

M&A TRANSACTIONS in UKRAINE

Antimonopoly aspects

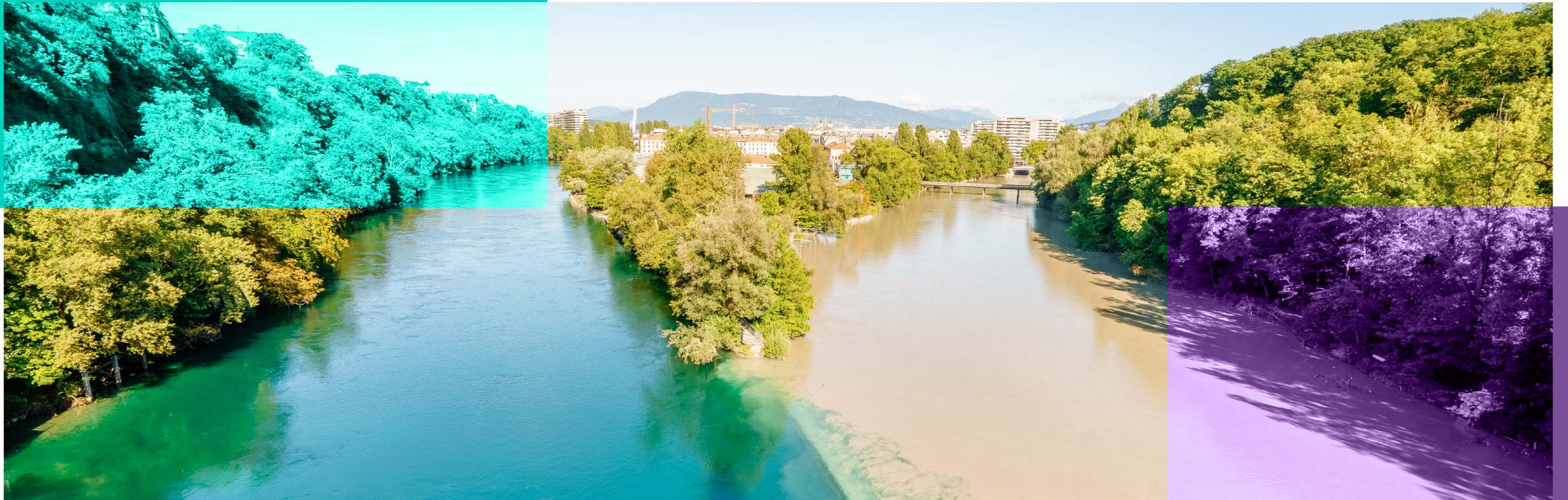


Table of Contents

Introduction.....	4		
I. Merger Control in Ukraine	5		
II. Basic Legal Framework	6		
2.1. Definition of the Economic Concentration	6		
2.2. Types of Economic Concentration.....	7		
2.2.1. Consolidation and Merger	7		
2.2.1.1. Consolidation.....	7		
2.2.1.2. Merger	7		
2.2.2. Acquisition of Control over a Business Entity.....	7		
2.2.2.1. Control Relations	7		
2.2.2.2. Control in the narrow sense.....	8		
2.2.2.3. Control in the broad sense	8		
2.2.2.4. Types of Control	11		
2.2.2.5. Unilateral and Joint Control.....	11		
2.2.2.6. Business Entity	12		
2.2.2.7. Control Implementation.....	12		
2.2.2.8. Asset Purchase.....	14		
2.2.2.9. Control over Governing Board	14		
2.2.3. Establishment of Joint Venture	14		
2.2.3.1. Joint Ventures	14		
2.2.3.2. Absence of Coordinated Activity.....	15		
2.2.4. Shares Purchase.....	16		
III. Participants of the Economic Concentration	17		
3.1. Successors	17		
3.2. Target Company (Assets).....	17		
3.3. Related Legal Persons and Individuals	17		
3.4. Predecessors	18		
3.4.1. Position of the EU Antitrust Law	19		
3.4.2. Position of the Ukrainian Antitrust Law	19		
IV. Thresholds.....	20		
V. Control and Enforcement Organizations.....	24		
5.1. Description.....	24		
5.2. Authority	24		
5.3. Investigative Initiative and Enforcement Capability	25		
VI. Notification	26		
6.1. Mandatory/Voluntary Notification	26		
6.2. Notification Type, Format and Procedure	26		

6.3. Authority to be Notified.....	26	11.1. Types of Violations	35	12.1. Grounds.....	40
6.4. Who Has to Notify.....	26	11.2. Liability and Sanctions for Violations.....	35	12.2. Who Can Initiate and Who Conducts.....	40
6.5. Time of Notification	26	11.2.1. Liability	36	12.3. Stages of Investigation and Timeframe	41
6.6. Moment of Violation	28	11.2.2. Types of Sanctions	36	12.3.1. Gathering Evidence	41
VII. General Timeframe and Process.....	29	11.3. The Procedure and Specifics of Fine Assessment....	36	12.3.2. Preparing Preliminary Conclusions regarding the Case	41
7.1. Timeframe for Submitting Notification	29	11.3.1. Economic Concentration Committed without prior Approval.....	36	12.3.3. Hearing the Case by an Authorized Agency	41
7.2. Notification Acceptance – Timeframe.....	29	11.3.2. Determination of a Fine for the Members of a Group.....	36	12.3.4. Making a Decision regarding the Case.....	41
7.3. Case on the Concentration	29	11.3.3. Members of a Group.....	36	12.3.5. Complying with the Decision.....	42
7.4. Final Decision – Timeframe, Cases of the Suspension of the Consideration Application/Case.....	30	11.4. Procedure for Imposing Compulsory Demerger Sanctions	37	12.3.6. Appealing the Case.....	42
VIII. Filling Fee	31	11.5. Administrative Liability of the Officers of the Partici- pant of the Concentration	38	XIII. Confidentiality	43
IX. Available Guidance for the Notification Process ..	31	11.6. Additional Liability Measures	38	13.1. Publicity	43
X. Grounds for Concentration approval	32	11.6.1. Invalidation of Completed Transaction.....	38	13.2. Procedural Stage	43
10.1. Main Criteria for the AMCU’s Assessment	33	11.6.2. Compensation of Incurred Damages	38	13.3. Automatic Confidentiality	43
10.1.1. Monopolization	33	11.7. Summary Table with the Fines Amounts	39	13.4. Confidentiality on Request.....	43
10.1.2. Substantial Restraint of Competition	33	XII. Investigation	40		
XI. Penalties for Non-Compliance.....	35				

Introduction

The Ukrainian antimonopoly law, while not fully in line with the best international standards, is currently undergoing important stages of development, and some serious efforts are made in order to modernize it, which is mainly related to the terms and conditions of the signed EU-Ukraine Association Agreement. There are some expectations that following harmonization of the Ukrainian antimonopoly legislation, in particular of the regulatory aspects of M&A transaction control, with the EU rules, along with the ongoing reforms in the economic sector, Ukraine will experience significant increase in the amount of M&A transactions, as well as general business activity.

The author of this publication, Mr. Andriy Navrotskiy, shares his knowledge of the peculiarities of the Ukrainian antimonopoly law, which he acquired during being a civil servant at the Antimonopoly Committee of Ukraine for a number of years, wherein he was responsible, *inter alia*, for drafting the antimonopoly legislative acts, including in the area of M&A. In addition, this brochure contains some practical observations of the author, which he often uses in his professional practice when advising foreign and local enterprises on peculiarities of the antimonopoly legislation and respective procedures.

This brochure is intended for use by the legal professionals, counsels, legal entities, businessmen and specialists in the antimonopoly law, who often deal with or are interested in M&A transactions on the Ukrainian market. It includes some comprehensive information about various aspects of M&A regulatory control in Ukraine, such as legislative framework, thresholds for antimonopoly control, liability for breach of the antimonopoly legislation, etc.

Information in this brochure does not constitute legal advice or consultation in any form, but provides some general overview of the applicable legislative framework and analysis of typical M&A transaction structures. Each M&A transaction shall be treated separately in order to determine any applicable regulations and thresholds. If any information, data or issues covered in this brochure require additional clarification, please do not hesitate to contact lawyers at DLF attorneys-at-law, who will be glad to provide you with specific and detailed advice regarding your case.

September 2016

Andriy Navrotskiy, LL.M.
(University of Augsburg)
Partner

Andrii Zharikov, LL.M.
(University of Essex)
Associate

I. Merger Control in Ukraine

Mergers and acquisitions which meet certain criteria, such as particular thresholds, size and type of the transaction, etc., are referred to as economic concentration under the Ukrainian law, and are subject to merger control and regulation in Ukraine. The relevant regulatory authority is the Antimonopoly Committee of Ukraine (the AMCU). Notification of certain mergers can also be submitted to the Cabinet of Ministers of Ukraine.

The Ukrainian legal system of economic concentration control includes the following integral components:

- 1 Assessment of applicability of economic concentration definition to a particular business transaction between business entities;
- 2 Identification of all economic concentration participants;
- 3 Evaluation of all financial parameters of the economic concentration participants;
- 4 Assessment of necessity of advance authorization from the AMCU and its authorities for implementation of the economic concentration;
- 5 Authorization procedure (notification about the concentration and application for authorization, application review, decision-making process, appeal of the AMCU's decision, judicial appeal);
- 6 Sanctions and penalties for violation of the antimonopoly law in the sphere of economic concentration control;
- 7 Review of violations of the antimonopoly law in the sphere of economic concentration control.



II. Basic Legal Framework

2.1. Definition of the Economic Concentration

Article 22 of the Law of Ukraine “On protection of economic competition” (the Competition Law) provides for the following types of concentration:

- 1 Consolidation of business entities or joining of one enterprise with another (merger);
- 2 Acquisition, directly or through other entities, of control by one or several business entities over another business entity or entities, or parts thereof, *inter alia*, by means of:
 - a. direct or indirect acquisition or any other acquirement of ownership to assets in the form of an integral complex of assets or a structural subdivision of a business entity; acquirement of the right to use assets in the form of an integral complex of assets or a structural subdivision of a business entity via management, lease, rent, concession or any other means; any other type of acquirement of the right to use assets of integral complex of assets or a structural subdivision of a business entity, including acquisition of assets of a business entity undergoing liquidation;
 - b. appointment or election of a chairman, deputy-chairman of the supervisory board, management board, supervisory or executive body of a business entity, if the proposed candidate already occupies one or several similar positions in other business entities, or allotment of over 50 percent of the total control on the supervisory board, management board, other supervisory or executive bodies of two or more business entities to the same people;
- 3 Establishment of a business entity by two or more business entities, which will engage in commercial activities independently over a prolonged period of time if such establishment does not encourage the coordination of competition among the establishing business entities or between the business entities and the newly established business entities (Joint Venture);
- 4 Any other direct or indirect purchase or acquisition of, or acquirement of control over shares, which ensure the acquirement of or over 25 percent, and of or over 50 percent of the votes in the highest managing body of a particular business entity (Stock Purchase).

2.2. Types of Economic Concentration

2.2.1. Consolidation and Merger

2.2.1.1. Consolidation

Business transactions defined as mergers and acquisitions are the first to fall under the economic concentration definition.

The Competition Law does not contain any particular descriptions of features of commercial transactions, which are defined as mergers and acquisitions in accordance with the international standards. Therefore, these terms and definitions are not in any way different from the common definitions of the relevant business transactions. Thus, a common definition of these terms is sufficient for the purposes of this manual.

The most common definition of a consolidation is the following:

Consolidation is a contractual and statutory process by which two or more entities join to become a completely new entity (the successor entity), the original successor entity acquires all of the assets and liabilities of the original (now defunct) entities.

2.2.1.2. Merger

The most common definition of a merger is the following:

Merger is a contractual and statutory process, by

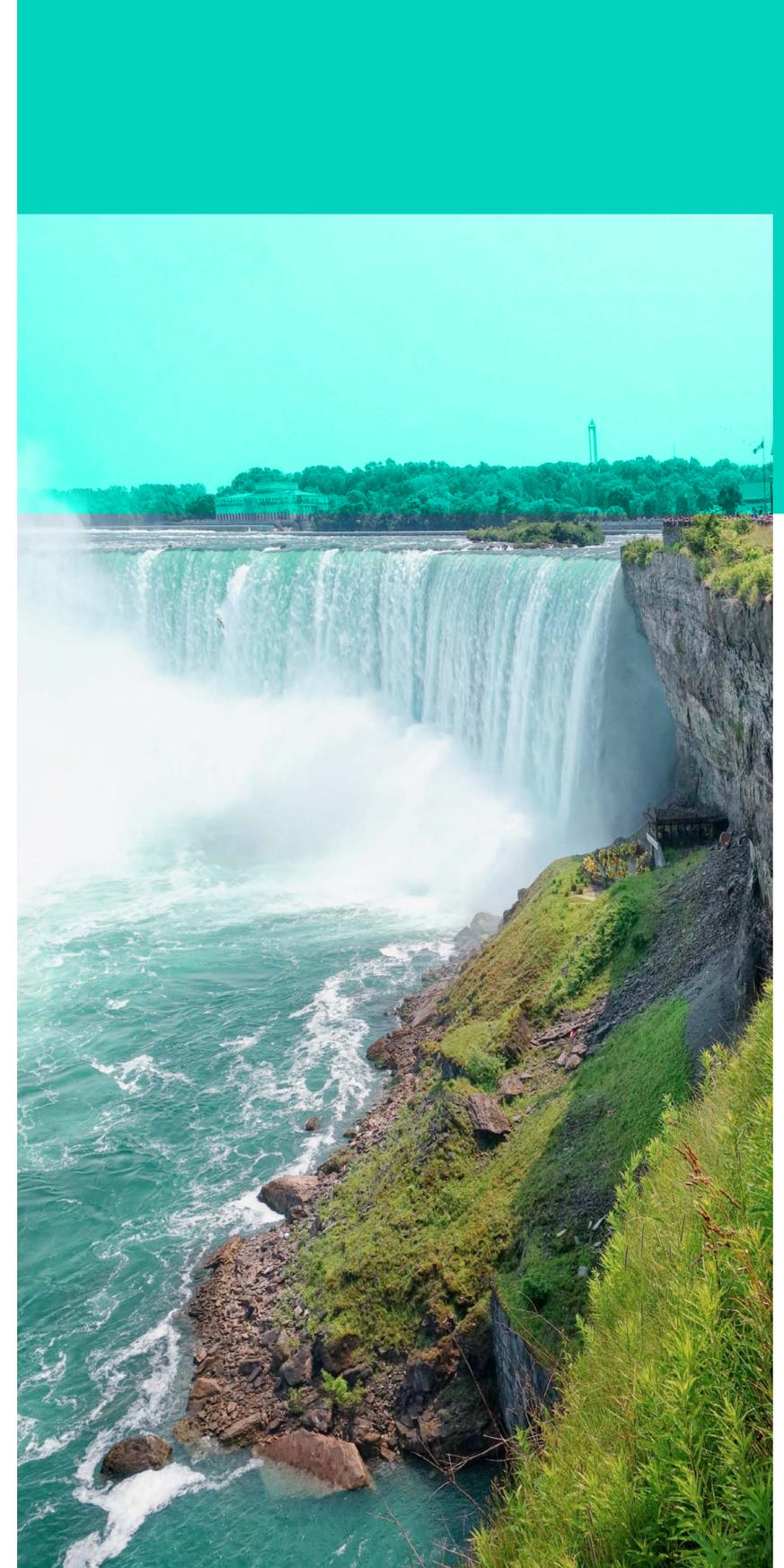
which one entity (the surviving entity) acquires all of the assets and liabilities of another entity (the merged corporation), causing the merged entity to become defunct.

2.2.2. Acquisition of Control over a Business Entity

Consolidation and merger in any event relate to acquisition of control by one business entity over the other. Thus, in order to comprehensively understand the process of acquisition of control over a business entity, which the antimonopoly law classifies as the economic concentration, first it is necessary to review the subsection “Control Relations”, which is aimed at further clarification of this issue.

2.2.2.1. Control Relations

Part 2 of Article 22 of the Competition Law specifies that acquisition of control over a business entity by one or more business entities shall be deemed an economic concentration. Furthermore, the Competition Law lists the cases of acquisition of control. For instance, control can be acquired through purchase of assets of another company, appointment of the same persons to governing bodies of two or more companies, etc. At same time, it should be noted that this Article (as well as the relevant regulation pursuant to the Competition Law) does not contain an exhaustive list of all possible cases of acquisition of control. This is due to the fact that accounting for all possible scenarios of acquisition of control of one company over another is a very difficult task as well as unfeasible because of constant changes in economic processes.



Therefore, the law classifies as economic concentration only those processes the main goal of which is acquisition of control over another company.

2.2.2.2. Control in the narrow sense

Control in the narrow sense of the word is “substantial influence” of one company over the business processes and activity of another company as a whole. Furthermore, the definition of “control” will be explained in greater detail in the next chapter.

2.2.2.3. Control in the broad sense

Control, or, defined more broadly, exercise of control by one enterprise over activity of another, so that the controlling enterprise can affect competition in the market where the controlled enterprise does business, is the key factor in assessing the impact of economic concentration on commodity markets.

Consideration of importance of the control factor for conducting a complex evaluation of economic concentration, its parameters, components and principle definitions were established as soon as the Competition Law was enacted.

Therefore, according the Article 1 of the Competition Law:

Control is the determinative direct or indirect impact of one or more related legal entities or individuals upon commercial activity of a business entity or its part, specifically due to the following:

- full or partial asset ownership or management right;

- any right resulting in ability to determinatively impact composition, membership, voting results and decisions of the business entity's governing body;
- entering into contractual agreements, which determine conditions for conducting commercial activity, establish mandatory directives or perform functions reserved for the business entity's governing body;
- substituting positions of the director or vice-director of the supervisory committee, management or any other managerial or executorial body of the business entity with a person already holding one or more of the above-mentioned positions in other business entities;
- substituting of over half of the positions of the business entity's supervisory committee or management or executorial body members with persons already holding one or more of the above-mentioned positions in other business entities.

Related entities are legal entities or individuals engaged in joint or coordinated business activity, including joint or coordinated influence upon commercial activity of a business entity. Specifically, married persons, parents, children and siblings are considered to be related individuals;

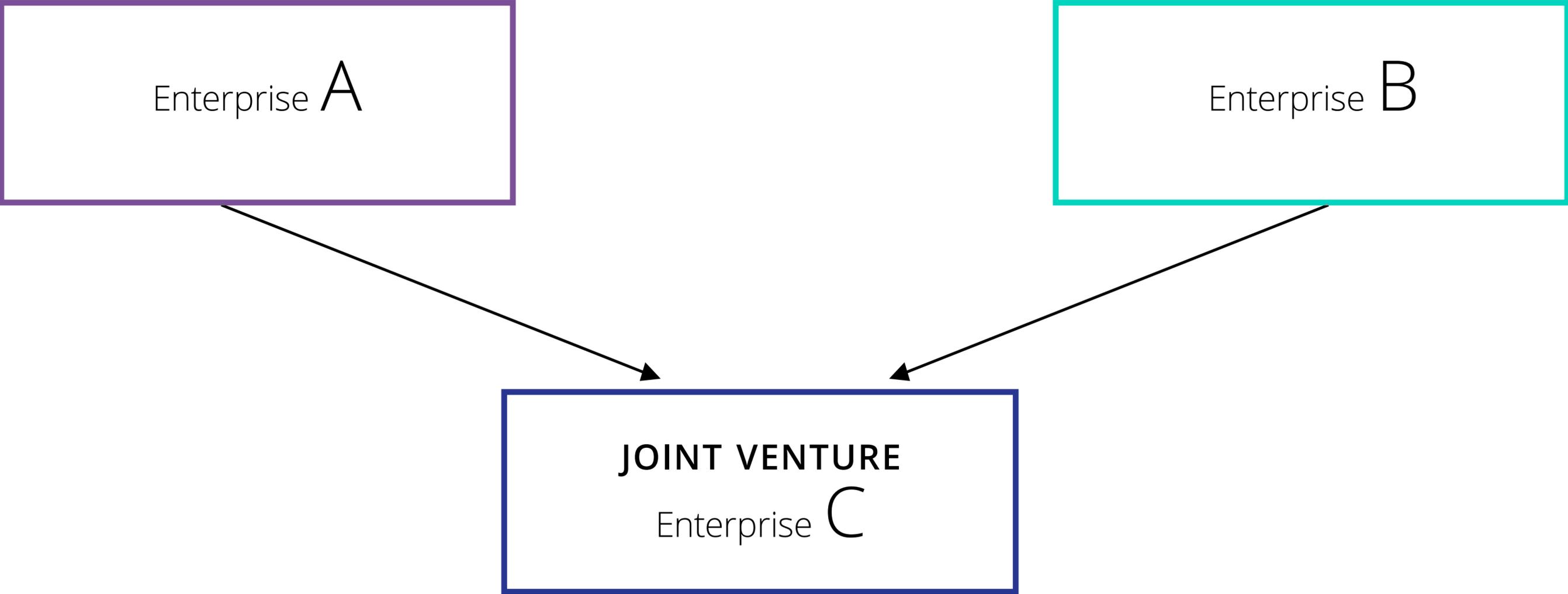
The following example will help illustrate importance of legal establishment of definition of control:



EXAMPLE

Two enterprises (A and B) have decided to establish an enterprise C within the Ukrainian territory. Financial parameters of A and B exceed the threshold established by Article 24 of the Competition Law. Article 22 of the Competition Law classifies establishment of enterprise C as an economic concentration.

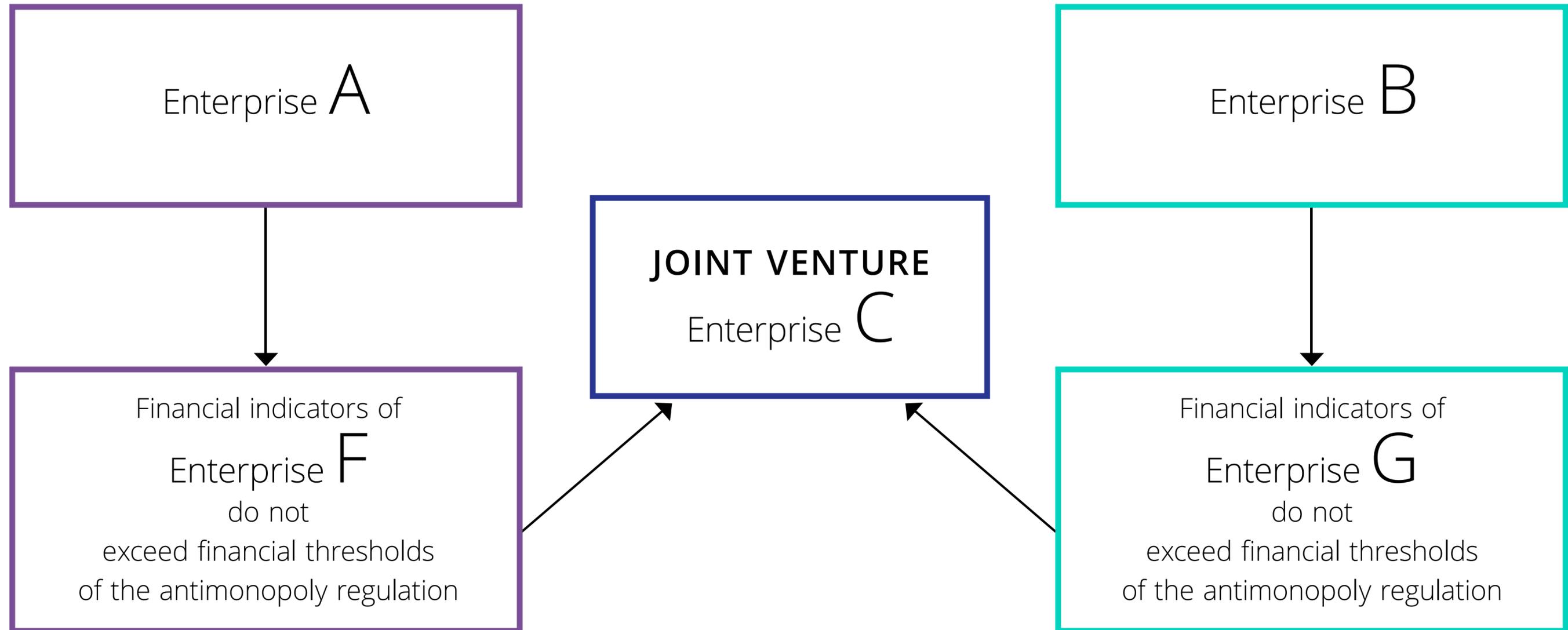
Financial indicators of both enterprises exceed financial thresholds of the antimonopoly regulation



Considering that the threshold is exceeded, this concentration requires advance authorization of the AMCU.

In this situation, one of the possible options for avoiding the obligation of obtaining the AMCU's authorization can be exercised as follows:

Financial indicators of both enterprises exceed financial thresholds of the antimonopoly regulation



Enterprise B establishes a 100% subsidiary F, while enterprise A establishes a 100% subsidiary G. Financial parameters of enterprises F and G do not exceed the required threshold. Two subsidiaries create enterprise C as planned and the established enterprise does not directly belong to A and B (although, in fact, it belongs to A and B). Without using the “control” factor in this case, obtaining of the AMCU authorization will not be mandatory.

However, if the control factor is used, the AMCU calculates the threshold for the concentration participants (enterprises F and G in the example above) together with taking into account the control relationship, i.e. legal or commercial relations between member enterprises with other enterprises (enterprises A and B in the example above). Therefore, financial parameters of enterprises A and G, concentration participants on one side, and B and F, on the other side, will be calculated together, and if the threshold is exceeded, the concentration will require the AMCU's advance authorization.

2.2.2.4. Types of Control

Based on the antimonopoly law analysis, the following types of control can be highlighted:

- corporate control, direct or indirect (via agent) ownership of shares of the entity being controlled;
- asset control, ownership of assets (or of the substantial portion thereof) of the entity being controlled;
- control over business activity through the right to establish conditions defining activity of an enterprise, and/or through issuing mandatory

directives to the governing bodies, and/or also through actual exercise of the governing body's authority;

- control through appointing members of the main governing body of the enterprise (supervisory board, director) or substitution of similar positions within the governing bodies of different enterprises;
- control through related entities, legal entities or individuals, which engage in joint or coordinated business activity, and, additionally, individuals, which are members of the same family, close relatives¹.

Every time the volume of sales, the value of assets or, generally, the commercial and financial power of an enterprise is assessed, it is necessary to evaluate the entire group, which the business entity belongs to, and is linked to through control relations. Subpart 3 of the Article 1 of the Competition Law also contains a concept of the “connected entities”, or entities “engaged in joint or coordinated business activity, including joint or coordinated influence upon commercial activity of a business entity”. In evaluating control relations, it is necessary to take into account business entities that are not members of the group, but together with one or more of its members (for example within a joint venture) conduct joint or coordinated

¹ For example, each spouse owns different companies active on the same or associated market. As a result, in certain circumstances, it is possible to presume a coordinated competitive market activity of the enterprises, which, in essence, due to their factual activity can act as joint enterprises.

directed business activity, impacting members of the group (for example, within a partnership agreement). The law directly defines spouses, parents, children and siblings as related persons, and, therefore, it is always necessary to take into account the size of their market share, volume of their sales, and value of the assets of the business entities they control directly or indirectly, regardless of whether they belong to the market operators that are the sole business entity. The “related persons” concept is limited to active control. However, this concept of related persons does not include business entities engaged in joint control or coordinated market influence.

Thus, the key element of the definition of “control” is presence of a deciding influence of one business entity over the others. This deciding influence provides the possibility of controlling competitive behavior of a business entity in the market.

For instance, deciding influence over a company can be acquired even by a bank as a result of extending to a company a loan, the payment of which is insured by providing the bank with, *inter alia*, rights to control financial reporting, to ban assignment of certain assets, purchases and sales, to prevent the company from seeking other loans, etc.

2.2.2.5. Unilateral and Joint Control

The law (without any direct specification) distinguishes between unilateral and joint (by no less than two related persons) control. Both types of control entail legal consequences established by the law.

Joint control occurs when none of the business entity's founders or shareholders can unilaterally make decisions of the governing or supervisory body of the business entity, but each of them has the right to prevent those bodies from making certain decisions. Specifically, joint control can happen when:

- two founders (shareholders) of the business entity have 50% of votes each in the highest governing body of the business entity (joint venture);
- decision of the business entity's highest governing body has to be authorized by another body or founder, vested with special powers according to the company's Charter. Specifically, this may be a veto right for decision-making related to appointing members of the governing body, establishing the company budget, confirming decisions regarding financial investment activity of the business entity, introduction of new products for manufacture or use of new technologies, etc.;
- founders (shareholders) own non-substantial shares, and neither one of them has the necessary number of votes to unilaterally block decisions of the highest governing bodies of the business entity, and, therefore, they have to act together in order to block or to attain majority of votes in the highest governing body of the controlled business entity. For example, establishing of holding structures, which transfer relevant corporate rights, entering into agreements between shareholders about transfer of the voting rights to the third parties for management of shares, and setting up of voting to support joint long-term interests.

Joint control can occur if one of the founders (shareholders) of the business entity have not chartered, but situational veto and can block decisions of the governing bodies of the controlled business entity through actual inability of its shareholders to reach the quorum for legality of the governing bodies' meetings without participation by such shareholder required by the establishing documents.

2.2.2.6. Business Entity

According to subpart 11 of Article 1 of the Competition Law, engaging in activity involving manufacturing, selling or purchasing of goods and/or controlling a business entity are equal grounds for qualifying as an entity or controlling individual of a business entity for the purposes of the Competition Law.

A business entity can be subject to full or partial control. Controlling the company assets or a part thereof can be considered a concentration only when these assets ensure a separate function of manufacture (separate type of activity), and the market volume of sales can be calculated with substantial certainty. The competition law of the EU, for example, generally allows even for trademarks and licenses to conform to that law². The Ukrainian law adheres to a stricter position, because, in order to become an object of control, part of the business entity must be an integral asset complex or separate structural subdivision.

Business entity can be controlled indirectly or directly by a person, who has a right of control or a determinative influence upon commercial activity of such

² See § 11 Notification of the EU Committee about concentration definition, OJEK 1998 № C 66, p. 5

business entity generally, or, for example, separately upon manufacturing, sales or purchases made by that business entity. Legal consequences are the same in both instances. This flexible formula for defining control allows an individual or a legal entity to use another individual or legal entity for acquisition of the majority shareholding of the company and grant the other entity relevant corporate rights. This formula also ensures that large vertically integrated groups fall under the definition of unified control.

2.2.2.7. Control Implementation

There are different types of control implementation. As defined in subpart 3 of Article 1, above all control entails certain rights which ensure their owner's ability to have determinative impact on commercial activity of a business entity, specifically: the right of ownership or possession to all company assets or the substantial part thereof, as well as the right to ensure the determinative influence upon membership, voting results and decisions of the business entity's governing body. Such rights must be confirmed in every instance. As a rule, an absolute majority of votes at the general shareholders' meeting allows to elect most of the members of the governing or supervisory body, who, in turn, can appoint management members. Such majority of votes allows for direct or indirect power over voting results and over decisions of the relevant business entity's governing body. However, the company's charter may establish a different decision-making procedure, for example, if two thirds of the persons with voting rights are present at the general meeting or, on the contrary, if the relative majority is achieved.

The law also regulates relations of actual control, which



may arise, for example, out of an agreement allowing one of the parties to make mandatory directives or function as a governing body for the other party of the agreement. Such situations of commercial dependence often arise because of agreements for long-term supply or lending from trade partners, and especially those linked by structural connections. Different actual control situations arise out of the so-called crossed directorships. Business entities have implied relations of control if the same individual holds the position of either the director or acting director of a supervisory board of directors, or another supervisory body, or a governing body of one of the entities, while simultaneously holding one or more of the above-mentioned positions at other companies. The same legal presumption applies to cases when representatives of one company simultaneously hold majority of positions on the supervisory board of directors, management, or other supervisory body, or other governing body of a business entity and the majority of positions within one or more of the above-mentioned bodies of the other business entities.

Thus, after a detailed consideration of definition of “control” and its key elements, we return to our discussion of the second type of economic concentration that is the subject of discussion of this chapter.

In section 2.2.2., there are two examples of control acquisition over business entities, which fall under the economic concentration definition³.

³ Notably, subsection 2 of Part 2 of Article 22 of the Competition Law does not contain the exhaustive list of control acquisition methods, but merely describes two most common examples thereof, which allows the AMCU to classify other methods of control acquisition over commercial entities as economic concentrations.

Thus, an acquisition of control, directly or through other entities, by one or several business entities over another business entity or entities, or parts thereof, *inter alia*, by means of:

- Asset Purchase
- Control over the Governing Board constitutes economic concentration.

2.2.2.8. Asset Purchase

Asset purchase is a direct or indirect acquisition or other acquirement of asset ownership in the form of an integral complex of assets or structural subdivision of a business entity; acquirement of the right to use assets in the form of an integral complex of assets or structural subdivision of a business entity via management, lease, rent, concession or other acquirement of the right to use assets in the form of an integral complex of assets or structural subdivision of a business entity, including acquisition of assets of a business entity undergoing liquidation;

The term “integral complex of assets” is not defined by the Competition Law itself. However, by analogy, its meaning can be inferred from other regulatory acts: a) an integral property complex is defined as the aggregate of assets essential for independent entrepreneurial activity on a permanent and regular basis, where the usage period of such assets exceeds 12 calendar months; b) an integral property complex is defined as an entity comprised of aggregate assets, which are essential for independent business activity conduct, where such activity qualifies the company as strategically significant for the economy or security of

the state, or as occupying monopolistic position on the national market; and c) an integral property complex is defined as an object, the aggregate assets of which provide for the conduct of an independent business activity on a permanent and regular basis. An integral property complex may be a structural subdivision of the company (workshop, division etc.), which may be spun-off into a separate structure and registered as an independent company. Therefore, definition “integral complex of assets” could apply to a purchase of an existing enterprise, including all its assets, liabilities and employees. However, it is also possible that any combination of assets that permits independent business activity will be considered an integral complex of assets.

2.2.2.9. Control over the Governing Board

The so-called process of establishing “cross directorship” between business entities is a second type (and second legislative example) of acquiring control over a business entity and thus engaging in economic concentration. In “cross directorship”, one entity gains ability/right to appoint its managers and/or directors to the highest governing body of another business entity or entities.

Clearly, the same officials, who directly or indirectly hold supervisory and managerial positions in two or more companies, can direct competition policy on a market by making determinative management decisions. Such decisions are usually made after considering competition policy of every participating business

entity, which allows for strengthening of the entity's position on the relevant market.

The managerial positions legally classified as related to the process of gaining control by “cross directorship” are expressly listed in the above-referenced legal statute (subsection b of Part 2, Article 22 of the Competition Law), and, therefore, it is not necessary to list them again. However, it should be noted that neither this list of the managerial positions and/or organizations, nor the actual definition of “control” are exhaustive. In order to determine that control was actually obtained through the process of “cross directorship”, every matter has to be reviewed on a case-by-case basis, and has to include assessment of the business entity's governing body structure, of its authority scope and of the decisions-making procedure by the governing body, which can directly influence the company's competition policy, etc.

2.2.3. Establishment of Joint Venture

2.2.3.1. Joint Ventures

According to Part 3 of Article 22 of the Competition Law, a concentration occurs when two or more business entities establish another business entity. In other words, establishment of a business entity by several other business entities constitutes a concentration under the Ukrainian antimonopoly law.

Even if the newly established business entity does not function autonomously after its creation (e.g. engages

in exclusive market transactions with the parent entities), the establishment of a new joint business entity will lead to a structural market change as is usually the case with acquisition of the sole control over a business entity. Therefore, as long as the criteria outlined in Part 3 of Article 22 of the Competition Law are met, establishment of a business entity by two or more other business entities constitutes a concentration regardless of the new entity's autonomy status.

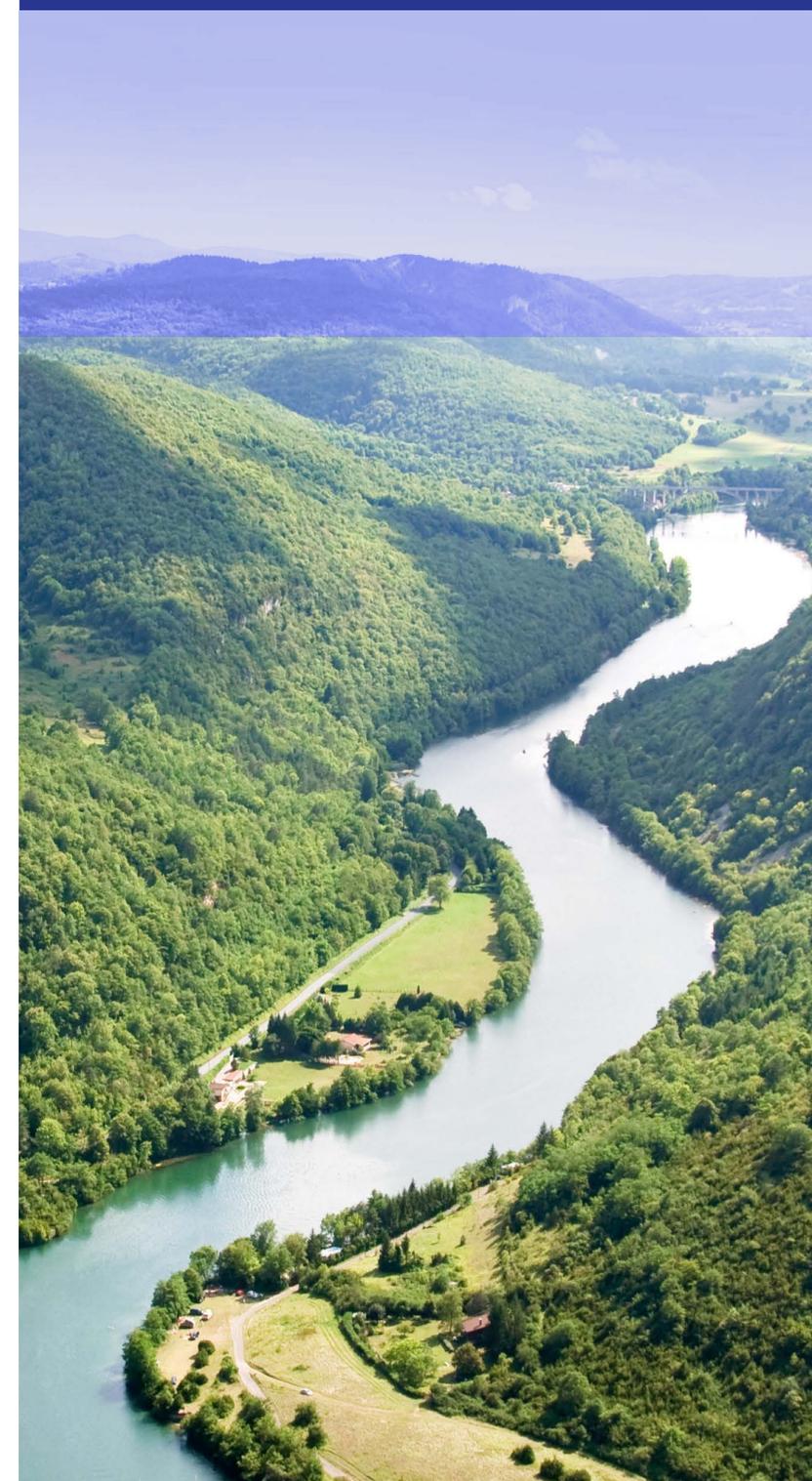
Additionally, Article 22 clarifies that establishment of a joint venture, which acts as an autonomous business entity on a long-term basis (referred to as full-function joint venture), is a concentration within the Competition Law. The autonomy factor, therefore, defines applicability of the Competition Law to a joint venture formation by business entities, regardless of whether the joint venture is created as an entirely new organization (this process is referred to as "Greenfield operation"), or whether the participating business entities contribute assets to a joint venture, which they previously owned individually. Under the circumstances, the established joint venture must meet the full-functionality criterion in order to constitute a concentration.

Even if a joint venture is in full-function as far as financial independence and operational autonomy are concerned, it may still not act independently in making and implementing its strategic decisions and planning. If decisional autonomy was required for a full-function status, a new entity established by other business entities could never be considered a full-functional joint venture, and the requirements of Article 22 would never be met. Therefore, the full-functionality criterion is met when a joint venture is operationally autonomous.

A joint venture's full function status entails operating on a market by performing functions consistent with the functions normally performed by other business entities operating on the same market. This is achieved if the venture has a managing body dedicated to its daily operations and full access to adequate tangible and intangible resources (funds, staff and other assets) necessary to sustain business activity in the area specified by the joint venture agreement on a long-term basis. The joint venture does not have to employ its personnel directly: it can obtain staffing through third parties under operational agreements or receive staff assignment from an intermediary employment agency as long as such staffing options are used in the standard business practice of the relevant industry. Temporary assignment of personnel from the parent business entities is possible only for a start-up period or if the joint venture deals with the parent entities in the same way as it does with third parties. For the latter condition to apply, the joint venture must deal with the parent companies at arm's length under normal commercial conditions and also must be free to employ its own personnel or to recruit staff via third parties.

2.2.3.2. Absence of Coordinated Activity

The second substantial characteristic for classifying a business transaction that involves establishment of a joint venture as an economic concentration is the absence of coordinated or agreed policy upon competitive market actions. The main goal of this classification is to differentiate between economic concentration through establishment of a joint venture that operates as an autonomous full-functional entity with independent competition policy arising out of coordi-



nated activity through establishment of an entity with a purpose of coordination of the competition policy either on a particular market or on associated markets of the parent entities.

Therefore, transactional assessment of a joint venture establishment should involve comprehensive evaluation of the initial intent of the establishing parties, the new entity's goals, its projected market operations and relative autonomy in creating its own business strategy.

Classifications resulting from assessment of the above-referenced factors should logically form a basis for determining the essence of the joint venture establishment. This is particularly important because obtaining authorization for an economic concentration and requesting permission for coordinated actions are based on two diametrically different procedures established by the AMCU. One of these procedures – authorization for economic concentration – is described in detail in the following chapters.

Thus, creation of a “joint venture” is an instance of economic concentration under the condition that the creation of such company does not lead to coordination of competitors' behaviour among the founders or between the founders and the company. Such stipulation is adopted to separate the definition of “economic concentration” (that in this case should only lead to creation of a new autonomous company) from definition of “coordinated action”, under which a company does not act as an independent player but only as a coordinator of interests of other companies in the market. In essence, the latter, as opposed to economic concentration, is originally prohibited.

2.2.4. Shares Purchase

The so-called acquisition of corporate control is the last type of transactions legally classified as economic concentration. Such transactions involve acquisition of enough shares to permit the new owner to attain or exceed 25% or 50% of votes in the highest governing body of the business entity.

The law preemptively defines the fixed number of votes in the highest governing body of the business entity, which must be obtained in order for the transaction to be classified as economic concentration.

The essence of this economic concentration type is gaining power to influence the business entity's vital operational decisions (e.g. budget approval, activity and progress reports, corporate strategy, appointment of officials, establishment of subsidiaries, etc.) through participation in the business entity's highest governing body, which in turn is determinative to the entity's further market operations.

In this case, the Competition Law actually defines four types of economic concentration, specifically acquisition of shares which allows:

- | | | |
|---|-----------|------|
| 1 | to reach | 25 % |
| 2 | to exceed | 25 % |
| 3 | to reach | 50 % |
| 4 | to exceed | 50 % |

of votes in the highest governing body of the relevant business entity.

Thus, the acquisition of shares that provide for 25 percent of votes constitutes one concentration, if reaching the threshold indicators is required for an approval from the AMCU. Upon further acquisition of shares providing for more than 25 percent of votes, the second concentration takes place that will also require an approval from the AMCU. Accordingly, further acquisition of 50 percent of votes and more than 50 percent of votes will entail two other types of concentration that require a preliminary approval of the AMCU.



III. Participants of the Economic Concentration

Article 23 of the Competition Law provides that the following business entities, *inter alia*, are deemed to be “participants to the concentration”:

3.1. Successors

Those business entities that acquire or have the intention to acquire control over the business entity or business entities over which the control is acquired or to be acquired;

3.2. Target Company (Assets)

Those business entities, the assets (property) and/or shares (shareholdings) of which are acquired or obtained with the right of ownership, lease, rental, concession, together with the acquiring entities;

3.3. Related Legal Persons and Individuals

Individuals and legal entities are related to the concentration participants mentioned in subsections above through a control relationship in such a way that the group of entities may be regarded as a single business entity under Article 1 of the Competition Law. The term “concentration participants” is definitive for establishing jurisdiction of matters concerning concentration regulation. The jurisdiction of the provisions found in Section V of the Competition Law is established based on the quantitative parameters specified in Article 24 of the Competition Law.

The determinative factor in establishing the jurisdiction is whether the concentration participants have reached the “threshold”, which attests to their combined economic scale, especially to their combined sales of goods or combined stock value, or their market share regardless of their combined stock value. Correct assessment of concentration participants impacts calculation of concentration agreement thresholds, scope of rights and obligations of business entities involved in the concentration agreement and the complexity of the concentration agreement analysis by the AMCU agencies.

The above-referenced method for determining the concentration participants can be tailored for particular business agreements, which may be qualified as a concentration agreement. However, the following entities may be classified as direct concentration participants:

- in case of *merger* of two or more business entities, each party to the merger agreement, which establishes a new business entity, executes the merger or acquisition or through some other activity of several business entities creates an integrated business structure (single business entity) while allowing the parent companies to remain separate legal entities, is classified as a concentration participant;
- in case of establishment of new business entities, all founders of the new legal entity or partners of the business community, such as governing companies owned by the governing company or the executive agency, are classified as direct concentration participants;

- In case of any acquisition of control, classification of the concentration participants depends on the nature and the scope of the proposed business transaction. One or more business entities acquiring sole or shared control can act as participants/purchasers. One or more subsidiaries acting as separate legal entities, internal branches of the seller (separate structural entity, etc.) or separate set of assets comprising a single business entity can act as participants/objects of purchase.

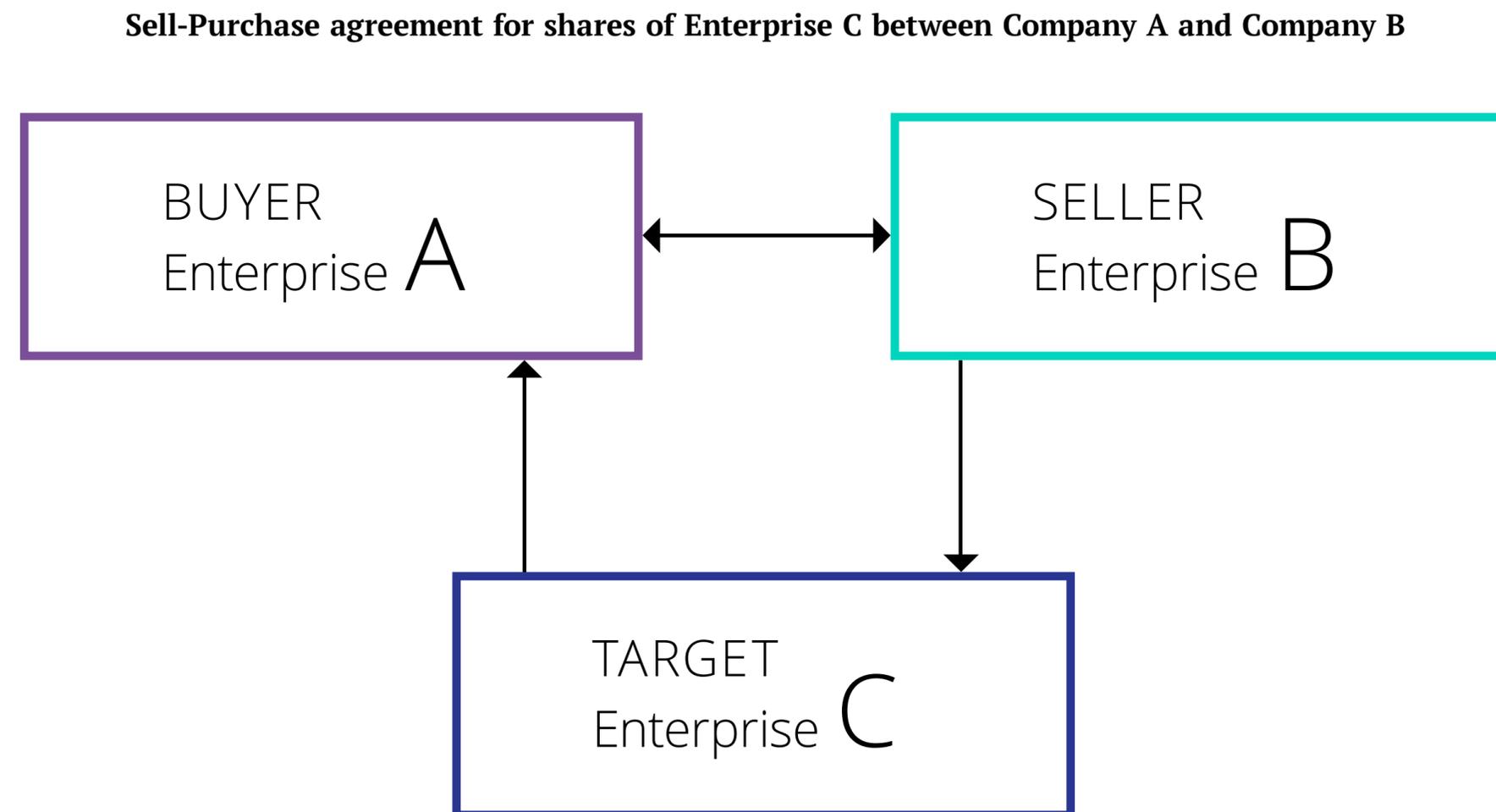
3.4. Predecessors

Predecessors are those business entities, regarding which an acquisition or merger is to be completed.

The following issue of determining the concentration participant status under the Ukrainian law should be expressly addressed.

EXAMPLE

Company A buys 100% of Company C's shares of stock from company B, which gives Company A 100% control over Company C.



Undoubtedly, Company A, as the control purchaser, and Company C, as the company subject to A's control and the vehicle for A's increased influence on the market, are the direct concentration participants in this situation.

The disputed issue is whether Company B, as the seller of the concentration participant's shares of stock, should be classified as the concentration participant or should be excluded from such classification, which would prevent inclusion of its financial parameters into the general assessment of the economic concentration scale.

3.4.1. Position of the EU Antitrust Law

According to the European Union legal point of view, in this situation Company B would not receive the status of concentration participant and its financial figures would not be included into assessment of economic concentration, which may significantly or even determinatively impact the necessity for obtaining advance concentration authorization from the European Commission.

3.4.2. Position of the Ukrainian Antitrust Law

The AMCU and its authorities do not have the same uniform approach to dealing with this issue.

Based on the prior AMCU precedent of application of Part 3 of Article 23 of the Competition Law, the AMCU classifies the stock seller - Company B in our case - as the party to concentration. Ultimately, the AMCU supports its position by citing Part 2 of Article 23 of the Competition Law, and, specifically, by citing the following provisions:

“Business entities, the assets (property) and/or shares (shareholdings) of which are acquired or obtained with the right of ownership, lease, rental, concession, together with the acquiring entities”

It shall be understood that the seller is an owner of assets (property) and/or shares under the wording “of

which are acquired or obtained” due to the opinion of the AMCU.

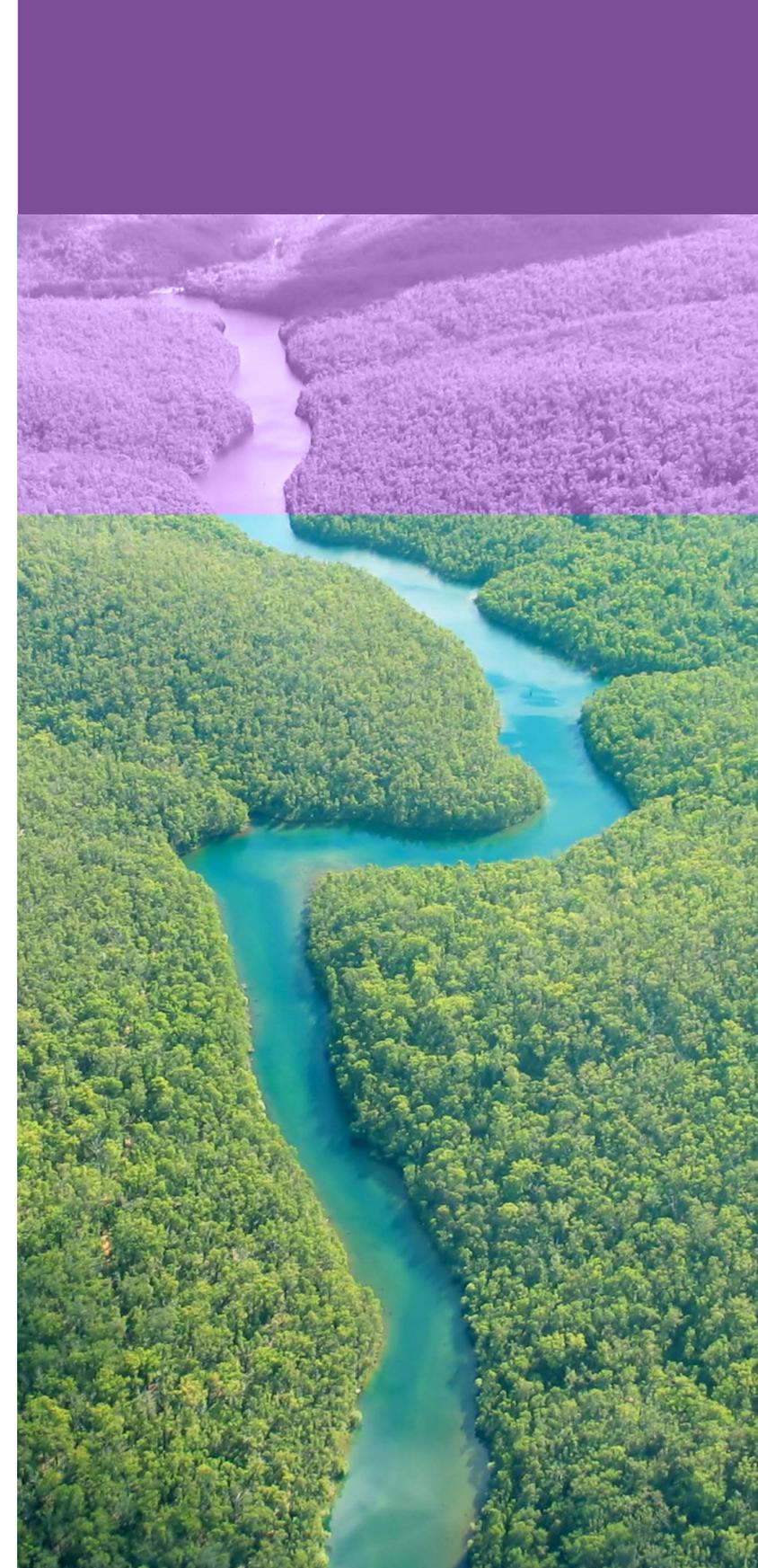
At the same time, several government officials designated as the AMCU’s Commissars tend to agree with the European Union law regarding exclusion of the seller of 100% of a company’s shares of stock from the concentration participant status.

This position is better argued from the economic concentration factors perspective, because in case of the sale of 100% business participation, the seller loses its ability to influence the market through the company being sold. Therefore, the economic concentration, or, in other words, concentration of economic market influence occurs exclusively between the purchaser of control and the entity being purchased.

At the moment, the AMCU officially follows the position pursuant to which the seller is regarded as a participant to economic concentration. The financial parameters of the seller are included for the general assessment of thresholds for determination of the economic concentration.

However, pursuant to EU-Ukraine Association Agreement, Ukraine accepted the obligation, *inter alia*, to harmonize its antimonopoly legislation with the basic principles of EU antimonopoly regulation, including in relation to exclusion of the seller’s company from economic concentration participants.

Thus, in the nearest time we expect relevant changes to be introduced in the Ukrainian antimonopoly legislation.



IV. Thresholds

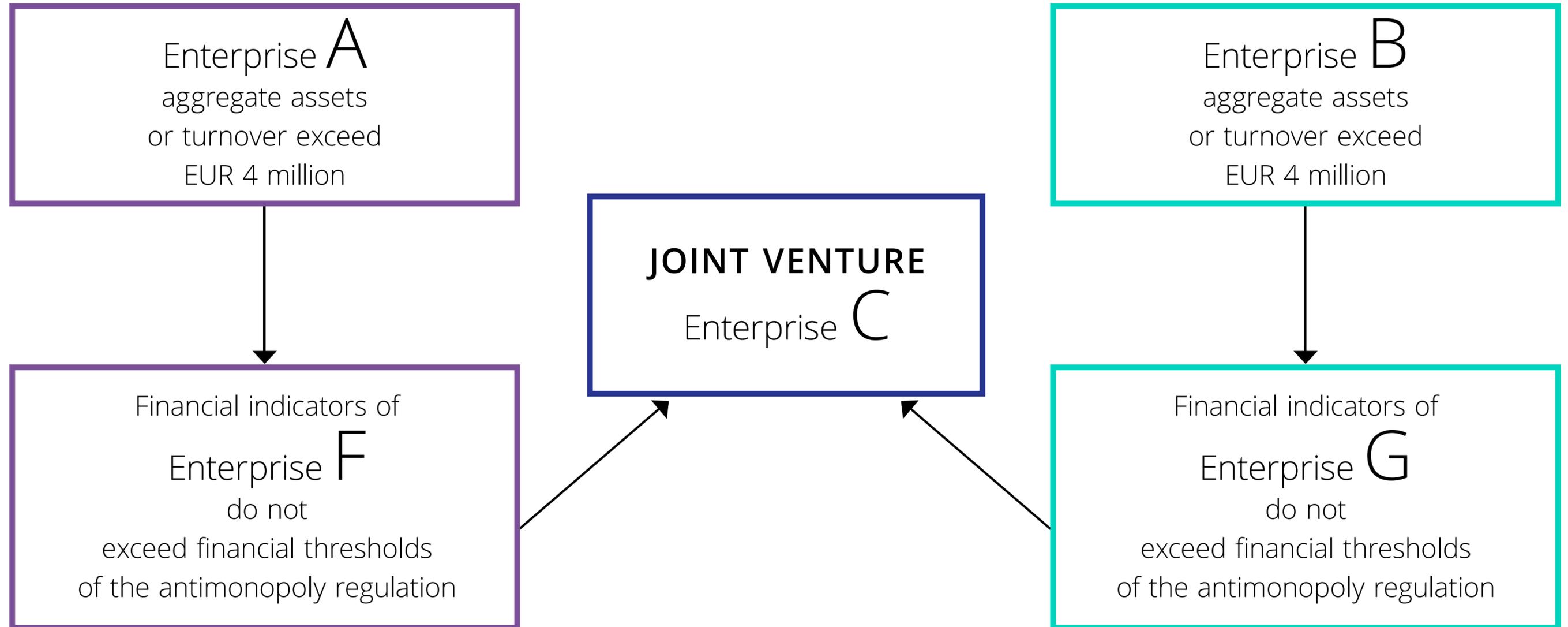
The antimonopoly legislation of Ukraine considers the above-referenced events to be economic concentrations capable of having an impact on the competition. Economic concentrations have to be approved in advance by the AMCU if the following quantitative thresholds, set out in Article 24 of the Competition Law, are met:

assets or the aggregate value of the participants' sales turnover, taking into account relations of control, exceeds EUR 30 million for the preceding financial year (1); and the aggregate assets or turnover, taking into account relations of control, of at least two participants exceeds EUR 4 million (2)

1) where the aggregate book value of the participants'



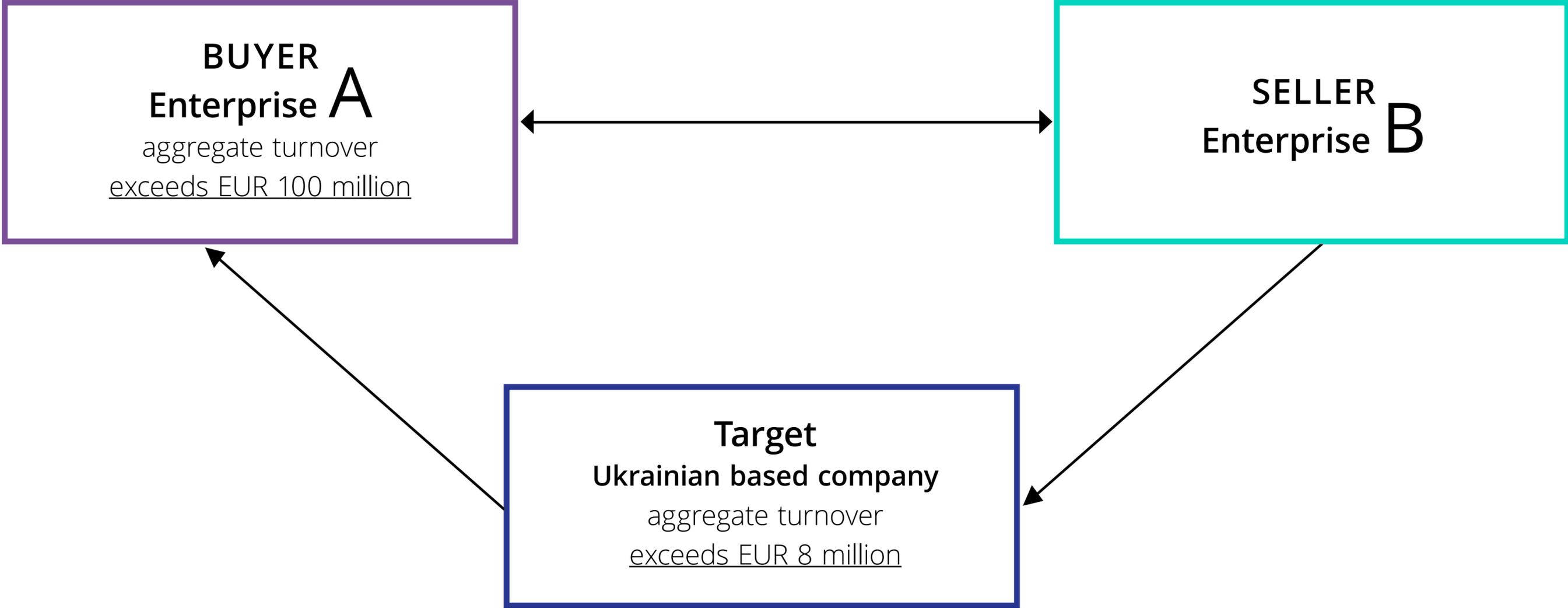
Financial indicators (assets or sales turnover) of Enterprise A (Company A + Company F) together with Enterprise B (Company B + Company G) exceed EUR 30 million



or
II) at least one of the participants had Ukrainian sales turnover, taking into account relations of control, exceeding EUR 8 million for the preceding financial year

(1); and where the aggregate sales turnover of at least one another participant, taking into account relations of control, exceeds EUR 100 million for the preceding financial year (in Ukraine or/and worldwide) (2).

Financial indicators of both enterprises exceed financial thresholds of the antimonopoly regulation



Therefore, the Ukrainian law is based on one core criterion for assessment of potential concentration impact on commodity: potential business significance of the concentration participants evaluated through parameters of their financial activity, namely through evaluation of sales turnover or evaluation of overall assets value.

Besides determining a concentration participant's gross volume of sales, the antimonopoly law of Ukraine requires assessment of overall assets value of each concentration participant for the purposes of the economic potential evaluation.

Additionally, concentration assessment involves evaluation of only one of the mentioned criteria, i.e. either the participant's gross volume of sales of goods or services or its overall assets value. For the purposes of concentration assessment, the greater of the two indicators is used.

Assessment of the concentration of the participant's overall assets value is based on certain peculiarities of the Ukrainian economy and on specifics of conducting an inventory of business entities' commercial activity. This criterion is ultimately utilized in order to prevent a company from bypassing the law through implementing illicit accounting and bookkeeping practices and deflating the sales volume numbers for goods or services while directly or indirectly (through dependent companies) exercising ownership and control over the substantial portion of the company's assets. In concentration evaluation, the sales volume (assets value) parameters are assessed based on their status at the end of the financial year preceding the concentration.

Furthermore, the antimonopoly legislation does not specify that assets and sales volumes are limited to Ukraine and, therefore, this criterion is rather construed broadly with the AMCU looking at all sales worldwide, not only particular goods in a specific market⁴.

Special emphasis should be attributed to the fact that calculation of the financial parameters of a concentration participant includes evaluating its control relationship with other business entities. In other words, financial parameters of the concentration participant are supplemented by financial parameters (profit or assets) of the associated business entities⁵.

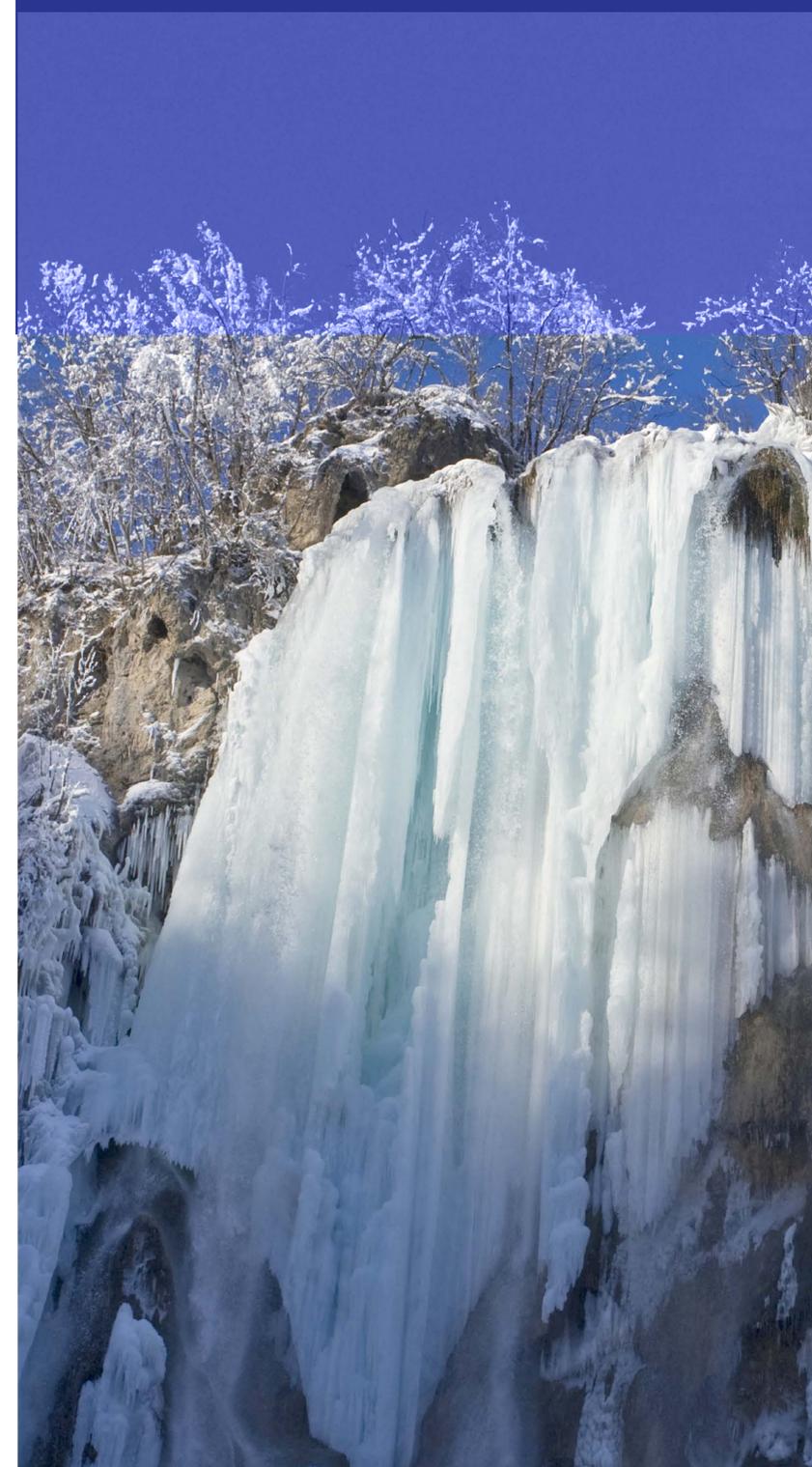
⁴ It should be further noted that the gross sales volume is calculated by subtracting the following sums from the profit amount:

- VAT amount, assize fee, other tax duties and fees arising from output for the last fiscal year before application submission.
- Amount received from sales and distribution of goods among one group of business entities connected through a control relationship, if accounting of such amounts is performed.

⁵ In calculating financial parameters of commercial banks and insurance agencies the following specifics are considered:

- if the concentration participants are commercial banks, one tenth of their assets value is used for calculating their sales volume and assets value;
- if the concentration participants are insurance companies, the sum of their net assets is used for calculating their sales volume – sum of profits from insurance activity, as defined under the Ukrainian insurance activity law.

At the same time, the procedure for calculating thresholds (for example, the list of supporting documents), and its specifics relative to separate categories of business entities is established directly by the AMCU.



V. Control and Enforcement Organizations

5.1. Description

The AMCU is the state authority with special status focused on providing state protection to competition in the field of entrepreneurial activity.

The main features of the special status of the AMCU, its tasks, authority and role in the competition policy formation are determined by the Law of Ukraine "On the Status of the Antimonopoly Committee of Ukraine" and other legislative acts.

5.2. Authority

The AMCU acts pursuant to the economic competition protection legislation such as the Laws of Ukraine "On the Antimonopoly Committee of Ukraine", "On protection against unfair competition" and the Competition Law.

The key aim of the AMCU is participation in shaping, applying and enforcing the Ukrainian competition policy through the following means:

- control over adherence to the economic competition protection legislation relative to prevention, investigation and termination of economic competition protection violations;
- control over mergers and other attempts of acquisition of control over business entities;
- control of price-setting policies (tariffs) for goods of natural monopolies;

- support and development of fair competition etc.

Decisions of the AMCU, which is the superior collective authority in the government system of the anti-monopoly organizations of Ukraine, are to be passed at the meetings of its members by the simple majority of votes.

Local offices of the AMCU are created in every region of Ukraine, and in the cities of Kyiv and Sevastopol. The above-mentioned offices are legal entities, which carry out the AMCU's tasks on the regional level.

The AMCU and its corresponding local offices are entitled to create permanent and temporary administrative boards of the AMCU and administrative boards of the local offices of the AMCU for review of cases, which fall within the AMCU's authority.

Activities of the AMCU are supervised by the President of Ukraine. The AMCU is also accountable to the Parliament of Ukraine. The President and the Parliament of Ukraine together designate and dismiss the Chairman of the AMCU. First deputies and deputies of the Chairman of the AMCU are designated and dismissed by the President of Ukraine upon the proposal from the Prime Minister of Ukraine. Such proposal is based on the proposal from the Chairman of the AMCU.



5.3. Investigative Initiative and Enforcement Capability

The AMCU has the authority to make decisions concerning abatement of the competition legislation violations, which are obligatory for enterprises and state authorities; to approve or prevent mergers in the market; to impose fines or apply other sanctions with respect to the entities violating the fair competition laws.

The AMCU, apart from being the authority, which penalizes violators of the competition laws, also poses itself as a partner for entrepreneurs, who follow fair trade practices, and an aid for those people, who suffer from the arbitrary actions of monopolists and require assistance.

In the area of issues of economic concentration, the AMCU has an internal system of distribution of responsibility. The decision regarding approval or prohibition of economic concentration is in the competence of either the AMCU as a collective body or the administrative committee of the AMCU, which consists of several governmental officials.

The competence of either body regarding a particular case is determined on a case-by-case basis and is not strictly regulated by the law.

VI. Notification

6.1. Mandatory/Voluntary Notification

Economic concentration, which meets the financial thresholds of the concentration participants described above, shall submit a notification/application for approval to the AMCU. Until the concentration has been authorized, concentration participants shall abstain from performing any irreversible actions, which may result in restriction of competition and impossibility of restoring the original state of affairs.

In other words, the participants of the concentration must suspend the concentration until the approval of the concentration is granted.

6.2. Notification Type, Format and Procedure

Approval for concentration is obtained by way of submission to the AMCU of a set of documents containing information about economic concentration, its participants and their financial and economic indicators, evaluation of possible economic consequences for the relevant markets and Ukrainian economy.

6.3. Authority to be Notified

Application for approval of the economic concentration shall be filed with the AMCU. The procedure involves submission of a completed application and supporting documents in the proper form.

As previously discussed, the decision concerning approval of economic concentration can be passed either by the AMCU or by its administrative committees.

The laws of Ukraine do not provide a strict distinction of competence between the AMCU and its administrative committees; however, decision of both has equal legal power.

As a rule, administrative committees of the AMCU consider applications regarding approval of economic concentration in cases wherein under some circumstances no quorum is reached for AMCU's session, i.e. some of the state officials are absent.

In addition, administrative committees also consider applications, if due to the large amount of applications for economic concentrations the AMCU is not capable to consider such matters within the prescribed terms.

6.4. Who Has to Notify

The notification can be filed either jointly by the participants or by the successor.

6.5. Time of Notification

Article 50 of the Competition Law provides for the list of activities constituting violation of the competition laws of Ukraine. Subpart 12 of Article 50 of the Competition Law considers economic concentrations committed without obtaining of the AMCU approval as a violation of the competition legislation.

However, the exact determination of the moment when violation of the antimonopoly law occurred is essential for the AMCU in order to apply its sanctions to participants of the concentration. Notably, the competition protection law does not contain any legal parameters, which could help to determine the exact moment when a violation, such as economic concentration completed without the advance AMCU approval, occurred.

This issue may be further illustrated as follows:

EXAMPLE

Parties to an agreement on the purchase and sale of 51% of shares of a Public Joint Stock Company executed a written contract wherein Party A is acquiring ownership of 51% of Party C's ordinary shares, while Party B is selling the above-referenced shares for 1 ton of gold due immediately upon execution of the contract. Does the above-described concentration, where 51% of ordinary shares are acquired without prior approval from the AMCU, violate the economic concentration regulation, if the parties to concentration meet and/or exceed the applicable legal threshold?

Obviously, the entity purchasing the 51% of ordinary shares acquires control as it gains ability to make the majority of decisions during the meetings of the highest governing body of the Joint Stock Company, i.e. the General Meeting of the Shareholders. The entity gains the decision-making power of this magnitude, as well as ability to participate in the general meeting of shareholders and other rights associated with the transferred shares at the moment of purchase of the other company's shares.

Analysis of the laws governing acquisition and exercise of share ownership rights provides that certain rights, such as management and receipt of profit, derived from ownership of ordinary shares, may be exercised as soon the appropriate changes are made to the registry of shareholders, while the ownership rights for stock not issued in paper format are vested at the moment of transfer of such stock to the purchaser's account.

Therefore, the legislation separates the moment of transfer of ownership rights to simple shares from the moment of acquisition of the relevant governing rights and the moment of execution of the purchase agreement regarding ownership rights transfer. In other words, when a party enters into a purchase agreement and pays the purchase price, it does not actually acquire the shareholding governing and management rights to participate until appropriate registration and change of ownership information in the Registry of shares (shareholders). As a result, the shareholder cannot influence market competition by directing (or participating in regulation of) activities of a market competitor until the stock registration is completed.

The main principles of the directive "Statement on Concentration" issued by the AMCU further confirm that the essential criterion for determining the moment of competition protection violation is the moment of acquisition of the actual control over a company.

This Subsection 6.2 of the directive establishes that violation of the economic protection law through engaging in concentration without advance approval of the AMCU or its agency is effective, unless otherwise specified by the law or otherwise follows from the entity's actions, when:

- *the business entity is created when one or more entities acquire control over another entity or entities or their parts – at the moment of control acquisition;*
- *acquisition of simple shares of stock in paper format - at the moment of the ownership change entry to the registry of shareholders.*

Therefore, the above-referenced question may be answered as follows:

The concentration resulting from execution of the purchase contract and payment of the purchase price for the sale and purchase of simple shares of stock without prior authorization from the AMCU cannot be considered a violation of the competition law until the purchaser of the stock acquires the actual governing right (right to participate in management), which appears no earlier than the appropriate entry is made in the Register of Shareholders due to the transfer of shares of stock.

6.6. Moment of Violation

Based on the above-described example and on the analysis of the following "Statement on Concentration" guidelines it can be concluded that:

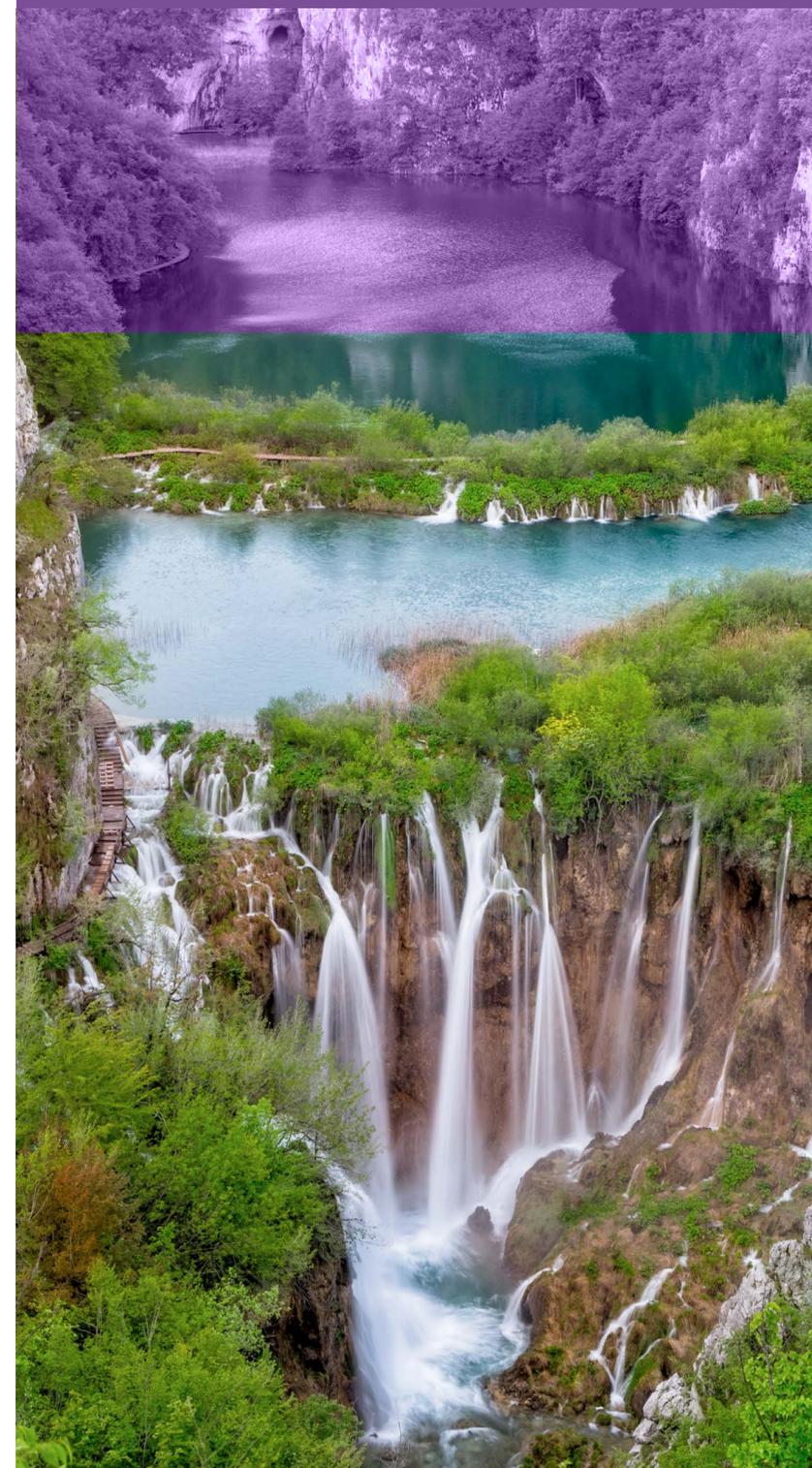
Engaging in concentration without the appropriate authorization by the AMCU (if such authorization is mandatory) is a violation of the economic competition protection laws and, therefore, results in relevant liability as specified by the law.

Violation of the economic competition protection law by engaging in economic concentration without ad-

vance authorization of the AMCU is considered committed, unless otherwise provided by the legislation or follows from the business entity's activity, when:

- economic concentration by creation of a business legal entity occurs at the moment of state registration of such entity;
- merger of business entities occurs at the moment of state registration of the resulting entity;
- accession of a business entity occurs at the moment of removal of the joining entity from the state registry of business entities;
- acquisition of ordinary shares, issued in a non-paper format, occurs at the moment of transfer of such shares to the purchaser's account;
- acquisition or other acquirement of ownership, management and/or partial ownership rights occurs at the moment of contractual acquisition of the ownership, management or partial ownership right;
- acquisition of shares occurs at the moment of contractual transfer of ownership rights to such shares;
- acquisition or other acquirement of ownership or management over assets (property) of a business entity or a structural subdivision of a business entity occurs at the moment of contractual acquisition of ownership or management rights over the assets.

Therefore, it is appropriate to conclude that violation of the economic competition protection laws through engaging in economic concentration without the advance AMCU approval occurs at the moment of acquirement of such actual control over the business entity (concentration participant), which gives the business entity a real ability to influence commodity market activities.



VII. General Timeframe and Process

7.1. Timeframe for Submitting Notification

Concentration must be announced prior to the moment when it takes place. Otherwise, concentration without approval is unlawful and can become the ground for imposition of sanctions (fines).

7.2. Notification Acceptance – Timeframe

Normally, the AMCU's approval is granted within one to two months following submission of the relevant application. Granting of such approval includes preparation of all supporting documents, which itself can be a lengthy process.

As long as the State Commissioner of the AMCU does not reject the application due to a failure to meet the requirements specified by the AMCU, the application for approval of a concentration shall be accepted for consideration by the AMCU within 15 days following the date of its receipt.

The AMCU or its administrative board shall consider the application for approval of a concentration within 30 days following its acceptance for consideration. Therefore, the AMCU usually will have 45 days to review an application and come to a decision.

If the AMCU fails to launch its application consideration process during the 45-day period specified above, a

decision to grant consent for concentration shall be deemed to have been rendered. The last day of the consideration period specified above shall be the date of such rendered decision granting permission for concentration.

7.3. Case on the Concentration

Notwithstanding the above, if any grounds prohibiting the concentration come to light, or if a more thorough investigation or expert appraisal is required, the AMCU may initiate a more detailed review of the application called a "concentration case". If this occurs, the applicant will be notified.

The AMCU will send the applicant a respective notice that the concentration case was initiated along with a list of information, which the applicant needs to provide to aid in a decision being made. The AMCU may request additional information from the applicant or other parties, if the lack of such information impedes consideration of the case. The AMCU may also request an expert opinion according to the procedure specified by the law.

The period for consideration of the concentration case shall not exceed three months. Such consideration period starts at the date when the applicant submitted required information in full and obtained an expert opinion. The law does not limit the amount of time for collection of additional documents or information. Therefore, there can be delays between the opening of a case by the AMCU, the resulting request for addi-

tional documents, information or expert opinions and the actual start of the procedure of consideration of the concentration case.

7.4. Final Decision – Time-frame, Cases of the Suspension of the Consideration Application/Case

If the AMCU fails to make a decision during the specified three-month period for consideration of a concentration case, a decision to grant consent for con-

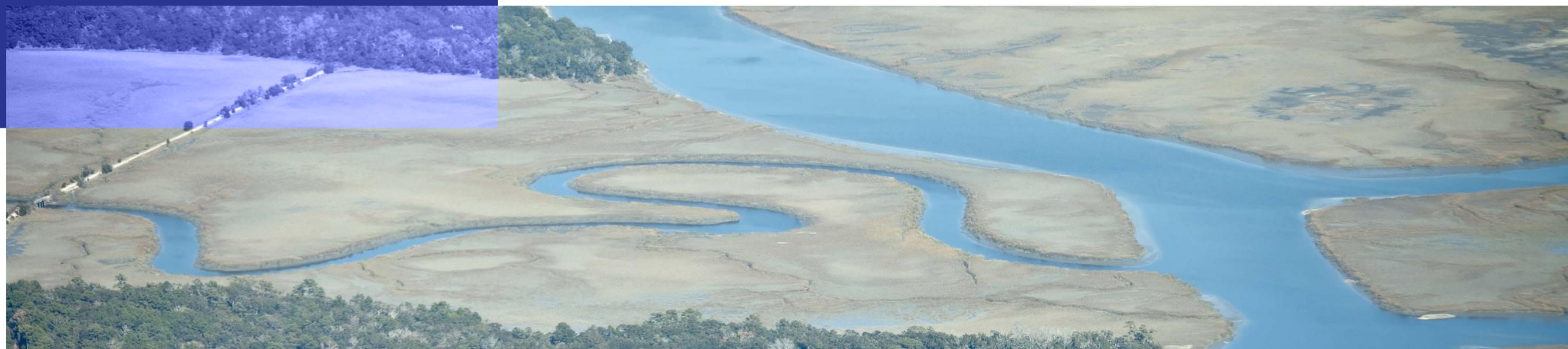
centration shall be deemed to have been rendered. The last day of the three-month period shall be the date of such rendered decision granting permission for concentration.

Under some limited circumstances, which make consideration of the case very difficult or impossible, consideration of the concentration case may be suspended until resolution of another related concentration case or issues related to it. If this occurs, the AMCU will notify the applicant that consideration of the case has been suspended or resumed.

The AMCU will resume consideration of the concentration case only following elimination/resolving of the circumstances, which resulted in suspension of such con-

sideration. During suspension of the concentration case consideration, the period for review is also suspended so that the time for case consideration shall continue as of the date when consideration is resumed.

Based on the above, the usual period for consideration of an application for concentration should not exceed 45 days. However, in certain circumstances, this period may be extended to three months plus the time for collection of the requested information/documentation.



VIII. Filing Fee

IX. Available Guidance for the Notification Process

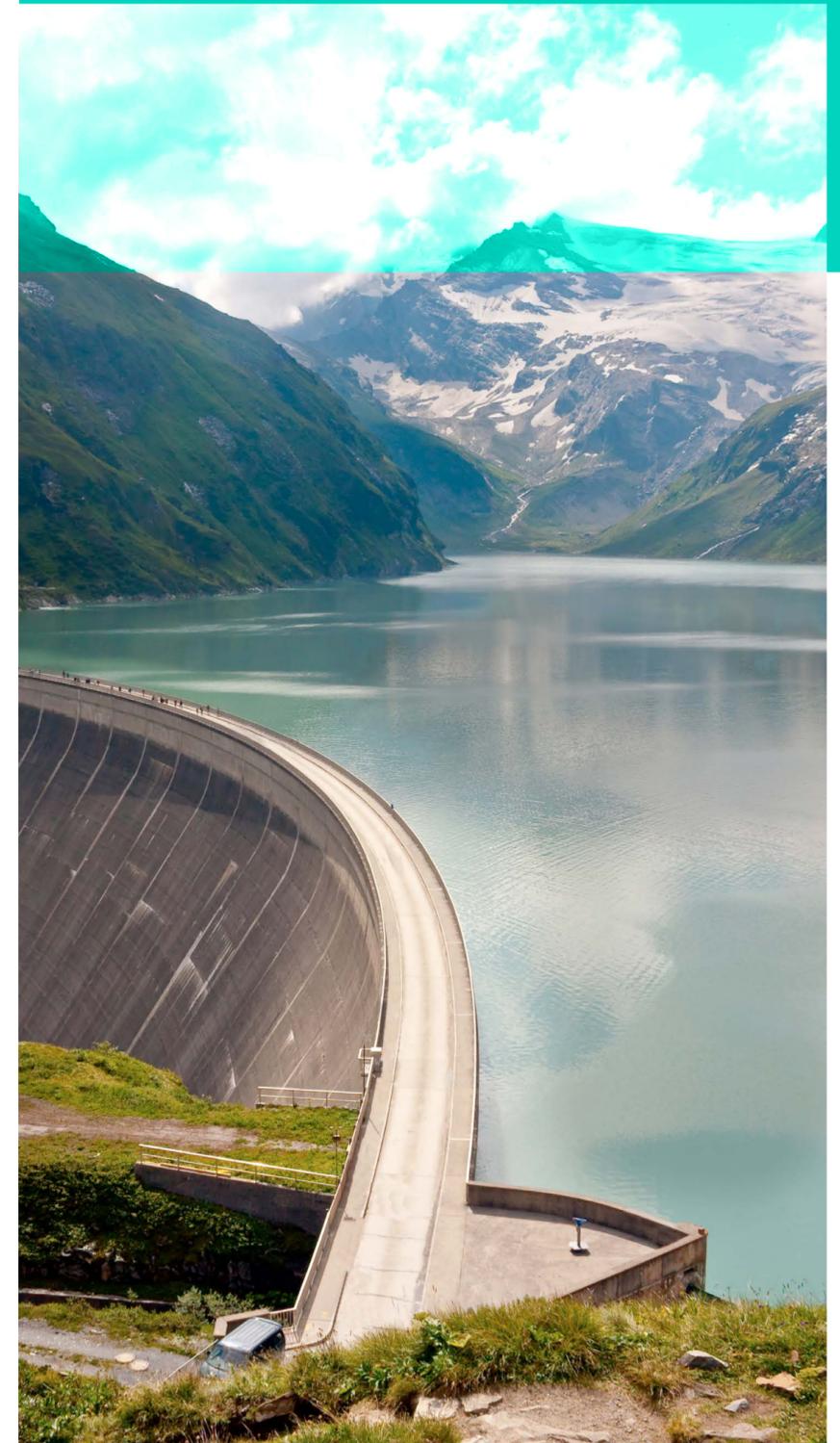
The fee for submission of notification is 1200 times the non-taxable minimum personal income, which is currently UAH 20.400,00⁶ (approximately USD 815). The fee for submission for preliminary conclusions of the AMCU (see chapter 10) amounts to 320 times the non-taxable minimum personal income, which is currently UAH 5.440,00 (approximately USD 215).

Based on an application and the information attached to it, the AMCU or its administrative committee can give preliminary conclusions on the intended concentration. Preliminary conclusions on the consideration of applications for concerted actions or concentrations are to be given within a month and in the form of a letter stating:

- the possibility of approving concerted actions, concentration;
- the possibility of opposing concerted actions, concentration;
- the necessity of approving concerted actions, concentration or lack of such necessity;
- the insufficiency of information provided for making any conclusions.

Obtaining the preliminary conclusions does not replace the duty of the participants to clear the transaction with the AMCU and to receive the appropriate approval.

⁶ As of 1 September 2016 the official exchange rate established by the National Bank of Ukraine is as follows: 1 USD= 26.08 UAH



X. Grounds for Concentration Approval

As a general rule, an economic concentration is not, in its essence, an anticompetition action and, therefore, is not illegal per se. In other words, the competition protection law of Ukraine does not automatically consider an economic concentration as a prohibited activity or as a factor negatively impacting competition on the commodities market.

Therefore, business entities applying to the AMCU for authorization of an economic concentration, are not asking for the concentration to be approved as an exception to the general rule, but are simply following the lawful authorization procedure for completing business transactions of certain commercial magnitude.

The Competition Law requires approval of a competition protection organization or agency confirming that a business transaction of a significant economic magnitude is permissible for a particular market structure, developmental progress of particular branches of economy, and for types of competition on relative markets.

An economic concentration itself is not a violation of the Competition Law. Furthermore, the merger is often necessary not only to increase competitive ability of a business entity on global markets or to develop a particular branch of the economy, but for the mere survival of a company in harsh competitive circumstances. However, the law is violated when the concentration occurs without approval of the AMCU or the Cabinet of Ministers (if the AMCU denies the application).

The main purpose of the concentration regulation is

prevention and/or eradication of unrestrained market changes leading to increase of market power of certain companies, decrease of competition and establishment of additional barriers for business entities' market entry.

Granting of approval for concentration to business entities confirms the principle that, although the concentration may be of a substantial magnitude, it may not threaten adequate market competition due to particular levels of economic capitalization or due to the aggregate resources of the concentration participants.

Therefore, an authorization for economic concentration is a regular occurrence, while its prohibition, in fact, is an exception and an infringement upon business entities' ability to conduct business transactions aimed at increasing their competitive power.

The AMCU approves transactions that do not:

- result in the emergence of a monopoly on the affected market;
- substantially restrict competition in, or on a substantial part of, the affected market.

In the case of overlapping markets, the emergence of a monopoly⁷ is assessed by the expected aggregated market shares after the concentration.

⁷ The entity holding 35% in the Ukrainian market is considered to have a monopoly position on that market.

10.1. Main Criteria for the AMCU's Assessment

Within the scope of its authority, the AMCU assesses concentrations in order to decide whether a concentration should be authorized or denied. Part 1 of Article 25 of the Competition Law provides that authorization or denial depends on:

- 1 Whether the relevant agreement would lead to monopolization of the entire associated market or its substantial part, or
- 2 It would cause substantial restraint of competition on the relevant market.

10.1.1. Monopolization

Part 1 of Article 25 of the Competition Law specifies primary principles for the market monopolization assessment as to whether a concentration can be permitted.

Article 1 of the Competition Law defines the term "monopolization" as a business entity's attainment, maintenance and escalation of a monopoly (dominant position), i.e. if a business entity does not have any competitors on a relevant market (subsection 1 of Part 1 Article 12 of the Competition Law).

Although this type of monopoly is easy to detect and classify, it is very rare in a contemporary market setting. Another type of monopolization relates to market

domination wherein one or more business entities "do(es) not experience substantial competition" on a particular market. This occurs, for example, in case of joint domination of an oligopoly participants, if the combined market share of the three largest business entities is greater than 50% (subsection 5 of Part 1 Article 12 of the Competition Law), or the combined market share of five largest business entities is greater than 70% (subsection 5 of Part 2 Article 12 of the Competition Law). If the applicable "market share threshold" is exceeded, the AMCU can apply the above-mentioned presumptions, and the respondent (business entity) has to rebut them by submitting proof that it experiences substantial competition in the existing market conditions. If the applicable threshold is not exceeded, the AMCU has the burden of proof regarding the entity's dominant market position.

10.1.2. Substantial Restraint of Competition

Assessment of the possible extent of a concentration agreement's impact on competition requires comparison of a market situation before and after execution of the agreement or evaluation of conditions, which would have existed if the concentration had never happened. Although distribution of individual and combined market shares is a useful and most obvious indicator of the market structure, it is only one of general criteria used for evaluating the concentration's impact on the market competition.

There are several noteworthy examples of economic concentration's negative impact on the commodities

market, which may lead to the AMCU's prohibition of economic concentration:

- possible disappearance of potential competition or of an important market factor for competition, which existed before the concentration;
- "concentrated" business entity's ability to control the market trade channels, to change conditions of access to resources and infrastructure;
- change in advertising, product promotion and market entry capacity, access to patents or other forms of intellectual property rights (for example, trademark and brand use);
- high financial power achieved by the concentration participants in comparison to their competitors;
- impossibility of a third party to have market access due to vertical concentration.

Resolution of the following issues encounters additional difficulties: whether the conglomerate consequences of concentration can lead to achievement, maintenance and reinforcement of the business entity's dominant market position or otherwise create a negative impact upon competition, and also whether there are sufficient grounds for the state's intrusion into particulars of a business transaction. There are several examples, which may be reviewed in this context: due to concentration, its participant may broaden and diversify the goods assortment, increase its ability to offer clients a combination of its own and supplemental goods, and increase its ability to bal-



ance its market power on one of the markets through parallel influence upon other markets.

The extent of harm caused to competition must be adequately high for concentration assessment to be based on the “substantial restraint of competition” criterion.

Thus, the AMCU holistically evaluates the influence of a transaction on competition in the market with consideration of factors that impact or can possibly impact not only the market where the concentration is taking place, but also on the adjacent markets and the economy as a whole.



XI. Penalties for Non-Compliance

Liability as well as types and amounts of possible sanctions for violation of the antimonopoly law in the sphere of control over economic concentration are provided in Section 8 of the Competition Law and provisions of the Civil and Commercial Codes of Ukraine.

11.1. Types of Violations

The following types of violations should be mentioned:

Principal Violations:

- 1 Engaging in economic concentration without obtaining the appropriate authorization from the AMCU's agencies if obtaining such authorization is obligatory;
- 2 Breach of the antimonopoly legislation by a person, whose main activities are financial and securities transactions and further resale of such securities, if such person has a voting right in the highest managing body or such resale was not conducted within one year following of acquisition of securities;
- 3 Failure of participants of the economic concentration to comply with the requirements and obligations upon which the decision to grant a permission to proceed with the economic concentration was rendered.

These violations are key violations in the sphere of control over economic concentration.

By their nature, all three mentioned violations are related to non-compliance with the requirements of the AMCU with respect to obtaining permission for economic concentration under the established procedure.

Derivative Violations:

- 1 Failure to provide the AMCU or its local departments with information within the terms established by the AMCU's agencies, the head of its territorial unit, or by the legislation;
- 2 Providing the AMCU or its territorial units with incomplete information within the terms established by the AMCU's agencies, the head of its local department, or by the legislation;
- 3 Providing the AMCU or its territorial units with false information.

These violations are indirect violations, which are possible, as a rule, when cases regarding concentration, applications for authorization for the concentration and violations of the antimonopoly law are heard.

The essence of these violations is failure to timely provide information, which was officially requested by the AMCU, and also provision of incomplete information or information in inadequate scope or format, as well as provision of false information.

11.2. Liability and Sanctions for Violations

11.2.1. Liability

Under the Ukrainian law liability for violations of antimonopoly law in the sphere of control over economic concentration are formally classified in the following types:

1 Public liability

Public liability encompasses liability of legal persons and individuals provided by the administrative and criminal law of Ukraine. It includes, in particular, liability for the commission of violations by individuals, who are officers of entities and perform managerial functions or vested with the authority to manage these entities. Liability for public violations also embraces legal persons' liability (business entities) directly provided for in the Competition Law.

2 Private liability

Private liability is represented by a statutory option to claim damages caused by a violation of the antimonopoly law. For instance, persons who suffered damage because of economic concentration, which was consummated without the AMCU's preliminary permission, are entitled to claim damages from participants of the concentration, if the damages were caused by this violation.

The most widespread type of liability is public liability,

under which sanctions are imposed on the participants of the economic concentration established by the Competition Law. Such liability and sanctions that are most often enforced constitute the subject discussed in this Guide.

11.2.2. Types of Sanctions

The Competition Law provides for the following sanctions for violations of the concentration rules:

- a fine;
- a compulsory demerger;
- administrative liability of the officers of the participant of the concentration.

11.3. The Procedure and Specifics of Fine Assessment

11.3.1. Economic Concentration Committed without Prior Approval⁸

If an economic concentration was committed without prior approval of the AMCU, sanctions can be imposed in the amount of up to five percent of the income (proceeds) of a business entity from the sale of products (goods, work, services) over the previous financial year, which preceded the year of imposition of a fine;

⁸ Also for violations related to commencing economic concentration without receiving the AMCU authorization see section.

The income (proceeds) of a business entity is to be defined as the aggregate value of the sale of products (goods, work, services) for the year preceding the current year.

11.3.2. Determination of a Fine for the Members of a Group

Special attention should be paid to the procedure for determination of a fine in case when the participant of the concentration is a business entity that is connected with other business entities by the control relationships.

For instance, Article 52 of the Competition Law prescribes the following:

If members of a group recognized as a business entity have committed actions (acts, omissions) resulting in violation of the economic competition protection laws by such business entity, and/or have rights, exercise of which would inevitably result in a violation, and/or have obtained or may obtain competitive or other advantages, the penalty will be imposed upon the business entity and/or upon individuals, who have committed the above actions (acts, omission) or have obtained, or may obtain the above advantages. An "advantage" is the ability to influence the activities of other business entities or to obtain part of their profit.

Therefore, the fine in this case is calculated on the basis of the sum of all financial indicators of the participants of the group recognized as a single business entity.

11.3.3. Members of a Group

It should be noted that in order to determine business entities that constitute a single business entity as a participant of the concentration, the AMCU is obliged to prove the presence of the following circumstances of the actions of a business entity-candidate for inclusion into the unified group:

- a. Business entity committed actions (inactions) resulting in violation.

For instance, a holding company acquired 24% of the business entity's shares. The business entity did not provide information that the holding company had already possessed 2% of shares of this company. In turn, this resulted in the holding company securing its possession of 25% and more shares of the business entity. As a result, this acquisition constituted the economic concentration.

- b. Business entity has powers, without which the commission of violation would be impossible.

For instance, a majority participant of a purchasing legal entity adopted a decision to conduct a purchase of shares/assets by this legal entity that constituted the concentration.

- c. Business entity obtained or acquired an opportunity to receive an advantage in competition or other advantages.

For instance, an indirect purchaser obtained influence

upon its competitor's market following the purchaser's acquisition of the competing company.

It is worth mentioning that the AMCU has the authority to include a business entity in the group of business entities participants of the concentration only if at least one of the above conditions is met. The AMCU also has a power to calculate a fine taking into account financial indicators of the group and not based only on the financial indicators of a business entity, which is a direct participant of the concentration.

If there is no income (proceeds) or the defendant has failed to specify the income (proceeds) upon request of the AMCU or the head of its territorial unit, the penalty shall be imposed in the amount of up to 10,000 or 20,000 non-taxable individual minimum income (UAH 170,000 or UAH 340,000, or approximately USD 6,800 or USD 13,600, respectively).

Implementation of a merger after it has been prohibited by the AMCU is seen as a breach of the AMCU's decision. It is sanctioned by a fine of ten percent of the income (proceeds) of a business entity from the sale of products (goods, work, services) over the previous financial year, which preceded the year of imposition of a fine. In addition, if the unlawfully received profit exceeds 10% of the aggregate profit from such sales, the fine applied must not exceed the value of three times of the unlawful profit.

Derived violations are the following breaches of the competition legislation:

- 1 Withholding information, or
- 2 Provision of incomplete information contrary

to the request of the AMCU or requirements of the applicable legislation; and

- 3 Provision of inadequate information.

The AMCU can impose a penalty of up to 1% for these violations. The penalty is calculated based on the entities' sale proceeds for the preceding fiscal year. The way of the determination of the fine is quite similar as described above.

11.4. Procedure for Imposing Compulsory Demerger Sanctions

According to the Article 53 of the Competition Law, the AMCU has the authority to take more extreme actions, including the mandatory demerger or reorganization of the monopolistic business entities.

This sanction is not directly related to the economic concentration and/or its implementation without obtaining an authorization. Moreover, the Competition Law makes this sanction contingent upon the business entity explicitly taking advantage of its monopolistic market status.

At the same time, monopolistic market status may be obtained through engaging in economic concentration without the AMCU authorization and through express avoidance of notification and submission of the authorization application to the AMCU for a particular transaction, because such transaction may not

have been authorized by the AMCU⁹.

Therefore, in such situation the AMCU may, along with imposition of a fine, apply the compulsory demerger sanction if the business entity, which achieved a monopolistic market status, expressly took advantage of such status in a bad faith.

The compulsory demerger sanction has to be complied with within the time specified in the final order, but not less than 6 months. Compulsory demerger (reorganization) is conducted as proposed by the business entity as long as the monopolistic market status of the business entity is extinguished.

Compulsory demerger is not used if such demerger is impossible because of administrative or territorial specifics, corporate structure, and close technological ties between the enterprise and all or most of its structural subdivisions.

11.5. Administrative Liability of the Officers of the Participant of the Concentration

Officials and other employees of business entities, employees of authorities, local autonomous bodies, administrative/economic management and control bodies may also be subject to administrative liability for violation of the competition legislation.

⁹ The AMCU does not authorize a concentration which may lead to establishment of a monopoly.

At the same time, these sanctions are applicable only to a limited list of violations, which does not include violation through engaging in economic concentration without the AMCU's authorization.

Administrative liability is imposed, as a rule, for non-compliance with the AMCU's requirements for submission of information and for non-compliance with the AMCU's orders and decisions.

Individuals as well as companies can be fined under the applicable law. If a party refuses to pay a fine, it can be enforced through court proceedings.

11.6. Additional Liability Measures

A failure to follow and implement any decisions made by the AMCU results in a fine in the amount of up to ten percent of the income (proceeds) of a business entity from the sale of products (goods, work, services) over the previous fiscal year, which preceded the year of the fine.

This sanction cannot be imposed if compliance with an order was suspended because of the appeal.

11.6.1. Invalidation of Completed Transaction

Any transaction made in violation of the antimonopoly legislation could be invalidated by a court order.

11.6.2. Compensation of Incurred Damages

The Competition Law, along with the provisions of the Civil Code of Ukraine, guarantees each entity a right of compensation for damages incurred because of unlawful action or omission.

Therefore, if the economic concentration completed without the AMCU's authorization caused harm to an entity, that entity has a right to initiate an action before a court for compensation of damages. In this case, a lawful decision by the AMCU regarding imposing a fine upon a business entity for engaging in concentration without the AMCU's authorization will be viewed as an established fact and as sufficient ground for subsequent compensation of damages.

11.7. Summary Table with the Fines Amounts

Violation	Fine	Violation	Fine
Concentration without obtaining of the necessary approval of the AMCU authorities	up to 5% of income from turnover of the entity for the last fiscal year; if the entity had no income in the last financial year or if it failed to provide information regarding its financial performance at the request of the AMCU, the fine will be in the amount of up to 20000 non-taxable minimum incomes of citizens (UAH 340,000)	Breach of the provisions of the constitutional documents of the business entity created in the result of concentration, which were approved by the AMCU, if this leads to restriction of the economic competition	up to 5% of income from turnover of the entity for the last fiscal year; if the entity had no income in the last financial year or if it failed to provide information regarding its financial performance at the request of the AMCU, the fine will be in the amount of up to 20000 non-taxable minimum incomes of citizens (UAH 340,000)
Failure to fulfill terms and conditions of the concentration approval	up to 5% of income from turnover of the entity for the last fiscal year; if the entity had no income in the last financial year or if it failed to provide information regarding its financial performance at the request of the AMCU, the fine will be in the amount of up to 20000 non-taxable minimum incomes of citizens (UAH 340,000)	Provision of incorrect data about concentration to the AMCU	up to 1% of income from turnover of the entity for the last fiscal year; if the entity had no income in the last financial year or if it failed to provide information regarding its financial performance at the request of the AMCU, the fine will be in the amount of up to 10000 non-taxable minimum incomes of citizens (UAH 170,000)
Breach of the antimonopoly legislation by a person, whose main activities are financial and securities transactions and further resale of such securities, if such person has a voting right in the highest managing body or such resale was not conducted within one year following of acquisition of securities	up to 5% of income from turnover of the entity for the last fiscal year; if the entity had no income in the last financial year or if it failed to provide information regarding its financial performance at the request of the AMCU, the fine will be in the amount of up to 20000 non-taxable minimum incomes of citizens (UAH 340,000)		

XII. Investigation

Review of cases involving an antimonopoly law violation may be formally divided in a two-level structure. The first level involves hearing of cases by an authorized governmental authority in the matters of competition: the AMCU and its agencies. The second level is a hearing of cases in the courts.

Power to investigate in the cases regarding violations of the antimonopoly law is vested in the agencies of the AMCU. The AMCU is empowered to initiate and conduct investigations and impose sanctions for violations of the antimonopoly law, in particular for violations of the competition law in the sphere of control over an economic concentration.

As a rule, review of cases dealing with violation of the antimonopoly law in the sphere of control over economic concentration by the courts is conducted upon filing of an appeal regarding the decisions made by the AMCU's agencies.

12.1. Grounds

The presence of elements of violations of the antimonopoly law constitutes grounds to initiate an investigation.

Grounds to initiate a case may include:

- 1 Applications by legal persons or individuals alleging violation of their rights or interests;
- 2 Applications by governmental and local authorities alleging violation;

- 3 The AMCU's own initiative.

12.2. Who Can Initiate and Who Conducts

Following receipt of an appropriate application from legal persons or individuals alleging violation of their rights and interests or governmental and local autonomous authorities' application, the AMCU reviews the presented materials and initiates a case within 30 days (or 60 days if it is necessary to receive additional materials). It informs the defendant, the applicant and third parties about this.

The AMCU's agencies are the following:

- the AMCU as an integrated agency;
- permanent and temporary administrative boards of the AMCU;
- governmental Representative of the AMCU;
- administrative Board of the Local Department of the AMCU.

The authorities authorized to hear cases regarding violations of the antimonopoly law in the sphere of economic concentration are:

- the AMCU as an integrated agency;
- permanent and temporary administrative boards of the AMCU.

The Governmental Representative of the AMCU makes a decision to initiate a case regarding a violation of the antimonopoly law in the sphere of control over economic concentration.

After commencement of the case, the agency, which is authorized to hear it, determines the circumstances of the case, gathers evidence and takes other actions provided by the law to prepare materials in order to make a decision in the case.

12.3. Stages of Investigation and Timeframe

Investigation in cases of violation may be formally arranged into the following stages:

- gathering materials and evidence;
- preparing preliminary conclusions regarding the case;
- hearing the case by an authorized agency;
- making decision regarding the case;
- complying with the decision;
- appealing the case.

12.3.1. Gathering Evidence

The AMCU's agencies, which are authorized to hear the case, empower the AMCU's employees and its local departments to gather evidence and materials regarding the case.

The AMCU's agencies have the scope of varied powers, which include a power to gather evidence, request information, seize written and real evidence, apprehend subjects that may be evidence, and to commence examination etc.

12.3.2. Preparing Preliminary Conclusions regarding the Case

After gathering of evidence is completed, the AMCU's structural subdivision prepares preliminary conclusions regarding the case. The preliminary conclusions contain description of grounds to initiate the case, parties to the case, established circumstances, evidence that proves circumstances and presence or absence of a violation.

Preliminary conclusions contain a proposed decision regarding the case, which is submitted for the hearing by the AMCU's agency. The preliminary conclusion is sent to the parties to the case, who are entitled to present their comments and proposals regarding the case and a proposed decision.

Regardless of the acceptance or non-acceptance of comments or proposals by the parties to the case, the preliminary conclusion together with the case files (and together with comments and proposals if received) is submitted for the hearing by AMCU's agency that decides the case.

12.3.3. Hearing the Case by an Authorized Agency

The parties to the case are informed about the date of hearing in writing no later than five days before the

date of hearing by the AMCU's agency.

Defendant and other interested parties are invited to the hearing of the case by the AMCU agency and they have a right to present explanations and comments regarding the case.

12.3.4. Making a Decision regarding the Case

The main criteria for deciding the case is proof of all circumstances of the case that evidence the commission of violation and all mitigating and aggravating circumstances related to the commission of violation.

If the commission of violation is established, the AMCU's agency issues a decision confirming a violation and imposes sanctions in the amount depending on the established circumstances of the case.

If the commission of violation is not established, the AMCU's agency issues a decision according to which it ceases to hear the case.

The AMCU's decision is issued in writing and describes the case, parties and third parties, established facts and evidence, which prove these facts, mitigating or aggravating circumstances, conclusions reached by the AMCU's agency and also a final decision regarding the case.

12.3.5. Complying with the Decision

The decision of the AMCU's agency is sent to the parties and third parties for compliance. If a decision was not delivered because the respective persons are absent (except for confidential information), it is subject to publication in official mass media. The decision is considered delivered after 10 days from the date of publication.

The decision to impose a fine is subject to compliance within two months. The term in which to comply with the decision may be extended by the AMCU's agency upon the interested person's application. If the payment of a fine is overdue, sanctions in the form of penalty amounting to 1.5% of the sum of an unpaid fine per day are levied. The amount of the penalty is limited to the amount of the imposed fine and may not be higher than the fine itself.

If the decision is not complied with, the AMCU files a lawsuit with the commercial court to enforce the decision, e.g., to enforce collection of a fine and penalty.

12.3.6. Appealing the Case

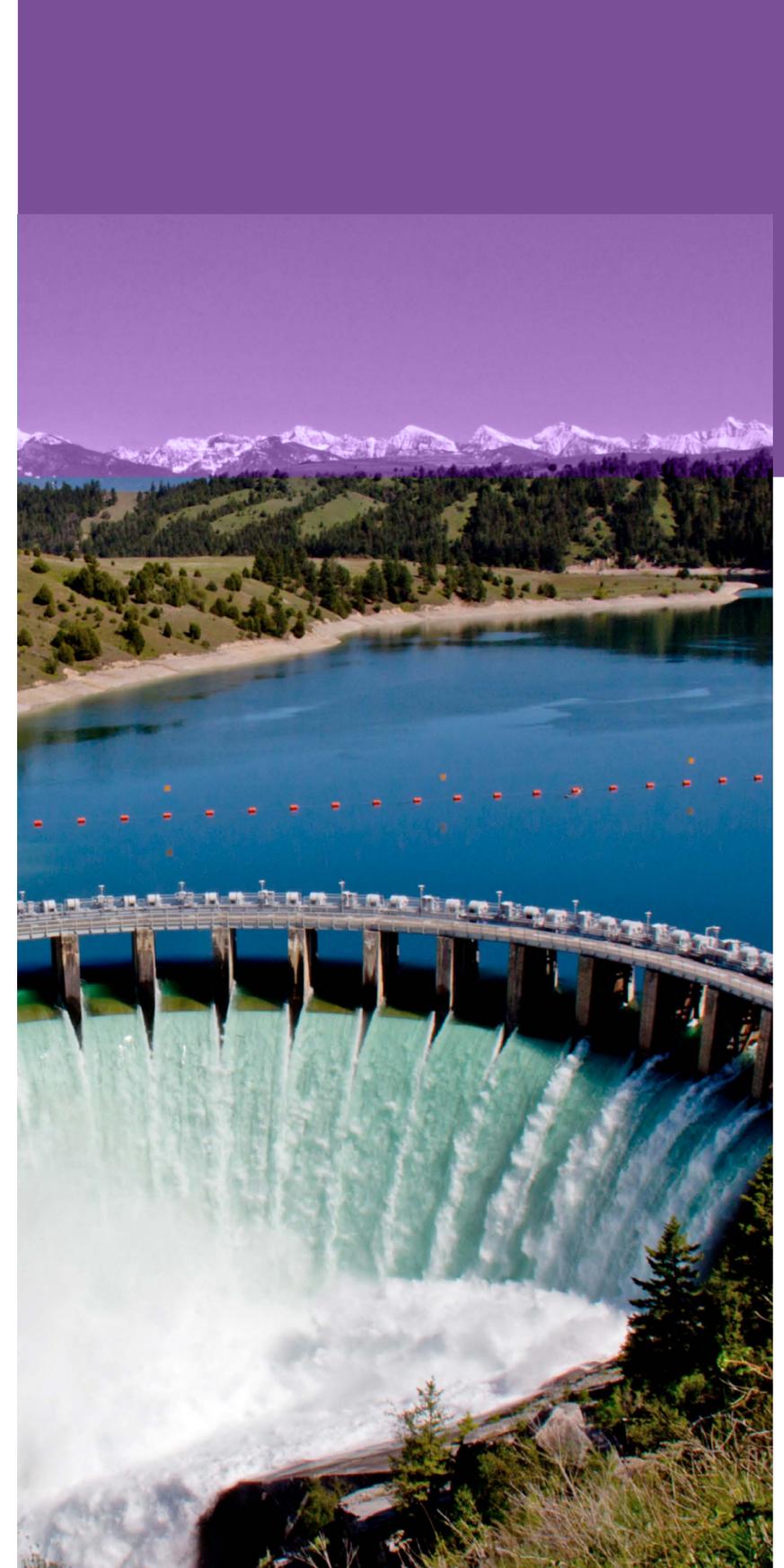
The decision of the AMCU's agency may be appealed in a superior agency and in the court within two months from the date when this decision is received.

The decision of the administrative board (either permanent or temporary) may be appealed by the AMCU

as an integrated agency. The AMCU's decision as an integrated agency may not be reviewed by another AMCU's agency.

The AMCU's agency, which decides the case, is entitled to review it if at the time of the hearing essential circumstances that could have influenced an initial decision were unknown and could not have been known.

The decision of any AMCU's agency may be appealed with the commercial court of Ukraine directly. The appealing of the decision of the AMCU's agency in the court suspends its enforcement if the AMCU's agency does not state its decision. The court has authority to change the decision of the AMCU's agency, to reverse it or remain it in force.



XIII. Confidentiality

13.1. Publicity

The AMCU publishes limited information, such as a grant of approval and the names of the participants.

13.2. Procedural Stage

The AMCU usually publishes information only after the transaction is cleared.

13.3. Automatic Confidentiality

Information filed with the AMCU is not automatically kept confidential unless the applicant marks it as "information with limited access". However, in practice only information concerning the participants is disclosed.

13.4. Confidentiality on Request

The participants can request the AMCU to keep certain information confidential. They must mark this information as "information with limited access". The AMCU must keep this information strictly confidential.



Contacts

DLF attorneys-at-law

Torus Business Centre
17 d Hlybochytska Street
04050 Kyiv, Ukraine

+380 44 384 24 54
info@DLF.ua
www.DLF.ua

Other DLF Publications

[Taxes in Ukraine](#)

[Doing agricultural business in Ukraine: legal aspects](#)

[Trademark protection in Ukraine](#)

[Use of image for commercial purposes in Ukraine](#)

**Andriy Navrotskiy, LL.M.
Partner**

andriy.navrotskiy@dlf.ua



**Andrii Zharikov, LL.M.
Associate**

andrii.zharikov@dlf.ua

