PRACTICE OF THE CONSTITUTIONAL COURT OF UKRAINE WITH RESPECT TO STATE PROTECTION OF COMPETITION IN ENTREPRENEURIAL ACTIVITIES

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Annotation. *This article aims to provide an overview of the practice of the Constitutional Court of Ukraine (the "CCU" or the "Court") related to constitutional principles of state protection of competition in entrepreneurial activities, to determine the state of development of such practice and to analyse it.*

The article provides a comprehensive analysis of the existing CCU's decisions adopted following review of constitutional submissions, where issues related to state protection of competition were raised, the CCU's positions set out in these decisions, as well as the CCU's practice of considering constitutional complaints challenging constitutionality of certain provisions of Ukrainian legislation on protection of economic competition. System analysis of the CCU's acts on the researched issues, Ukrainian legislation in force at the time of elaborating the article, and that in force at the time of adoption of relevant decisions by the CCU, as well as works of Ukrainian scholars relevant to the article's objectives, were the main methodological basis for the research.

The analysis of the CCU's practice on the researched issue does not allow for stating that it is very developed. Nevertheless, certain important issues have arisen before the CCU over the years of its activity. During the decade of 2000-2010, the CCU adopted a number of decisions clarifying the substantive content of constitutional provisions on state protection of competition, as well as outlining distribution of authorities between different branches of power in determining types and boundaries of monopolies, as well as in establishing competition rules. The period after 2010 has not yet been marked by adoption of remarkable CCU's decisions on the researched topic.

Analysis of the CCU's practice with respect to consideration of constitutional complaints shows their active use by business entities in order to challenge constitutionality of certain provisions of Ukrainian legislation on protection of economic competition. Despite the lack of success of such complaints to date, their contents and direction, which can be understood from relevant rulings on refusal to initiate constitutional proceedings, allow to identify problematic aspects of application of Ukrainian competition laws and define appropriate decisions to address them.

Keywords: *Constitution of Ukraine, Constitutional Court, state protection of competition, entrepreneurship.*

1. Introduction.

Constitution of Ukraine (the "Constitution" or the "Basic Law") defines the right to entrepreneurial activity within limits not prohibited by law as a fundamental principle of the social order of Ukraine and an inalienable right of every person (Article 42(1) of the Constitution). Along with this right, the Constitution establishes that the state takes on the commitment to ensure protection of competition in entrepreneurial activity. For development of the latter provision, the Basic Law establishes that abuse of monopoly position in the market, unfair competition, and unlawful restriction of competition are inadmissible, as well as that types and boundaries of monopoly should be determined by law (Article 42(3)). It also defines that legal foundations and guarantees of entrepreneurship, competition rules, and norms of antimonopoly regulation should be determined exclusively by laws of Ukraine (item 8 of Article 92(1)) [1].

The CCU is one of important elements of the institutional mechanism for ensuring constitutional principles of state protection of competition in Ukraine. As a body of constitutional jurisdiction that ensures the Constitution's supremacy, given the powers granted to it, the CCU has the crucial task of ensuring conformity of laws and other legal acts with provisions of the Constitution.

Due to (a) elevating the issues of state protection of competition in entrepreneurial activity in Ukraine to the level of the Basic Law considering their fundamental importance for proper functioning of the economy; (b) supremacy of the Constitution and the direct effect of its provisions (Article 8 of the Basic Law), and (c) binding force, finality of the CCU's decisions and conclusions, as well as impossibility of their appealing (Article 1512 of the Constitution), the CCU's role and importance in ensuring proper implementation of constitutional principles of state protection of competition cannot be overestimated.

Thus, the study of existing CCU's practice on issues related to state protection of competition has significant theoretical and practical importance, as it allows, on the one hand, to understand the CCU's approaches towards interpretation of certain constitutional provisions, and, on the other, to take them into account by relevant subjects when determining their behavior and making decisions, including by public authorities when adopting laws and other legal acts.

2. Analysis of scientific publications.

Due to significant role of the CCU in ensuring the whole legal order in Ukraine, various issues related to its activities have traditionally been a subject of increased attention of Ukrainian scholars. Among recent publications taken into account while preparing this article are the studies of D.M. Byelov and V.Y. Danko [2], V.V. Horodovenko [3], and O.M. Spinchevska [4] discussing the nature of law (legal) positions of the CCU. At the same time, despite increased attention of scholars to various aspects of the CCU's activities, comprehensive research on the existing CCU's practice regarding implementation of the constitutional principles of state protection of competition in Ukraine is absent. This, in turn, calls for the theoretical and practical necessity of exploring and analysing relevant practice.

3. The aim of the work.

Aim of this article is to provide an overview of the CCU's practice on consideration of issues related to implementation of constitutional principles of state protection of competition in entrepreneurial activity, to determine the state of development of such practice and to assess it, based on search and analysis of relevant CCU's acts in public access.

4. Review and discussion.

Analysing the CCU's practice on considering issues related to state protection of competition in entrepreneurial activity, it cannot be said that it is very developed. At the same time, certain issues have still arisen before the CCU over the years of its activity. Further comes a description of the most notable, in the author's view, CCU's decisions that were adopted following consideration of constitutional submissions, as well as an analysis of the CCU's practice of considering constitutional complaints, where issues of conformity of certain provisions of Ukrainian legislation on the protection of economic competition, namely, of the Law of Ukraine "On Protection of Economic Competition" No 2210-III of 11 January 2001 (the "Law") [5] and the Law of Ukraine "On Antimonopoly Committee of Ukraine" No 3659-XII of 26 November 1993 (the "Law on the AMCU") [6], with the Constitution were raised.

In part of constitutional submissions, each of the CCU's decisions adopted following their consideration needs to be considered in light of circumstances and regulatory framework that existed at the time of adoption of relevant decisions. At the same time, given that respective CCU's decisions in some cases contain certain universal law positions, the relevance of such decisions persists to this day. Although the phenomenon of the CCU's law positions is complex and multifaceted, and various discussions arise in domestic law science regarding the nature of such positions, it is generally accepted that the CCU's law

positions are mandatory and should be taken into account by the relevant subjects of relations [2-4]. The phenomenon of law positions received certain consolidation in Article 92 of the Law of Ukraine "On Constitutional Court of Ukraine" No 2136-VIII of 13 July 2017 (the "Law on the CCU") [7], which is titled "Legal Position of the Constitutional Court". Article 92(1) of the said law contains a list of acts in which the CCU's legal position may be contained: motivational and/or operative part of a decision/conclusion of the CCU, rulings on refusal to initiate constitutional proceedings in a case and on closing constitutional proceedings in a case adopted by the CCU's Senate or the Grand Chamber. Article 92(2) of the Law on the CCU establishes that the CCU may develop and specify a Court's legal position in its subsequent acts, change the legal position in case of significant change in the regulatory framework, which guided the Court in expressing such position, or in the presence of objective grounds for the need to improve protection of constitutional rights and freedoms, considering international obligations of Ukraine and subject to justification of such changes in the Court's act. Thus, the above provisions are aimed at forming stability of the CCU's legal positions: deviations from previous positions are allowed in case of certain objective grounds.

The most significant practice of the CCU regarding state protection of competition was formed as a result of review of constitutional submissions, and the most fruitful period in terms of development of such practice was the decade of 2000-2010.

One of the first decisions where the CCU provided interpretation of constitutional provisions on protection of competition was the decision No 1-rp/2001 of 27 February 2001 in the case No 1-20/2001 (the "Case No 1-20/2001"), initiated following the constitutional submission of the President of Ukraine (the "President"). In paragraph 4.1. of the decision's motivational part, the CCU, among other things, indicated that based on constitutional provisions establishing the principles and legal forms of regulation of property, property relations, given that the legal regime of property is determined exclusively by the laws of Ukraine (item 7 of Article 92(1) of the Basic Law), state ensures protection of rights of all subjects of property and economic relations, their equality before the law, social orientation of the economy (Article 13(4) of the Basic Law), and the Constitution guarantees everyone the right to own, use, and dispose their property (Article 41), "it is logical that legal foundations and guarantees of entrepreneurship, competition rules, and norms of antimonopoly regulation are determined exclusively by the laws of Ukraine (item 8 of Article 92(1) of the Constitution of Ukraine). The state ensures the right to entrepreneurial activity, which is not prohibited by law, protection of competition in entrepreneurial activity; abuse of monopoly position in the market, unfair competition and unlawful restriction of competition are not allowed (Parts 1 and 3 of Article 42 of the Constitution of Ukraine)" [8]. Thus, the CCU, firstly, pointed out on the systemic connection of the provisions of Article 42(1), Article 42(3) and item 8 of Article 92(1) of the Basic Law with the abovementioned other provisions of the Constitution, and secondly, emphasized that the legal foundations and guarantees of entrepreneurship, competition rules and norms of antimonopoly regulation are subject to regulation of the law, that is, the power of Ukrainian Parliament, Verkhovna Rada of Ukraine (the "VRU" or the "Parliament"). In its further practice, the CCU will refer to its conclusions set out in paragraph 4.1 of the motivational part of the decision in the Case No 1-20/2001, which indicates that these conclusions actually amount to the CCU's law (legal) position.

Year 2004 was marked by adoption of notable CCU's decisions in two cases: No 1-16/2004 (the case on introduction of the state monopoly in the field of control over production of certain types of products) (the "Case No 1-16/2004") and No 1-7/2004 (the case on determining the minimum price for sugar) (the "Case No 1-7/2004"), following consideration of which the CCU adopted decisions No 8-rp/2004 of 31 March 2004 [9] and No 10-rp/2004 of 15 April 2004 [10], respectively.

Case No 1-16/2004 was initiated in connection with the constitutional submission of national deputies regarding constitutionality of the President's Decree "On Measures to Introduce the State Monopoly in the Field of Control Over the Production and Circulation of Spirits, Alcoholic Beverages and Tobacco Products" No 1234/2002 of 27 December 2002 (the "Decree No 1234/2002"). As a result of consideration of the Case No 1-16/2004, by decision No. 8-rp/2004 of 31 March 2004, the Court confirmed constitutionality of Decree No. 1234/2002, except for provision on introduction of the state monopoly contained in the above Decree's title, Article 1, and item 1 of Article 2, which, in turn, were recognized as unconstitutional [9].

The context behind the Case No 1-16/2004 was as follows. In the end of 2002, the President signed Decree No. 1234/2002, which was initially titled "On Measures to Introduce the State Monopoly in the

Field of Control Over the Production and Circulation of Spirits, Alcoholic Beverages and Tobacco Products" According to its preamble, the Decree No 1234/2002 was adopted with the aim of increasing effectiveness of implementation of the state policy in the field of state control over the production and circulation of spirits, alcoholic beverages and tobacco products, and increasing revenues to the state budget. Article 1 of Decree No 1234/2002 was formulated as "to introduce a state monopoly in the field of control over the production and circulation of spirits, alcoholic beverages and tobacco products" By item 1 of the Decree's Article 2 the President instructed the Cabinet of Ministers of Ukraine (the "CMU") to take certain specified measures "related to introduction of the state monopoly in the field of control over the production and circulation of spirits" (approve the procedure for determining producers and consumers of spirits entitled to order, produce and use it, with their mandatory registration, introduce annual advance submission of orders for the purchase of spirits, prohibit sale of spirits intended (ordered) for export on Ukrainian market, etc.) [11].

As a result of consideration of the Case No 1-16/2004, the Court concluded that provisions of the Decree's Article 1 actually defined the type and boundaries of monopoly, which is not within the President's powers. In light of the above, the CCU reached accompanying conclusion that the provision on introduction of the state monopoly contained in the title, Article 1, and item 1 of Article 2 of the Decree No 1234/2002 did not comply with requirements of Article 42(3) of the Constitution establishing that types and boundaries of monopoly are determined by law. The above provisions were declared unconstitutional [9]. Thus, following consideration of the case, the CCU unequivocally confirmed that the President is not entitled to establish types and boundaries of monopoly through his acts – such powers are attributed to the VRU via exercise of legislative functions by the latter.

As for Case No 1-7/2004, it was also initiated due to constitutional submission of national deputies. The CCU's area of assessment was conformity of provisions of Articles 6 and 9 of the Law of Ukraine "On State Regulation of Production and Sale of Sugar" No 758-XIV of 17 June 1999 (the "Law on Sugar") with the Constitution. With respect to Article 6 of the Law on Sugar, which established a minimum price for sugar in sales contracts, national deputies argued that this article violated rights of citizens being consumers of sugar and sugar producers, provisions of the said article did not correspond to provisions of Articles 13, 42 of the Constitution on the state protection of rights of all subjects of property and economic activity, social orientation of the economy, as well as on ensuring protection of competition in entrepreneurial activity. In part of Article 9 of the Law on Sugar, members of Parliament believed that a fine in amount of double value of sugar sold in violation of the established procedure set forth by the article is not proportionate to level of social danger of such violation and its possible harm. According to national deputies, such measure of liability for business entities may result in actual forced confiscation of an enterprise's fixed and working assets, which contradicts requirements of Article 41 of the Constitution, according to which no one can be unlawfully deprived of right to property [10].

Upon consideration of the Case No 1-7/2004, the Court concluded on constitutionality of both disputed articles and adopted respective decision. As to Article 6 of the Law on Sugar, the CCU, among others, noted that the state pricing regulation in the sugar beet complex via introduction of minimum prices for sugar beets and sugar could not be regarded as the state's failure to ensure protection of rights of all subjects of property and economic activity (including those who engage in the cultivation of sugar beets, production of sugar and are its owners), as well as social orientation of the economy (Article 13(4) of the Constitution). The introduction, by the Law on Sugar, of state regulation of production and sale of sugar could not be viewed as limitation of a right of a business entity to own, use, and dispose its property (paragraph 3 of the motivational part of the CCU's decision No 10-rp/2004 of 15 April 2004). Interesting aspect of the Court's decision is that the CCU directly assessed the issue of unlawful restriction of competition and unfair competition due to introduction of minimum price for sugar when concluding sale and purchase agreements on Ukrainian market. In this regard, the Court stated that provisions of Article 6 of the Law on Sugar concerning introduction of minimum price for sugar did not entail unlawful restriction of competition, since (a) they applied to producers of sugar of different forms of ownership, and (b) sugar producers were not deprived of possibility to compete with each other via setting their selling price as close to the minimum price determined in accordance with the Law on Sugar as possible. In the CCU's opinion, by introducing state regulation of pricing in the sugar beet complex through the Law on Sugar, the VRU exercised its powers on legislative determination of legal foundations and guarantees of entrepreneurship, rules of competition, and norms of antimonopoly regulation (item 8

of Article 92(1) of the Constitution). As a result, the CCU concluded that establishment, by the Law on Sugar, of regulation of the minimum price for sugar at a level that ensures profitability of production while concluding sale and purchase agreements on Ukrainian market did not contradict provisions of Article 42(3) of the Constitution (paragraph 4 of the motivational part of the aforementioned decision). As to Article 9 of the Law on Sugar, which envisaged imposition of a fine in amount of double value of sugar, supply or sale of which was carried out above the established quota or at prices below established minimum price, the CCU noted that liability set by the article is not aimed at restricting or depriving ownership rights (paragraph 5 of the motivational part of the decision) [10].

Another notable decision is the CCU's decision No 22-rp/2008 of 9 October 2008 [12] in case No 1-41/2008 (the "Case No 1-41/2008") initiated following the President's constitutional submission regarding constitutionality of the CMU's Resolution "On Procurement of Services Related to Formation of Information and Telecommunication System of the State Register of Voters" No 363 of 17 April 2008 (the "Resolution No 363"). Within this case, the CCU considered the question of constitutionality of delegation of powers to determine the rules of competition by the Parliament to the CMU.

The Resolution No 363 contained a single provision and this provision envisaged that in accordance with item 6 of the Temporary Regulation on Procurement of Goods, Works and Services for State Funds, approved by the CMU's Resolution No 274 (the "Resolution No 274"), the Central Election Commission (the "CEC") was entitled to purchase services on developing and implementing software tools for creating an information and telecommunication system and maintaining the State Register of Voters (the "Register") through a single-source procurement procedure without approval of the Ministry of Economy [13], which implied possibility of the CEC to use a non-competitive procurement procedure. The President claimed that such provision, inter alia, contradicted provisions of Article 42(3) of the Constitution [12].

In its decision in the Case No 1-41/2008 the CCU provided quite detailed intepretation of provisions of Article 42(3) and item 8 of Article 92(1) of the Constitution. Firstly, the CCU stated that "the state is obliged to ensure protection of competition among business entities in obtaining and distributing profits for the purpose of achieving economic and social results" (subparagraph 1 of paragraph 3.2. of the motivational part of the decision) [12], thereby in fact defined what state protection of competition in entrepreneurial activities means. Secondly, the Court pointed out that "Parts 1 and 3 of Article 42 of the Constitution of Ukraine, guaranteeing the right to entrepreneurial activity and protecting competition in entrepreneurial activity, do not exclude possibility of restricting competition, but contain a prohibition of unlawful restriction of competition in entrepreneurial activity" (subparagraph 3 of paragraph 3.2. of the decision's motivational part) [12], thus confirmed that it is unlawful restriction of competition that is not permissible. Thirdly, referring to its previous decisions No 1-rp/2001 of 27 February 2001 and No 10-rp/2004 of 15 April 2004 that have been already mentioned above, the CCU confirmed constitutionality of exercise of powers in determining and regulating competition rules by the VRU (subparagraphs 6-8 of paragraph 3.2 of the motivational part of the decision) [12], in other words, these powers are attributed solely and exclusively to the Parliament.

While deciding on the Case No 1-41/2008, the CCU examined the wider context of adoption of the Resolution No. 363. In its decision, the CCU noted, inter alia, that on 20 March 2008 the Parliament adopted the Law of Ukraine "On Recognition of the Law of Ukraine "On Procurement of Goods, Works and Services for State Funds" No 150-VI (the "Law No 150-VI"), according to which the aforementioned Law of Ukraine "On Procurement of Goods, Works and Services for State Funds" No 1490-III of 22 February 2000 (the "Law No 1490-III") was repealed while the CMU was instructed to approve a temporary regulation of procurement of goods, works and services for state funds based on the Law No 1490-III in its version effective as of 17 November 2004, except for provisions that contradicted WTO requirements (paragraphs 1 and 2 of item 2 of the Law No 150-VI section "Final Provisions"). On 28 March 2008 the CMU adopted the Resolution No 274, which, according to the CCU's conclusions, established certain competition rules within procurement of goods, works and services for state funds. In the Resolution No. 363, while establishing that CEC purchases relevant services concerning the Register, the CMU referred to item 6 of the Temporary Regulation on Procurement of Goods, Works, and Services for State Funds (the "Temporary Regulation"), approved by Resolution No 274 [12].

Guided by considerations that legal relations regarding establishment of competition rules in the field of public procurement, which according to item 8 of Article 92(1) of the Constitution should be determined

exclusively by laws of Ukraine, were in fact determined by a subordinate act, the CMU's resolution, the Court concluded that by adopting the Law No 150-VI the Parliament delegated its own powers regarding determination of competition rules in the field of procurement of goods, works, and services for state funds to the CMU, with simultaneous conclusion that the Basic Law does not provide for delegation of legislative functions by the Parliament to another authority (the CMU in that case). Thus, the Court concluded that the VRU violated requirements of Article 19(2) of the Constitution, according to which state authorities and their officials are obliged to act only on the basis of, within the limits of powers and in the manner provided for by the Constitution and laws of Ukraine. Following consideration of the Case No 1-41/2008, the CCU found unconstitutional not only the Resolution No 363, but also provisions of paragraph 2 of item 2 of the Law No 150-VI section "Final Provisions" and the Resolution No 274 [12].

Among other noteworthy CCU's decisions is the decision No 10-rp/2003 of 28 May 2003 [14] in the case No 1-16/2003 (the case on organization of distribution of postage stamps, stamped envelopes, and cards) (the "Case No 1-16/2003 "). Case No 1-16/2003 was initiated during period when the CCU was entitled to provide official interpretation of Ukrainian laws upon submissions from state authorities. Case No 1-16/2003 was initiated due to constitutional submission of Ukrainian competition authority, Antimonopoly Committee of Ukraine (the "AMCU"), to provide official interpretation of the term "organization of distribution of postage stamps, stamped envelopes, and cards" used in paragraph 2 of Article 15(3) of the Law of Ukraine "On Postal Communication" (the "Law on Postal Communication"). According to the CCU's decision, AMCU also asked to clarify whether exclusive rights of Ukrainian State Enterprise of Postal Communication "Ukrposhta" ("Ukrposhta") defined as national operator apply to organisation of distribution of blank and artistic envelopes (without stamps). The AMCU's submission was motivated by complaints it received from business entities that Ukrposhta had prohibited them from selling postal stamps, stamped envelopes, cards, blank and artistic envelopes (without stamps), arguing that, according to paragraph 2 of Article 15(3) of the Law on Postal Communication, exclusive right to issue, put into circulation, and organise distribution of postal stamps, stamped envelopes, and cards, as well as to withdraw them from circulation, was granted to the national operator. Based on the above provision, Ukrposhta claimed that since it was entrusted with functions of the national operator by the CMU's order, it had exclusive right to sell the above products [14].

Following consideration of the case, the Court explained that the term "organisation of distribution of postal stamps, stamped envelopes, and cards" used in paragraph 2 of Article 15(3) of the Law on Postal Communication should be understood as "a set of measures taken by the national postal operator to ensure that postal service users and other consumers are provided with postal stamps, stamped envelopes, and cards, that, envisage, in particular, determining the procedure for distributing these products and their sale by the national postal operator directly, as well as by other legal and natural persons on a contractual basis in accordance with Ukrainian legislation." [14] Thus, the CCU, in essence, concluded that Ukrposhta did not have exclusive rights to sell the aforementioned products and that other entities could also sell them. It should be noted that the provision, which was subject to the CCU's interpretation within the Case No. 1-16/2003, remains effective in the current version of the Law on Postal Communication [15], meaning that the interpretation given by the Court is still relevant today. Furthermore, the CCU even included its position in the Case No. 1-16/2003 into the catalogue of the CCU's legal positions related to a right to entrepreneurial activity, which it publishes on its official website [16].

As was stated above, the period from 2000 to 2010 was the most fruitful period of the CCU's activity in terms of considering cases related to implementation of constitutional principles of state protection of competition. In the period after 2010, no remarkable CCU's decisions or conclusions in the researched area have been rendered. At the same time, currently the CCU is reviewing the constitutional submission from national deputies as to compliance of the CMU's Resolution "On Implementation of the Experimental Project "National Operator on the Market for Tobacco Products" No 840 dated 9 September 2020 (the "Resolution No 840") [17] with the Constitution. The procedure for implementing the aforementioned experimental project (the "Procedure") approved by the Resolution No 840 [18] establishes (1) criteria for determining the business entity that can perform the functions of a national operator in Ukrainian tobacco market (the "National Operator"); (2) its functions; (3) recommendations on interaction with it. According to the Procedure, the National Operator is responsible for ensuring performance of logistics and informational function during supply of tobacco products, deploying a control system in accordance with the provisions and principles set out in the Directives of the European Parliament and of the Council No 2001/37/EU of 5

June 2001 and No 2014/40/EU of 3 April 2014, seamless exchange of information on circulation of tobacco products with the Ministry of Finance, the Ministry of Economy, and the State Fiscal Service (item 4 of the Procedure). Thus, the overall goal of the experimental project is to ensure control over circulation of tobacco products. According to the Procedure, the National Operator performs its functions for a period of at least five years from the date when Resolution No 840 came into force. The Procedure defines certain criteria that the National Operator must meet (item 5 of the Procedure) and serves as a basis for determining the National Operator by tobacco products manufacturers and importers and concluding contracts with it for provision of relevant services (item 6 of the Procedure) [18]. At the same time, the Procedure does not contain direct and unambiguous provisions that there could be only one National Operator meaning that, subject to compliance with the criteria set in the Procedure, there may be several National Operators.

The authors of the constitutional submission heavily criticize the Resolution No 840, claiming that by this resolution the CMU is cementing monopoly position of the Ukrainian tobacco products distributor – LLC TEDIS UKRAINE, with respect to which the AMCU previously adopted high-profile decisions establishing commitment of infringements of legislation of protection of economic competition, including abuse by LLC TEDIS UKRAINE of its monopoly position in the cigarette distribution market, which was subsequently supported by courts. The authors of the submission argue that by adopting Resolution No 840, the CMU, among other things, violated provisions of Article 42(3) of the Basic Law [19].

A specific feature and complexity of this case is that the Resolution No 840 does not contain any direct provisions that would allow one to speak about creation of a monopoly on the market or unlawful restriction of competition by the CMU. Summarizing the content of the constitutional submission, its authors argue that the CMU has formed criteria for the National Operator in a way that, given existing market players, only one business entity could meet them in fact, thereby significantly restricting a right to entrepreneurial activity of other persons and imposing a "forced counterparty" [19]. The case initiated in connection with the above constitutional submission has been subject to the CCU's review for more than two years. The CCU's decision in this case may have significant impact on interpretation of provisions on state protection of competition enshrined in the Basic Law.

Due to introduction into Ukrainian legislation in 2016 of such form of appeal to the Court as a constitutional complaint, which is a written application to verify compliance of Ukrainian law (its specific provisions) applied in a final court decision in a case involving subject of a right to a constitutional complaint with the Constitution (Article 55(1) of the Law on the CCU), it is expedient to examine the CCU's practice in cases related to consideration of such form of appeals. Such study allows, firstly, to identify certain problematic aspects of Ukrainian laws, constitutionality of which is challenged, and, secondly, to clarify the views of the Court on them. Interesting in this regard are the CCU's authorities with respect to constitutional complaints review: the Court can adopt decisions not only on constitutionality or unconstitutionality of certain laws (their provisions) applied in court decisions, but also assess whether the courts' interpretation of these laws (their provisions) was made in a manner consistent with the Constitution in case the CCU concludes on constitutionality of respective laws (their provisions) (Article 89(3) of the Law on the CCU).

Analysis of information placed on the CCU's official website shows that business entities actively use the instrument of constitutional complaint. Constitutional complaints generally raise issues of constitutionality of certain provisions of legislation on protection of economic competition, namely of the Law and the Law on the AMCU, in particular:

(1) Article 6(3) of the Law, which establishes grounds for qualifying so-called "parallel" behaviour, that is, similar actions of undertakings, as anticompetitive concerted practices (complainant – LLC "Montazhnaladka", case No 3-205/2021(422/21) [20]);

(2) Article 41(2) and (3) of the Law setting the procedure for collecting evidence by the AMCU and its territorial divisions (Article 41(2)), submitting evidence by persons involved in a case on infringement of legislation on protection of economic competition (Article 41(3)), and Article 60(1) of the Law establishing the procedure and deadlines for appealing decisions of the AMCU's bodies to court (complainant – GJUSS PKF LTD, case No 3-3/2021(3/21) [21]);

(3) Article 60(2) of the Law providing the rules of territorial jurisdiction of commercial courts in reviewing appeals against decisions of the AMCU, its bodies and territorial divisions, and item 7 of Article 20(1) of

the Commercial Procedural Code of Ukraine, which assigns to commercial courts the authority to review cases in disputes related to protection of economic competition, including disputes related to appeals against decisions of the AMCU's bodies (complainant – PPL33-35 LTD, case No 3-89/2020(176/20) [22]);

(4) Article 34(3) of the Law of Ukraine "On Telecommunications", according to which information on a consumer and the telecommunications services he/she received may be provided in cases and in the manner prescribed by law while in other cases the above information could be only provided with the written consent of the consumer, and Article 221(1) of the Law on the AMCU, which establishes obligation of undertakings to provide information, including with restricted access, at the request of the AMCU's bodies, the head of the AMCU's territorial division, authorised employees of the AMCU or its territorial division (complainant – KYIVSTAR JSC, case No 3-52/2019(1067/19) [23]);

(5) Article 59(1) of the Law setting forth the grounds for changing, cancelling, or invalidating decisions of the AMCU's bodies (complainant – JSC "TogliattiAzot", case No 3-319/2018(4311/18) [24]).

It should be stressed that despite active use of constitutional complaints by business entities, as can be seen from the above, none of the aforementioned complaints has led to initiation of constitutional proceedings as it was found that the complaints did not meet requirements established by the Law on the CCU. However, despite lack of precedents when the CCU adopted decisions following consideration of constitutional complaints challenging constitutionality of provisions of Ukrainian legislation on protection of economic competition, respective rulings of board of judges on refusal to initiate proceedings, references to which were provided above, amount to important source of information because, firstly, they indicate practical problems in application of legislation of protection of economic competition, and secondly, they shed light on requirements a constitutional complaint, according to the CCU's view, must meet to be regarded as admissible. In particular, the CCU points out that disagreement with legislative regulation or court decisions is not a sufficient ground for initiating constitutional proceedings, complaint must properly substantiate violation of constitutionally guaranteed rights in connection with application of particular law by court.

5. Conclusions.

The Constitutional Court of Ukraine, as a body of constitutional jurisdiction whose activities are aimed at ensuring supremacy of the Constitution, occupies key position in institutional mechanism for ensuring constitutional principles of state protection of competition in entrepreneurial activity. Over the years of its existence, the CCU has had the opportunity to implement its functions in this mechanism in practice, and has actually done so through adoption of decisions that explained the substantive content, in particular, of the special provisions of the Constitution regarding state protection of competition (Article 42(3), item 8 of Article 92(1)). Among decisions adopted by the CCU, one could highlight those that outlined distribution of powers between the Parliament, the President, and the Cabinet of Ministers in establishing types and boundaries of monopolies, as well as competition rules, including the possibility of delegating such powers by the Parliament to other bodies. Many of the CCU's positions set out in the analysed decisions remain relevant today.

With the introduction into Ukrainian legislation of such a form of appeal to the Court as a constitutional complaint, the role of the CCU as a body ensuring supremacy of the Constitution has expanded to ensuring such supremacy in courts' activities. Analysis of the CCU's practice indicates active use of constitutional complaints by business entities to challenge constitutionality of certain provisions of Ukrainian legislation on protection of economic competition. Despite unsuccessful outcome of such complaints to date, their content and direction enable to identify problematic aspects of application of the above legislation and to make appropriate decisions to address them.

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