal prices for milk purchased from individual households in Belogorsk district in Khmelnytsky region.

2.3. Territorial Office of AMCU in Khmelnytsky **initiated cases** against two companies that concerted their actions during preparation and participation in the quotation procedure for procurement of cooked sausages, links and refrigerated beef meat carried out in March 2015 by the Department for Education, Youth and Sports at Slavutsk District State Administration. Currently, evidence in the cases is being gathered.

3. MONOPOLY (DOMINANCE) ABUSE

3.1. Territorial Office of AMCU in Khmelnytsky **fined** 2 public veterinary hospitals in Khmelnytsky region that overcharged for some veterinary and preventive services. The fines totalled **UAH 6 thousand** and **UAH 4 thousand**. The hospitals acknowledged and ceased the violations.

3.2. AMCU's Territorial Offices **initiated cases** against the following entities for the monopoly abuse:

- a hospital in Khmelnytsky region that overcharged for veterinary and sanitary services;
- a farm that set wholesale prices for wheat flour without any economic feasibility.

Currently, the evidence in the cases is being gathered.

4. ANTICOMPETITIVE ACTIONS ON THE PART OF GOVERNMENT AND LOCAL SELF-GOVERNMENT AUTHORITIES

Regional Territorial Offices of AMCU recognized actions of the following government and local self-government authorities as violating the legislation on protection of economic competition:

- Apostolove City Council (Dnipropetrovsk region), Zarechnoe Village Council (Rivne region) and their executive committees that failed to carry out an auction for solid household waste removal services and, respectively, to select providers of the services above and to conclude contracts for the provision of the services above in the territories of their responsibility;
- Voronovitsa Village Council that selected a provider for solid household waste removal services without an auction in violation of law requirements¹. The violation was ceased by means of carrying out an auction;
- executive committee of the Nova Kakhovka City Council in Kherson region that approved the auction documents for selection of a provider for solid household waste collection and removal services in Nova Kakhovka containing qualification requirements not provided by the current legislation.

5. INFORMATIONAL VIOLATIONS (NON-PROVISION OF INFORMATION UPON AMCU'S REQUEST)

AMCU **fined** a fish product importer with **UAH 68 thousand** for violation of the legislation on protection of economic competition in form of non-provision of information upon AMCU's request in the period of time set by the latter.

AMCU'S NEWS

NEW AMCU'S AUTHORIZED GOVERNMENT OFFICIALS

On 29.06.2015 with decrees of the President of Ukraine² new AMCU's authorized government officials were appointed. Thus, Andrey Vovk, Agia Zagrebelskaya, Maria Nizhnik, Maria Protsyshen, Svetlana Panaiotidi, Nina Sidorenko, Valery Polyukhovych, and Anna Artemenko have been appointed³ as authorized government officials.

AMCU WILL CHECK MILK PRICES

The Ministry of Agrarian Policy and Food of Ukraine announced that AMCU should check the increase of milk retail prices in Ukraine.

The Minister of Agrarian Policy and Food of Ukraine said previously that milk retail prices grew by 45%, and wholesale – by 21%. At the same time, prices for milk purchase from agricultural companies grew by 19%, and from individuals – by 8%.

1. Part 3 Article 35-1 of the Law of Ukraine "On Waste" No. 187/98-VR dd. 05.03.1998

2. Decrees of the President of Ukraine No. 372/2015 – 376/2015 dd. 29.06.2015

3. Decrees of the President No. 377/2015 – 384/2015 dd. 29.06.2015

It shall be noted that AMCU is not responsible for price control. However, the authority may investigate violations of the legislation on protection of economic competition, in particular, anticompetitive concerted actions in form of adjustment of raw materials purchase prices between competitors, including exchange of the relevant information.

It shall be noted that on 15.07.2015 the Parliament of Ukraine passed in first reading the bill No. 2089 dd. 10.02.2015 "On Amendments to Certain Legislative Acts of Ukraine regarding State Purchase Price Control and Support of Rural Areas".

The key novelty of the bill is setting on the legislative level minimum purchase prices for second class whole milk in the amount of 4 UAH/kg (excl. of VAT). The control price shall be set for all raw milk materials and milk manufacturers – legal entities, private entrepreneurs, private farms, and individuals that keep cattle, sheep, goats, buffalo cows, and mares and produce raw milk materials and milk.

It shall be noted that such novelties contradict the market economy laws and the deregulation course adopted by the Parliament, the Cabinet of Ministers, the President and the central executive authorities for purposes of enforcement of the Association Agreement between Ukraine and the EU, as well the Law of Ukraine "On Prices and Pricing" dd. 21.06.2012 No. 5007-VI, according to which the Cabinet of Ministers of Ukraine, executive authorities, public collective bodies and local self-government authorities have the power to establish public control prices. Moreover, these novelties contradict the rules of regulatory procedure (by setting prices in a law, any amendments shall be made in form of a law, which, considering the duration of the law-making process, will be ineffective).

The bill also proposes to put the whole raw milk on the list of products subject to state price control pursuant to the Law of Ukraine "On Government Support for the Agriculture in Ukraine" (the List). It means that the maximum trade mark-up for the whole milk will amount to 20% of the manufacturer's wholesale price for end consumers. Moreover, it is envisaged that procuring and processing companies shall pay milk suppliers within 7 banking days after receipt of proceeds from the sale of the product. Considering the nature of the product (wholesale raw milk is subject to subsequent processing by procurement and processing companies) the whole raw milk is not intended for sale to end consumers. Moreover, considering that milk is mixed in course of processing it is impossible to determine what milk exactly was sold.

In addition, if the whole raw milk is put on the List, manufacturers (suppliers), wholesale companies and retailers will be prohibited to conclude contracts envisaging any other relations except sale and purchase of agricultural products.

As to the date of preparing this information letter the bill is being prepared for second reading.

Kind regards and best wishes,

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ARZINGER'S FOOD & DRINKS PRACTICE

One of Arzinger's priorities is to provide legal support to the food industry. Our internal Food & Drinks Practice employs more than 12 experienced associates who worked in top alcohol companies, major companies manufacturing foods, mineral water, soft drinks, sparkling and still drinking water, in legal departments of large retail chains, as well as having experience in legal support of the restaurant and hotel business. At the same time, we keep strengthening and expanding our team to meet our clients' needs. In addition, depending on the project we engage lawyers from Arzinger's other practices with deep expertise in certain areas of law (such as intellectual property rights, tax and customs law, public procurement, corporate law, advertising, etc.), which enables us to provide our clients with integrated and comprehensive advice on all aspects of doing business in Ukraine..

OUR FOOD & DRINKS PRACTICE RENDERS LEGAL SUPPORT TO THE FOLLOWING CLIENT CATEGORIES:

- Manufacturers of food products, alcoholic and soft drinks, and mineral water;
- Food retailers;
- Restaurant Business.

We advise leading international and national companies on all issues of legal regulation in the food industry.

We have significant experience in representing our clients in their relations with supervisory and regulatory authorities as well as provide support to clients in the inspections conducted by the above authorities.

Arzinger's partners and associates are active participants of conferences, workshops and round tables dedicated to problems of regulating the food industry in Ukraine, as well as to improvement of relevant legislation. In addition, the lawyers of our practice conduct internal and external seminars and trainings for clients' customers in the food industry on the most pressing legal issues in the said field.

Arzinger's working languages are Ukrainian, Russian, German and English.

OUR RECENT EXPERIENCE IN THE FOOD INDUSTRY¹ IN TYPICAL ISSUES OF ANTITRUST AND COMPETITION LAW²:

1. REPRESENTING A MAJOR BUCKWHEAT PRODUCER IN A BUCKWHEAT PRICE-FIXING INVESTIGATION CONDUCTED BY THE ANTIMONOPOLY COMMITTEE OF UKRAINE
2. REPRESENTING A GLOBAL BUTTER AND OIL PRODUCER OF IN A CASE ON CHARGES OF ABUSE OF MONOPOLY POWER INITIATED BY THE ANTIMONOPOLY COMMITTEE OF UKRAINE;

1 *The essence of the legal services is disclosed to the extent permitted by our Clients in non-disclosure agreements*

2 *Arzinger is a co-founder of the Association for Resistance to Unfair Competition (ARUC), which is an all-Ukrainian non-profit non-governmental public organization (<http://www.aruc.org.ua/ru/about/>). ARUC is a member of the global network International League of Competition Law, with headquarters in Lausanne, Switzerland (www.ligue.org), and acts as its official affiliate in Ukraine. ARUC's main mission is to facilitate the development of fair competitive environment in Ukraine and worldwide. President of the Association – Sergiy Shklyar, our firm's Senior Partner, is also a member of the Public Council under the Antimonopoly Committee of Ukraine and Chairman of the Unfair Competition Committee. Due to this we can discuss the Committee's position on the practical application of any antitrust law provision with the officers of the Committee.*

3. REPRESENTING A HYPERMARKET CHAIN OPERATOR IN A CASE ON CHARGES OF UNFAIR COMPETITION INVESTIGATED BY THE ANTIMONOPOLY COMMITTEE OF UKRAINE;
4. LEGAL SUPPORT TO A MAJOR UKRAINIAN SUNFLOWER OIL PRODUCER IN OBTAINING AMCU'S MERGER CLEARANCE IN THE RESPECTIVE FIELD (WITH 14 LARGEST SUNFLOWER OIL PRODUCERS AND TRADERS IN THE UKRAINIAN MARKET);
5. LEGAL SUPPORT TO A CLIENT IN OBTAINING AMCU'S CLEARANCE TO ACQUIRE A PLANT PRODUCING APPLE JUICE.

THE SCOPE OF OUR SERVICES IN THE FOOD INDUSTRY INCLUDES THE FOLLOWING:

- ADVISING ON REGULATORY ISSUES;
- ADVISING IN THE AREA OF ANTITRUST AND COMPETITION LAW;
- SUPPORTING REGISTRATION, PROTECTION AND TRANSFER OF INTELLECTUAL PROPERTY RIGHTS;
- CONSULTING IN THE FIELD OF ADVERTISING AND OTHER TYPES OF PROMOTION;
- LEGAL SUPPORT FOR PRODUCTION, IMPORT AND EXPORT OF FOOD PRODUCTS;
- CONSULTING IN THE AREA OF FOOD SALES IN UKRAINE;
- ADVISING ON TAX ISSUES;
- ADVISING ON PERSONAL DATA PROTECTION;
- ADVISING ON CORPORATE LAW ISSUES;
- CONSULTING IN THE AREA OF EMPLOYMENT LAW;
- REPRESENTING PRODUCERS IN CONFLICT SITUATIONS WITH CONSUMERS;
- ADVISING ON THE POWERS OF LAW ENFORCEMENT AND REGULATORY AUTHORITIES AS WELL AS LEGAL SUPPORT IN INSPECTIONS CONDUCTED BY THE SAID AUTHORITIES;
- LITIGATION;
- ADVISING ON REAL ESTATE AND CONSTRUCTION ISSUES;
- CONSULTING ON PROJECT FINANCING;
- DEVELOPING AND IMPLEMENTING COMPLIANCE PROGRAMS AND TRAININGS.

As part of Arzinger Academy Legal Days we hold monthly business breakfasts for food industry representatives, food retailers and restaurant businesses to let the participants know experts' opinions, to discuss current market issues and to share their experience.