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JUDICIAL REVIEW OF THE EUROPEAN COMMISSION'S DECISIONS IN THE FIELD OF MERGER CONTROL: LESSONS TO BE LEARNED FOR UKRAINE

The article considers judicial review of the European Commission's decisions in the field of merger control as well as relevant procedure applicable to the Antimonopoly Committee of Ukraine under Ukrainian law. The article further identifies the scope of the standard of proof imposed on competition authorities in merger cases as well as the scope of judicial powers in merger control in general.

Стаття присвячена проблемам судового нагляду за рішеннями Європейської Комісії в сфері контролю за концентрацією та досліджує застосування європейського досвіду у відповідній практиці судового перегляду рішень органів Антимонопольного Комітету в Україні.

The role of judicial system in the dynamic development of competition law is undisputed. Judicial review contributes to the evolved complexity of merger analysis, ensures compliance with due process and puts high standard of proof on competition authority's decisions. Judicial review of the European Commission's decisions by the Court of Justice and the Court of First Instance in the field of merger control facilitated development of a more economic approach in the Commission's decision-making. The present article will consider the landmark cases assessed by the Commission and reviewed by the Court of First Instance on appeal. In the focus of attention is scrutiny of the Commission's economic assessment by the judiciary in order to verify whether it is supported by convincing and cogent evidence. Second part of the article will be dedicated to respective judicial review of the decisions of the Antimonopoly Committee of Ukraine. Finally, concluding remarks will be offered on improvement of judicial review process in the field of Ukrainian competition law and, more specifically, merger control.

I. Judicial Review of the EU Commission's Decisions: limits and challenges

The decisions of the European Commission in the field of merger control are subject to annulment procedure under Article 263 TFEU [1]. The decision may be challenged by the merging parties, their competitors or by a third party affected by the merger decision. Generally, the Commission enjoys wide margin of discretion in its analysis under Merger Regulation 139/2004 [2]. This approach has been repeatedly stressed by the CFI, stating in particular, that «it should be observed that the basic provisions of Regulation No 4064/89, in particular Article 2 thereof, confer a discretion on the Commission, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations» [3].

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However, wide margin of discretion enjoyed by the Commission is balanced by judicial review on appeal. The Court of First Instance manifested its commitment to scrutinize economic assessment performed by the Commission in cases Airtours plc v. Commission [4], Schneider Electric SA v. Commission [5], Tetra Laval v. Commission [6], and IMPALA v. Commission [7], where the Commission decisions were annulled on appeal. The above decisions were found by the Court to be inadequately reasoned and analyzed, as well as lacking convincing or cogent evidence. Along with important procedural implications for the parties[8], the fundamental issues of the standard of proof and standard of judicial review imposed on competition authority arising thereof deserve more thorough consideration.

As a starting point, it appears useful to recall briefly the scope and grounds of judicial review performed by the European courts in relation to the European Commission decisions. Generally, Commission decisions can be challenged on the grounds of lack of competence, violation of procedural rule, error of law or misuse of power [9]. With time, the error of law has most notably expanded beyond mere misinterpretation or misapplication of law. It evolved so as to include errors of fact, lack of convincing reasoning and «manifest» errors of appreciation most often found in the economic assessment made by the Commission [10].

Although the Commission's margin of discretion in the economic assessment described above is widely recognised, it remains subject to strict limitations posed by the judicial review. This is evident from the judgement by the European Court of Justice in the Commission v. Tetra Laval case. While recognising margin of discretion held by the Commission in its economic assessment, the ECJ noted such margin of discretion «does not mean that the Community courts must refrain from reviewing the Commission's interpretation of information of an economic nature» [11]. In practice, the Court of First Instance repeatedly scrutinized economic issues such as relevant market, market structure or dominant position addressed in the Commission decisions [12]. The standard of judicial review under the Merger Regulation appears to be particularly high as is the standard of proof or «requisite legal standard» [13] imposed on the Commission in merger cases.

The aim pursued by the judicial review is, therefore, twofold. First, the court analyses the factual background of the decision to verify that the evidence presented are cogent and coherent. Second, the court verifies whether economic and legal analysis performed by the Commission contains manifest errors. By making conclusion to this effect, however, the court must maintain the delicate balance of power between judicial review and the Commission's recognised «margin of appreciation» [14]. Division of powers ensures that the court must refrain from substituting its own view for that of the Commission except for when the latter has made a manifest error of appraisal. In fact, it reflects the underlying goal of the judicial review of an administrative body decision: to exercise an appeal jurisdiction rather than review the case on its merits [15]. At the same time, it raises an intriguing question as to where the boundaries of the judicial review of economic assessment should be.

Judicial review of the Commission's economic reasoning in merger cases reveal striking similarity in the grounds for annulment as relied on by the courts. In Kali und Salz the ECJ contested one of the Commission findings by stating that it was «not supported by a sufficiently cogent and consistent body of evidence» [16]. In Airtours, the CFI annulled the Commission decision by concluding that it was «far from basing its prospective analysis on cogent evidence, vitiated by a series of errors of assessment» [17]. In Schneider v. Commission, the CFI found that there was not «sufficient evidence to support the Commission's findings» [18]. The CFI referred again to «specific and consistent evidence» in BaByliss case [19], where the question at stake was whether the Commission had met the requisite legal standard. These formulations are

consistent with those often used by the EU judiciary in cases of antitrust infringements or state aid review [20].

The question of convincing evidence emerged again in a strict legality test laid down by the CFI in Tetra Laval v Commission [21]. In examining the potential anti-competitive effects of the conglomerate mergers and the Commission's economic assessment thereof the Court held that:

«the Commission's analysis of a merger transaction which is expected to have an anti-competitive conglomerate effect calls for a particularly close examination of the circumstances which are relevant for an assessment of that effect ... where the Commission takes the view that a merger should be prohibited ... it is incumbent upon it to produce convincing evidence thereof .... [T]he proof of anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects» [22].

Tetra Laval judgment reopened the question of standard of proof imposed on the competition authority and relevant scope of such standard in the context of merger decisions [23]. However, in this regard, the judgement posed more questions than answers. It left open the question of where the judicial review should stop in relation to the margin of appreciation enjoyed by the Commission. As a result, the question of whether the margin of discretion has been trespassed inevitably emerges in each case where the court reviews the Commission economic reasoning with particular rigour. The extend, to which the courts will engage into increasingly rigour judicial review of the Commission margin of appreciation, on the other hand, will depend on the level of self-restraint possessed by the judiciary and the tolerance to its attempts to replace the Commissions view for its own [24].

The necessity of the weighed balancing approach to the scope of judicial review and the respective danger of substituting the Commission's views with that of the judiciary arising hereof were echoed in the responding ECJ judgement. In his opinion in Commission. v. Tetra Laval, [25] reviewed by the ECJ on appeal Advocate General Tizzano found that the competition authority cannot be required to establish with absolute certainty prospective anticompetitive effects of a given merger transaction [26]. The inherent difference between simple fact-finding and complex economic assessment involved in merger review inevitably poses limitations as to the scope of the judicial review. The need to maintain fundamental division of powers between the Commission and the EC judiciary requires, therefore, the latter to limit its review of the complex economic assessments made by the Commission to the following essential questions: (i) whether the factual information relied upon is accurate and correct; (ii) whether the Commission has diligently carried out a thorough investigation; (iii) whether the reasoning followed by the Commission is logic, coherent and appropriate. Exceeding the limits of the above competences would disrespect the Commission's margin of discretion and thus wrongly substitute their own view to that of the Commission [27].

II. The Role of Judiciary in Competition Law Enforcement in Ukraine

Judicial system of Ukraine comprises the Constitutional Court of Ukraine and the courts of general jurisdiction. Commercial courts have exclusive competence over commercial-related matters and disputes involving parties engaged in commercial activity. Prior to the 2001 judicial reform commercial disputes in Ukraine were addressed by the system of arbitral courts. However, they were poorly qualified to address competition related issues; judicial enforcement of competition law remained, therefore, rather fragmented. The modern judiciary plays more active role in the enforcement of competition policy. Primarily, this is done through judicial review of the decisions taken by the Antimonopoly Committee as an administrative authority. Another important direction is private enforcement of competition law by the courts, a field where

judges become increasingly active. Private actions for damages in competition law were first allowed in the 1996 Constitution and subsequently reaffirmed in the Law on Protection of Economic Competition [28]. Since then, courts have been enforcing competition law directly against violators in private actions without the need to refer first to the Antimonopoly Committee of Ukraine. Judicial decisions in private actions are subject to appeal by the higher instance of general jurisdiction.

Although there is no precedent value in judicial decisions the Antimonopoly Committee tries to keep consistency with important judgements. At the same time many scholars note general inconsistency of the judicial enforcement of competition law in Ukraine. In fact, competition related matters fall under the competence of different courts of general jurisdiction. Such inconsistency frequently results in adoption of opposite decisions or different approaches to competition law by different courts [29]. Civil law disputes related to anticompetitive concerted actions and unfair competition fall under the competence of general courts while cases brought by the Antimonopoly Committee as well as appeals of the Committee decisions are considered by commercial courts [30].

Commercial courts also consider private actions for damages under Article 55 of the Law on Protection of the Economic Competition. There is some ambiguity however, as to whether commercial courts have jurisdiction over private actions for damages brought by individuals rather than economic entities. Under the general rule, commercial courts hear cases brought by the economic entities or individual entrepreneurs [31]. This led some legal scholars to believe that competition related actions brought by individuals are subject to consideration in general courts rather than commercial courts [32].

Finally, anticompetitive behaviour (such as abuse of dominance and discrimination) falls under the jurisdiction of commercial and administrative courts [33]. Absence of a uniform procedure for consideration of competition cases resulted in proposals put forward for establishment of the Competition Court of Ukraine with exclusive competence over competition matters [34]. Numerous reasons are put in favour of such option. It is argued that establishment of the Competition Court could ensure fast track procedure for consideration of competition cases with appeals of its decisions made directly to the Supreme Court of Ukraine [35]. While Competition Court could undoubtedly play an important role in shaping coherent competition law principles this perspective raises some constitutional concerns.

The system of courts of general jurisdiction is explicitly outlined in the Constitution of Ukraine and this list is deemed to be exhaustive. Conclusive opinion to this effect was expressed by the Constitutional Court of Ukraine in its decision concerning establishment of the Court of Cassation [36]. There are also proposals widely expressed to achieve the fast track judicial review. This could be done through direct appeals of the Antimonopoly Committee decisions to the Higher Commercial Court of Ukraine, the third level instance. However, such mechanism leaves rather limited possibilities for further appeal. Decision of the Higher Commercial Court can only be subject to appeal in the Supreme Court of Ukraine. Although some scholars do not consider such mechanism to hinder the parties rights in any respect [37], such system appears to limit parties right for judicial protection from four appeal instances to just one.

III. The Scope of Judicial Review Applied to the AMC Decisions

The grounds for the judicial review of decisions taken by the Antimonopoly Committee of Ukraine as an administrative body can be derived from Article 59 of the Law on Protection of Economic Competition. Under these general provisions, the Committee decision can be annulled under the following conditions: (i) incomplete discovery of essential evidences; (ii) insufficient level of proof for the established evidences which have essential impact on the decision; (iii) er-

rors of assessment; and (iv) infringement or misapplication of material or procedural law [38]. Notably, that misapplication of procedural law can only constitute a valid ground for annulment if it directly resulted in the adoption of erroneous decision [39]. It can be seen from the above wording that grounds for annulment and, implicitly, for the judicial review of the Antimonopoly Committee decisions generally follow that of the EC law. However, the Law on Protection of Economic Competition neither specifies the scope of such review nor establishes its limits in relation to economic assessment performed by the Committee. In practice, courts have been keen to annul the Committee decisions only where the manifest error of material law was found. Errors of facts and substantive assessment implicitly remained subject to the Committee internal control based on its allegedly more qualified interpretation of relevant facts.

Such approach, however, does not appear entirely flawless. In competition law the distinction between an error of fact and law is not readily apparent. The definition of relevant product, geographic market or market shares and dominant position involves assessment of facts in the first place. Next, such assessment must be in line with the envisaged legal analysis; therefore an error of fact can easily be combined with an error of law [40]. Thus, it can hardly be justified that the Committee's interpretation of factual grounds and substantive assessment to support its finding goes unchecked. This position was indirectly confirmed by the High Commercial Court of Ukraine through its persistent review of legal qualification of facts presented by the Committee. In fact, the Court went so far as to challenge the definitions of relevant market and dominant [41].

The High Commercial Court raised the issue of the scope and boundaries of the judicial review once again in 2005 by annulment of the Committee decision due to assessment errors [42]. In its judgement, the High Commercial Court in fact confirmed the right of the judiciary to review and contest definitions of relevant market, market shares and dominant position contained in the Antimonopoly Committee findings. By doing so, the Court expanded the scope of the judicial review and raised accordingly the standard of proof imposed on the Antimonopoly Committee. However, the Supreme Court of Ukraine that reviewed the judgement on appeal set the limits of judicial review rather strictly. It explicitly noted that the definition of relevant product market as well as dominant position of an undertaking lies within the exclusive competence of the Antimonopoly Committee [43].

In reaching this conclusion the Supreme Court relied on Article 7 of the Law on the Antimonopoly Committee establishing general powers of the latter to define relevant market [44]. In a narrow interpretation of this clause the Court concluded that the abovementioned powers can not be performed by the judiciary; the High Commercial Court therefore exceeded the limits of its competence by challenging the definition of relevant market made by the Committee. In particular, the Court noted:

«Under Article 7 of the Law on the Antimonopoly Committee of Ukraine the definition of product market as well as dominant position of an undertaking on such market constitutes an exclusive competence of the Antimonopoly Committee of Ukraine and can not be performed by other state bodies. In contradiction with the above provisions and contrary to Article 19, item 2 of the Constitution of Ukraine that envisages that state bodies and their respective officials shall act within the limits of their respective competence established by law and the Constitution commercial courts defined relevant product markets…and dominant position …; [commercial courts] also defined the relevant market as «central drainage system» while the Antimonopoly Committee concluded that the relevant market was «industrial water cleaning»« [45].

The above decision clearly limits the scope of judicial review restricting the judiciary in its ability to challenge economic qualifications made by the Committee. It appears that the Supreme

Court intended to ensure the proper balance of powers between the Committee and the judiciary in the first place. However, as welcome as intention is, the decision still raises serious controversy. Restrictive provisions of Article 7 of the Law on the Antimonopoly Committee can be justified as long as they apply strictly to state bodies in the meaning of public entities [46]. An obvious intent of such provisions is to restrict ability of governmental agencies to interfere with the Antimonopoly Committee decision-making. Restricting ability of the judiciary to check the basis of decisions taken by the Committee appears is something completely different. Lack of judicial control in this regard can turn to be equally harmful.

At the same time, the Supreme Court of Ukraine insisted on maintaining the standard of proof imposed on the Antimonopoly Committee of Ukraine with the same rigour [47]. Having found the lack of sufficient proof in the Committee decision the Supreme Court showed greater tolerance towards judicial review of the substantive assessment on the verge of facts and law. The case concerned annulment of the Antimonopoly Committee decision on dominance by the Commercial Court of the City of Kiev in the first instance; The High Commercial Court confirmed the judgement. Both Commercial Court and the High Commercial Court annulled the Committee decision on the grounds of error of law as well as insufficient proof of evidence to support the finding of dominance. The first instance Court found the Committee to be in breach of the Methodology for establishment of the dominant position [48] which is in itself the rule of law. In addition, the Court established that the Committee infringed evidence collection rules of Article 41 of the Law on Protection of Economic Competition [49]. The Committee's definition of relevant product market, geographic market and assessment of major competitions, consumers and entry barriers was found not to be based on sufficient evidence. The Court, therefore, ruled that «the Committee failed to present sufficient evidence to support its findings» [50]. The High Commercial Court of Ukraine upheld the judgement on appeal. It concluded that

«…the court of first instance was right to conclude on absence of sufficient evidence to support the finding of dominance… and, therefore, [support of] respective legal qualifications of acts» [51].

The Antimonopoly Committee appealed the decision to the Supreme Court of Ukraine. In its appeal the Committee argued the contested decision to contradict the established practice of the Supreme Court of Ukraine on application of the rule of law. The Committee also contested different interpretation by the High Commercial Court of one and the same rule of law in the identical cases [52]. However, these arguments were not upheld on appeal. The Supreme Court concluded that different application by the High Commercial Court of one and the same the rule of law occurred in cases which were not identical in nature and therefore had no relevance whatsoever for the subject matter of contested decision. The Court further dismissed the argument by pointing out that the case referred to by the Committee raised different aspects of competition law that the dominant position. Therefore, it could, by no means define the circumstances under which an undertaking may be considered dominant and establish the standard of proof imposed on the Committee in dominant position cases [53].

Despite their practical value, the abovementioned judgements of the Supreme Court leave many questions unanswered. It appears that the Court deliberately refrained from going into a deeper discussion on the scope of standard of proof imposed on the Antimonopoly Committee and the scope of judicial review applied to its substantive assessment. Ambiguous as it is, existing system of judicial review of the Committee decision remains rather fragmented. As considerable number of its economic qualifications goes unchecked the Committee is widely engaged in discretionary interpretation of the facts and law. This results in increasing risk of substantive assessment errors and unjustified decisions made by the Committee. In its both

judgements the Court avoided explicit conclusion on the factual grounds of the Committee decisions; nowhere in the decision are they recognised as a subject to judicial review equal to the rules of law.

At the same time, the Court judgement in case No. 39/225 significantly contributed to raising the standard of proof imposed on the Antimonopoly Committee. In fact, the judgement implicitly suggests that the Antimonopoly Committee should be more careful in analysing the facts and evidence upon which it bases its findings. The Committee should also be prepared to show more diligence in presenting convincing evidences in decisions on economic issues such as dominant position or relevant market. In the past, the Committee has not always ensured completeness and cohesion of evidence in its conclusions. Therefore, in cases where the complex economic assessment was involved verification of underlying reasoning appears particularly problematic.

The judgement of the Supreme Court in case 39/225 may provide additional (albeit rather laconic) guidance for the judiciary on how to expand judicial control over the Committee decisions. It is beyond doubts that a more thorough control is needed. The purpose of a diligent scrutiny is not to overturn the higher number of the AMC decisions; much less to substitute them with that of the judiciary. The rigorous verification should rather serve to develop clear boundaries of the judicial review and ensure that the standard of proof imposed on the Antimonopoly Committee is sufficiently high to justify its decisions.

References

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3. Case T-221/95, Endemol Entertainment Holding BV v Commission [1999] ECR II-1299 [1999] 5 CMLR 611, para 106; Joined Cases C-68/94 and C-30/95 France and Others v Commission [1998] ECR I-1375, paras 223, 224.
4. Case T-342/99, Airtours plc v. Commission, [2002] ECR II-2585, [2002] 5 CMLR 317.
5. Case T-310/01, Schneider Electric SA v. Commission, [2002] ECR II-4071, [2003] 4 CMLR 768.
6. Case T-5/02 Tetra Laval v. Commission, [2002] ECR II-4381, [2002] 5 CMLR 1182.
7. Case T-464/04 Independent Music Publishers and Labels Association (Impala) v. Commission, [2006] ECR II-2289.
8. Where the Commission's decision is annulled, the concentration in question must be considered again, based on the new market conditions.
9. Treaty On European Union and Treaty Establishing the European Community, consolidated versions, 29 December 2006, O.J. (C321) E/1 (2006), Article 230.
10. See C. BELLAMY, Antitrust and the Courts, Roundtable, in 1998 Annual Proceedings of the Fordham Corporate Law Institute (New York, Juris Publishing, 1998), at P. 389.
11. Case C-12/03P Commission v. Tetra Laval BV [2005] ECR I-987, para 39.
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13. Case T-342/99 Airtours plc v Commission [2002] ECR II-2585, para 62, 294.
14. Joint cases C-68/94 and C-30/95 France v Commission [1998] ECR I-1375, para 223, 224.

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19. Case T-114-02, BaByliss v. Commission [2003], ECR II-1279.
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27. Opinion of Advocate General Tizzano, at paras 87-89.
28. The Constitution of Ukraine, Article 42; the Law on Protection of Economic Competition, Article 55.
29. O. MELNYCHENKO notes conflicting decisions taken by district general court and district commercial court in one and the same case. See O. MELNYCHENKO, The Court of Special Jurisdiction, 1 Competition, 2004, at p. 45.
30. Under Article 12 of the Commercial Procedural Code of Ukraine, commercial courts hear cases involving claims on behalf of the bodies of the Antimonopoly Committee of Ukraine in all issues under their respective competence; the Law on Protection of Economic Competition, Article 60.
31. Commercial Procedural Code of Ukraine establishes the right of referral to commercial courts in economic entities and private (individual) entrepreneurs. Commercial Procedural Code of Ukraine dated 06 November 1991, Article 1 (1)(Відомості Верховної Ради (ВВР), 1992, N 6, item 56).
32. See O. MELNYCHENKO, Id., at p. 47. At the same time, it should be noted that the Law on Protection of Economic Competition establish jurisdiction of commercial courts over private actions for damages as well as appeals of the Committee decisions (Article 55; Article 60). The question arises, therefore, about the supremacy of the Commercial Procedural Code provisions over more specific Law on Protection of Economic Competition in relation to the jurisdiction of commercial courts to hear competition cases brought by the individuals rather than economic enterprises.
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34. See V. MOYSYK, O. MELNYCHENKO, Protection of economic competition: Ukraine reaches new standard, 3 Competition, 2005,at p. 60-61. On proposals for Competition Court see also J.Jurick, Problems of Kegislatyive Reglamentation of Powersa of the Antimonopoly Committee; Competition Policy and legislationm at p. 6.
35. Direct appeals to the Supreme Court of Ukraine speed up the appeal process as long as there remains only one instance to review the court decision on a final basis instead of existing four.
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37. See V. Moysyk, O. Melnychenko, at p. 60.
38. See the Law on Protection of Economic Competition (ВВР, 2001, 12, item 64), Article 59, item 1.
39. Id., item 2.
40. See Case 8/26, Judgment of the High Commercial Court of Ukraine dated 27 June 2001 (Постанови ВСУ та ВСГУ, 2003, No. 1). In this case, challenge by the Court of the definition of «monopoly high prices» was based on both factual assessment made by the Committee and legal analysis, which resulted in the Committee decision being annulled on the grounds of both errors of fact and law.
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42. See Case No. 20/707-10/254, Judgment of the High Commercial Court of Ukraine dated 28 April 2005 (Постанови ВСУ та ВСГУ, 2005, No. 2). See also O. MELNYCHENKO, Is the Court to Define Relevant Market?, 4 Competition, 2005, at p. 56.
43. Case No. 20/707-10/254, Judgement of the Supreme Court of Ukraine dated 6 September 2005 (Інформаційний Лист ВГСУ № 01-8/2450 dated 13 December 2005), para 10.
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45. Case No. 20/707-10/254, Judgement of the Supreme Court of Ukraine dated 6 September 2005, para 10-11.
46. Under the cited provisions powers of the Antimonopoly Committee of Ukraine to define relevant market and dominant position of an undertaking on such market shall not be performed by any other state bodies (the Law on the Antimonopoly Committee of Ukraine, Article 7, para 20 (ВВР 1993, No.50, item 472)).
47. Case No. 39/225, Judgment of the Supreme Court of Ukraine dated 13 September 2005 (Інформаційний Лист ВГСУ № 01-8/2450 dated 13 December 2005).

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49. The Law on Protection of Economic Competition, Article 41, 1-3 (ВВР, 2001, No.12, item 64).
50. Case No. 39/225, Judgment of the Commercial Court of the City of Kiev dated 9 November 2004 (Інформаційний Лист ВГСУ № 01-8/2450 dated 13 December 2005).
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53. Case No. 39/225, Judgment of the Supreme Court of Ukraine dated 13 September 2005, para 13.