THE MERGER CONTROL REVIEW

Tenth Edition

Editor
Ilene Knable Gotts

THE LAWREVIEWS

THE MERGER CONTROL REVIEW

TENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in August 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Ilene Knable Gotts

THE LAWREVIEWS

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALLEN & GLEDHILL LLP

ALTIUS

ANDERSON MŌRI & TOMOTSUNE

ASHURST

AZB & PARTNERS

BAKER & MCKENZIE

BERNITSAS LAW FIRM

BLAKE, CASSELS & GRAYDON LLP

BOWMANS

BREDIN PRAT

CAIAZZO DONNINI PAPPALARDO & ASSOCIATI – CDP STUDIO LEGALE

CALLOL, COCA & ASOCIADOS

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CMS

CRAVATH, SWAINE & MOORE LLP

DEBEVOISE & PLIMPTON LLP

DLF ATTORNEYS-AT-LAW

ELIG GÜRKAYNAK ATTORNEYS-AT-LAW

HOUTHOFF

KING & WOOD MALLESONS

LAW FIRM BEKINA, ŠKURLA, DURMIŠ AND SPAJIĆ LTD

LCS & PARTNERS

MAYER BROWN

MINTERELLISONRUDDWATTS

MOTTA FERNANDES ADVOGADOS

PAUL HASTINGS LLP

PÉREZ BUSTAMANTE & PONCE

PRAGMA LEGAL

SK CHAMBERS

SLAUGHTER AND MAY

UGGC LAW FIRM

VALDÉS ABASCAL ABOGADOS SC

WACHTELL, LIPTON, ROSEN & KATZ

WILMER CUTLER PICKERING HALE AND DORR LLP

YULCHON LLC

CONTENTS

Chapter 35

UKRAINE

Andriy Navrotskiy and Igor Dykunskyy[1]

I INTRODUCTION

The Antimonopoly Committee of Ukraine (AMCU) is the state authority with special status focused on ensuring state protection to competition, including merger control rules compliance.

The main features of the AMCU's special status, 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.

The AMCU acts pursuant to the economic competition protection legislation such as the Law on the Antimonopoly Committee of Ukraine, the Law on Protection against Unfair Competition and the Law on Protection of Economic Competition.

The Cabinet of Ministers of Ukraine (CMU) is the highest state body in the system of the executive power bodies in Ukraine, and is authorised to overrule the AMCU's refusal to grant a permit on concentration.

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 comprises 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. The following legislative acts are considered the main acts of Ukrainian competition law:

a The Law of Ukraine on Protection of Economic Competition as of 2001, known as the Competition Law, with its amendments;

b The Law of Ukraine on the Antimonopoly Committee of Ukraine as of 1993; and

c Regulation of the Antimonopoly Committee of Ukraine on Concentration as of 2002.

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

a the combined worldwide value of the participants' assets or turnover exceeds €30 million for the preceding fiscal year and the value of assets or turnover of at least two participants exceeds €4 million; and

b at least one of the participants had Ukrainian sales turnover exceeding €8 million for the preceding financial year, and the worldwide turnover of at least one other participant exceeds €150 million for the preceding fiscal year, in Ukraine and worldwide.

1 Andriy Navrotskiy and Igor Dykunskyy are partners at DLF Attorneys-at-law.

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

a the merger of two or more previously independent undertakings, or the takeover of one undertaking by another;

b 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:
- direct or indirect acquisition, obtaining into ownership (by other means) of assets in the form of a single (integral) property complex or a structural unit of an undertaking; obtaining in management, rent, lease, concession or acquisition in another manner of the right to use the assets in the form of the single (integral) property complex or structural unit of an undertaking, including acquisition of assets of an undertaking being liquidated; or
- appointment or election of a person as the head or deputy head of a supervisory board, executive board or other supervisory or executive bodies of an undertaking if that person already occupies one or several of the mentioned positions in other undertakings; or the creation of the situation, where more than half of the offices of the members of the supervisory board, executive board, other supervisory or executive bodies of two or more undertakings are occupied by the same persons;

c establishment of an undertaking by two or more undertakings that will independently perform business activities for a long period of time, but at the same time, the establishment does not result in coordination of the competitive behaviour between the undertakings establishing the new undertaking, or between them and the newly established undertaking; and

d direct or indirect acquisition, obtaining in ownership by other means or obtaining in management of shares (participation interests, shareholdings), ensuring achievement or exceeding 25 per cent or 50 per cent of votes in the highest governing body of the appropriate undertaking.

In November 2017, the Parliament of Ukraine amended the Competition Law to deal with notifications by the sanctioned (Russia-related) parties (in force from December 2017). Pursuant to the amended law, the AMCU will reject notifications or drop their review (if such notifications have already progressed into Phase I or II) if the concentration is prohibited by the Law on Sanctions. The AMCU also published guidelines on the issue: the new rules will apply if any of the parties to the concentration (or any individuals or entities connected to them by relations of control) is on the Ukrainian sanctions list; and a particular type of sanction applies to a given individual or entity (e.g., prohibition on disposal of assets, equity). Under adverse interpretation, the new rules 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 controlled by or controlling the sanctioned individuals or entities.

The thresholds and procedures established in the beginning of the 21st century are outdated and do not comply with the current demands in part of ensuring the effective balance between the necessity of merger control and monopolisation of the market, on the one hand, and expenses and administrative restrictions imposed on business under such procedures, on the other.

The need to change the current approaches to merger control was also envisaged under the Ukraine–European Union Association Agreement.

In 2017, the AMCU launched public consultations on the draft Non-Horizontal Merger Guidelines. The relevant document was adopted by the authority in early 2018. It is largely modelled on the EU Non-Horizontal Merger Guidelines and will complement the existing Guidelines on Horizontal Mergers.

The AMCU is also starting to apply its Guidelines on the Assessment of Horizontal Mergers, and has recently adopted the Guidelines on the Assessment of Non-Horizontal Mergers to analyse the possible unilateral or coordinated effects of the transaction, as well as countervailing factors (such as buyer power, market entry and the 'failing firm' defence).

II YEAR IN REVIEW

From the available statistics, it can be concluded that in most cases of economic entities' claims for the cancellation and invalidation of the AMCU's decision on anticompetition laws violations, including in the area of mergers and acquisitions, the courts reject the claims. The courts find it legitimate for the AMCU to declare actions of economic entities as a violation.

For example, in one of the rulings of the Economic Court of Cassation dated back to 13 March 2018, the court disregarded the economic entity (individual entrepreneur) arguments, noting that for the actions of an economic entity to be classified as anticompetitive concerted actions, they should not necessarily have negative consequences in the form of damages or violations of rights and legal interests of other economic entities or consumers. Even if there are no signs of concentration in the classical sense (setting up a joint venture as a separate entity for the purpose of carrying out independent business activities), it is sufficient to establish the very fact of coordinating competitive behaviour, which may have a negative effect on competition.

Moreover, the economic entities' failure to achieve the purpose for which they originally coordinated their competitive behaviour shall not be grounds for establishing the absence of a violation, if it was for reasons and circumstances beyond their control.

Therefore, for the AMCU to recognise violations of the laws that protect economic competition, it is sufficient to establish and prove the economic entities' intentions to coordinate their competitive behaviour or to carry out a concentration without obtaining the AMCU's approval.

In another Resolution dated 7 August 2018, the Supreme Court, when abolishing the previous instances' decisions based on a substantive law violation, noted that while resolving the disputes related to recognising the AMCU decisions as invalid, the courts must investigate and evaluate only the evidence provided directly in the AMCU decision.

At the same time, the Supreme Court, in its Resolution dated 24 April 2018 on another case, ruled to reject the cassation appeal and upheld the previous instances' decisions, declaring the AMCU decision invalid.

The statistics of the AMCU decisions for the first quarter of 2019 in the field of granting approval for economic concentration are as follows. The AMCU received 81 applications, 66 of which were considered by the AMCU. Therefore, it is apparent that the remaining 15 applications were left without consideration owing to non-compliance with the requirements for submitting applications and supporting documents. Out of the reviewed applications, 40 concerned concentrations with the participation of foreign companies; 65 applications were granted approval for concentration. There were no refusals to grant approval for concentration. We can assume that the AMCU opened a concentration case as a result of considering one application, scheduling a more detailed study of concentration than during the standard

procedure, and this investigation is ongoing. According to the AMCU annual report, in 2018 the AMCU considered 453 applications for approval for concentration filed by economic entities. In 447 cases the economic entities were granted approval for concentration; in six cases the consideration was closed without making a decision on the merits.

The statistical absence of refusals to grant approval for concentration confirms the fact that the economic concentration per se is allowed. The need to file an application for approval of concentration with the AMCU is not a permitting process, but rather a process of notifying the AMCU of potential changes in the competition situation in the commodity market concerned.

As one of the recent (though rather controversial) instances, the AMCU granted DTEK Group a permission to acquire majority shares of Kyivoblenergo and Odesaoblenergo (regional power providing companies), even though this results in the group's share on the electricity supply market to exceed 35 per cent (under the competition protection law, the entity holding 35 per cent in the Ukrainian market is considered to have a monopoly position on that market).

III THE MERGER CONTROL REGIME

i Waiting periods and time frames

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

As long as the AMCU State Commissioner does not reject the application because of a failure to meet the requirements specified by the AMCU, the application for concentration approval 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 concentration approval within 30 days following its acceptance for consideration. Therefore, the AMCU will usually have 45 days to review an application and come to a decision.

If the AMCU fails to launch its application consideration process within 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.

Notwithstanding the above, if any grounds prohibiting the concentration come to light, or if a more thorough investigation or an 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 separate notice that the concentration case was initiated, along with a list of information, which the applicant needs to provide to aid the making of the decision. The AMCU may request additional information from the applicant or other parties if the lack of such information impedes the case consideration. 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 a consideration period starts on 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 additional documents or information collection. Therefore, there can be delays

between the opening of a case by the AMCU, the resulting request for additional documents, information or expert opinions and the actual start of the procedure of the concentration case consideration.

If the AMCU fails to make a decision within the specified three-month period for consideration of a concentration case, a decision to grant consent for concentration 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, the concentration case consideration 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 the concentration case consideration only following elimination or resolution of the circumstances, having resulted in suspension of such a consideration. During suspension of the concentration case consideration, the period for review is also suspended so that the time for the case consideration shall continue as of the date when the consideration is resumed.

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

ii Parties' ability to accelerate the review procedure

The accelerated 25-day review procedure is only applicable 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, the parties' aggregate market shares do not exceed 15 per cent or the parties' aggregate shares on the vertical markets do not exceed 20 per cent. The decision on the accelerated merger review is taken by the State Commissioner (a member of the AMCU) supervising the application consideration.

In some cases, the regular merger clearance procedure can be sped up. An informal way of accelerating the process is to submit the appropriate grounding and additional explanations regarding the necessity to obtain the clearance as soon as possible for the AMCU.

The time required to review a merger application largely depends on the AMCU's workload at the time of consideration, the accuracy and completeness of the merger application, the complexity of the transaction, the absence or not of competition concerns, and the merger's potential positive effect on the market or national economy.

If any grounds 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.

iii Grounds for concentration approval

As a general rule, an economic concentration is not, in its essence, an anticompetition action and, therefore, it 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 affecting competition in the commodities market.

Therefore, business entities applying to the AMCU for economic concentration authorisation do not ask for the concentration to be approved as an exception to the general rule, but simply follow the lawful authorisation procedure for completing business transactions of certain commercial magnitude.

The Competition Law requires approval of a competition protection organisation 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.

Economic concentration itself is not a violation of the Competition Law. Furthermore, the merger is often necessary not only to increase a competitive ability of a business entity at 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 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 because of particular levels of economic capitalisation or owing to the aggregate resources of the concentration participants.

Therefore, an authorisation for economic concentration is a regular occurrence, while its prohibition is an exception, and an infringement upon business entities' ability to conduct business transactions aim to increase their competitive power.

The AMCU approves transactions that do not:

a result in the emergence of a monopoly on the affected market; or

b substantially restrict competition in, or on a substantial part of, the affected market.

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

iv Main criteria for the AMCU's assessment

Within the scope of its authority, the AMCU assesses concentrations to decide whether they should be authorised or denied. Part 1 of Article 25 of the Competition Law provides that authorisation or denial depends on whether the relevant agreement would:

a lead to monopolisation of the entire associated market or its substantial part; or

b cause substantial restraint of competition on the relevant market.

v Monopolisation

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

Article 1 of the Competition Law defines the term 'monopolisation' as a business entity's attainment, maintenance and escalation of a monopoly (dominant position); that is, where a business entity does not have any competitors in 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 monopolisation relates to market domination in which one or more business entities 'do(es) not experience substantial competition' in a particular market. This occurs, for example, in the case of joint domination of oligopoly participants if the combined

market share of the three largest business entities is greater than 50 per cent (subsection 5 of Part 1 Article 12 of the Competition Law), or the combined market share of the five largest business entities is greater than 70 per cent (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 with regard to the entity's dominant market position.

vi 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 the agreement execution 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 obvious indicator of the market structure, it is only part of the general criteria used to evaluate the concentration's impact on the market competition.

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 that may be reviewed in this context: because of concentration, a 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 balance its market power at 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.

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

vii What substantive test will the authority apply in reviewing the transaction?

There are several noteworthy examples of economic concentrations having a negative impact on the market, and that would possibly lead to a ban by the AMCU. They are as follows:

a possible disappearance of potential competition or an important market factor for competition that existed before the concentration;

b concentrated business entities' ability to control the market trade channels and change conditions of access to resources and infrastructure;

c change in advertising, product promotion and market entry capacity, and change in access to patents or other forms of intellectual property rights (for example, trademark and brand use);

d high financial power achieved by the concentration participants in comparison with their competitors;

e the impossibility of a third party having market access as a result of vertical concentration; and

f third-party access to the file and rights to challenge mergers.

Third parties have no access to the filing; however, the decision of the AMCU on a merger clearance may be appealed to the commercial court by third parties if the decision violates their rights.

viii Resolution of authorities' competition concerns, appeals and judicial review

The AMCU's decisions can be challenged in commercial courts. The relevant statement of claim indicating the grounds for the AMCU's decision invalidation should be filed to a commercial court within two months from the date of the decision receipt.

Courts' decisions may be further appealed to the competent appellate instance within a 20-day period. Further, if the appeal is unsuccessful, the claimant may go to the higher cassation court – the Supreme Court of Ukraine (the cassation commercial court).

As there have been very few AMCU prohibition decisions, and in each of these cases the authority 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). What is more, there is no public record of successful appeals against the AMCU's clearance decisions.

ix Effect of regulatory review

If the AMCU prohibits a concentration, the Cabinet of Ministers may still grant a clearance if its positive effects for the public interest outweigh the negative impact of the competition restriction, unless that restriction is not necessary for achieving the purpose of the concentration or jeopardises the market economy system. If an AMCU decision is appealed to the Cabinet of Ministers, the latter creates a special commission, which includes a number of independent experts from different industries and authorities as well as the AMCU's senior officers.

The commission analyses the positive and negative effects of implementing the concentration using the same substantive test employed by the AMCU. The Cabinet of Ministers then prohibits or approves the reviewed concentration.

IV OTHER STRATEGIC CONSIDERATIONS

How to coordinate with other jurisdictions

The AMCU cooperates with competition authorities in other jurisdictions through bilateral treaties either between Ukraine and other countries or between the AMCU and other competition authorities. The AMCU cooperates with the competition authorities of certain CIS countries – members of the Agreement on Conducting Coordinated Antimonopoly Policy as of 2000 through the Interstate Council on Antimonopoly Policy established pursuant to the requirements of the Agreement.

The AMCU also collaborates with international organisations such as the Organization for Economic Cooperation and Development, United Nations Conference on Trade and Development and the International Competition Network. Particularly, the OECD provides the AMCU with specific recommendations as to the improvement of diverse aspects of the AMCU-authorised activity.

V OUTLOOK AND CONCLUSIONS

One of the expected amendments to the merger control legislation in 2019 is the suggested definition of 'state aid' as a criterion for the impact of trade between Ukrainian and EU enterprises, especially with regard to setting up government-powered enterprises in the energy sector. Such a change will provide for the definition of state aid in line with the Association Agreement, defining examples of state aid measures whose influence is limited to the local level and do not require the AMCU's notification.

Another proposition is introducing a new concept of a 'business entity' to be determined depending on the activities it conducts. In the EU, unlike in Ukraine, an entity is determined according to the principle of its activities' division into economic and non-economic categories. That is, in the understanding of the law, a business entity carries out economic activity, consisting of goods sale on the market. Accordingly, the state support for non-economic activities will not fall under the rules of the state aid control, since the Competition Law applies exclusively to the state aid for economic entities.

In February 2019, the Competition Law was supplemented by Article 52-2, which reloads and provides new content to the principle of 'notification about violation' including notification in merger cases (not notified merger), introduced by the AMCU more than 18 years ago. This principle did not receive a proper response in Ukraine and failed to gain popularity; however, the introduced changes are expected to alter the situation. The new rules regulate: (1) the AMCU detailing actions when it receives a statement of violation; and (2) the procedure for exemption from liability and the scale of liability reduction, even if the person declaring the violation was not the first applicant in the case. In particular, the first applicant receives a total exemption from liability; the fine for the second applicant is reduced by 50 per cent; for the third one, by 30 per cent; and for other applicants, by 20 per cent. However, it should be emphasised that neither the first or the second, nor any other applicant can be exempted from the obligation to compensate for the damage. This, in our opinion, is fair, as without this norm, there is the possibility of gaining illegal advantages or unlawful profit, while at the same time damaging the competitors.

Appendix 1

ABOUT THE AUTHORS

ANDRIY NAVROTSKIY

DLF Attorneys-at-law

Andriy Navrotskiy consults and represents clients worldwide for antitrust, labour and contract law. He specialises in legal due diligence, preparation of legal opinions, as well as the legal design and tax optimisation of transaction structures. Advice and support do not end after the closing phase or notification of the merger. Andriy also offers his clients competent and comprehensive post-merger consulting.

Having worked at the Antimonopoly Office of Ukraine, where Andriy contributed to the development of a number of ground-breaking laws and regulations, he possesses invaluable experience in consulting and supporting investors on diverse matters of antitrust and competition law. Andriy has managed numerous cross-border M&A transactions, focusing on mergers in particular.

In addition, Andriy represents clients before Ukrainian competition authorities, including cases involving the abuse of a dominant position, concerted practices and penalty proceedings.

Another practice area of Andriy Navrotskiy is advising and representing our customers' interests in court proceedings and arbitration courts, with support in the subsequent enforcement of claims in enforcement proceedings.

IGOR DYKUNSKYY

DLF Attorneys-at-law

Igor Dykunskyy has been advising international, mainly German-speaking commercial enterprises in Ukraine for almost 15 years. In addition to providing ongoing legal advice, he is responsible for business acquisitions and greenfield investments.

Igor Dykunskyy managed a significant number of M&A transactions, guided numerous clients through due diligence, merger applications and the subsequent structuring of the transactions. His other practice areas include labour law and renewable energy law. Here, Igor Dykunskyy can draw on his extensive experience, especially for implementing solar energy projects in Ukraine.

Igor Dykunskyy also boasts distinct expertise in developing distribution structures, as well as in asserting and enforcing creditor's claims.

Igor regularly publishes in professional periodicals and lectures on legal aspects of market entry, as well as investment protection in Ukraine.

DLF ATTORNEYS-AT-LAW

IQ Business Centre
13–15 Bolsunovska Street, 8th Floor
01014 Kyiv
Ukraine
Tel: +380 44 384 24 54
Fax: +380 44 384 24 55
andriy.navrotskiy@dlf.ua
igor.dykunskyy@dlf.ua
www.dlf.ua