ПУБЛІЧНЕ ПРАВО

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ANTIMONOPOLIC CONTROL OF INFORMATION EXCHANGE BETWEEN COMPETITORS

The normative principles of evaluation of information exchange between rival enterprises based on the experience of the EU regarding compliance with the legislation on protection of economic competition are investigated; forms of information exchange between competitors that are compatible (incompatible) in the context of the protection of economic competition; the progressive international practice on termination of violations in the form of information exchange, which leads to distortion of economic competition is analyzed. The prospects of normative settlement of requirements in the current legislation are defined.

Keywords: information exchange, tacit consent, concerted actions, competition law.

Бакалинская О., Бугаенко Н. Антимонопольный контроль обмена информацией между конкурентами. *Исследованы нормативные основы оценки обмена информацией между предприятиями-конкурентами на основе опыта ЕС в контексте соблюдения законодательства о защите экономической конкуренции; формы обмена информацией между конкурентами, которые являются совместимыми (несовместимыми) в контексте защиты экономической конкуренции; проанализировано прогрессивную международную практику по пресечению нарушений в виде обмена информацией, что приводит к нарушению экономической конкуренции. Определены перспективы нормативного урегулирования требований в действующем законодательстве.*

Ключевые слова: обмен информацией, молчаливое согласие, согласованные действия, конкурентное законодательство.

Background. In the current conditions the obtaining information on market dynamics, trends in demand changes, alternative offers from competitors is vital to maintain the effective operation of business entities in the market. Normal business practice is the discussion of legislative initiatives, non-confidential information of a technical nature, quality and safety standards and various aspects of the development of the industry as a whole. However, for direct or indirect information exchange, there may be various unwanted intentions of business entities (for example, elimination of competitors, creation of entry barriers, price level agreement, certain discounts, sales volumes, geographical distribution of the market, etc.). Therefore, obtaining information and exchanging certain data can carry significant risks of distortion of the competitive environment, which means that under certain conditions such actions may be considered by the competition authority as anticompetitive practice.

In this regard, the question is where is the boundary between lawful actions and a violation of the legislation on the protection of economic competition. In practice, the assessment of the admissibility of information exchanges is usually accompanied by many problems, in particular, with the collection of appropriate evidences of informal arrangements, in particular the demonstration of the causal link between the information exchanged and the changes taking place in the relevant market. Competition agencies are always faced with these facts, especially when it is necessary to prove the restriction of competition on the consequences.

Analysis of recent researches and publications. The works of such scholars as A. Usova, V. Gladka-Batiuk, M. Bloom, A. Kapobianco, F. Wagner-von Papp, H. Niemeyer, E. Bissocoli, C. Osti [1–8] are devoted to the analysis of the peculiarities of information exchange among competitors in the context of observance of competition law.

The **aim** of the article is to provide a comprehensive system analysis of the problems of legal regulation of agreements on the exchange of information between competitors, defining the prospects for the development of Ukrainian competition law, taking into account the experience of normative regulation of information exchanges in the EU and other countries of the world.

Materials and methods. The theoretical basis of the article was the scientific works of scientists from various fields of law, which to some extent studied the problems of information exchange between competitors in relation to monopoly risks (antitrust compliance) and improving the regulatory provision of antimonopoly regulation. There were also used the philosophical methods of cognition (dialectical, hermeneutic), general science (analysis and synthesis, systemic-structural, modeling, abstracting, formal-logical, historical) and special methods used in jurisprudence (methods of interpretation of rules of law, legal-dogmatic, comparative legal).

Results. Each country has its own history of adopting the Manual for the exchange of information between competitors [9–10]. In Mexico, the Federal Law on Economic Competition defined the criteria for assessing

the exchange of information, which caused great uncertainty for companies, professional and trade associations [11]. In part, due to these problems, the law also provides that the Comisión Federal de Competencia Económica (COFECE) may issue recommendations and directives for its implementation and realization, as well as to assist the private sector in complying with its provisions. Recognizing the importance of providing certainty on the issues of information exchanges and in response to all requests from the private sector, in 2015 the Federal Commission has developed the Guidelines for the exchange of information between competitors. In December 2009, the Canadian Competition Bureau published a series of Guidelines on Competitive Cooperation [12–13]. Documents are devoted to the exchange of information between competitors in the form of direct and immediate exchanges, and through trade associations. The Fair Trade Commission of Japan has published Guides on the activities of trade associations [14, p. 42]. Although the Manual directly examines the possible impact on competition through the activities of trade associations, the detailed assessment of the exchange of information within the trade association by the Commission on Fair Trade of Japan, can be applied even outside the context of the trade association. In particular, the Japan Fair Trade Commission proceeds from the fact that a tacit conspiracy will definitely facilitate the exchange of information, in particular, related to important competitive factors.

In Ukraine, there is a need for the development and adoption of a Manual for the exchange of information between competitors, which will enhance the awareness of the business community (including associations and chambers of commerce), lawyers, society as a whole on the main aspects of assessing information exchange between competitors in the context of compliance competition law by the competition authority in order to promote good business practices, protect the competitive environment and improve the well-being of consumers.

Most often, information exchanges take place within existing business relationships and/or the conclusion of formally irreproachable contracts, the content or consequences of which have signs of the law abuse. In legal practice, the question of the limits of the implementation of the principle of freedom of economic contract has become more and more commonplace in recent times. At the same time, as A. O. Belianevych correctly notes, the general principles of civil law defined by Article 3 of the Civil Code of Ukraine are the norms – principles, «dry residue» of civil law, which determine the vector of regulation of social relations based on equality, free expression of will, property independence of their participants. In the field of regulating civil-legal contractual relations, the main burden is the principle of freedom of contract and the principle of justice, integrity and prudence (Article 3 of the Civil Code of Ukraine). However, in the Commercial Code (CC) of Ukraine, the principles on which the legal regulation of economic contractual relations is based, are not separately identified and can be deduced from the general principles of management

set forth in Art. 6 of the Civil Code of Ukraine, first of all, the freedom of entrepreneurship within the limits defined by law, and the restriction of state regulation of economic processes in connection with the need to ensure social orientation of the economy, fair competition in entrepreneurship, environmental protection of the population, consumer protection and safety of society and the state. Thus, the principles of contracts (civil and commercial) should not only serve as a guide in shaping the content of positive law, but also to determine the direction of enforcement [15, p. 65].

Issues related to antitrust risks related to information exchanges are becoming more and more relevant in today's world. Ukrainian companies are already experiencing new trends in strengthening the control of the Antimonopoly Committee of Ukraine for the exchange of information between companies operating in the relevant market. In Europe and the United States, business has long been very cautious with the «dialogue» with competitors, the norm was the training for employees on the «safe area» in the exchange of information. This was preceded by a significant practice of the competition authorities in proving the anticompetitive effects of exchanges of information and a wave of large fines for such unlawful actions [16–19].

The conclusion of the Association Agreement between Ukraine and the EU placed an issue of adaptation and unification of the current competition legislation of Ukraine to the EU standards on the agenda. Despite the fact that the practice of controlling the exchange of information between competitors in the EU has more than forty years, the unified position on this issue has developed in the EU only at the beginning of the second decade of the XXI century. In particular, in 2011, the European Commission adopted a detailed Notice «Recommendations on the application of Article 101 of the Treaty on the Functioning of the European Union for horizontal cooperation agreements» [20], which outlines the main principles and criteria for assessing the admissibility of information exchanges. The document specifies the characteristics of the illegal exchange of information; certain features of the markets, the presence of which facilitates the illicit exchange of information; conditions of release from liability. According to European legislation, the exchange of strategic confidential information is illegal (violation of Article 101 of the Treaty on the Functioning of the European Union). According to the Notice, such information generally refers to prices (such as actual prices, discounts, increases/decreases in prices), customers, production costs, turnover, profits, product quality, marketing plans and strategies, production risks, investments, technologies, etc.

An analysis of European practice has led to the conclusion that anticompetitive exchanges of information are most likely in markets that are transparent, highly concentrated (especially oligopolistic), simple and stable, where new players sometimes appear, including through significant entry barriers to such markets. Enterprises involved in the exchange of information, in most cases, are homogeneous in terms of their value, product

mix and market share. In markets with such characteristics, favorable conditions for enterprises to conclude silent deals, successful monitoring of their implementation and application of sanctions for avoiding agreements are created. Under such conditions, the result of the development of competitive relations as a result of information exchange depends both on the initial characteristics of the market where the exchange takes place, and on the possible changes in these characteristics that may arise as a result of the exchange of information. Therefore, it is necessary to analyze not only the initial characteristics of the market, where the exchange of information takes place, but also the forecast of the development of a market situation without such exchange.

Also, the probability of coordinating competitive behavior is higher in the markets of the same type of goods, where competition is reduced exclusively to the price but the role of non-price factors is leveled, such as assortment, brand image, format and quality of service, etc. In addition, a significant impact on competition may occur if the enterprises involved in the exchange of information have large market shares. As a rule, significant anticompetitive risks can arise when companies exchange information that relates to the entire market or a significant part of it: otherwise, uncertainty remains for the rest of the market participants and in the case of a conspiracy it is unknown what other players will react to, which will impede effective coordination of the arrangements.

The nature of the exchanged information, the frequency of exchanges and the way in which this occurs (public/non-public information sharing) are important to assess whether information will be exchanged to actual collusion/anticompetitive practices. The greatest risks of distortion of competition arise when exchanging data on future prices and sales volumes; when exchanging current or recent prices of individual enterprises or other individualized information that reduces uncertainty about future prices, pricing components, promotions, market shares and contractual terms with suppliers or buyers. The high degree of threat is the sharing of confidential and strategic business information, which, having got to competitors creates competitive advantages for them in comparison with other market participants. There is a direct proportional dependence: if the more information is detailed and individualized, it is the more likely that the exchange of such data will have a significant negative effect on competition [9].

An important part of evaluating information exchange agreements is the analysis of specific characteristics of the exchange, such as its purpose, the conditions for access to information and participation in the exchange, and also the type of information exchanged (e.g. public or private, aggregated or detailed, historical, current or predictable), the frequency of such information and its importance for fixing prices, volumes or market conditions of operation. For example, the exchange of aggregated data on sales volumes and production in a particular sector of the economy is allowed,

when it is rather difficult to take into account individualized information at the enterprise level [9–11].

The scope of the exchange of information between enterprises operating in the relevant market is a complex sub-sector of competition law. The exchange of forecast, current, unconsolidated information on the concentrated market of homogeneous goods is prohibited, whereas the exchange of historical and aggregated data in the market of differentiated products may be permitted. Between these two extremes there is a «grey zone», where compatibility with the rules of competition for each exchange must be evaluated taking into account the characteristics of the structure of the market, the parameters of the exchange of information pursued by the enterprises of the purpose of exchange.

The impact of information exchange on competition should be assessed on a case-by-case basis. The competition authorities of the European Union member states consider the exchange of individualized information, especially valuable to competitors, as a serious violation of the anti-trust law, which provides for severe sanctions, and in some countries, criminal prosecution. The more detailed information, the more it relates to the future (strategic) plans of enterprises, the more important is its inaccessibility for competitors. Analysis of the practice of using Art.101 of the Treaty on the Functioning of the European Union (TFEU) allows us to conclude that it does not matter how the company receives information from a competitor – by e-mail, phone or informal meeting, during an informal conversation. Also, it does not matter whether such an exchange occurs directly or through third parties (association, joint vendors or buyers, consulting firms, authorities, etc.). Silent consent to obtain information from a competitor is also regarded as exchange participation, because regardless of the way information is received, it is presumed that the knowledge of this information will affect the following behavior of the enterprise on the market [13].

Article 101 The TFEU is intended not only to protect the direct interests of individual competitors, but to protect the fundamental principle of competition between economic entities, that is, the lawful structure of the market and, consequently, competition as such. Therefore, in its application, any interpretation of the European Court is binding on all national courts of the EU member states. The provisions of Article 101 of the TFEU may be declared inapplicable if the agreements or concerted practices contribute to the improvement of the production or distribution of goods or to technical or economic progress, provided that they give a fair share of the profit to consumers, do not impose restrictions that are not required to achieve these goals and does not allow interested economic entities to eliminate competition for a significant part of the products concerned. This provision is fully taken into account in domestic legislation on the protection of economic competition.

An analysis of the European practice of terminating the violations of competition law in the form of anticompetitive exchanges between economic

entities operating on the relevant (relevant) market allowed establishing of the following features.

Anticompetitive practice of an enterprise can be determined not only by the consequences of unlawful behavior, but also for the purpose, that is, because of the very purpose of the impact on economic competition. There is no need to consider the effects of an information exchange when its anti-competitive purpose is established. In cases where the results of the information exchange analysis did not establish that the negative impact on economic competition was sufficiently substantial and was pursued as the goal of such exchange, it's possible or actual consequences in terms of preventing, eliminating, limiting or distorting economic competition in the relevant market are considered.

An information exchange between competitors will be considered anticompetitive even when its purpose is to eliminate uncertainty about the expected behavior of participating companies. For this, it is not necessary that actual prevention, elimination, restriction or distortion of competition or a direct link between the concerted actions and one of the essential parameters of competition (for example, consumer prices) – in some cases it is sufficient to prove the very possibility of negative influence on economic competition (terms of trade).

The legal assessment of the exchange of information in the context of the functioning of the cartel should be provided separately, taking into account the existence of a conspiracy in the relevant market (a complex violation). That is, anticompetitive exchange of information is an independent violation of the legislation on the protection of economic competition. In the case of a complex violation there is no need to identify a specific form of illegal behavior.

Even when competitors exchange information that is not individually confidential about planned future business parameters (prices, sales volumes, etc.), competitive authorities should evaluate the possible consequences of such exchanges for economic competition, taking into account a set of specific characteristics. It should be noted that according to the case law of the European Union, in order to reach an agreement in the sense of Article 101 of the TFEU it is sufficient that enterprises express their common desire to behave in the market in a certain way. In addition, if a representative of an enterprise is present at meetings at which the parties agreed on a certain behavior on the market, then this enterprise may be held responsible for the violation even if its own behavior in the market does not correspond to the agreements reached. The fact that an enterprise does not comply with a meeting that pursues an anticompetitive purpose does not relieve it of responsibility if it has not taken appropriate measures.

In determining the amount of fines, the European Commission pays special attention to the need to ensure a deterrent effect of similar violations in the future and to respect the principle of proportionality, and therefore the fine for breach may increase for enterprises with significant market power

(for example, particularly large turnover from the sale of goods or services). It should be noted that if the company knew about the exchange, the intentions of the exchange or it received the information itself (which had signs of wrongful practice), however, it did not distanced publicly and within a reasonable time from the situation in which the said enterprise appeared, and/or did not report about it to the competent authorities, it is believed that such an enterprise effectively promotes the possibility of existence, the duration of the violation and jeopardizes its disclosure. In this case, there is a passive mode of participation in the violation, which does not relieve the said enterprise from liability. According to the case law, the condition for the reciprocity of concerted action implies that when one enterprise reveals its future intentions to another (competitor), the latter, at least, accepts this information. For such an enterprise, an increased factor in the calculation of penalties will be applied, since the situation in which the party was aware of the possibility of concluding/existence of the relevant unlawful arrangements and did not take appropriate measures or implemented them after inspections by the competitive authority is an aggravating factor. It is sufficient for the European Commission to establish that the relevant company participated in meetings, during which antitrust agreements were concluded in order to bring the participation of the company to them. If the company's participation in such meetings is established, then it is the duty of it to prove the absence of any anticompetitive intentions, while enough actions of the person who has the right to act on behalf of the enterprise [14–15].

A particular difficulty in qualifying anticompetitive information exchange is the collection of a sufficiently adequate evidence base that would prove that, among other things, it is the informal unlawful agreements reached about the purpose of distortion of competition in the relevant market, the ways of achieving the future behavior of the exchange participants, the creation of entry barriers. Evidence on cases can be: system messages of the information system administrator, advertisements, email correspondence, audiovisual recordings of meetings; transcripts of meetings, copies of minutes, handwritten notes; standard sheets of manufacturers to their regular buyers, copies of parking tickets; accounting records on employee expenses for certain purposes; commercial reports of companies, information from periodicals, correspondence of the branch association, witnesses' testimonies, written explanations of the parties, etc. In this regard, the competition administration should have the authority to carry out sudden inspections of enterprises and associations [15, 20].

Application of the Mitigation Program is a necessary «tool» for a competitive agency, firstly, in identifying informal contacts of business entities with signs of violation of competition law; and secondly, in proving of the unlawfulness of the information exchange, since, in such cooperation with the competitive authority, the participants of the exchange provide important evidence and evidence in the case; thirdly, in demonstrating its openness and transparency in law enforcement activities to the business

community, since the goal is to encourage business entities to be honest market participants who are responsible for maintaining public welfare in the country.

Conclusion. The need for the adoption of the Guidelines for assessing the exchange of information between competitors in Ukraine is justified not only by the possibility of significant anti-competitive effects (especially if exchanges took place within the framework of the existence/maintenance of the cartel), but also the importance of the availability of market information and the positive effects that may result from information exchanges. Although this document should not duplicate the provisions of the Law on the Protection of Economic Competition, it will be of a recommendatory nature, creating the legal basis for ensuring certainty in cases of information exchanges between competitors, as well as encouraging the voluntary observance of fair market rules. This is important for protecting the legal position of the competitive authority when considering relevant cases in court instances. Consequently, the adoption of the Guidelines (recommendations) in Ukraine is necessary for all target groups: the Antimonopoly Committee of Ukraine, companies, associations and chambers of commerce, lawyers (lawyers, judges), society as a whole.

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Бакалінська О., Бугаєнко Н. Антимонопольний контроль обміну інформацією між конкурентами.

Постановка проблеми. *В сучасних умовах отримання інформації про динаміку ринку, тенденції зміни попиту, альтернативні пропозиції від конкурентів життєво необхідно для підтримки ефективної діяльності суб'єктів господарювання на ринку. Тому отримання інформації й обмін певними даними можуть нести в собі істотні ризики спотворення конкурентного середовища, а значить, за певних умов такі дії можуть розглядатися конкурентним відомством як антиконкурентна практика. У зв'язку з цим актуальним є питання, де знаходиться межа між правомірними діями і порушенням законодавства про захист економічної конкуренції.*

Аналіз останніх досліджень і публікацій. *Особливостям інформаційного обміну серед конкурентів у контексті дотримання конкурентного законодавства посвячено праці багатьох науковців, зокрема А. Усової, В. Гладкої, М. Блумом, А. Капобьянко, Папп Ф. Вагнер-фон, Х.-Ю. Німейєр, Е. Бісоколі, К. Ості.*

Метою *статті є комплексний системний аналіз проблем правового регулювання угод щодо обміну інформації між конкурентами, визначення перспектив розвитку конкурентного законодавства України з урахуванням досвіду нормативного врегулювання інформаційних обмінів в ЄС та інших державах світу.*

Матеріали та методи. *Теоретичну основу статті склали наукові праці вчених з різних галузей права, які в тій чи іншій мірі досліджували проблеми обміну інформації між конкурентами з точки оцінки монопольних ризиків (антимонопольного комплаєнсу) та вдосконалення нормативного забезпечення антимонопольного регулювання. Також використані філософські методи пізнання (діалектичний, герменевтичний), загальнонаукові (аналіз та синтез, системно-структурний, моделювання,*

абстрагування, формально-логічний, історичний) та спеціальні методи, що використовуються у правознавстві (методи тлумачення норм права, юридико-догматичний, порівняльно-правовий).

Результати досліджень. *Аналіз європейської практики дозволив зробити висновок, що антиконкурентні обміни інформацією найбільш імовірні на ринках, які є прозорими, висококонцентрованими (особливо, олігопольними), простими та стабільними, де іноді з'являються нові гравці, у тому числі через істотні вхідні бар'єри на такі ринки. Підприємства, що беруть участь в обміні інформацією, у більшості випадків однорідні з точки зору їх вартості, асортименту продукції, частки ринку. На ринках з такими характеристиками створюються сприятливі умови для підприємств щодо укладання негласних угод, успішного моніторингу їх виконання та застосування санкцій за ухилення від домовленостей. За таких умов результат розвитку конкурентних відносин внаслідок інформаційного обміну залежить як від початкових характеристик ринку, де відбувається обмін, так і від можливих змін цих характеристик, які можуть виникнути через обмін інформацією. Тому необхідно аналізувати не тільки початкові характеристик ринку, на якому відбувається обмін інформацією, але й прогнозувати розвиток ринкової ситуації без такого обміну.*

Висновки. *В Україні існує необхідність розробки й ухвалення Керівництва з обміну інформацією між конкурентами, яке буде сприяти підвищенню поінформованості бізнес-спільноти (у тому числі асоціацій та торговельних палат), правників, суспільства в цілому про основні аспекти оцінки конкурентним відомством інформаційного обміну між конкурентами в контексті дотримання конкурентного законодавства з метою сприяння добросовісній підприємницькій діяльності, захисту конкурентного середовища та підвищення добробуту споживачів.*

Ключові слова: обмін інформацією, мовчазна згода, узгоджені дії, конкурентне законодавство.