

GETTING THE DEAL THROUGH

# Merger Control

The international regulation of mergers and joint ventures in 60 jurisdictions worldwide

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# Ukraine

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## Legislation and jurisdiction

### 1 What is the relevant legislation and who enforces it?

The main competition laws and regulations include the following:

- Protection of Economic Competition Act of 11 January 2001 (the Competition Act)
- Protection Against Unfair Competition Act of 7 June 1996
- Anti-Monopoly Committee of Ukraine Act of 26 November 1993
- Regulation of the Anti-Monopoly Committee of Ukraine (the AMC) on the Procedure for Obtaining of the AMC's Approval for Concerted Practices of 12 February 2002, No. 26-R
- Regulation of the AMC of Ukraine on the Procedure for Obtaining the AMC's Approval for Concentrations of Undertakings of 21 March 2002, No. 33-R
- Resolution of the Cabinet of Ministers of Ukraine on the Cabinet of Ministers' Approval of Concerted Practices and Concentrations of Undertakings of 28 February 2002, No. 219
- Regulation of the AMC of Ukraine on the Procedure of Determining of Undertakings' Monopoly (Dominant) Position of 5 March 2002, No. 49-R.

There are also a number of other regulations with respect to specific competition-related issues.

The AMC is responsible for enforcing anti-monopoly legislation and protecting entrepreneurs' and consumers' interests. This authority is also entitled to issue regulations interpreting the anti-monopoly legislation.

### 2 What kinds of mergers are caught?

Under the Competition Act, a concentration of undertakings needs prior AMC approval in case the stipulated thresholds are triggered. A concentration per se arises where:

- two or more previously independent undertakings merge;
- one or more undertakings acquire direct or indirect control over the whole or parts of one or more other undertakings by means of:
  - the direct or indirect (through other parties) purchase of assets in the form of integrated asset units or subdivisions including asset purchases of undertakings in liquidation proceedings;
  - the management, rental, lease, concession or other agreements which entitle one of the parties to use fixed assets in the form of integrated asset units or subdivisions, including use of the assets of undertakings in liquidation proceedings;

- appointment or election to top executive positions or as chairmen of boards of persons already holding a similar position in other undertakings, or the creation of situations where more than 50 per cent of the members of the supervisory council, board or other supervisory or executive body of one or more companies are the same persons;
- the establishment of a business entity by two or more entities, provided that this business entity would undertake business activities independently, where the establishment will not lead to coordination of competitive conduct among participating undertakings. The Competition Act stipulates that the creation of a joint venture that will lead to coordination of competitive conduct among parent companies or between the parent companies and that such a joint venture would not be regarded as a concentration. On the contrary, such creation of a joint venture is deemed to be a concerted practice which could also require prior AMC approval in some cases. But in this case, the Regulation on Concerted Practices 2002 would apply with another procedure and requirements; or
- the direct or indirect purchase by one person or undertaking of the shares conferring up to or more than 25 or 50 per cent of the votes within the top decision-making bodies of other undertaking.

A concentration is not deemed to arise, and accordingly these cases do not require the AMC's approval, where:

- a business entity is established, the purpose of which or result is the coordination of competitive conduct between the parent business entities or between them and the newly established business entity. Such actions are considered concerted actions in accordance with the current competition legislation. In some cases when the thresholds and other conditions are met the performance of the concerted actions requires prior approval of the AMC according to the Regulation on Concerted Practices 2002;
- the purchasing of shares is executed by special institutions, whose ordinary activities include transactions and dealing in securities or financial operations. The further sale or transfer of such securities has to be carried out within one year of the date of acquisition. This period may be extended by the AMC upon request where such institutions can demonstrate that the further sale or transfer was not reasonably possible within the period set. This exemption has the following conditions:
  - the holding of shares should be on a temporary basis;
  - further sale or transfer is a purpose of the acquisition; and
  - it is prohibited to exercise voting rights on such shares;
- actions are performed between business entities which are linked by relations of control. This exemption would not be

applied to cases where such control was acquired without the AMC's approval; and

- acquisition of control over an undertaking or a part thereof, including distribution of its property, is made by writ of an arbitration manager, or an official in the process of liquidation.

### 3 Are joint ventures caught?

The creation of a joint venture by two or more undertakings that will perform on a continuing basis all the functions of an autonomous economic entity, where the creation will not lead to coordination of competitive conduct among participating undertakings, is deemed to be a concentration and requires prior AMC approval in case the stipulated thresholds are triggered. Establishing of a joint venture via the acquisition by one party of the shares in an existing entity so that after closing such a joint venture would be jointly controlled also requires prior AMC approval.

However, the creation of a joint venture that will lead to coordination of competitive conduct among parent companies, or between the parent companies, is deemed to be a concerted practice which could also require prior AMC approval, although not deemed to be a concentration.

### 4 Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Act 2001 defines control as the decisive impact of one or several undertakings or individuals on the business activity of a business entity or a part of it, either directly or implemented via other entities or individuals, in particular by virtue of:

- the right to own or use all and any assets or a substantial part thereof;
- the right to ensure a decisive impact on the formation, voting results and decisions of managing bodies of the business entity;
- the conclusion of contracts and agreements that make it possible to set conditions of business activities, give binding instructions or perform management functions of the business entity;
- the occupying of the position of head or deputy head of the undertaking (of the supervisory board, the board of directors or other management body of the business entity) by a person who holds one or several of the mentioned positions with other undertakings; or
- more than half of the members of the supervisory board, board of directors or other management bodies holding one or several of the mentioned positions with another business entity.

Related parties are defined as legal entities or individuals, or both, who conduct business jointly or concertedly, including the joint or concerted impact on the business activity of the business entity.

Changes introduced in 2005 to the Protection of Business Competition Act added a definition of "related persons" to stipulate wife or husband, siblings, parents and children.

### 5 What are the jurisdictional thresholds?

Prior AMC approval of concentrations is mandatory in the case of the mergers described above where the undertaking's worldwide total asset value or aggregated sales turnover for the last financial year exceeded €12 million, and at the same time:

- the worldwide total asset value or aggregated sales turnover of at least two participants to a concentration exceeded €1 million each; and
- the total asset value or aggregated sales turnover in Ukraine of at least one participant to a concentration exceeded €1 million.

Even if thresholds are not triggered, approval for a concentration is also required if one or all the participants of the concentration – together with controlled entities – have a market share which exceeds 35 per cent of this or an adjacent market.

It should be noted that all financial data is calculated for the parties to the concentration taking into account the control relations, ie, including the controlled and controlling parties.

### 6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory if the stipulated thresholds are triggered.

### 7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Ukrainian competition legislation is applicable to any mergers which effect or could effect economic competition in Ukraine. That is why foreign-to-foreign mergers are caught when they meet the stipulated requirements (see question 5).

Only the AMC is empowered to decide whether a transaction (including a foreign-to-foreign) has or would have any effect in Ukraine. Ukrainian legislation does not contain transparent rules for the evaluation of mergers' effects.

## Notification and clearance timetable

### 8 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Participants to a concentration must apply to the AMC and must obtain its approval prior to the planned concentration.

The AMC may impose fines for the following violations:

- concentrations performed without the AMC's approval, a fine of up to 5 per cent of revenue for the previous fiscal year of all participants to the concentration; and
- failure to submit documentation to the AMC within the required terms, up to 1 per cent of revenue for the previous fiscal year.

The officers of the undertakings which violate competition legislation bear administrative responsibility and will be fined.

### 9 Who is responsible for filing and are filing fees required?

The participants to the concentration are responsible for filing. The Competition Act stipulates the following official payments, which should be made by the parties applying to the AMC:

- for obtaining approval for a concentration, €750;
- for obtaining approval for concerted practices, €375; and
- for obtaining a preliminary conclusion on whether the AMC's approval is required for a concentration, €200.

### 10 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

According to Ukrainian law, the transaction may be performed only upon obtaining the AMC's approval. The parties to the con-

centration are obliged to refrain from any actions which may restrict competition or which may make it impossible to revert to the previous state, or both.

At the same time, parties can conclude an agreement before the AMC's permission is granted, but without transferring title to the buyer in shares or assets to be acquired.

Please also see question 16.

**11** What are the possible sanctions involved in closing before clearance and are they applied in practice?

Most of AMC's decisions where fines were imposed are not available to the public. Moreover, AMC imposes fines using a special internal regulation which is also not available to public. As a general rule, concentrations undertaken without prior AMC approval incur fines of up to 5 per cent of revenue for the previous fiscal year of all participants thereof.

**12** What solutions (such as a local 'hold-separate' arrangement) might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

According to the Competition Act the participants to the concentration shall refrain from any actions which may result in the impossibility of restoring the initial situation. Ukrainian legislation does not stipulate the possibility of obtaining derogation from the AMC, and entering into various hold separate agreements would not be a way out. Therefore the participants to the concentration are not permitted to close prior to clearance.

**13** Are there any special merger control rules applicable to public takeover bids?

The general regulations apply to this type of activity as well, with one exception: the application for AMC approval, if required, may be submitted either prior to the public bid or tender, or within 30 days of the winner being announced, unless otherwise directly stipulated by law.

Ukrainian competition law was specifically developed to regulate national mergers, but it also catches numerous foreign mergers. Parties to foreign public takeover bids could find themselves caught between foreign and Ukrainian law, or face legal gaps, ie, situations not governed by Ukrainian competition law at all.

**14** What is the level of detail required in the preparation of a filing?

To obtain the AMC's approval for concentrations the participants are required to submit an application to the AMC in two parts: the application itself and the attached documentation.

Applications must be submitted in writing and in particular must contain the following information: the relevant law (indicating the specific provisions of such law) establishing the basis for filing an application to the AMC; the name and other details (mailing address, phone, fax, etc) of the applicant or applicants; and the transaction for which the applicant wishes to obtain approval.

The attached documents contain the relevant agreements, contracts, decisions of the undertakings made by executive bodies in written form, copies of statutory documents of all the participants and draft documents describing the intended concentration or concerted practice worldwide and in Ukraine.

In addition, all the participants must provide the AMC with

a lot of business information, including, but not limited to the following: financial statements; data (volumes) on the produced goods or rendered services; information on market share; and information on the main consumers, competitors, suppliers, etc. In the case of a hostile takeover, the participant who applies to the AMC provides the latter only with the information with respect to itself and the AMC has the right to request the required information from the target.

**15** What is the timetable for clearance and can it be speeded up?

See question 16. There is no 'fast-track' procedure.

**16** What are the typical steps and different phases of the investigation?

The Competition Act stipulates the following stages for the investigation:

- Preliminary analysis of the application takes 15 days. If after this period the application is not returned to the applicant it is deemed accepted for examination.
- The examination of the application takes 30 days. If after this period there is no decision from the AMC, the concentration is deemed to be cleared. As a result of examination the AMC may approve the concentration, prohibit it, or open the investigation and require additional documents.
- The investigation may be opened if there are grounds for prohibition of the concentration, and the complex profound investigation or examination is required. The case investigation takes three months. If after this period there is no decision from the AMC, the concentration or the concerted practices are deemed to be approved. The AMC may only approve the concentration or the concerted practices, or prohibit them.
- The case investigation by the Cabinet of Ministers of Ukraine may be initiated by the applicant in case the AMC prohibited the concentration within 30 days from the date of AMC's decision. The procedure or the examination of the application is stipulated in the Resolution of the Cabinet of Ministers of Ukraine on the Cabinet of Ministers' Approval of Concerted Practices and Concentrations of Undertakings. This document does not contain the terms of such examination.

### Substantive assessment

**17** What is the substantive test for clearance?

Under the Competition Act the AMC will grant approval of a concentration if the concentration does not lead to the creation of a monopoly, whether by monopolisation of a market (creating or considerably enhancing a monopoly position by enterprises) or a significant restriction to the competition on the entire Ukrainian market or an essential part thereof. The Cabinet of Ministers of Ukraine acts as a second instance authority that can approve concentrations if their benefits outweigh the negative consequences of the restriction of competition on the market.

**18** Is there a special substantive test for joint ventures?

Ukrainian legislation does not contain any specific rules for joint ventures, therefore the general rules would be applicable.

**19** What are the 'theories of harm' that the authorities will investigate?

There are no special theories investigated by the AMC. The AMC analyses all available information and defines whether a concentration could lead to monopolisation of the market or restriction of competition in Ukraine.

**20** To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

As noted earlier, the Cabinet of Ministers of the Ukraine functions as a second instance authority which can approve concentrations prohibited by the AMC if the public interest benefits outweigh the negative consequences of the restriction of competition in the market.

But according to the Competition Act, the Cabinet of Ministers cannot approve the concentration or the concerted practices if participants to the concerted practices use restrictions that are not necessary to the performance of such practices or the restriction on competition poses a threat to the market economy.

**21** To what extent does the authority take into account economic efficiencies in the review process?

The AMC can approve concerted practices which promote:

- industrial improvements;
- technical, technological and economic growth;
- the development of small- and medium-sized businesses;
- the optimisation of exports or imports;
- the development and implementation of uniform technical standards for goods; or
- industry rationalisation.

**Remedies and ancillary restraints****22** What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The AMC can prohibit the concentration as well as concerted practices. As to a completed concentration, the AMC can impose compulsory divestment or prohibition of circulation of stocks. The AMC can withdraw documents and other exhibits evidencing violations of the competition legislation, and may seize the property, documents or other sources of information required for the investigation.

**23** Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Under the Competition Act, the AMC can make a decision requiring compulsory divestment of an enterprise or prohibition of the circulation of stocks.

**24** What are the basic conditions and timing issues applicable to a divestment or other remedy?

Compulsory divestment is not applicable where:

- the organisational or territorial separation of entities, or their parts or divisions, is impossible; or
- there are strong technological links between entities, their parts or divisions.

The AMC decision on compulsory divestment must be complied with within a determined period, but the AMC may not

set a deadline for compliance of less than six months. However, enforcement of the AMC's decisions outside of Ukraine is problematic.

**25** What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Information about remedies applied to foreign-to-foreign mergers is not available. There are no special rules for foreign-to-foreign mergers so AMC could apply any of the remedies. According to the information available, in the majority of cases, the AMC imposes fines on participants. Please see also question 12.

**26** In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

AMC's permission can include special restrictions or regulations aimed at minimising the negative influence of a concentration. Such restrictions, in particular, could stipulate further maintaining and disposing of a property or require the obligatory sale of some property.

**Involvement of other parties or authorities****27** Are customers and competitors involved in the review process and what rights do complainants have?

Any third party can be involved in the AMC's review process if the decision may sufficiently affect its rights and interests protected by the Act. Third parties also have the right to appeal to the courts for protection of their rights and interests. The exercise of third parties' rights is sometimes problematic, in particular, due to non-disclosure by the AMC of facts that particular mergers are in the process of reviewing.

**28** What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Information regarding concentrations and concerted practices may be disclosed or published if such information has been previously made public, or the participant does not object to its disclosure. Information defined as being of limited access or confidential, including commercial and banking information, must be maintained and stored according to the legislation. All confidential information should be sent to the AMC in separate files marked 'confidential'.

Information on the AMC's decisions may be published in the official media.

**29** Do the authorities cooperate with antitrust authorities in other jurisdictions?

The AMC cooperates widely with the competition authorities in other jurisdictions.

The AMC has developed relations with the competition authorities in other countries through bilateral agreements. In particular, agreements have been signed with Georgia (2002), Azerbaijan (2002), the Russian Federation (2000), Lithuania (1997), Poland (1997), Hungary (1996), Bulgaria (1994), Czech Republic (1994) and other countries. In 2002, a memorandum on cooperation with France was signed. Also, the AMC recently signed a memorandum on cooperation in the sphere of competition policy with the Competition Authority of the Latvian Republic (2005) and with the Competition Authority of the Hun-

garian Republic (2006).

Ukraine is a party to the NIS (New Independent States) Agreement on Implementation of Concerted Anti-Monopoly Policy (1993, superseded by a new agreement in 2000). This agreement was concluded in the framework of the NIS Interstate Council on Competition Policy.

The AMC is also a member of, and participates in, some international associations of the competition authorities. Since January 2002, Ukraine has been a member of the International Competition Network. Ukraine also participates in the United Nations Conference on Trade and Development and the OECD. Ukraine also chairs and participates in the Organisation of Black Sea Economic Cooperation.

**30** Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no specific merger control provisions relating to foreign investment.

The competition legislation does not contain any specific rules about merger control by the AMC depending on the economic area of the merger. Peculiarities are stipulated for calculating the financial statements of banks and insurance companies. Nevertheless, the specialised legislation contains detailed provisions regarding mergers in specific sectors, in particular, banking, media and the power industry.

The relevant legislation for these sectors is as follows:

- The Banks and Banking Act of 7 December 2000
- The Telecommunications Act of 18 October 2003
- The Information Act of 2 October 1992
- The Print Media in Ukraine Act of 16 November 1992
- The Television and Radio Broadcasting Act of 21 December 1993
- The Power Industry Act of 16 October 1997.

### Judicial review

**31** What are the opportunities for appeal or judicial review?

The applicant can appeal (file a new application) the AMC decision within 30 days to the Cabinet of Ministers of Ukraine.

If undertakings, state agencies and other interested parties do not agree with decisions of the AMC, they can appeal to the courts requesting complete cancellation or modification of the decisions of the AMC. Appealing does not automatically suspend a decision of the AMC for the period during which the court is

considering the petition, though the court can decide to suspend such a decision.

Compensation for damages caused by the AMC is paid out of the state budget.

**32** What is the usual time frame for appeal or judicial review?

There are no fixed time frames for appeal or review. Terms in each particular case could vary significantly.

### Enforcement practice and future developments

**33** What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

Breakdowns are unavailable. According to the AMC's annual report, collectively in 2006, the total amount of fines imposed by the AMC for all violations grew by 50 per cent compared to 2005.

**34** What are the current enforcement concerns of the authorities?

Generally, AMC activity could be characterised as moving towards being a state body with a strong enforcement policy. The number of cases reviewed by the AMC and the amount of fines imposed is constantly growing.

Among the notable decisions in the competition sphere we should emphasise the resolution of the Supreme Court of Ukraine dated September 2005. In this resolution the Supreme Court underlined that only the AMC has the right to define markets and monopoly position. The Supreme Court stated that this rule applies to commercial courts and therefore they do not have the right to define markets or monopoly position during the hearings. This resolution makes it impossible to effectively appeal the AMC's decision on defining markets or monopoly position.

**35** Are there current proposals to change the legislation?

There are no bills recently registered in the parliament aimed to significantly add or change current competition legislation. The AMC is in the process of drafting some new regulations and amendments to current legislation, particularly with respect to the harmonisation of Ukrainian legislation with the EU competition regulations.



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