

Concerted actions in Ukraine: legal aspects

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1. Definition and types of concerted actions

Pursuant to the Law of Ukraine On the Protection of Economic Competition (hereinafter the "Competition Law"), anticompetitive concerted actions are concerted actions that have resulted or may result in prevention, elimination or restriction of competition. Pursuant to the Competition Law, anticompetitive concerted actions shall be prohibited and entail liability in accordance with the Competition Law. Thus, this means a general prohibition on all concerted actions that have or could have a negative effect on competition in Ukraine.

Related publication: Concerted Actions in Ukraine

The Competition Law specifies a list of prohibited types of anticompetitive concerted actions of business entities, in particular:

- setting prices or creating other conditions for the purchase or sale of goods;
- limiting production, commodity markets, technical and technological development, investments or establishing control over them;
- dividing markets or sources of supply by territorial principle, range of goods, volume of their sale or purchase, by the range of sellers, buyers or consumers or by other principles;
- distortion of the results of auctions, bidding, tenders;
- elimination from the market or restriction of market access for other business entities, buyers or sellers;
- application of dissimilar conditions to equivalent transactions with other business entities, thereby placing them at a competitive disadvantage;
- concluding agreements subject to other business entities' accepting additional obligations which, by their nature or in accordance with trade customs and other fair business practices, are not related to the subject matter of such agreements;
- a significant restriction of competitiveness of other entities on the market without valid reasons.

It should be noted that the list is non-exhaustive as the general prohibition provided for in the Competition Law applies to any concerted actions that have led or may lead to prevention, elimination or restriction of competition in Ukraine.

In practice, the Competition Law differentiates between types of anticompetitive concerted actions depending on the objective of the concerted action participants, as well as on their position in the market.

Depending on the market structure and position of business entities in such market, there are three main types of anticompetitive concerted actions, namely horizontal, vertical and mixed.

2. Which actions are not considered as anticompetitive

The Ukrainian law defines areas of economic activity and certain cases of concerted actions that result in an insignificant restriction of competition, but, nevertheless, are not prohibited by the law as economic benefits of such actions prevail over possible negative consequences for the Ukrainian economy.

In particular, pursuant to the Competition Law, the prohibition shall not apply to:

1. any voluntary concerted actions of small and medium-sized enterprises relating to joint procurement of goods, which do not result in significant restriction of competition and improve competitiveness of Ukrainian small and medium-sized enterprises;

2. concerted actions relating to the supply or use of goods, where a participant of concerted actions imposes, with respect to another participant of concerted actions, restrictions on:

- use of goods supplied by the concerted action participant or goods of other suppliers;
- procurement of other goods from other undertakings or sale of other goods to other undertakings or consumers;
- procurement of goods which by their nature or in accordance with trade customs and other fair business practices do not constitute the subject matter of the agreement;
- setting of prices or other agreement terms regarding selling the supplied goods to other undertakings or consumers;

3. agreements concerning the transfer of intellectual property rights or the intellectual property use in the part where such agreements set restrictions on the business activities of the transferee, provided that such restrictions do not go beyond legitimate rights of the intellectual property rights' holder.

Moreover, the Antimonopoly Committee of Ukraine (hereinafter also the "AMCU") may, by its regulations, establish typical requirements to concerted actions of business entities to qualify for general exemption from the prohibition on their implementation. Such regulations provide that if certain transactions between business entities meet the criteria established by the AMCU, such actions shall be permitted as they do not result in a significant restriction of competition in Ukraine. It should be determined on a case-by-case basis whether the concerted actions in question are subject to exemptions specified in the typical requirements.

3. Application and notification procedure

3.1. Obtaining the AMCU approval

Concerted actions that by their very nature are subject to a general prohibition may be authorized by the relevant AMCU bodies if their participants prove that such actions contribute to:

1. production improvement; 2. purchase or sale of goods; 3. technical, technological, and economic development; 4. small or medium-sized entrepreneurs development; 5. optimization of goods export or import; 6. development and application of unified technical specifications or standards for goods; 7. production rationalization.

Note! Concerted actions may not be authorized by the AMCU bodies if competition is substantially restricted in the whole market or in a significant part thereof as a result of such actions.

Moreover, the Cabinet of Ministers of Ukraine may grant approval for concerted actions not authorized by the AMCU, if the concerted action participants prove that the positive effects for the public interest outweigh the negative impact of the restriction of competition.

The procedure for obtaining approval for concerted actions begins with the preparation and submission by the participants of concerted actions (or their representatives) of an application for approval accompanied by relevant supporting documents describing the concerted actions and proving their positive impact on the Ukrainian economy.

3.2. Application processing timeframes

An application shall be deemed accepted for consideration following expiry of 15 days from the date of its receipt, if during this time it is not returned due to non-compliance with the requirements established by the AMCU preventing its processing.

An application for approval for concerted actions shall be processed within 3 months from the date of its acceptance.

An application for changes in the concerted actions cleared by the AMCU shall be considered within 30 days. At the same time, such changes are only allowed where the participants remain the same and the concerted actions do not spread to other commodity markets.

In case of detecting the grounds for the concerted action prohibition, the AMCU bodies shall initiate the respective case. In this case, the processing term shall not exceed 3 months from the receipt of all information necessary for processing the case.

Thus, the minimum period for obtaining approval for new concerted actions is 3.5 months, while the maximum period can exceed 6.5 months.

3.3. AMCU's preliminary conclusions and clarifications

Taking into account that obtaining approval for concerted actions of business entities is a time-consuming process, in cases where there is a reasonable doubt that the creation and/or functioning of procurement groups may lead to prevention, elimination or restriction of competition, it is expedient to apply to the Antimonopoly Committee of Ukraine not for approval for concerted actions, but rather for:

- preliminary conclusions regarding concerted actions of business entities, or
- conclusions as to classification of actions.

4. Violations

The implementation of anticompetitive concerted actions without obtaining approval of the AMCU bodies is considered a violation of the legislation on the protection of economic competition and entails liability in accordance with the Ukrainian law.

Violations of the legislation on the protection of economic competition in the form of concerted actions without approval of the AMCU bodies include in particular:

- conclusion by business entities of agreements in any form,
- establishment of a business entity whose objective or result is the coordination of the competitive behavior between the business entities having established such a business entity or between them and the newly established business entity,
- adoption by undertaking associations of decisions in any form,
- any other coordinated behavior (actions, omissions) of business entities that have led or may lead to prevention, elimination or restriction of competition.

5. Sanctions

If an undertaking fails to notify a transaction that is subject to approval by the Antimonopoly Committee of Ukraine, such a transaction shall be automatically considered a competition law violation. If the AMCU finds out about it, it may impose fines. Furthermore, the AMCU may also impose sanctions for other competition law violations. The major violations and fines are:

- implementation of concerted actions: a fine of up to 10% of the undertaking's revenues (proceeds) from the sale of products (goods, works, services) for the last reporting year preceding the year in which the fine is imposed;
- implementation of concerted actions that are subject to merger control without approval of the AMCU, provided that such an approval must be obtained: a fine of up to 5% of the undertaking's turnover for the last reporting year preceding the year in which the fine is imposed;
- submission of false information about concerted actions to the AMCU: a fine of up to 1% of the undertaking's total turnover for the last reporting year preceding the year in which the fine is imposed;
- implementation of a concentration that is subject to merger control without approval of the AMCU, provided that such an approval must be obtained: a fine of up to 5% of the undertaking's total turnover for the last reporting year preceding the year in which the fine is imposed.

It should be noted that the aggregate turnover of all legal entities and individuals belonging to the group shall be considered the undertaking's turnover.

In addition to imposing fines on the parties, the negative consequences of the concerted actions implemented without the respective approval can also be remedied by claims for damages.

The Antimonopoly Committee of Ukraine may also include the concerted action participants in the list of companies with a dominant market position. As a result, business activities of such undertakings (including prices of their products, services, and works) will be subject to special control by the AMCU. If the AMCU finds out that the company is abusing its dominant market position, then it can adopt a decision on the forced demerger of the respective company.