

## 1. Legal and enforcement framework

### 1.1 Which legislative and regulatory provisions govern merger control in your jurisdiction?

- As of 2001, the Law of Ukraine on Protection of Economic Competition (the Competition Law), as amended;
- As of 1992, the Law of Ukraine on the Anti-monopoly Committee of Ukraine; and
- As of 2002, the Regulation of the Anti-monopoly Committee of Ukraine on Concentrations.

### 1.2 Do any special regimes apply in specific sectors (eg, national security, essential public services)?

Yes. With regard to natural monopolies – such as national security, energy (eg, nuclear, gas) and transportation – a special regulatory regime may be established by the government under the Law of Ukraine on Natural Monopolies, as of 2000.

### 1.3 Which body is responsible for enforcing the merger control regime? What powers does it have?

The Anti-monopoly Committee of Ukraine (AMCU) is responsible for the state protection of competition, including ensuring compliance with the merger control rules.

## 2. Definitions and scope of application

### 2.1 What types of transactions are subject to the merger control regime?

- The merger of undertakings or the takeover of one undertaking by another;
- The acquisition (directly or through other entities) of control over other undertakings, or parts thereof, by means of, among other things, the following:
  - the direct or indirect acquisition, or acquisition through asset purchase, of ownership of an integral complex of assets or a structural subdivision of an undertaking; or the acquisition of the right to use assets in the form of an integral complex of assets or a structural subdivision of an undertaking through management, lease, rent, concession or any other means, including acquisition of assets of an undertaking in liquidation;
  - the appointment or election of a person as the head or deputy head of the supervisory board, the executive board or other supervisory or executive bodies of an undertaking, if that person already occupies one or several such positions in other undertakings; or the creation of a situation where more than half of the positions on the supervisory board, executive board, other supervisory or executive bodies of two or more undertaking(s) are occupied by the same person; or
  - the establishment of an undertaking by two or more undertakings engaged in business activities independently over an extended period, if such an establishment does not encourage competitive coordination between the established undertakings or between the undertakings and the newly established undertaking (joint venture); and

### Merger Control Comparative Guide Ukraine



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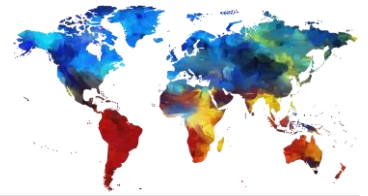


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- Any other direct or indirect acquisition of, or acquisition of control over, shares which grant the holder 25% or 50% of the voting rights in the highest managing body of a particular undertaking (stock purchase).

## **2.2 How is 'control' defined in the applicable laws and regulations?**

According to Article 1 of the Competition Law, 'control' refers to the decisive direct or indirect influence of one or more undertakings over all or some commercial activities of another undertaking - in particular:

- complete or partial asset ownership or management rights;
- any right resulting in the ability to decisively influence the membership, voting results and decisions of the undertaking's governing body;
- conclusion of contractual agreements that determine the conditions for conducting commercial activity, provide binding instructions or perform the functions of a governing body;
- substitution of the director or vice director of the supervisory committee, management or any other managerial or executorial body with someone who already holds one or more such positions in another undertaking; and
- substitution of over half the members of the undertaking's governing bodies with persons who already hold one or more of such positions in another undertaking.

'Related entities' are legal entities or individuals engaged in joint or coordinated business activities, including joint or coordinated influence over the commercial activities of an undertaking. In particular, they include spouses, parents, children and siblings.

Joint control occurs where none of the company's founders or shareholders can unilaterally make decisions through its governing or supervisory body, but each has the right to prevent those bodies from making certain decisions. Specifically, joint control can arise when:

- two founders (shareholders) of the company each have 50% of the votes in the highest governing body of the business entity (joint venture);
- a decision of the company's highest governing body must be authorised by another body or founder vested with special powers according to the company's charter. Specifically, this may be a veto right for decisions relating to the appointment of members of the governing body, the company budget, investment activities, the introduction of new products or the use of new technologies and so on; or
- the founders (shareholders) own non-substantial shareholdings and none has the necessary percentage of votes to unilaterally block decisions of the highest governing bodies of the company, so must therefore act together in order to block decisions or to achieve a majority of votes in the highest governing body of the controlled company - for example, by establishing holding structures which transfer relevant corporate rights, entering into shareholders' agreements on the transfer of voting rights to third parties and organising voting to support joint long-term interests.

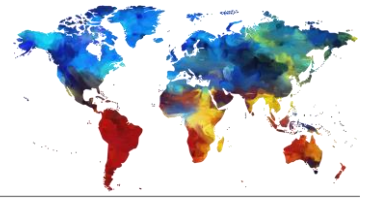
## **2.3 Is the acquisition of minority interests covered by the merger control regime, and if so, in what circumstances?**

The threshold for notification is reached in the event of the direct or indirect acquisition of, or the acquisition of control over, a shareholding of 25% or more.

## **2.4 Are joint ventures covered by the merger control regime, and if so, in what circumstances?**

Yes, joint ventures are covered by the merger control regime. The establishment of an undertaking by two or more undertakings which will engage in business activities independently over an extended period, where such an establishment will not encourage competitive coordination between the established undertakings or between the undertakings and the newly established undertaking, is considered to constitute a joint venture.

Joint control can arise if one of the founders (shareholders) of the company can effectively block decisions of the governing bodies of the controlled company due to the inability of the shareholders to reach the necessary quorum



for meetings of the governing bodies without the participation of that shareholder, as required by the founding documents.

## **2.5 Are foreign-to-foreign transactions covered by the merger control regime, and if so, in what circumstances?**

Foreign-to-foreign transactions are covered by the merger control regime if one or more participants to the transaction have controlling relations with a participating Ukrainian company, or possess assets or achieve turnover in Ukraine of a value which triggers the requirement to notify the Anti-monopoly Committee of Ukraine (AMCU) (see question 2.6). The AMCU has exclusive authority to determine whether a particular transaction may affect competition in Ukraine; this assessment is conducted in the process of reviewing the merger and granting clearance.

## **2.6 What are the jurisdictional thresholds that trigger the obligation to notify? How are these thresholds calculated?**

Concentrations require merger clearance by the AMCU if the following thresholds are met:

- The combined worldwide value of the participants' assets or turnover exceeded €30 million in the preceding fiscal year and the value of the assets or turnover of at least two participants exceeds €4 million; or
- At least one of the participants had Ukrainian sales turnover exceeding €8 million in the preceding financial year and the turnover of at least one other participant exceeded €150 million in the preceding fiscal year (in Ukraine and/or worldwide).

## **2.7 Are any types of transactions exempt from the merger control regime?**

The following transactions are exempt from the merger control regime:

- the establishment of a new undertaking aimed at the coordination of competitive behaviour of an undertaking or a newly established undertaking;
- a share acquisition that qualifies as a financial buyer transaction (ie, where the shares are acquired by a financial institution for the purpose of further resale within one year (which may be extended further), provided that the acquirer does not exercise the voting rights attached to the shares);
- actions taken between undertakings connected by controlling relations, except where such control is gained without AMCU clearance, if this is required by law; and
- the takeover of an undertaking or a part thereof by an insolvency receiver or state authority official.

## **3. Notification**

### **3.1 Is notification voluntary or mandatory? If mandatory, are there any exceptions where notification is not required?**

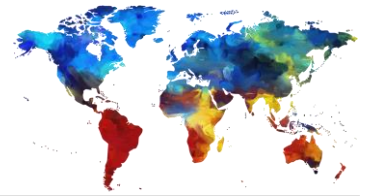
If the thresholds are met, the approval of the Anti-monopoly Committee of Ukraine (AMCU) is mandatory. Until approval has been granted, the participants must refrain from performing any irreversible actions which may result in the restriction of competition. The exceptions where notification is not required are outlined in question 2.7.

### **3.2 Is there an opportunity or requirement to discuss a planned transaction with the authority, informally and in confidence, in advance of formal notification?**

The AMCU can issue preliminary conclusions on a proposed concentration.

Preliminary conclusions on the consideration of applications for concerted actions or concentrations will be given within one month in the form of a letter, stating:

- the possibility of approving the concerted action or concentration;



- the possibility of opposing the concerted action or concentration;
- the need for approval of the concerted action or concentration; and
- any insufficiencies in the information provided that must be addressed in order to reach a conclusion on the concerted action or concentration.

Obtaining a preliminary conclusion on the transaction does not absolve the participants from their obligation to notify.

### **3.3 Who is responsible for filing the notification?**

Notification can be filed either by the participants jointly or by the acquirer.

### **3.4 Are there any filing fees, and if so, what are they?**

The fee for submission of notification is 1,200 times the non-taxable minimum personal income, which is currently UAH 20,400 (approximately €680). The fee for submission for a request for the AMCU's preliminary conclusions (see question 3.2) is 320 times the non-taxable minimum personal income, which is currently UAH 5,440 (approximately €180).

### **3.5 What information must be provided in the notification? What supporting documents must be provided?**

A full list of the necessary documentation can be found in the AMCU Regulation on Concentrations 2002.

Among other things, the merger application should include the following information:

- details of the participants, including any corporate groups to which they belong and the ultimate beneficiaries thereof;
- a detailed description of the transaction, together with the originals or copies of the transactional documents;
- the sources of the transaction financing, so that the AMCU can ensure that the participants are acting in their own interest;
- details of any corporate groups to which the participants belong, including asset value and turnover;
- the economic justification for the transaction;
- powers of attorney, which should include specific wording; and
- documentary confirmation of payment of the application fee.

### **3.6 Is there a deadline for filing the notification?**

No. The main rule is that the application must be submitted before closing of the transaction. Until approval has been granted, the participants should refrain from undertaking any irreversible actions which may result in a restriction of competition.

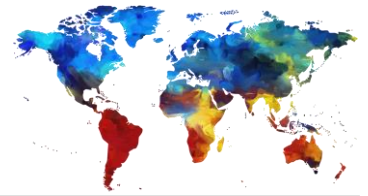
### **3.7 Can a transaction be notified prior to signing a definitive agreement?**

Yes, the transaction can and should be notified prior to signing a definitive agreement.

### **3.8 Are the parties required to delay closing of the transaction until clearance is granted?**

Yes, the parties must delay closing of the transaction until clearance is granted.

### **3.9 Will the notification be publicly announced by the authority? If so, how will commercially sensitive information be protected?**



The AMCU publishes limited information in relation to the transaction (eg, the grant of approval and the names of the participants). The AMCU will not usually publish this information until clearance has been granted. 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.

## **4. Review process**

### **4.1 What is the review process and what is the timetable for that process?**

Normally, it takes one to two months for the Anti-monopoly Committee of Ukraine (AMCU) to conduct its review once the application has been submitted.

Unless the AMCU state commissioner rejects the application due to failure to meet the requirements specified by the AMCU, the application shall be accepted for consideration by the AMCU within 15 days of receipt.

The AMCU or its administrative board shall consider the application within 30 days of its acceptance for consideration.

### **4.2 Are there any formal or informal ways of accelerating the timetable for review? Can the authority suspend the timetable for review?**

A decision on accelerated consideration of the merger is taken by the AMCU state commissioner who is supervising the application.

The accelerated 25-day review procedure is applicable only to a fraction of merger transactions. In particular, it can be applied if:

- only one party to the transaction under consideration is active in Ukraine; or
- if the parties' aggregate market shares do not exceed 15% or the parties' aggregate shares on the vertical markets do not exceed 20%.

In other cases, there are no formal ways to accelerate the timetable, except by ensuring that all necessary documentation is submitted together with the application. An informal way to accelerate the process is to submit the appropriate grounds and additional explanations regarding the need for clearance as fast as possible for the AMCU's consideration.

Sometimes the ordinary clearance timetable can be expedited; this mostly depends on factors such as:

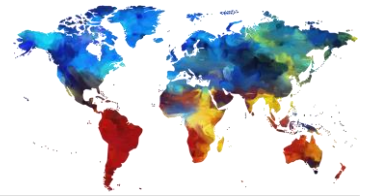
- the AMCU's workload;
- the accuracy and completeness of the merger application;
- the complexity of the notified transaction;
- the absence of any competition concerns; and
- any national interest in accelerating the process.

If any grounds for prohibiting the concentration come to light, the AMCU may initiate a more detailed review of the application, called a 'concentration case'. If this occurs, the applicant will be notified accordingly.

The timeframe for considering the concentration case shall not exceed three months, as from the date on which the applicant submits all information in full and obtains any expert opinion that is required. The law does not impose a time limit for the collection of additional documents or information. Therefore, there may be delays between the opening of a case by the AMCU, any resulting request for additional documents, information or expert opinions, and the actual commencement of the case consideration procedure.

### **4.3 Is there a simplified review process? If so, in what circumstances will it apply?**

No. Simplified review is possible only in the form of preliminary conclusions.



**4.4 To what extent will the authority cooperate with its counterparts in other jurisdictions during the review process?**

This will depend on the information submitted to the AMCU.

**4.5 What information-gathering powers does the authority have during the review process?**

AMCU agencies and employees and local departments are empowered to gather evidence and materials regarding the case.

AMCU agencies and employees have diverse powers at their disposal, including the power to gather evidence, request information, seize evidence, apprehend subjects and commence examinations.

**4.6 Is there an opportunity for third parties to participate in the review process?**

Third parties can participate in the review process by submitting information required by the AMCU.

**4.7 In cross-border transactions, is a local carve-out possible to avoid delaying closing while the review is ongoing?**

This possibility is not provided for by law.

**4.8 What substantive test will the authority apply in reviewing the transaction? Does this test vary depending on sector?**

In assessing the potential impact of a transaction on competition, the AMCU will compare the market structure before and after execution of the transaction, and evaluate the conditions which would prevail in the absence of the transaction. Although market share is the most obvious indicator of market structure and the extent of the participants' and their competitors' impact on the market, this is only one of several criteria used to evaluate the impact of the transaction on competition in the market.

There are several noteworthy examples of potential negative impacts on the market which may lead the AMCU to prohibit the transaction, including:

- the possible elimination of potential competition or of an important market factor for ensuring competition;
- the ability to control trade channels or to change conditions of access to resources and infrastructure;
- changes in advertising, product promotion or market access, or changes in access to patents or other forms of IP rights (eg, trademarks and brands);
- the gaining of significant financial power by the participants in comparison with their competitors; and
- the impossibility of third parties gaining market access due to vertical concentration.

**4.9 Does a different substantive test apply to joint ventures?**

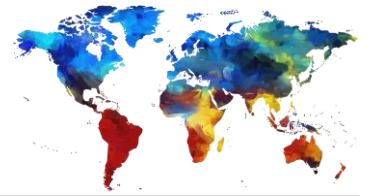
The AMCU applies a similar test to joint ventures.

**4.10 What theories of harm will the authority consider when reviewing the transaction? Will the authority consider any non-competition related issues (eg, labour or social issues)?**

In recent years, the AMCU has tended to lean towards the 'substantial restraint of competition' test, as opposed to the 'dominance' test.

However, additional difficulties can arise if the transaction might create, maintain or reinforce a dominant market position or otherwise have a negative impact upon competition; or if there are sufficient grounds for state intrusion into the particulars of the transaction - for example, if, as a result of the transaction, the participants will be able to:

- extend and diversify their product offerings;



- offer clients a combination of their own and supplementary goods; or
- balance their market power in one market with their parallel influence in another.

The potential competitive harm must be sufficiently high for the AMCU's assessment to be based on the 'substantial restraint of competition' criterion.

Thus, the AMCU will holistically evaluate the impact of the transaction on competition in the market, considering factors that will or may impact not only on the market in which the transaction is taking place, but also on adjacent markets and the economy as a whole.

## **5. Remedies**

### **5.1 Can the parties negotiate remedies to address any competition concerns identified? If so, what types of remedies may be accepted?**

The parties can negotiate remedies to address possible competition concerns. A wide range of such measure may be proposed; however, the remedies will additionally be tested for compliance with the concerted actions prohibition.

There are three general types of remedies:

- removal of links with competitors;
- divestment; and
- other remedies (access remedies and behavioural remedies).

The general rule in assessing potential remedies is whether the remedy is suitable to address a specific competition concern.

### **5.2 What are the procedural steps for negotiating and submitting remedies? Can remedies be proposed at any time throughout the review process?**

There is no legally regulated procedure for the proposal of remedies. If the Anti-monopoly Committee of Ukraine (AMCU) establishes grounds for prohibiting the transaction, it will inform the participants accordingly and give them 30 days to propose undertakings to eliminate or mitigate the competition concerns of the AMCU. The undertakings assumed by the participants should be proportionate to the reasonable threat of the negative impact on competition. The undertakings may be negotiated between the AMCU and the participants.

The AMCU's decision to clear the merger may be made conditional on implementation of the undertakings. Such undertakings may relate, in particular, to restrictions on the management, use or disposal of property, as well as to obligations to dispose of property. Remedies may be proposed at any time during the review process until the AMCU has issued its decision.

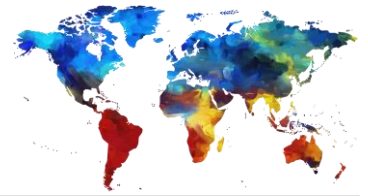
### **5.3 To what extent have remedies been imposed in foreign-to-foreign transactions?**

The law does not distinguish between national and foreign-to foreign mergers in this regard.

## **6. Appeal**

### **6.1 Can the parties appeal the authority's decision? If so, which decisions of the authority can be appealed (eg, all decisions or just the final decision) and what sort of appeal will the reviewing court or tribunal conduct (eg, will it be limited to errors of law or will it conduct a full review of all facts and evidence)?**

If the AMCU prohibits the transaction, the Cabinet of Ministers of Ukraine (CMU) may still grant clearance if the positive effects in the public interest outweigh the negative impact on competition, unless the restriction of



competition is not necessary to achieve the purpose of the concentration or jeopardises the market economy. However, there are no publicly available cases of the CMU granting clearance for a transaction that was prohibited by the AMCU.

The AMCU's decisions can also be challenged in the commercial courts. The relevant statement of claim indicating the grounds for invalidation of the AMCU's decision must be filed with the commercial court within two months of receipt of the decision.

Decisions of the commercial courts may be further appealed to the competent appellate instance within 20 days. If the appeal is unsuccessful, the claimant may appeal to the Supreme Court of Ukraine (the cassation commercial court).

As the AMCU has issued few prohibition decisions, and in each case has thoroughly and deliberately assessed the facts and the potential impact of the transaction on the relevant markets, there have been no instances of successful appeals in merger cases (although not all court decisions are publicly available). Further, there is no public record of successful appeals against clearance decisions of the AMCU.

## **6.2 Can third parties appeal the authority's decision, and if so, in what circumstances?**

Third parties may appeal an AMCU decision on merger clearance if the decision violates their rights.

## **7. Penalties and sanctions**

### **7.1 If notification is mandatory, what sanctions may be imposed for failure to notify? In practice, does the relevant authority frequently impose sanctions for failure to notify?**

Failure to notify a transaction is punishable by fines of up to 5% of the entity's turnover in the last fiscal year. If the entity had no income in the last financial year or if it fails to provide information regarding its financial performance at the Anti-monopoly Committee of Ukraine's (AMCU) request, a fine of up to UAH 340,000 will be imposed.

The AMCU also has the power to calculate a fine based on the financial indicators of the corporate group to which a participant belongs, and not just those of the participant itself.

According to the Competition Law, the AMCU also has the authority to take more extreme measures, including the mandatory demerger or reorganisation of monopolistic business entities. This sanction is not directly related to the transaction and/or its implementation without clearance. The Competition Law further makes this sanction contingent on the company explicitly taking advantage of its monopolistic market status.

### **7.2 If there is a suspensory obligation, what sanctions may be imposed if the transaction closes while the review is ongoing?**

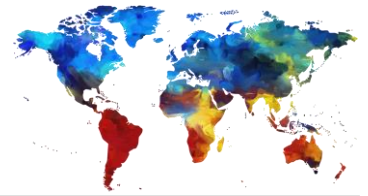
In such cases the AMCU can reduce the imposed sanctions; however, this will depend on the circumstances of the case.

### **7.3 How is compliance with conditions of approval and sanctions monitored? What sanctions may be imposed for failure to comply?**

The AMCU will oblige the participants to submit regular reports on fulfilment of the undertakings. The AMCU also has diverse powers at its disposal, including the power to gather evidence, request information, seize evidence, apprehend subjects and commence examinations.

Failure to notify a transaction is punishable by fines of up to 5% of the entity's turnover in the last fiscal year. If the entity had no income in the last financial year or if it fails to provide information regarding its financial performance at the AMCU's request, a fine of up to UAH 340,000 will be imposed.





## 8. Trends and predictions

### 8.1 How would you describe the current merger control landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

In November 2017 the Parliament of Ukraine amended the Competition Law to address notifications by parties subject to sanctions (Russia related), in force from December 2017. Pursuant to the amended law, the AMCU will reject notifications or cease its review (if such notifications have already progressed to Phase I or II) if the transaction is prohibited by the Law on Sanctions. The AMCU also published guidelines on the issue, confirming that the new rules will apply if any of the participants (or any individuals or entities connected to them by controlling relations) is on the Ukrainian sanctions list; or if a particular type of sanction applies to a given individual or entity (eg, prohibition on disposal of assets or equity). An adverse interpretation of the new rules would suggest that they may apply on a group-wide basis (unlike many of the sanctions themselves) - that is, where a party is not on the list itself, but belongs to a group that is controlled by or that controls sanctioned individuals or entities.

The thresholds and procedures established in the early 21st century are now outdated and no longer adequate to ensure an effective balance between the need for merger control on the one hand and the financial and administrative burden that the merger control regime imposes on businesses on the other.

The need to modernise the approach to merger control was also recognised under the Ukraine-EU Association Agreement.

In 2017 the Anti-monopoly Committee of Ukraine (AMCU) launched a public consultation on the draft Non-horizontal Merger Guidelines, which were subsequently adopted in early 2018. They are largely modelled on the EU Non-horizontal Merger Guidelines and will complement the existing Guidelines on Horizontal Mergers.

One anticipated amendment to the merger control legislation is the suggested definition of 'state aid' as a criterion for the impact of trade between Ukraine and the European Union, especially in relation to the establishment of state enterprises in the energy sector. This will align the definition of 'state aid' with that in the Ukraine-EU Association Agreement, defining examples of state aid measures whose influence is limited to the local level and which thus do not require notification to the AMCU.

Another proposal is to introduce a new concept of a 'business entity' which will depend on the specific activities conducted. In the European Union, unlike in Ukraine, business entities are categorised depending on whether their activities are economic or non-economic. Thus, business entities are entities that carry out economic activities, consisting of the sale of goods or services on the market. Accordingly, state support for non-economic activities will not fall under the rules on state aid, since the law applies exclusively to state aid for economic entities.

## 9. Tips and traps

### 9.1 What are your top tips for smooth merger clearance and what potential sticking points would you highlight?

It should first be stressed that concentrations are generally allowed in Ukraine. The Anti-monopoly Committee of Ukraine (AMCU) grants clearance in approximately 97% of cases. Clearance is refused extremely rarely and only in cases where there is a serious threat to competition on a particular Ukrainian market.

The main recommendation is to file with the AMCU before execution of the transaction, even if the documentation is incomplete (as missing documents can be submitted later). Otherwise, the AMCU may impose substantial fines, including recognising the transaction as illegal, which in turn may be exploited by competitors.