The Merger Control Review

Eleventh Edition

Editor
Ilene Knable Gotts

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THE MERGER CONTROL REVIEW

ELEVENTH EDITION

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, such as Malaysia, are currently considering imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). Also, the book includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, high technology and media, as well as a chapter on merger remedies, to provide a more in-depth discussion of recent developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 30 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency in 2018. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has amended its law to ensure that it has the opportunity to review transactions in which the parties' turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). The focus on 'killer acquisitions' (i.e., acquisitions by a dominant company of a nascent competitor), particularly

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involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Some jurisdictions have adopted a process to 'call in' transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions, and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., in Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

Covid-19 and the current economic environment have provided new challenges to companies and enforcement agencies. Many jurisdictions have extended the review times to account for covid-19 disruptions at the agencies. At the same time, some of the transactions are distress situations, in which timing is key to avoid the exit of the operations and termination of employees. Regardless of the speed at which the economic recovery occurs, it is very likely that for the next couple of years the agencies will be faced with reviews of companies in financial distress, if not at the point of failure. Some jurisdictions exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the

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transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the European Commission (EC) both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies that are found to be in violation. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. In addition, the EC has fined companies on the basis that the information provided at the outset

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was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm, in large cross-border transactions raising competition concerns, for the US, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential

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of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the

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ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
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Part II

Jurisdictions

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Chapter 32

UKRAINE

Igor Dykunskyy[1]

I INTRODUCTION

The Antimonopoly Committee of Ukraine (AMCU) is the state authority with special status focused on ensuring state protection for 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.

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 of 2001, known as the Competition Law, with its amendments;
b the Law of Ukraine on the Antimonopoly Committee of Ukraine of 1993;
c the Regulation of the Antimonopoly Committee of Ukraine on Concentration of 2002; and
d the Law on Protection against Unfair Competition of 1996, with its amendments.

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.

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Article 22 of 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; or 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 of 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 sanctioned (Russia-related) parties (in force since 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) are 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 at 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 (the Association Agreement).

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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 transactions, as well as countervailing factors (such as buyer power, market entry and the 'failing firm' defence).

II YEAR IN REVIEW

According to the published data, in 2019, the AMCU received 532 applications for economic concentration, 44 of which were declined mostly due to non-compliance with the requirements for submitting applications and supporting documents or application withdrawal. Out of 442 applications considered by the AMCU (compared with 453 in 2018), only three were closed without a decision on the merits. Hence, the AMCU approved economic concentration in the remaining 439 cases. Such a small percentage of dismissed applications for concentration suggests that 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 in the market concerned.

Applications by foreign investors or companies with foreign investors accounted for 34 per cent (181 applications) of those considered by the AMCU.

In the majority of cases, economic concentrations were implemented via share acquisition (68.3 per cent of cases). Other types of control acquisition accounted for 21.4 per cent of cases, whereas a new undertaking was established in only 3.4 per cent of cases. In terms of industries, agricultural production, the extractive industry, including raw materials processing, and the energy and utilities sectors held the top positions.

On 27 September 2019, the AMCU adopted the Guidelines on consideration of concentration via establishment of joint ventures, which to a large extent mirror the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004. The Guidelines specify the following criteria for a joint venture formation to be considered a concentration:

a the joint venture is newly established by two or more undertakings;

b the joint venture is fully functional (i.e., able to carry out its business activity independently of the parent undertakings);

c the joint venture is capable of operating on a lasting basis; and

d the creation of the joint venture does not result in coordination of competitive behaviour.

On 12 December 2019, the AMCU introduced a resolution with two amendments to the concentration legislation. The resolution provides for a revised definition of an integral property complex as all types of property that, when combined, enable a legal entity to carry out its business activity, including buildings, facilities, equipment, inventory, raw materials, produce, and rights to claims and debts, as well as rights to trademarks or similar and other rights, such as rights to land plots and the integral property complex itself. It is a rather broad definition, which means that more economic transactions will now be subject to merger clearance.

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The second amendment is that acquisitions by a bank or other financial institution of assets in the form of an integral property complex or shares of a legal entity, provided that such an acquisition is carried out under a restructuring plan developed in accordance with the Law On Financial Restructuring, as a result of debt recovery, with further alienation of such assets within two years, will not be considered a concentration.

Also, as expected, the AMCU proposed that the impact on trade relations between Ukraine and the EU be added to the definition of 'state aid'. This would bring the definition of state aid in Ukraine in line with the Association Agreement. However, to date, the definition remains unchanged. Furthermore, on 31 May 2020, the Supreme Court of Ukraine upheld the first ever decision of the AMCU on the unlawfulness of state aid. The local authority, having provided the mentioned state aid, was appealing against the AMCU's decision, claiming that the potential effect on the trade relations between Ukraine and the EU had not been taken into account. The Supreme Court ruled that until the Ukrainian legislation is amended, the AMCU is not entitled to consider this criterion.

III THE MERGER CONTROL REGIME

i Waiting periods and time frames

Normally, the AMCU's approval is granted within one to two months of 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 of the date of its receipt.

The AMCU or its administrative board shall consider the application for concentration approval within 30 days of 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 the applicant submitted the 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

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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 anticompetitive 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.

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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 CMU (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 aims 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

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(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.

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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 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 CMU 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 CMU, 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 CMU 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 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 Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development and the International Competition Network. In particular, the OECD provides the AMCU with specific recommendations as to the improvement of diverse aspects of the AMCU-authorised activity.

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V OUTLOOK AND CONCLUSIONS

Currently, several bills aiming to reform the AMCU, as well as the effective competition legislation, are awaiting parliament's consideration. In general, the competition legislation in Ukraine requires substantial revision to both assimilate the EU standards and meet the requirements of the Ukrainian marketplace.

Some bills include similar amendments envisioning the establishment of a new body that will be entitled to consider claims as to violations of legislation on state aid, thereby enabling the AMCU to focus on competition protection, without the additional workload caused by consideration of cases on state aid. Another proposed change is the creation of a special court to handle competition-related cases. This, again, is aimed at increasing the AMCU's efficiency, yet the proposed amendment raises concern that such a court may not retain full impartiality and so could become a means of eliminating competition. In addition, the introduction of the aforementioned changes conflicts with the Constitution of Ukraine; therefore, changes to the Constitution will be necessary.

Another bill, registered in 2017, addresses a range of issues, including authorising territorial offices to impose increased fines and revising the procedure for the enforcement of AMCU decisions, the fine collection procedure, etc. In particular, the bill stipulates abolition of the penalty incurred on late payment of fines, as this, in practice, does not facilitate timely collection of fines. The authors of the bill suggest that the penalty be replaced by a 50 per cent discount for timely payment.

Other potential changes include the proposed increase of the threshold for presumed market dominance of a single undertaking to 40 per cent from 35 per cent, the establishment of clearer time frames for application consideration and increased state duties.

With the announcement of six large state-owned enterprises and a long list of smaller businesses to be put up for privatisation in 2020, the AMCU recently made a statement urging potential bidders to take into account the competition protection legislation to avoid triggering concentration clearance, or if required, to apply for such clearance in a timely manner (i.e., either before the tender launch or within 30 days of the winner's announcement).

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Appendix 1

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Igor has managed a significant number of M&A transactions and has 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, he can draw on his extensive experience, particularly in the implementation of solar energy projects in Ukraine.

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

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

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