DISCUSSION ISSUES OF DISCRETIONARY POWERS OF THE ANTIMONOPOLY COMMITTEE OF UKRAINE

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Abstract. The article is devoted to the debatable issues of discretionary powers of the bodies of the Antimonopoly Committee of Ukraine. It is noted that for the Ukrainian legal doctrine and, especially, the practice of law enforcement, discretion is a fairly new legal category and its content is poorly understood. Considering the above, in particular, the concept and types of discretionary powers are considered.

The situation of the refusal of the antimonopoly body to consider the case, issued by a letter, which is an act of individual action, which can be challenged in court, is being investigated. An analysis of the judicial review of the proper exercise of the powers of the competition agency is given, which must act not only within the limits of its powers, choosing one or another type of behavior according to the law, but it is also necessary that such behavior is fully aimed at protecting human rights, the general interest of the state and society. give an example of illegal implementation of discretionary powers of the Antimonopoly Committee of Ukraine in which cases

Keywords: discretionary powers, appeals, Antimonopoly Committee of Ukraine, court, refusal to consider the case, orders, decisions in the form of letters.

INTRODUCTION

In the activity of collegial subjects of public administration, the issue of their exercise of discretionary powers is of particular importance. Firstly, this is due to the fact that the relevant powers are defined and used by the authorities, in particular the Antimonopoly Committee of Ukraine, in the performance of their administrative functions, although there is no clear answer in the current legislation of Ukraine regarding the definition of such powers, as well as when and how they can be used.

Discretionary powers of authorities are a necessary and irreplaceable legal construction for the management activity of an administrative body, thanks to which a number of important tasks are solved, the central of which is the provision of fair, effective and oriented to the individual needs of a private person, law-enforcement and law-making activities of the named subjects.

The binding of discretionary powers of the authority by law (law) makes it possible for administrative courts to review decisions (actions) taken by the administrative body as a result of the exercise of discretionary powers.

The currently prevailing opinion about the possibility of the courts to check the exclusively formal legality (legitimacy) of the discretionary powers of the authorities is increasingly subject to justified criticism, which leads to

a gradual expansion of the limits of the courts' control over the discretionary powers of the authorities.

Courts can control both the compliance of the implementation of discretionary powers with the law (law), and the consistency of decisions (actions) taken on the basis of discretion with human and citizen rights, general principles of public administration, procedural norms, case circumstances, available resources, etc.

Illegal implementation of discretionary powers can be manifested in various forms: a) exceeding the power to exercise discretion; b) non-application/ insufficient application of discretion; c) abuse of discretion.

Antimonopoly authorities have a certain freedom of action in decision-making and behavior due to the possibility of exercising discretionary powers that may go beyond the powers defined by law and violate the rights and interests of individuals. When resolving such public legal disputes, courts usually take a position of non-interference in the discretionary powers of a collegial body (in our case, the Antimonopoly Committee of Ukraine).

MATERIALS AND METHODS

The purpose of this study is to determine the essence and features of the implementation of the discretionary powers of the Antimonopoly Committee of Ukraine based on the analysis and generalization of judicial practice.

In accordance with the set goal, the main tasks of this research are:

- clarify the conceptual apparatus by analyzing the essence and concept of discretionary powers of the Antimonopoly Committee of Ukraine;
- carry out the classification of discretionary powers;
- review and analyze the decisions of the Grand Chamber of the Supreme Court.

The methodological basis for solving the tasks is a set of approaches, principles, methods and methods of scientific knowledge, both general scientific (dialectical, logical, systemic analysis, etc.) and special (formal-legal, comparative-legal, etc.). Thus, the dialectical method of learning the processes taking place during the exercise of discretionary powers by the Antimonopoly Committee of Ukraine allows to consider them in their development and interrelationship, to identify established directions and regularities as a whole, logical-semantic for the formulation of relevant definitional constructions.

RESULTS AND DISCUSSION

According to Article 19 of the Constitution of Ukraine, the legal order in the state is based on principles, according to which no one can be forced to do what is not provided for by law (Constitution of Ukraine, 1996). That is, the bodies of state power and local self-government are obliged to act only on the basis, within the limits of authority and in the manner provided by the Constitution and laws of Ukraine.

In the mentioned constitutional norm, the principle is enshrined in essence: "everything is prohibited, except what is permitted by law."

Recommendation No. R (80) 2 of the Committee of Ministers of the Council of Europe "On the Exercise of Discretionary Powers by Administrative Bodies", adopted on March 11, 1980, provides that the term "discretionary power" means a power which gives an administrative body a degree of freedom in making a

decision, giving it be able to choose from several legally permissible solutions the one that will be the most acceptable (On the Exercise of Discretionary Powers by Administrative Bodies", 1980).

Thus, exercising their discretionary powers, administrative bodies have the right to choose how to act in a particular situation to achieve a certain result. Such "action" within the framework of the law involves discretion on the part of officials and state authorities. Essentially, the word "discretion" means the use of one's own discretion to decide matters within the competence of an official, or the choice of certain actions solely on the basis of the powers granted.

Acts, the subject of which is the regulation of administrative procedures, have been approved and are in force in most European countries.

For example, Article 4 of the Law of the Republic of Estonia "On Administrative Proceedings" dated June 6, 2001 establishes that discretion is the authority given to an administrative body by law to act at its own discretion in making decisions or to choose between different decisions. The discretionary right should be exercised in accordance with the powers, purposes of the discretionary right and general principles of law, taking into account the essential circumstances and justified interests (On Administrative Proceedings, 2001).

During the Soviet period, "discretion" ("administrative discretion") was practically not studied in works on administrative law. In jurisprudence, discretionary powers are defined as the right of the head of state, the government, other officials in state authorities, in the case of a decision on an issue within their competence, to act under certain conditions at their own discretion within the framework of the law (Kryvetskyi, O., 2015).

In Ukraine, discretionary powers are legally enshrined by the order of the Ministry of Justice dated 23.06.2010 No. 1380/5, which was amended by the order dated 24.04.2017 No. 1395/5. And also an appendix to recommendation No. P(80)2 of the Committee of Ministers of the Council of Europe. Clarifications are also provided in the scientific opinion of the Supreme Court on the limits of the discretionary authority of the subject of power and judicial control over its implementation dated April 11, 2018 (On the approval of the Methodology of anti-corruption examination, 2010).

According to the text of the order of the Ministry of Justice, discretionary powers are a set of rights and obligations of the subject of power, which provide the opportunity to determine the type and content of an administrative decision at their own discretion or to choose at their own discretion one of several options for administrative decisions provided for regulatory act.

In Ukraine, the concept of discretionary powers is reflected in the anti-corruption by-law. The lack of legal support for the concept of "discretionary powers" at the level of the law affects the uncertainty of regulating relations in this area.

An important guarantee of the protection of the rights of individuals against the discretionary decisions of the bodies of the Antimonopoly Committee of Ukraine (hereinafter referred to as the Committee, the competition department, the antimonopoly body) is the possibility of challenging these decisions in court. Today, this possibility is guaranteed by the Constitution of Ukraine, which provides for the right of everyone to appeal the decisions, actions and inaction of state bodies in court, and the special

Law of Ukraine "On the Protection of Economic Competition", which provides for the appeal in court of the decisions of the Antimonopoly Committee of Ukraine (On the Protection of Economic Competition, 2001).

However, despite the existence of the aforementioned legislative guarantees, certain difficulties arise in practice among applicants, as well as sometimes among judges.

The question of which decisions of the bodies of the Antimonopoly Committee of Ukraine can be reviewed by the court is debatable.

The following may be appealed to the court:

– decisions in cases of violation of legislation on the protection of economic competition and in applications, cases of concerted actions, concentration;

– other decisions of the Antimonopoly Committee of Ukraine (demand, refusal to consider the case, order, decision to close the case, decision in the form of letters, etc.).

First of all, Ukrainian courts and the Antimonopoly Committee of Ukraine still indicate that some decisions of the competition department, which are not formalized, cannot be appealed. The fact is that the legislation on the protection of economic competition does not contain clear requirements for the decisions of the Committee, in particular, regarding their legality or justification. This can sometimes lead to abuse.

The following main types of authority discretion can be distinguished (Malashenkova, T., Buromenska, N., Shklyar, Kucheruk, N., Severinsson, D., Sepe, G. (2021):

- discretion regarding making or committing such a decision/action, i.e. the body has the right to independently decide whether it will/will not make or make a decision/act in a specific situation;
- discretion regarding the choice of one of several decision/action options, i.e. the body, on the grounds and options provided for by law, is given the opportunity to make one of the legally permissible decisions or perform one of the legally permissible actions under the given circumstances;
- discretion regarding the method of action, that is, the body is given the opportunity to independently decide how it will act/make a decision that it considers best under the circumstances of a specific situation.

At the level of national legislation, the basic standards (principles) that must be observed by the antimonopoly body when making decisions (taking actions) on the basis of discretion are laid down. Failure to take into account (non-fulfillment) of these standards may become the basis for recognition by the court, which has the right to monitor their compliance, of the decision (committed / non-committed action) as illegal.

We consider it necessary to cite an example of the refusal of the Antimonopoly Committee of Ukraine to consider the case, issued by a notification letter (not an order) (Resolution of the Grand Chamber of the Supreme Court of July 2, 2019).

Thus, in May 2017, an individual applicant purchased two tickets to the Eurovision Song Contest 2017: Grand Final from V Ticket (online resource concert.ua) via the Internet. The seller also included a service fee and a fee for additional services in the nominal price of the tickets, but did not provide the consumer with any information about the components of the service fee or the essence and conditions of providing additional services.

The buyer, believing that such actions of the seller are misleading

(which is a manifestation of unfair competition) and, in the absence of other sellers of tickets for the relevant event, contain signs of abuse of a monopoly position, filed a corresponding statement with the antimonopoly body. In the statement, in particular, the buyer asked the competition department to conduct an investigation on the specified facts and bring the guilty parties to justice. However, after reviewing the application, the Antimonopoly Committee of Ukraine refused to consider it, referring to the lack of confirmation of the arguments given in it about the violation of competition legislation.

This refusal of the Antimonopoly Committee of Ukraine to open a case and conduct an investigation became the subject of a further court appeal.

Referring to the norm of Article 60 of the Law of Ukraine "On the Protection of Economic Competition", the courts of the first two instances emphasized that the applicant, the defendant, and the third party were given the right to appeal the decisions of the Committee on the merits, but there was no provision for the possibility of appealing individual letters to the commercial court. Therefore, appealing the refusal of the Antimonopoly Committee of Ukraine, set out in the letter, cannot be considered a proper way of protecting the violated right.

However, the Supreme Court, based on a systematic analysis of the provisions of Articles 7 and 16 of the Law of Ukraine "On the Antimonopoly Committee of Ukraine" (On the Antimonopoly Committee of Ukraine, 1993), Article 36 of the Law of Ukraine "On the Protection of Economic Competition" and Clause 20 of the Rules for Reviewing Applications and Cases on Violation of Legislation on the Protection of Economic Competition, approved by the Committee's order dated April 19, 1994 No. 5 (Rules for Reviewing Applications and Cases on Violation of Legislation on the Protection of Economic Competition, 1994), the Committee's refusal to consider the case, formalized in a letter (not an order), in its essence is a decision of the Antimonopoly Committee of Ukraine, i.e. an act individual action, which can be challenged in court (Resolution of the Grand Chamber of the Supreme Court of July 2, 2019).

The Supreme Court established that the Committee in this case provided the plaintiff with a formal response about the refusal to consider the case, which was based on contradictory arguments.

Since the current legislation hardly regulates the procedures and criteria by which the antimonopoly body makes a decision to open or refuse to consider a case, the Committee's decision to refuse should be as exhaustive and thorough as possible, and should disclose to the applicant the reasons for its adoption.

Discretionary powers should not be used arbitrarily by the body, and the court should be able to review the decisions made on the basis of the exercise of these discretionary powers, which is a safeguard against corruption and arbitrary decisions in conditions of maximum discretion of the state body.

Thus, the Supreme Court found that the Committee's refusal to open a case is itself a decision, despite the fact that it was given to the complainant in the form of a notification letter, and not an order. Therefore, such a refusal can be challenged in the commercial court in accordance with Part 1 of Art. 60 of the Law of Ukraine "On Protection of Economic Competition". This norm is an exception to the general rule established by Part 2 of Article 4 of the Code of Administrative Procedure, according to which the jurisdiction of administrative courts extends to all public legal disputes.

The Grand Chamber of the Supreme Court examined the limits of the Committee's discretion when considering the complainant's application and, accordingly, when deciding whether to open a case, indicating that the Committee's discretion is not unlimited. The Grand Chamber noted that the Committee should in no case act arbitrarily when making any decisions. Even more, in the event that the antimonopoly body makes a decision to refuse to consider the case, such a decision should be as exhaustive and substantiated as possible and disclose to the applicant the reasons for its adoption.

The Grand Chamber of the Supreme Court effectively reminded the Committee that discretion is not so much about making a decision on its own as it is about the Committee's statutory authority to choose between alternatives, each of which is legal. Such a "choice" must be made on the basis of an internal assessment of the specific circumstances of the case, based on the goals and principles of law, as well as the general principles of ensuring state protection of competition in business activities, in particular, by responding in a timely manner to manifestations of unfair competition or abuse of a monopoly position. As evidenced by the practice of the European Court of Human Rights, the freedom of assessment in the exercise of discretionary powers is limited to the scope, method and limits established by law, which, in turn, can be provided with an exhaustive justification of the chosen decision.

Having determined the limits of discretionary powers, the Grand Chamber of the Supreme Court studied not only the formal, procedural or procedural grounds for the antimonopoly body's refusal to open a case, but also the material ones, giving an assessment of the manifestations of unfair competition and abuse of a monopoly position, which the complainant referred to in his application to the Committee. According to the results of the study of the materials and circumstances of the case, related, in particular, to the inclusion of additional services unknown to consumers in the price of the ticket by the exclusive seller with an unknown cost of each such service, the Grand Chamber of the Supreme Court noted in its decision that the conclusions of the Committee regarding the lack of actions of the ticket seller signs of unfair competition are premature, and the complainant's assertions about the abuse of the monopoly position by the ticket seller are left out of the attention of the Committee,

As regards a specific case, the competition authority should reconsider its decision to refuse to consider the case. However, such a review does not mean that the committee must open a case, conduct an investigation and make a decision on the merits, establishing the presence or absence of a violation of competition law in the actions of the ticket seller. Since the Grand Chamber of the Supreme Court did not oblige the Antimonopoly Committee to open the case, the committee can again refuse to consider the case. In this case, the Committee will be obliged to properly justify its decision to refuse.

CONCLUSIONS

For the law enforcement practice of the Committee as a whole, the above decision of the Supreme Court is quite weighty. In particular, from now on, the Committee is obliged to more carefully investigate the circumstances of the case and the arguments referred to by the applicant, even at the stage of making a decision to open a case. Each refusal to open a case must be substantiated with a proper assessment of all the applicant's arguments. This

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may lead to the fact that the boundaries between the preliminary stage, when the Antimonopoly Committee makes a decision on the submitted application (whether to open a case or not) and the investigation (when the decision to open a case has already been made and it is considered by the Committee) will gradually blur, which, in its in turn, may lead to the opening of a greater number of cases based on the statements of third parties.

The decision of the Supreme Court stopped the practice of judicial refusals to consider cases of appeals against the decisions of the subjects of authority only on the grounds that they are issued in the form of letters, messages, acts or other similar documents, without particularly listening to the arguments that they actually affect rights and obligations of plaintiffs.

The decision of the Grand Chamber of the Supreme Court dated July 2, 2019 in case No. 910/23000/17 is to limit the discretionary powers of the Antimonopoly Committee of Ukraine when making a decision to refuse to consider the case by the need to provide an assessment of each circumstance referred to by the applicant.

Considering the quasi-judicial status of the Committee, this fact is fundamentally important for the protection of the rights and interests of citizens and companies in resolving cases of violations of legislation on the protection of economic competition.

REFERENCES

Constitution of Ukraine dated June 28, 1996 No. 254k/96-BP. Verkhovna Rada of Ukraine. Legislation of Ukraine. URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.

On the Exercise of Discretionary Powers by Administrative Bodies. Recommendation No. R (80) 2 to Member States, adopted by the Committee of the Council of Europe on March 11, 1980. URL: https://rm.coe.int/16804f22ae

On Administrative Proceedings: Law of the Republic of Estonia of June 6, 2001. URL: http://estonbbbia.news-city.info/docs/sistemsw/dok_iegdqb/index.htm

Kryvetskyi, O. (2015). Discretion - the limits of what is allowed or arbitrariness without limits. Public opinion on law-making: an informational and analytical bulletin based on operative materials. 20 (102). 11-14.

On the Approval of the Methodology of Anti-Corruption Examination: Order of the Ministry of Justice of Ukraine dated 23.06.2010 No. 1380/5 (as amended from 24.04.2017 No. 1395/5) URL: https://zakon.rada.gov.ua/laws/show/v1395323-17#Text (date of application: 01.12.2022)

On the Protection of Economic Competition: Law of Ukraine dated January 11, 2001 No. 2210-III. Verkhovna Rada of Ukraine. Legislation of Ukraine. URL:https://zakon.rada.gov.ua/laws/show/2210-14#Text

Malashenkova, T., Buromenska, N., Shklyar, Kucheruk, N., Severinsson, D., Sepe, G. (2021). Guide for judges "Protection of economic competition". Recommended for publication by the Scientific and Methodological Council of the National School of Judges of Ukraine (protocol No. 6 dated December 16, 2021) URL: http://nsj.gov.ua/files/1643191642Handbook%20on%20Competition_Final.pdf

Resolution of the Grand Chamber of the Supreme Court of July 2, 2019 in case No. 910/23000/17. URL: https://reyestr.court.gov.ua/Review/82998256

On the Antimonopoly Committee of Ukraine: Law of Ukraine of November 26, 1993 No. 3659-XII (as amended and supplemented in the edition of January 15, 2012). URL: http://zakon3.rada.gov.ua/laws/show/3659-12.

Rules for Reviewing Applications and Cases on Violation of Legislation on the Protection of Economic Competition : approved by the Order of the Antimonopoly Committee of Ukraine dated April 19, 1994 No. 5 (as amended by the Order of the Antimonopoly Committee of Ukraine dated June 29, 1998 No. 169- r; as amended), (registered with the Ministry of Justice of Ukraine on May 6, 1994 under No. 90/29) URL: http://zakon1.rada.gov.ua/laws/show/z0090-94