



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Ukraine: Merger Control (4th edition)

This country-specific Q&A provides an overview to merger control laws and regulations that may occur in Ukraine.

It will cover jurisdictional thresholds, the substantive test, process, remedies, penalties, appeals as well as the author's view on planned future reforms of the merger control regime.

This Q&A is part of the global guide to Merger Control. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/index.php/practice-areas/merger-control-4th-edition>

1. Overview

The Ukrainian antimonopoly law, while not fully in line with the best international standards, is currently going through 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 main legal acts in the sphere of merger control:

Country Author: DLF attorneys-at-law

The Legal 500



**Andriy Navrotskyi, LL.M.,
partner, attorney at DLF
attorneys-at-law**

andriy.navrotskyi@dlf.ua



**Igor Dykunsyy, LL.M.,
partner, attorney at DLF
attorneys-at-law**

igor.dykunsyy@dlf.ua

- The Law on Protection of Economic Competition as of 2001, known as the Competition Law, with the amendments.
- The Law on the Antimonopoly Committee of Ukraine as of 1993
- Regulation of the Antimonopoly Committee of Ukraine on Concentration as of 2002

2. **Is notification compulsory or voluntary?**

Concentrations exceeding the thresholds stipulated by the Competition Law must be cleared with the Antimonopoly Committee of Ukraine before their implementation.

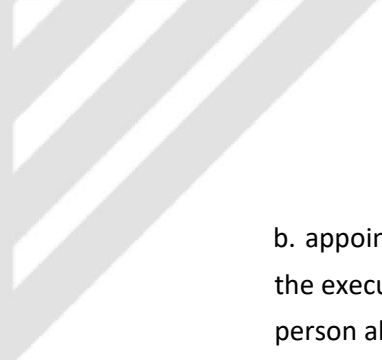
3. **Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?**

The Competition Law prohibits the partial or entire implementation of the concentration prior to clearance. Parties may not 'carve out' some part of the transaction for closing prior to approval. No derogations of this rule are either stipulated by the law.

4. **What are the conditions of the test for control?**

The following transactions shall be notified to the AMCU provided that the financial thresholds are met:

1. the merger of undertakings or the takeover of one undertaking by another one
2. an acquisition, (directly or through other entities) of control over other undertakings, or parts thereof, *inter alia*, by means of:
 - a. direct or indirect acquisition or any other acquirement of assets ownership in the form of an integral complex of assets or a structural subdivision of an undertaking; acquirement of the right to use assets in the form of an integral complex of assets or a structural subdivision of an undertaking via management, lease, rent, concession or any other means, including acquisition of assets of an undertaking under liquidation;

- 
- b. appointment or election of a person as the head, 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 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 undertaking(s) are occupied by the same person;
 3. Establishment of an undertaking by two and more undertakings, engaged in business activities independently over a prolonged period of time if such an establishment does not encourage the competition coordination among the established undertakings or between the undertakings and the newly established undertaking (joint venture);
 4. Any other direct or indirect acquisition of, or the acquirement of control over shares which ensure the acquirement of or over 25 percent, of or 50 percent of the votes, in the highest managing body of a particular undertaking (stock purchase).

As for the main test for whether or not a transaction shall be notified prior of its enforcement, the AMCU applies only the financial thresholds of the participant of the concentration. Until 2016, it was also a market share (35% and more) of at least one of the participant, however after the Law Amendments as of 2016 such test is not applied by the AMCU. For more details regarding the test for control, see question 13 below.

5. **What are the conditions on minority interest in your jurisdiction?**

Direct or indirect acquisition, obtaining ownership in another manner or obtaining a management of shares (participation interests), ensuring achievement or exceeding 25 per cent of votes in the highest governing body of the undertaking in question amounts to a merger and in the case of meeting the thresholds described in question 4.4 above triggers merger control filing obligations.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)?

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

1. where the combined worldwide value of the participants' assets or turnover, exceeds 30 million Euro for the preceding fiscal year and (1) the value of assets or turnover of at least 2 participants exceeds 4 million Euro and (2) or
2. at least 1 of the participants had Ukrainian sales turnover exceeding 8 million Euro for the preceding financial year (1) and the worldwide turnover of at least one another participant exceeds 150 million Euro for the preceding fiscal year (in Ukraine or/and worldwide).

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

The relevant turnover for the purposes of the merger clearance is the total turnover of the participant (with the control relations) in the previous financial year.

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.

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 entities.

8. Is there a particular exchange rate required to be used for turnover thresholds and asset values?

Foreign currency shall be converted into EUR according to the exchange rate of the currency in the previous year. The exchange rate is officially published by the National Bank of Ukraine as a basis for the appropriate calculations.

9. Do merger control rules apply to joint ventures (both new joint ventures and acquisitions of joint control over an existing business)?

According to the Competition Law, joint venture is to be cleared with the AMCU, if establishment of an undertaking by two and more undertakings, which will be engaged in business activities independently over a prolonged period of time, does not encourage the competition coordination among the established undertakings or between the undertakings and the newly established undertaking and the financial thresholds (see above) are met.

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 of such a shareholder required by the establishing documents.

As long as the criteria of the thresholds are met, establishment of a business entity by two or more other business entities as well as a joint control over another business entity constitutes a concentration regardless of the new entity's autonomy status and shall be prior approved by the Antimonopoly Committee of Ukraine.

At the same time, setting up the joint venture for the purpose of coordination of competitive behaviour between the founding undertakings or between the founding undertakings and the joint venture, is not viewed as concentration, but as concerted actions, which are subject to the concerted actions regulations and the merger control clearance.

10. **In relation to “foreign-to-foreign” mergers, do the jurisdictional thresholds vary?**

Thresholds do not vary in relation to “foreign-to-foreign” mergers. If participants of the transaction or one of the participants have / has control relations with a Ukrainian company, possess assets or turnover in Ukraine in the volume which triggers the notification to AMCU, the transaction shall be cleared with the AMCU before its enforcement. It shall be noted the AMCU has the exclusive authority to determine whether a particular transaction may or may not impact competition in Ukraine, and such an impact verification is in fact conducted while reviewing a merger case and granting clearance.

11. **For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?**

Not applicable. Ukraine has a compulsory filing regime.

12. **What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies?**

Assessment of the extent of concentration impact on competition requires comparison of 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 most obvious indicator of the market structure and the extent of the concentration participants’ and their competitors’ impact on the market, it is only one of the general criteria used to evaluate the concentration’s impact on the market competition (so the test is the same for every particular sector).

There are several noteworthy examples of economic concentration’s negative impact on the market, which may lead to ban of the economic concentration by the AMCU as follows:

- 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 and, change in 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 with their competitors; ○the impossibility of a third-party to have market access due to vertical concentration.

13. Are non-competitive factors relevant?

The factors unrelated to competition are not relevant.

14. Are ancillary restraints covered by the authority’s clearance decision?

Ancillary restraints can be covered by the decision of the Antimonopoly Committee of Ukraine.

15. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

No, there is no statutory deadline for notification of the transaction. The main rule is that the application has to be submitted before the transaction closing. Until the approval has been granted, concentration participants shall refrain from performing any irreversible actions which may result in competition restriction and in the impossibility of the original state restoration.

16. What is the earliest time or stage in the transaction at which a notification can be made?

The notification can be made as soon as the parties have signed a concentration agreement.

17. **What is the basic timetable for the authority's review?**

Normally, AMCU approval requires one to two months for review after an application was submitted.

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

The AMCU or its administrative board shall consider an application for approval of a concentration within 30 days after it is accepted for consideration.

18. **Under what circumstances the basic timetable may be extended, reset or frozen?**

If any grounds prohibiting the concentration become known, 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 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 additional documents, information or expert opinions and the actual start of the procedure of consideration of the concentration case.

19. **Are there any circumstances in which the review timetable can be shortened?**

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, or if the parties' aggregate market shares do not exceed 15% or the parties' aggregate shares on the vertical markets do not exceed

20%. 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 only possible for the AMCU.

The time required to review a merger application largely depends on the AMCU workload at the time of consideration, accuracy and completeness of the merger application, transaction complexity, absence of competition concerns, the merger potential positive effect on the market or national economy, etc.

20. **Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?**

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

21. **What information is required in the filing form?**

The following information is required: information on the transaction parties, the transaction detailed description, the corporate structure, preferably in the form of diagrams, details of the party group's volume of assets and amount of sales, etc. The full list of documents can be found in Regulation of the Antimonopoly Committee of Ukraine on Concentration as of 2002.

22. **Which supporting documents, if any, must be filed with the authority?**

The merger application should include also the following:

- o details of the parties with disclosure of their relevant group of business undertakings connected by control relations, and details of the ultimate beneficiaries thereof;

- the transaction detailed description, together with the originals or copies of the transactional documents;
- sources of the transaction financing for the AMCU to make certain that the participants are acting in their own interest;
- details of the party groups' volume of assets and the amount of sales proceeds;
- economic justification of the transaction;
- power of attorneys which should include specific wordings;
- a documentary confirmation of the application fee payment

23. Is there a filing fee? If so, please specify the amount in local currency.

The fee for the notification submission is 1200 times the non-taxable minimum personal income, which is currently UAH 20,400 (approximately EUR 680). The fee for submission for AMCU preliminary conclusions (see point 3.2.) amounts to 320 times the non-taxable minimum personal income, which is currently UAH 5,440 (approximately EUR 180).

24. Is there a public announcement that a notification has been filed?

No, there is no public announcement that a notification has been filed.

25. Does the authority seek or invite the views of third parties?

Engaging third parties is possible in the way of submission of the information required by the AMCU.

26. **What information may be published by the authority or made available to third parties?**

The AMCU publishes limited information, such as the fact that the approval has been granted and the names of the participants.

27. **Does the authority cooperate with antitrust authorities in other jurisdictions?**

AMCU cooperate with competition authorities in other jurisdictions through bilateral treaties between Ukraine and other countries or between the AMCU and competition authorities. The AMCU cooperates with the competition authorities of certain CIS countries – members of the Agreement on Conducting Coordinated Antimonopoly Policy dated 2000 through the Interstate Council on Antimonopoly Policy established pursuant to the requirements of the Agreement. The AMCU also collaborates with international organizations such as the Organization for Economic Cooperation and Development, United Nations Conference on Trade and Development, the International Competition Network and others. Particularly, OECD provides the AMCU with specific recommendations of improvement to diverse aspects of the AMCU authorized activity.

28. **What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in comparison with major merger control jurisdictions, such as the EU or US?**

The parties can negotiate remedies regarding possible competition concerns. There is a wide range of such measures, however it shall be noted that the remedies are to be tested additionally for the compliance with the concerned actions prohibition.

There are three general types of remedies that can be identified: removal of links with competitors, divestment, and other remedies (access remedies and behavioral remedies). General rule for remedies assessment is whether the remedy is suitable for eliminating a competition concern or not.

29. **What procedure applies in the event that remedies are required in order to secure clearance?**

There is no legally regulated procedure for remedies submission. In case of establishment of the grounds for the merger prohibition the AMCU informs the concentration participants on such grounds substance and provides a 30-day period for submission by the participants of their proposals as to obligations that they are ready to take in order to eliminate or mitigate the negative impact of the merger on competition acceptable for the AMCU.

The obligations assumed by the participants of the concentration should be proportional to the reasonable threat of the negative impact on competition. Those remedies may be negotiated by the AMCU and participants. The AMCU decisions on the issue of merger clearance may be conditional to the implementation of the above obligations, which eliminate or mitigate the negative impact of the merger on competition. Such conditions and obligations may concern, in particular, restrictions on the management, use or disposal of property, as well as the obligation of the entity to dispose of the property. However, the remedies can be submitted at any time of the review process until the AMCU decision is adopted.

30. **What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?**

In case of failure to notify the transaction, sanction in the form of fines for the violation may reach up to 5% of income from the entity turnover 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 AMCU request, the fine will be imposed in the amount of up to UAH 340,000 (approximately EUR 11,330).

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.

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

This sanction is not directly related to the 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.

31. **What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?**

The penalty for incomplete or misleading information in the notification or in response to the authority's questions may amount 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 amount up to 10000 non-taxable minimum incomes of citizens (UAH 170,000, approximately EUR 5,670)

32. **Can the authority's decision be appealed to a court? In particular, can third parties who are not involved in the transaction appeal the decision?**

If the AMCU prohibits the concentration, the Cabinet of Ministers of Ukraine (the CMU, the Government) 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 jeopardizes the market economy system. Yet, there are no publicly available cases of the CMU granting clearance for the concentration that was prohibited by the AMCU.

The AMCU's decisions can also 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 higher cassation court – the Supreme Court of Ukraine (the cassation commercial court).

As there have been very few AMCU's 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). Further, there is no public record of successful appeals against the AMCU clearance decisions.

33. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?

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 sanctions applies to a given individual or entity (e.g., prohibition on disposal of assets, equity, etc.). Under adverse interpretation, the new rules may apply on a group-wide basis (unlike many of the sanctions themselves) (i.e., 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 monopolization of the market, on the one hand, and expenses and administrative restrictions imposed on business under such procedures, on the other hand.

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 after the EU Non-Horizontal Merger Guidelines and will complement the existing Guidelines on Horizontal Mergers.

34. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

One of the expected amendments to the merger control legislation in 2019 is the proposed definition of "state aid" as a criterion for the impact of trade between Ukraine's and the EU's enterprises, especially in case of setting up of the government powered enterprises in the energy sector. Such a change will allow to have the definition of state aid in line with the Association Agreement and which defines examples of state aid measures, whose influence is limited to the local level, and herewith do not requires the Committee's notification.

Another proposal is the introduction of a new concept of a "business entity", which will be determined depending on the activities it conducts. In the EU, unlike in Ukraine, an entity is determined by the principle of the division of activities into economic and noneconomic ones. That is, a business entity in the understanding of the law is only one who carries out the economic activity, which consists in the sale of goods in the market. Accordingly, the state support for non-economic activities will not fall under the rules on state aid control, since the Law applies exclusively to state aid to economic entities.