

THE MERGER  
CONTROL  
REVIEW

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Editor  
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THE LAWREVIEWS

# UKRAINE

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## 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 twenty-first 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).

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 2020 the AMCU received 602 applications for economic concentration, 104 of which were declined, mainly due to non-compliance with the requirements for submitting applications and supporting documents or application withdrawal. Out of 498 applications considered by the AMCU (compared with 487 in 2019), only two were closed without a decision on the merits. Hence, the AMCU approved economic concentration in the remaining 496 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 37 per cent (223 applications) of those considered by the AMCU.

In the majority of cases, economic concentrations were implemented via share acquisition (72.5 per cent of cases). Other types of control acquisition accounted for 16.1 per cent of cases, whereas a new undertaking was established in only 2.7 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.

In 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 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.

Another amendment is that acquisitions by bank or other financial institutions 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. 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 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.

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 does '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,<sup>2</sup> or the combined market share of the five largest business entities is greater than 70 per cent.<sup>3</sup> 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;

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2 Subsection 5 of Part 1, Article 12 of the Competition Law.

3 Subsection 5 of Part 2, Article 12 of the Competition Law.



- 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 with 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).

In most cases, the court denies business entities' appeals to invalidate the decision of the AMCU on violation of antitrust law. The court considers the AMCU to be authorised in the detection of violation in the business entity's actions.

#### **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 AMCU-authorized activity.

## 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.

The Ukrainian parliament, Verkhovna Rada, is currently considering the draft bill on amendments to certain laws of Ukraine concerning competition and antitrust reform.<sup>4</sup> The document should reform the Ukrainian competition law to increase the AMCU's efficiency, bring it in line with existing standards in the European Union and introduce the best EU and US practices.

The latest legislation changes concerning the AMCU include amendments to the Law of Ukraine on the Antimonopoly Committee of Ukraine and the adoption of several legislative acts to improve the composition of the AMCU.

Some bills include similar amendments envisioning the establishment of a new body that will be entitled to consider claims for 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 2018, addresses a range of issues. In particular, the authors of the bill suggest that penalties incorporate 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.

On 30 March 2021, the Verkhovna Rada supported the draft bill on unblocking large-scale privatisation. The law's adoption will remove the last obstacle to the resumption of large state-owned enterprises' privatisation. In this regard, the AMCU 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 a tender launch or within 30 days of the winner's announcement).

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<sup>4</sup> No. 2730, dated 14 January 2020.

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

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.

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