

Damirchayev M. I.

*Doctor of Law, Associate Professor,
Yaroslav Mudryi National Law University, Ukraine;
e-mail: m.damirchayev@gmail.com; ORCID ID: 0000-0002-9734-7988*

Komarov V. V.

*Ph. D. in Law, Professor,
Yaroslav Mudryi National Law University, Ukraine;
e-mail: v.kom@ukr.net; ORCID ID: 0000-0001-7113-1372*

Komarova T. V.

*Doctor of Law, Associate Professor,
Yaroslav Mudryi National Law University, Ukraine;
e-mail: komarova.tetyana.ukr@gmail.com; ORCID ID: 0000-0002-7663-3264*

PROTECTION OF UKRAINIAN BUSSINESS IN THE EUROPEAN UNION COMPETITION LAW

Abstract. The article is devoted to the analysis of the procedural rights of private persons in EU competition law, including Ukrainian ones who carry on business in the EU. In order to be successful in doing business in the EU, private persons (individuals and legal entities) need to be aware of their rights and be able to effectively protect them.

In the field of EU competition law procedural rights of individuals are of particular importance, since very often their violations during the investigation of competitive cases become the grounds for challenging decisions of such institution as the European Commission, which is one of the main regulators of EU competition law.

The article explores the scope of procedural rights of private persons, such as the right to defense, which includes the so-called privilege against self-discrimination, the right to be heard, the right to have a representative and the right to defend communication with a representative, the right to good governance, the principle of innocence, etc. Importantly, this study is based on an analysis of the jurisprudence of the Court of Justice the EU, which has jurisdiction to protect private persons against EU institutions' infringements and has the monopoly to interpret EU law.

Keywords: Court of Justice of the EU, European Union, EU competition law, EU internal market, protection of rights, procedural rights.

JEL Classification K36

Formulas: 0; fig.: 0; tabl.: 0; bibl.: 16.

Дамірчиєв М. І.

*доктор юридичних наук, доцент,
Національний юридичний університет ім. Ярослава Мудрого, Україна;
e-mail: m.damirchayev@gmail.com; ORCID ID: 0000-0002-9734-7988*

Комаров В. В.

*кандидат юридичних наук, професор,
Національний юридичний університет ім. Ярослава Мудрого, Україна;
e-mail: v.kom@ukr.net; ORCID ID: 0000-0001-7113-1372*

Комарова Т. В.

*доктор юридичних наук, доцент,
Національний юридичний університет ім. Ярослава Мудрого, Україна;
e-mail: komarova.tetyana.ukr@gmail.com; ORCID ID: 0000-0002-7663-3264*

ЗАХИСТ УКРАЇНСЬКОГО БІЗНЕСУ В КОНКУРЕНТНОМУ ПРАВІ ЄВРОПЕЙСЬКОГО СОЮЗУ

Анотація. Аналіз процесуальних прав суб'єктів конкурентного права ЄС, які стосуються в тому числі й українських приватних осіб, що здійснюють свою підприємницьку діяльність на території ЄС. Зважаючи на те, що між Україною та ЄС діє Угода про асоціацію, що набула чинності 2017 року та яка запустила функціонування зони вільної торгівлі, відкривається багато можливостей для українського бізнесу на території ЄС. Так, 10 822 українські компанії працюють в ЄС, український експорт в ЄС 2018 року становив 42,6 %, а в першій половині того самого року Україна експортувала товарів та послуг в ЄС на 11,2 мільярда дол., що майже на 2 млрд дол. більше за аналогічний період попереднього року. Найбільшими торговельними партнерами для України в ЄС є шість країн — Іспанія, Нідерланди, Італія, Польща, Німеччина і Франція. У цьому контексті для українського бізнесу є вкрай актуальним і важливим обізнаність у своїх матеріальних та процедурних правах для того, щоб ефективно їх реалізовувати і вдало захищати свої власні інтереси.

У сфері конкурентного права ЄС особливого значення набувають саме процесуальні права приватних осіб, оскільки дуже часто підставою оскарження рішень такого інституту, як Європейська Комісія, яка є одним з головних регуляторів конкурентного права ЄС, стають порушення процесуальних прав під час проведення розслідування у конкурентних справах.

Досліджено зміст таких процесуальних прав приватних осіб, як права на захист, яке включає так званий привілей проти самодискримінації, право бути заслуханим, право мати представника і право на захист спілкування з представником, право на належне управління, принцип невинуватості тощо. Важливим є те, що це дослідження засновано на аналізі судової практики Суду справедливості ЄС, який наділений юрисдикцією щодо захисту прав приватних осіб від порушень з боку інститутів ЄС, а також має монопольне право на тлумачення права ЄС, тож саме він виступає тією інстанцією, котра розвиває право у цій сфері.

Ключові слова: внутрішній ринок ЄС, захист прав, Європейський Союз, конкурентне право ЄС, процесуальні права, Суд справедливості ЄС.

Формул.: 0; рис.: 0; табл.: 0; бібл.: 16.

Дамирчиев М. И.

доктор юридических наук, доцент,

Национальный юридический университет им. Ярослава Мудрого, Украина;

e-mail: m.damirchiev@gmail.com; ORCID ID: 0000-0002-9734-7988

Комаров В. В.

кандидат юридических наук, профессор,

Национальный юридический университет им. Ярослава Мудрого, Украина;

e-mail: v.kom@ukr.net; ORCID ID: 0000-0001-7113-1372

Комарова Т. В.

доктор юридических наук, доцент,

Национальный юридический университет им. Ярослава Мудрого, Украина;

e-mail: komarova.tetyana.ukr@gmail.com; ORCID ID: 0000-0002-7663-3264

ЗАЩИТА УКРАИНСКОГО БИЗНЕСА В КОНКУРЕНТОМ ПРАВЕ ЕВРОПЕЙСКОГО СОЮЗА

Аннотация. Анализ процессуальных прав субъектов конкурентного права ЕС, касающихся в том числе и украинских частных лиц, осуществляющих свою предпринимательскую деятельность на территории ЕС.

В сфере конкурентного права ЕС особое значение приобретают именно процессуальные права частных лиц, поскольку очень часто основанием обжалования решений такого института, как Европейская Комиссия, которая является одним из главных регуляторов конкурентного права ЕС, становятся нарушения процессуальных прав при проведении расследования в конкурентных делах.

Исследовано содержание таких процессуальных прав частных лиц, как права на защиту, которое включает так называемый привилегия против самодискриминации, право заслушанным, право иметь представителя и на защиту общения с представителем, право на надлежащее управление, принцип невиновности и тому подобное. Важно то, что это исследование основано на анализе судебной практики Суда справедливости ЕС, который наделен юрисдикцией по защите прав частных лиц от нарушений со стороны институтов ЕС.

Ключевые слова: внутренний рынок ЕС, защита прав, Европейский Союз, конкурентное право ЕС, процессуальные права, Суд справедливости ЕС.

Формул: 0; рис.: 0; табл.: 0; библи.: 16.

Introduction. The effective functioning of the EU internal market is the primary objective of creating this unique supranational integration organization, and fair competition policy is one of the main conditions for the development of the fundamental freedoms of the Union. The economic policies of the EU and its Member States in the internal market are carried out in accordance with the principle of an open market economy with free competition.

Due to the fact that between the EU and Ukraine there is an Association agreement, which came into force in 2017, a lot of possibilities for Ukrainian business right now are opened in the territory of the EU. For example, there are 10,822 Ukrainian companies operating in the EU, Ukraine's exports to the EU in 2018 amounted to 42.6%, in the first half of this year, Ukraine exported goods and services to the EU by \$ 11.2 billion, which is almost \$ 2 billion more than in the same period last year. The largest trading partners for Ukraine in the EU are six countries — Spain, Netherlands, Italy, Poland, Germany and France. In light of this it is highly important for Ukrainian business to know all material and procedural rights in order to implement them and effectively protect their own interests.

Some issues of the problems that are mentioned above were studied by such scientists as: Forrester I., Geradin D., Petit N., Smirnova K., Lukianec V., Vesterdorf B. At the same time it should be underlined that in Ukrainian doctrine there is a lack of researches on procedural rights in EU competition law.

Presentation of the primary research material. The sources of legal regulation of competition law in the EU are founding treaties, acts of secondary law of the Union, international agreements and as a separate category of sources are judgments of the Court of Justice of the EU (CJEU). The utmost importance of such source as the CJEU judgments is underlined by all scholars. For example, Smirnova K. notes that: «... jurisprudence has developed a system of principles of antitrust law and has become applied as the basic «doctrines» of EU law.» [1].

Judicial control in the field of competition is an important element of the right to an effective remedy and a fair trial, as guaranteed by Art. 47 of the Charter of Fundamental Rights of the EU and Art. 6 ECHR. It is of particular importance because in the field of competition the Commission is endowed with extremely broad powers, which include law-making, enforcement and investigative powers [see: 2]. For example, the Commission is empowered to investigate the breaches of EU competition law and to impose material penalties on infringers. Such a model of implementation of EU competition law is regularly criticized on the basis that in most Member States competition law enforcement, decision-making and sanctioning are carried out by separated authorities with the aim of reducing the risk of error, as well as the realization of system of checks and balances. There is no such separation in EU competition law, even despite some decentralization of antitrust powers that took place after the adoption of Council Regulation (EC) No 1/2003 [3]. That's why the possibility of challenging the Commission's actions in the CJEU is one of the main mechanisms of protecting the rights of market actors.

It should be noted that the financial consequences of possible errors by the EU are very significant since in recent years the tendency of increasing the amount of material sanctions for violation of EU competition law. For example, in 2004, the Commission imposed a € 497 million fine on Microsoft for abusing its dominant position in the computer market, which prevented other companies from developing Windows-compatible media players. At the time, it was the largest fine

imposed by the Commission for breach of EU law. The new record amount has already been imposed in 2016 — the Commission imposed a fine of 2.93 billion EUR on MAN, Volvo / Renault, Daimler, Iveco and DAF for the creation of a cartel, allowing these companies to control prices of freight cars for 14 years. In the same year, the Commission fined the Internet giant Google on 2.4 billion EUR for illegally favoring Google Shopping on its search engine. According to estimates, the Commission has fined totally on 8.5 billion EUR since 2013 for breaching of EU competition law [4]. In such way the Commission is combating with cartel practice, which is one of the greatest threats to the functioning of the common market. Such a large material impact of competition law and the decisions of the Commission on individuals confirms the importance of studying the procedural rights of competition actors.

More over the EU competition is closely linked to the possibility of restrictions on fundamental rights, such as property rights, rights to the protection of personal data, freedom of association, etc. For example, the right to the protection of personal data may be restricted in the process of investigation of breaches of competition law, so judicial review and verification of the legitimacy of all procedures by EU competent authorities must be guaranteed.

Accordingly to the Art. 263 Treaty on the Functioning of the EU (TFEU) the CJEU has the jurisdiction to review the legality of legislative acts of the Commission on the grounds of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. In doing so, the CJEU controls the correct application not only of substantive competition law, but also the proper decision-making procedures. Thus, in 2001, the Commission blocked an attempt of the French company, Schneider Electric, to buy a competing firm Legrand (the manufacturer of electrical equipment). The General Court in its decision *Schneider Electric* acknowledged a serious breach of law by the Commission because it did not provide an opportunity and even refused Schneider Electric to stand its position. The General Court emphasized that such a procedural violation gave Schneider Electric the right to compensation for damages in accordance with Art. 340 (2) of the TFEU [5]. This case is one in a series of cases in which the General Court held that the Commission must comply not only with EU substantive law but also with procedural rules which guarantee the protection of company rights in competition sphere [6]. This position is in line with one of the aims of Regulation No 1/2003, which is to strike a balance between the implementation of EU competition law and respect for the fundamental rights of individuals — and in particular the right to protection, which includes the so-called privilege against self-discrimination, the right to be heard, the right to have representative and the right to defend communication with the representative, the right to good governance, the principle of innocence.

The case-law of the CJEU has done a lot for development and interpretation of the above-mentioned procedural rights. Thus, pursuant to Regulation No 1/2003, the Commission has the right to contact companies for information in order to identify an infringement of EU antitrust law, but the Regulation does not provide any clarification of to the limits of such interference. The Court of Justice found that the powers of the Commission for investigation may be limited on the ground of safeguarding the rights of defense, and therefore companies have the right to remain silent [7]. In doing so, the Court of Justice insists that the company's complete silence goes beyond what is necessary to safeguard the right to a defense.

In other cases, the General Court emphasized that the Commission was not entitled to compel the company to provide answers that could include a finding of a breach of the EU antitrust law which the Commission had to prove. If the company voluntarily provides such answers, it loses the opportunity to invoke the privilege against self-discrimination [8].

It is also of practical importance that a company that refuses to provide information to the Commission by referring to the self-discrimination privilege may apply to a Hearing Officer who provides a reasoned recommendation about the existence of such a privilege, which is taken into account by the Commission in its decision making. On the basis of this reasoned recommendation, the company may appeal the actions of the Commission which compel it to provide information [9]. In the judgment *P Limburgse Vinyl Maatschappij*, the Court of Justice explained that in order to

prove a breach of the privilege against self-discrimination by the Commission, there should be a request from the Commission that requires not only information but also penalties for not providing it [10].

The privilege against self-discrimination has become of a high importance in competition law procedures. The privilege against self-discrimination cannot be invoked with regard to collection of documents by the Commission during sudden inspections because in such cases the company may use other types of rights of defense. The Court emphasized that this exemption does not apply to individuals - representatives of the company and its staff.

After the initiation of the formal procedure by the Commission, a number of additional procedural safeguards are taking effect. For example, the right to be heard. According to Art. 27 of Regulation No 1/2003, the Commission should give the company the right to be heard and for this all necessary documents relevant to the investigation procedure should be provided. The information contained in these documents must be accurate and complete in order the company to be able to fully understand the Commission's position and provide its observations concerning all points. For this all the facts relied on by the Commission and the legal qualification of the infringement must be provided [11]. In addition, the CJEU emphasizes that the Commission should make available the documents received during the investigation. The exceptions are the Commission's internal documents, such as draft acts, documents containing the trade secrets of other companies, and other confidential information [12]. In doing so, the CJEU is examining whether the Commission's failure to supply the relevant documents led to a breach of the rights of the defense, as there may be other sources of information available to the company [13].

It is noteworthy that the CJEU's has huge practice concerning the guarantees of the right to good governance in competition sphere. This right includes the right to a fair hearing of the case by the Commission within a reasonable time, as well as the need to reason all decisions by the Commission. This right flows directly from of Art. 41(1) of the Charter of Fundamental Rights of the EU and is fully protected by the CJEU. The Court insists that the Commission's requests for information should be in accordance with the principle of proportionality. This means that the obligations imposed on the company in connection with the request must be proportionate to the purpose of the investigation [14]. As regards the determination of the reasonableness of the time limit for a case, the CJEU considers that the qualification of the term as reasonable depends on the particular circumstances of the case, namely: its context, stages of proceedings, facilitation of the investigation by the parties, complexity of the case, etc [15]. In the case of the annulment of the act, a causal link must be proved between the delay of the procedure and the deprivation of the company's right to defense.

An important aspect of competition cases is the presumption of innocence of offenders of competition rules. With regard to guaranteeing the presumption of innocence in such cases, the case-law of the CJEU clearly states that if there is a breach of this principle an act of the Commission must be annulled. In the Court's view, the primary sources of the presumption of innocence are Regulation No 1/2003 and Regulation No 622/2008, which are supplemented by Art. 48 EU Charter of Fundamental Rights of the EU. In a recent *Icap and Others v Commission* judgment, the Court found that neglect of the presumption of innocence cannot be justified by the need for a speedy investigation [16].

The issue of non-contractual liability of the EU and compensation for losses are essential when considering competitive cases and exercising judicial control over the activities of the Commission in terms of its compliance with the investigation procedure. The case-law of the CJEU states that companies whose procedural rights have been substantially infringed by the Commission in the course of the inquiry procedure have the right to raise questions concerning the EU's non-contractual liability and damage compensation under Art. 340 (2) of the TFEU. The Court notes that even the complexity of competing cases cannot justify serious procedural irregularities which make it impossible to implement EU law. The existence of liability of the Commission for losses incurred in the performance of its obligations in the field of competition law is of the utmost importance, since this Commission's competence is related to the capital of companies. According

to Art. 46 of the Statute of the CJEU the claim for damages under Art. 340 TFEU may be filed within five years from the occurrence of the circumstances underlying the suit.

Conclusions. The EU-Ukraine Association Agreement, along with the benefits for Ukrainian business in the form of an EU open market, has also posed many challenges. The activities of Ukrainian individuals who want to do business in the EU fall under the competence of the European Commission, which has extremely broad authority in competition sphere. In order to conduct their business effectively, Ukrainian entrepreneurs should be aware in the particularities of EU competition law and legal mechanisms of protection of their interests. Particular attention should be paid to the procedural safeguards for business entities, which in practice commonly are breached by the Commission. The most important rights which should be protected are: privilege against self-discrimination, the right to be heard, the right to have representative and the right to defend communication with the representative, the right to good governance, the principle of innocence.

Література

1. Смирнова К. В. Джерела антимонопольного права Європейського Союзу / К. В. Смирнова // Вісник Київського університету імені Тараса Шевченка. — 2013. — Вип. 2. — С. 50.
2. Wils W. The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis / W. Wils // *World Competition*. — 2004. — № 27. — P. 202—224.
3. Council Regulation (EC) № 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty // *Official Journal of the European Communities*. — 2003. — Serie L. — P. 1.
4. Офіційний сайт Європейської Комісії [Електронний ресурс]. — Режим доступу : <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.
5. Case T-351/03. *Schneider Electric v Commission* // *European Court Reports*. — 2007. — P. II-02237.
6. Case T-342/99. *Airtours v Commission* // *European Court Reports*. — 2002. — P. II-2585; Case T-80/02. *Tetra/Laval v Commission* // *European Court Reports*. — 2002. — P. II-4519; Case T-310/01. *Schneider v Commission* // *European Court Reports*. — 2002. — P. II-4071; Case T-464/04. *Impala v Commission* // *European Court Reports*. — 2006. — P. II-02289.
7. Case 155/79. *AM&S v Commission* // *European Court Reports*. — 1982. — P. 1575; Case C-374/87. *Orkem v Commission* // *European Court Reports*. 1989. — P. 3343; Case T-112/98. *Mannesmannröhren-Werke v Commission* // *European Court Reports*. — 2001. — P. II-00729.
8. Case T-112/98. *Mannesmannröhren-Werke v Commission* // *European Court Reports*. — 2001. — P. II-00729; Case T-48/02. *Brouwerij Haacht v Commission* // *European Court Reports*. — 2005. — P. II-05259; Case T-446/05. *Amann & Söhne and Cousin Filterie v Commission* // *European Court Reports*. — 2010. — P. II-01255.
9. Case T-112/98. *Mannesmannröhren-Werke v Commission* [Electronic resource] // *European Court Reports*. — 2001. — P. II-00729; Decision of the President of the Commission on the function and terms of reference of the hearing officer in certain competition proceedings). — Available at : <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011D0695>.
10. Case C-238/99. *Limburgse Vinyl Maatschappij and Others v Commission* // *European Court Reports*. — 2002. — P. I-08375.
11. Case T-305/94. *Limburgse Vinyl Maatschappij NV v Commission* // *European Court Reports*. — 2002. — P. I-08375; Case T-228/97. *Irish Sugar v Commission* // *European Court Reports*. — 1999. — P. II-02969; Case T-5/00. *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* // *European Court Reports*. — 2003. — P. II-05761.
12. Case T-7/89. *Hercules Chemicals v Commission* // *European Court Reports*. — 1991. — P. II-01711.
13. Case T-25/95. *Cimenteries CBR and Others v Commission* // *European Court Reports*. — 2000. — P. II-00491.
14. Case T-191/98. *Atlantic Container Line and Others v Commission* // *European Court Reports*. — 2003. — P. II-03275.
15. Case T-5/00. *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* // *European Court Reports*. — 2003. — P. II-05761.
16. Case T-180/15. *Icap and Others v Commission* [Electronic resource]. — Available at : <http://curia.europa.eu/juris/document/document.jsf?text=&docid=196541&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=72487>.

Стаття рекомендована до друку 24.10.2019

© Дамірчиєв М. І., Комаров В. В., Комарова Т. В.

References

1. Smyrnova, K. V. (2013). Dzherela antymonopolnoho prava Yevropeiskoho Soiuzu [The sources of the competition law of the European Union]. *Visnyk Kyivskoho Universytetu imeni Tarasa Shevchenko — The Bulletin of the Taras Shevchenko Kyiv University*, 2, 50 [in Ukrainian].
2. Wils, W. (2004). The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis. *World Competition*, 27, 202— 224.
3. Council Regulation (EC) № 1/2003 of 16 December 2002. (2003). On the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. *Official Journal of the European Communities*, Serie L.
4. European Commission. (n. d.). Official web-site. ec.europa.eu. Retrieved from <https://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.
5. Case T-351/03. (2007). *Schneider Electric v Commission*. *European Court Reports*, II-02237.
6. Case T-342/99. (2002). *Airtours v Commission*. *European Court Reports*, II-2585; Case T-80/02. (2002). *Tetra/Laval v Commission*. *European Court Reports*, II-4519; Case T-310/01. (2002). *Schneider v Commission*. *European Court Reports*, II-4071; Case T-464/04. (2006). *Impala v Commission*. *European Court Reports*, II-02289.
7. Case 155/79. (1982). *AM&S v Commission*. *European Court Reports*, 1575; Case C-374/87. (1989). *Orkem v Commission*.

- European Court Reports*, 3343; Case T-112/98. (2001). Mannesmannröhren-Werke v Commission. *European Court Reports*, II-00729.
8. Case T-112/98. (2001). Mannesmannröhren-Werke v Commission. *European Court Reports*, II-00729; Case T-48/02. (2005). Brouwerij Haacht v Commission. *European Court Reports*, II-05259; Case T-446/05. (2010). Amann & Söhne and Cousin Filterie v Commission. *European Court Reports*, II-01255.
 9. Case T-112/98. (2001). Mannesmannröhren-Werke v Commission. *European Court Reports*, II-00729; Decision of the President of the Commission on the function and terms of reference of the hearing officer in certain competition proceedings). Retrieved from <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011D0695>.
 10. Case C-238/99. (2002). Limburgse Vinyl Maatschappij and Others v Commission. *European Court Reports*, I-08375.
 11. Case T-305/94. (2002). Limburgse Vinyl Maatschappij NV v Commission. *European Court Reports*, I-08375; Case T-228/97. (1999). Irish Sugar v Commission. *European Court Reports*, II-02969; Case T-5/00. (2003). Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission. *European Court Reports*, II-05761.
 12. Case T-7/89. (1991). Hercules Chemicals v Commission. *European Court Reports*, II-01711.
 13. Case T-25/95. (2000). Cimenteries CBR and Others v Commission. *European Court Reports*, II-00491.
 14. Case T-191/98. (2003). Atlantic Container Line and Others v Commission. *European Court Reports*, II-03275.
 15. Case T-5/00. (2003). Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission. *European Court Reports*, II-05761.
 16. Case T-180/15. Icap and Others v Commission. (n. d.). *curia.europa.eu*. Retrieved from <http://curia.europa.eu/juris/document/document.jsf?text=&docid=196541&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=72487>.

The article is recommended for printing 24.10.2019

© Damirchyiev M. I., Komarov V. V., Komarova T. V.