

Ukraine

Galina Zagorodnyuk

Konnov & Sozanovsky

1 What is the relevant legislation and who enforces it?

The main competition laws and regulations include the following:

- Protection of Business 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 Procedure for Obtaining the AMC's Approval for Concerted Practices" of 12 February 2002, No. 26-R;
- Regulation of the AMC of Ukraine "On 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; and
- Regulation of the AMC of Ukraine "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 issues.

The AMC, the Ukrainian competition authority, is responsible for enforcing antimonopoly legislation and protecting entrepreneurs' and consumers' interests. The AMC is also entitled to issue regulations interpreting the antimonopoly legislation.

For sectors subject to specific merger control regimes see 31 below.

2 What kinds of mergers are caught?

Under the Competition Act 2001, concentration of undertakings needs prior AMC approval in case the stipulated thresholds are exceeded. A concentration is deemed to arise where:

- Two or more previously independent undertakings merge.
- One or more undertakings acquire direct or indirect control of the whole or parts of one or more other undertakings namely by means of:
 - ◆ 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, leasing, concession or other contract with obtaining of rights 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; 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.

- ◆ 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 2001 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 this joint venture would not be deemed a concentration. In contrast to it such creation of joint venture is deemed to be the concerted practices 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.

- One person or undertaking directly or indirectly purchases the shares conferring up to or more than 25 or 50 per cent of the votes within the higher decision-making bodies of other undertaking.

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

- Establishment of a business entity whose purpose or result is the coordination of competitive behaviour between the parent business entities or between them and the newly-established business entity takes place. Actions of that sort are considered as concerted actions in accordance with the current antitrust 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.
- Purchasing of shares is executed by institutions, which normal activities include transactions and dealing in securities or financial operations. This exemption has the following conditions:
 - ◆ such holding is to be on a temporary basis;
 - ◆ reselling is a purpose of such purchasing;
 - ◆ it is prohibited to exercise voting rights on such shares.
 The disposal of such securities has to be fulfilled within one year of the date of acquisition. That period may be extended by the AMC on request where such institutions can show that the disposal was not reasonably possible within the period set.
- 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

(horizontal, vertical, mixed and conglomerate) as well as the financial statements of the participating undertakings.

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 2001 the Cabinet of Ministers cannot approve the concentration or the concerted practices if (a) participants to the concerted practices use the restrictions which are not necessary to the performance of such practices; or (b) the restriction on competition poses a threat to the market economy system.

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 and technological growth, 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.

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

Under the Competition Act 2001 the AMC can order the compulsory divestment of an enterprise or prohibition of circulation of stocks.

23 What are the basic conditions and timing 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;
- there are strong technological bonds between entities, their parts or divisions.

The AMC decision on compulsory divestment must be executed within a determined period of not less than six months.

24 What solutions (such as a local 'hold separate arrangement') might be acceptable to remedy local issues in a foreign-to-foreign merger?

There is no practice in this respect.

25 Are customers and competitors involved in the investigation 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.

26 What publicity is given to the process?

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.

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

27 What are the authorities' powers 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 it may seize the property, documents or other sources of information required for the investigation.

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

During 2003, the AMC examined 643 applications for a concentration (728 in 2002; 898 in 2001), and in 329 cases the AMC granted approval. It should be noted that in 2003 no refusal was made, the remaining 314 applications were returned to the applicants because of a lack of information, or were recalled by the applicants.

In 2002, 396 concentrations were approved and two were refused. The remaining 330 applications were shelved because of a lack of information, or were recalled by the applicants.

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), 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.

Ukraine is a party to the NIS (New Independent States) Agreement on Fulfilment of Concerned Antimonopoly Policy (1993, superseded by a new agreement in 2000). This agreement was concluded in the framework of the NIS Interstate Council on Competition Policy. In May 2004, the head of the AMC, O Kostusev, was elected a head 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.

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

The effective legislation does not contain any provisions regarding waiting periods. It also does not contain any requirement regarding suspension of transactions.

According to Ukrainian law, the transaction may be fulfilled only upon obtaining the AMC's approval and it is prohibited until approval. The parties to the concentration are obliged to refrain from any actions which may restrict competition and/or which may make it impossible to revert to the previous state.

11 What are the issues and possible sanctions involved in closing before clearance?

Concentrations undertaken without prior AMC approval would incur fines of up to 5 per cent of revenue of the previous fiscal year of all participants thereof. Anti-competitive concerted practices performed without prior AMC approval may result in fines of up to 10 per cent of revenue of the previous fiscal year of all participants thereof.

12 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 auction or tender, or within 30 days after announcing the winner, unless otherwise directly stipulated by law.

13 What is involved in and how detailed is the preparation of a filing?

To obtain the AMC's approval for concentrations or concerted practices the participants are required to submit an application to the AMC in two parts: (i) the application itself and (ii) 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; 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.

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, rendered services; information on market share; 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.

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

See 15 below. There is no 'fast-track' procedure.

15 What are the typical steps and different phases of the investigation?

The Competition Act 2001 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 for a concentration and three months for concerted practices. If after this period there is no decision from the AMC the concentration or the concerted practices are deemed to be approved. As a result of examination the AMC may: (a) approve the concentration or the concerted practices; (b) prohibit it; or (c) open the case and require additional documents.
- The case investigation may be opened if: (i) there are the grounds for prohibition of the concerted practices or concentration, and (ii) there is the necessity of the complex profound investigation or examination. 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: (a) approve the concentration or the concerted practices, or (b) prohibit it.
- The case investigation by the Cabinet of Ministers of Ukraine may be initiated by the applicant in case the AMC prohibited the concentration or the concerted practices. 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.

16 What is the substantive test for clearance?

Under the Competition Act 2001 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.

17 Can a merger be challenged on oligopoly grounds?

The Ukrainian legislation does not contain any specific rules relating to oligopolies.

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 Apart from high market shares, what other concerns may the authorities have (eg vertical foreclosure, portfolio effects, elimination of close substitutes)?

The level of monopolisation and the effect on competition are the most important criteria. High market share is not always the sole consideration. The special requirements may be addressed to an undertaking with a market share less than 30 per cent if there are no other strong competitors on the market.

As to concerted practices, the type is taken into account

AMC's approval.

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

3 Are joint ventures caught?

Under Ukrainian legislation joint ventures must comply with the organisational-legal form of some specific type of business company as determined by the laws of Ukraine, and as such they fall within the scope of the competition legislation in the same manner as other companies.

The creation of a joint venture by two or more undertakings that will perform on a lasting 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 exceeded.

However, the creation of a joint venture that will lead to coordination of competitive conduct among parent companies or between the parent companies and this joint venture is deemed to be a concerted practice which could also require the 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?

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

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

- the right to own or use all and any assets or their substantial part;
- 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, to give binding instructions or to perform management functions of the business entity;
- the occupation of the head (deputy head of the supervisory board, the board of directors or other management body of the business entity) by such a person who holds one or several of the mentioned positions with other entities;
- the occupation of more than half of the members of the supervisory board, board of directors or other management bodies by such persons who hold one or several of the mentioned positions with another business entity.

Related persons shall be legal entities and/or natural persons who conduct business jointly or concertedly, including the joint or concerted impact on the business activity of the business entity.

Only the provisions fixed as a control are caught.

5 What are the jurisdictional thresholds?

Prior AMC approval of concentrations is mandatory in the case of 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.

6 Is the filing mandatory or voluntary?

Filing is mandatory if the thresholds are exceeded. Filing is also mandatory for concerted practices, with some exceptions, for instance filing is not mandatory for any voluntary concerted practices of small or medium-sized businesses (whose turnover or total asset value does not exceed €500,000) regarding the joint purchase of goods that does not cause a substantial limitation of competition on the market.

7 Are foreign-to-foreign mergers caught?

The Ukrainian competition legislation is applicable for any mergers which effect or could effect the economic competition in Ukraine. That is why foreign-to-foreign mergers are caught in case they meet the stipulated requirements and at least one participant to the merger (eg the target or the buyer, or one of the founders of the new undertaking etc) has aggregated sales turnover or assets in Ukraine which exceed €1 million.

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

There are no specified deadlines. However, participants to a concentration or concerted practices must apply to the AMC and must obtain its approval prior to undertaking the aforesaid activities.

The AMC may impose fines for the following violations:

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

The executive officials of the undertakings which violated competition legislation bear administrative responsibility (fines).

According to the 2002 AMC Annual Report, about UAH60 million (about €10 million at the effective rate) were paid into the state budget as fines and illegal benefits.

At the same time, in 2003 the amount of fines imposed upon business entities and individuals for violating the competition legislation and the amount of illegal benefits which is to be repaid came to more than UAH145 million (more than €23 million at the effective rate).

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

The participants to the concentration and concerted practices are responsible for filing. The Competition Act 2001 stipulates the following official payments which should be made by the parties applying to the AMC:

- for obtaining approval for a concentration, 300 non-taxable minimum incomes (about €800);
- for obtaining approval for concerted practices, 150 non-taxable minimum incomes (about €400);
- for obtaining a preliminary conclusion on whether the AMC's approval is required for a concentration, 80 non-taxable minimum incomes (about €220).

UPDATE AND TRENDS

The main characteristic of the recent year was that big corporations were active in the process of obtaining AMC approval for their mergers. The AMC also increased its practice in foreign-to-foreign mergers' approval.

During the last year cooperation between the AMC and competition enforcement agencies in other countries increased. The AMC was especially active in its relations with the NIS competition agencies.

For the first time fines exceeding UAH100 million (about

€15 million) were imposed on business undertakings for violating competition legislation. In spite of this the AMC has not yet imposed the maximum fine for violations.

Regarding big cases, AMC approval was obtained in 2004 for the Television Industrial Committee Association, which united the top five Ukrainian TV channels, which have about 70 per cent of the market share, and the top three Ukrainian advertising agencies. According to the AMC, such an association would not lessen competition in Ukraine.

30 What are the opportunities for judicial review?

If undertakings, state agencies and other interested parties do not agree with decisions of the AMC, they can appeal to the courts or economic courts by submitting a petition for partial or complete cancellation or modification of the decisions of the AMC. Submission of a petition 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 so suspend such a decision.

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

31 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 field of the merger. Peculiarities are stipulated for calculating financial state-

ments of banks and insurance companies. Nevertheless the specialised legislation contains specific 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; and
- the Power Industry Act of 16 October 1997.

32 Are there current proposals to change the legislation?

There are some drafts being considered by the Parliament of the Ukraine, though they are not essential. The AMC is in the process of drafting some new regulations and amendments to current legislation, particularly with respect to amendments to EU competition regulations.

Konnov & Sozanovsky

Contact: Galina Zagorodnyuk

23 Shota Rustaveli Street
Suite 5
Kiev 01023
Ukraine

Tel: +380 44 490 5400
Fax: +380 44 490 5490
e-mail: gzagorodnyuk@konnov.com
Website: www.konnov.com