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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation
The relevant merger control legislation in Ukraine includes the following:

- the Law on Protection of Economic Competition 2001 (the Competition Law);
- the Law on the Antimonopoly Committee of Ukraine 1993 (the AMC Law);
- the Regulation on the Procedure for Filing Applications with the Antimonopoly Committee of Ukraine for Obtaining its Prior Approval of the Concentration of Undertakings 2002 (the Concentrations Regulation);
- the Methodology for Assessment of the Monopoly (Dominant) Position of Undertakings on the Market 2002;
- the Guidelines on Calculation of Fines for Violation of Ukrainian Competition Law 2016 (the Guidelines on Fines);
- the Guidelines on the Assessment of Horizontal Mergers 2016;
- the Guidelines on the Assessment of Non-Horizontal Mergers 2018;
- the Guidelines on Definition of Control 2018; and

1.2 Legislation Relating to Particular Sectors
There is no sector- or investor- specific merger control regime, although there may be certain special rules or exemption for particular industries or investors. For example, special rules apply to the review of notifications that concern capitalisation and reorganisation of banks – the Antimonopoly Committee of Ukraine (AMC) will review them and grant clearances within ten days of receiving the complete set of documents.

Also, due to the conflict with Russia, Ukraine introduced sanctions against certain individuals and legal entities. The AMC is required to reject notifications on concentrations (or drop their review, if they are already in Phase I or II) if any of the parties to the concentration (or any entity/individual connected to them through control relationships) is on the Ukrainian sanctions list, and where a particular type of sanctions applies to a given individual or entity (eg, assets freeze, etc).

Ukraine is now developing the set of FDI rules and expecting to introduce the relevant law within the nearest year.

Restrictions Applicable to Foreign Companies
For now, certain restrictions and limitations apply to foreign companies – for example, they are prohibited from owning agricultural land. Also, some restrictions apply in the following industries:

- Aviation: a Ukrainian air carrier cannot obtain the Ukrainian air transportation license if a foreign entity owns 50% or more of carrier’s share capital. Also, the license shall not be granted if the carrier is under control of residents of an aggressor-state (such as Russia);
- Television and broadcasting: residents of an aggressor-state (such as Russia), as well as residents of offshore jurisdictions are restricted from owning a stake in Ukrainian television and broadcasting companies;
- Licensed Business Activities: the license for conducting certain types of business activities (among others, education, medicine production and supply, medical practice, passenger transportation) shall not be granted (or may be annulled, if already granted) if the relevant entity is under the control of residents of an aggressor-state (such as Russia).

1.3 Enforcement Authorities
The AMC is the primary state authority that enforces merger control rules in Ukraine. It has powers to review transactions and grant or refuse clearance, and to investigate and penalise violations of the merger control regime. The Cabinet of Ministers of Ukraine (CMU) may overrule AMC decisions prohibiting a concentration on public interest considerations.

2. Jurisdiction

2.1 Notification
Notification is compulsory if the transaction amounts to a concentration, and the thresholds triggering merger clearance are met. The Competition Law provides for the following exemptions (such transactions are not considered concentrations):

- establishment of a new undertaking that aims at or results in co-ordination of competitive behaviour of either its parents or the new undertaking on the one hand, and its parents on the other (such establishment is generally regarded as concerted practice, which may require a separate – antitrust – clearance);
- acquisition of shares qualifying as a financial buyer transaction – ie, the shares are acquired by a financial institution for the purposes of further resale within one year period (extendable), provided that the acquirer does not exercise voting rights in the meantime;
- intra-group transactions, unless control links within the group were established in violation of the Ukrainian merger control rules; or
- acquisition of control over an undertaking or a part thereof by a receiver or a representative of a state authority.
2.2 Failure to Notify
Failure to notify can attract a fine of up to 5% of the turnover in the year immediately preceding the year when the fine is imposed. Such fine can be imposed on the entire corporate group of the infringer that allows the AMC to fine any local subsidiaries of the parties and improves the AMC’s chances to successfully collect fines.

As a matter of practice, fines for failure to notify are calculated based on the AMC Guidelines on Fines (which have a recommendatory nature, although the AMC has publicly committed to following them). Under the Guidelines, the “base” fines for failing to notify are as follows:

- 10% of the turnover on the relevant (and adjacent) Ukrainian markets for failure to notify a concentration that results in monopolisation or substantial restriction of competition;
- between UAH510,000 (approximately EUR16,900) and 5% of the turnover on the relevant (and adjacent) Ukrainian markets if a transaction does not pose serious competition concerns; or
- between UAH170,000 (approximately EUR5,600) and UAH510,000 (approximately EUR16,900) for failure to notify a transaction if the parties are active on non-overlapping and non-adjacent markets in Ukraine.

The above “base” amounts may be further adjusted depending on the effect of the violation on competition, the nature of the market involved, the profitability of operations connected with the violation, and other aggravating or mitigating circumstances. Based on recent AMC practice, the fines usually range from EUR5,000 to EUR16,000. Also, in 2019 the AMC imposed two biggest fines in its history for merger control violations – EUR1.9 million and EUR1.8 million. It appears that the AMC deviated from the rules provided by the Guidelines on Fines (in the past the fines did not exceed EUR500,000 for such violations).

Information about the imposed fine, the identity of the parties, and the non-confidential version of the fining decision, which normally includes general description of the transaction structure and the markets involved, are published by the AMC on its website.

Apart from the fine and possible reputational issues associated with the publication of the fining decision, parties may face the following negative implications:

- third-party damages claims (double the amount of actual damages sustained);
- possible complications with the Ukrainian clearance of future transactions, as the AMC sometimes may scrutinise these more actively; or
- hypothetically, invalidation of the transaction.

2.3 Types of Transactions
The following types of transactions are caught by the merger control rules:

- merger of two or more previously independent undertakings, or the takeover of one undertaking by another;
- acquisition of direct or indirect control over an undertaking or its part, including through (but not limited to):
  (a) acquisition or lease of the assets of an undertaking (including under liquidation); or
  (b) appointments to certain positions (eg, CEO, Deputy CEO, Chairman, Deputy Chairman or more than half of the members of decision-making or supervisory corporate bodies), if the same person(s) already holds similar positions in other undertakings (cross-directorship);
- establishment by two or more undertakings of a new undertaking that will independently pursue business activity on a lasting basis, while its establishment does not result in the co-ordination of competitive behaviour either of its parents or the new undertaking on the one hand, and its parents on the other; and
- direct or indirect acquisition (including receiving rights to use) of participation interests (shares, equity), whereby certain thresholds (25% or 50% of the votes in the highest governing body of the undertaking concerned) are reached or exceeded.

Intra-group transactions such as internal restructurings or reorganisations are not caught (see 2.1 Notification).

Operations not involving a transfer of shares or assets (eg, shareholders’ agreements, changes to articles of association, etc) are caught if they lead to the acquisition of control (including joint or negative) over an undertaking or a change in the nature of control (eg, joint control to sole control).

2.4 Definition of “Control”
Control is broadly defined as the ability to exercise decisive influence on the strategic decisions related to the business activity of an undertaking, including via veto/blocking rights. Among others, control is deemed to exist if an undertaking:

- directly or indirectly holds/manages more than 50% of shares or votes in another undertaking;
- is entitled to receive at least 50% of the profit in another undertaking;
• is authorised to appoint the CEO, Deputy CEO, Chairman, Deputy Chairman or more than half of the members of decision-making or supervisory corporate bodies (or if the same persons hold similar positions in several undertakings); or
• otherwise controls another undertaking (through management, joint activity, shareholders’ arrangements, lease of assets, etc).

In 2018 the AMC adopted the Guidelines on Definition of Control, which closely follow the lines of the EC Consolidated Jurisdictional Notice and provide some further guidance as to the concept of control. In particular, this document:

• distinguishes between negative and positive sole control. Negative control arises where a shareholder has veto rights for strategic decisions, but cannot adopt such decisions independently;
• recognises the difference between de jure and de facto types of control. Unlike de jure control, de facto control may arise in specific circumstances (eg, where a minority shareholder has a decisive influence at the GSM level relying on assessment of past shareholder participation/voting patterns);
• clarifies that veto rights over budget, business plan, strategic investments, appointment of senior management, and/or activity on certain markets will generally be regarded as granting control;
• clarifies which situations give rise to change in the quality of control;
• provides more details regarding control through Ukrainian investment funds.

Acquisitions of minority or other interests less than control are caught, beginning from the level of 25% of voting rights in an undertaking (see 2.3 Types of Transactions).

2.5 Jurisdictional Thresholds
A transaction is notifiable in Ukraine if either of the following thresholds is met:

• the combined parties’ worldwide value of assets or turnover exceeds EUR30 million and the value of assets in Ukraine or the Ukrainian turnover of each of at least two parties exceeds EUR4 million; or
• the value of assets in Ukraine or the Ukrainian turnover of the target (including its controlling shareholder/seller group) or of at least one of the founders of a new entity exceeds EUR8 million and the worldwide turnover of at least one other party exceeds EUR150 million.

All figures are calculated for the financial year immediately preceding the year of the concentration.

Special rules apply to the calculation of thresholds for banking and insurance companies, as follows:

• for banking companies: one tenth of the bank’s assets should be considered for the purposes of turnover/asset threshold;
• for insurance companies: the net assets of an insurance company should be considered for the purposes of the asset threshold, and the revenues from insurance activities should be considered for the purposes of the turnover threshold.

2.6 Calculations of Jurisdictional Thresholds
The turnover-based threshold is calculated based on the net revenue (ie, without VAT, excise duties and other turnover-based taxes and contributions) according to the financial statements of the parties, excluding intra-group sales. The law does not provide for any reliable guidance regarding the geographical allocation of turnover for the purposes of assessing whether the local threshold is met. In practice, the domicile of a customer is the most decisive element for the AMC’s determination regarding the geographical allocation of turnover. However, the AMC may also use EU approaches to allocation of turnover in cases of uncertainty.

Under the general rule, the asset-based threshold should be based on book value. Still, the AMC has publicly stated that in some cases it may also take account of fair market value of the assets (eg, in a privatisation procedure).

Sales or assets booked in foreign currency should be converted into EUR using the FX rate established by the National Bank of Ukraine as of the last day of the respective financial year.

Special rules regarding the calculation of thresholds apply in the banking and insurance sectors (see 2.5 Jurisdictional Thresholds).

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds
All businesses and corporate entities belonging to the respective group should be taken into account. The relevant group is defined as ultimate controlling parent(s) and all entities directly/indirectly controlled by it (them), including due to shareholding and/or directorship, family ties and otherwise. Importantly, the figures of a controlling seller (or other parent) also count towards those of the target. Formal interpretation of the law also allows for the allocation of turnover/assets of all controlling parents to the JV, and of the JV’s turnover in full to each of the controlling parents.

If there are changes in the group composition, the relevant figures should be adjusted accordingly to reflect the actual pre-transaction group composition.
2.8 Foreign-to-Foreign Transactions

The merger control law does not differentiate between domestic and foreign-to-foreign transactions. The latter are also subject to merger control if the relevant thresholds are met, irrespective of the overall effect of the transaction in Ukraine. This means that a filing can be required even if only the controlling seller meets the local turnover or assets threshold, while the target has no sales and/or assets in Ukraine.

However, based on general provisions of the Competition Law, there may be an argument that the application of the turnover/asset thresholds should be qualified by the effects doctrine, and clearance should not be required if a transaction lacks reasonable local nexus and cannot have any anti-competitive effects in Ukraine. Still, this argument is rather vague in legal terms and is not currently supported by the AMC.

2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional threshold in Ukraine.

2.10 Joint Ventures

The establishment of a joint venture through the formation of a new company may qualify as a concentration or concerted practice.

In particular, under the Competition Law, a joint venture is considered a concentration if such new company:

- is established by two or more independent undertakings;
- will independently pursue business activity on a lasting basis; and
- does not result in co-ordination of competitive behaviour either of its parents or the joint venture on the one hand, and its parents on the other.

In 2019 the AMC published the Guidelines on the Assessment of Joint Ventures, which provided further guidance as to assessment if the criteria above, as well as introduced the full-functionality criterion (i.e., ability to perform all functions of an autonomous economic entity) for joint ventures to be considered a concentration.

Joint ventures that do not meet the above-mentioned criteria may be considered a concerted practice (and not concentration) that may require antitrust clearance (and not merger clearance). If the establishment of a joint venture qualifies as a concentration, the general rules on jurisdictional thresholds apply.

2.11 Power of Authorities to Investigate a Transaction

The AMC does not have power to investigate a transaction that does not meet the jurisdictional thresholds, although the parties may still voluntarily file such transaction.

The statute of limitations for transactions that meet the relevant thresholds is five years from closing.

2.12 Requirement for Clearance Before Implementation

The implementation of a transaction must be suspended until clearance.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The penalties and risks associated with the implementation of the transaction before clearance are the same as for not filing at all (see 2.2 Failure to Notify), although, in practice, pre-clearance closing may receive more favourable treatment from the authority and involve less severe sanctions – in particular, a lower fine (compared to not filing at all and being caught).

Fines have been imposed for pre-clearance closing in a number of cases, including foreign-to-foreign transactions. In most cases they were below EUR10,000. The highest known fine for pre-clearance closing amounted to approximately EUR100,000 – it was imposed in the local transaction and the fact of closing was discovered during Phase II review.

Information regarding such penalties (the amount of the imposed fine, the identity of the parties, and the non-confidential version of the decision) is published by the AMC on its website.

2.14 Exceptions to Suspensive Effect

The requirement to suspend a notifiable transaction applies globally. There is no possibility to seek a waiver or derogation from this rule.

The only exception applies in case of a tender/bid process where a notifiable concentration should be filed within 30 days of the winner of a tender/bid being announced. This exception was originally designed for local privatisation procedures and may not be adaptable to public bids abroad.

2.15 Circumstances Where Implementation Before Clearance is Permitted

The AMC cannot permit closing before clearance. Hold-separate/carve-out arrangements also do not remove the risks of fines; however, in practice, they may mitigate the liability, as
they would clearly show the parties’ intention to comply with the Ukrainian merger control rules.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification
There is no deadline for notification. The only relevant rule is that the parties should apply for and obtain clearance before closing of the transaction.

See 2.2 Failure to Notify and 2.13 Penalties for Implementation of a Transaction Before Clearance regarding penalties applied in practice and publicity given to them, and 2.14 Exceptions to the Suspensive Effect regarding exemption for the tender/bid process.

3.2 Type of Agreement Required Prior to Notification
The parties can file on the basis of a draft transactional documentation, a letter of intent, a memorandum of understanding or similar written document providing sufficient details re transaction. No binding agreement is required prior to notification.

Under the general rule, filing cannot be made if there is nothing in writing, although this may be possible in some cases. For example, in a hostile takeover, the acquirer can file without any written documentation endorsed by the target or its shareholders. In this situation, the AMC can independently request certain information from the target that is necessary for merger review.

3.3 Filing Fees
There is a filing fee of UAH20,400 (approximately EUR680) per notifiable event (ie, each action/step of the transaction that qualifies as a concentration), which should be paid prior to filing a notification.

3.4 Parties Responsible for Filing
The obligation to file is joint, and all parties to the transaction (ie, the buyer and target/seller, merging parties, JV partners or their direct/indirect parents) are responsible for filing.

It is important to note, however, that “failure to file” does not in itself amount to a competition offence; rather, “closing without clearance” is the violation. Thus, although, for example, both the seller and the purchaser may fail to comply with the (joint) filing obligation, only the purchaser will eventually be held liable, because it is the “acquisition of control/interest” (and not a “divestiture” on the part of the seller) that qualifies as “closing without clearance” under the law.

3.5 Information Included in a Filing

Fast-Track Procedure
If the transaction qualifies for the simplified fast-track procedure, the filing should include the following information and documents (in summary):

- information regarding the transaction, the sources of its financing, and supporting documentation (transaction documents or at least their drafts, and documents regarding financing of the transaction and the availability of funds);
- information regarding the parties’ assets and turnover (group-wide) on a worldwide level and in Ukraine;
- information regarding the notifying parties and their beneficiary owners;
- general information on parties’ activities globally and in Ukraine (for all markets); and
- detailed information on the relevant markets, including information on sales, market shares and competitors.

Standard Procedure
If the transaction is subject to the standard procedure as opposed to the simplified fast-track procedure, the filing should additionally include the following information and documents (in summary):

- detailed economic analysis of the transaction’s impact on the Ukrainian market(s);
- information regarding membership in associations; and
- the parties’ excerpts from the trade/commercial/banking/court register or similar.

Furthermore, together with the hard copy of the notification, the parties are also required to attach electronic versions (PDF/Word, etc) of the notification and all documents filed along with it.

The filing should be made in Ukrainian, and all documents to be filed alongside it should be translated into Ukrainian. Additionally, powers of attorney (if the parties authorise external counsels) and registry excerpts for foreign entities should be notarised and apostilled/legalised, depending on the jurisdiction. Confidential information should be properly marked in the filing so that the AMC treats it accordingly.

3.6 Penalties/Consequences of Incomplete Notification
If the notification is deemed incomplete, it is rejected and parties will need to resubmit it. Still, normally the AMC holds consultations with the notifying parties during the 15-day “preview” period regarding the completeness of the filing and usually allows the parties to supplement any missing infor-
mation during the “preview” period (or sometimes even the “review” period) without a formal rejection.

3.7 Penalties/Consequences of Inaccurate or Misleading Information
Submission of inaccurate or misleading information in the filing may result in a fine of up to 1% of the respective party’s turnover in the preceding year being imposed. However, in practice and pursuant to the Guidelines on Fines, the fine for such violation is capped at UAH136,000 (approximately EUR4,400), subject to possible adjustments for aggravating or attenuating circumstances.

Also, the authority may reconsider its decision if it was based on inaccurate or misleading information.

3.8 Review Process
The standard merger review procedure involves the following phases:

Preview Period
The AMC has 15 calendar days to decide whether the notification is complete and can be accepted for the substantive review (Phase I). If the notification does not meet the formal requirements, the AMC may consider it incomplete and reject it, so the parties would need to refile, restarting the process.

Phase I
During Phase I, the AMC will either issue the clearance or initiate Phase II. Phase I lasts up to 30 calendar days and involves a substantive review and assessment by the AMC of whether the transaction can be approved or whether there are potential grounds to prohibit the transaction, in which case Phase II is initiated.

Phase II
Phase II review (if initiated) involves a close analysis of the transaction and the associated competition concerns, and an examination of expert opinions and other additional information. The recommended Phase II review period is up to 135 calendar days, starting from the day Phase II notice is sent to the parties. During this period, the AMC will either issue the clearance (conditional or unconditional) or adopt a decision prohibiting the concentration.

If the transaction qualifies for fast-track review, a 25-day period applies (see 3.11 Accelerated Procedure).

3.9 Pre-notification Discussions with Authorities
The Competition Law does not provide for formal pre-notification discussions. Usually, the parties can only request formal consultations with the AMC during the 15-day preview period although, in practice, informal pre-filing discussions are also possible.

3.10 Requests for Information During Review Process
Requests from the authority during the review process are very common and, depending on various factors (such as the complexity of the transaction mechanics and potential competition concerns), may be quite burdensome. Requests during the preview period do not stop the clock but can lead to the filing being rejected as being incomplete if the parties fail to respond promptly. Requests during Phase I also do not stop the clock. Requests at Phase II may suspend or even restart the review, but its overall duration still should not exceed 135 days.

3.11 Accelerated Procedure
The 25-day simplified fast-track review procedure is available for transactions where only one party is active in Ukraine (for this purpose, the seller’s group should also be taken into account), or where the parties’ combined shares do not exceed 15% on the overlapping markets or 20% on vertically related markets. The AMC tends to interpret the 15%/20% threshold quite restrictively, often in the manner that more than 15%/20% with one of the parties and 0% with the other (ie, no increment at all) does not meet the test, and the filing should undergo a standard review.

As a practical matter, the parties may also try to negotiate a more expedited review with the AMC under the standard review procedure.

4. Substance of the Review

4.1 Substantive Test
A transaction can be cleared by the AMC if it does not result in monopolisation (ie, creating or strengthening of the monopolistic (dominant) position) or a substantial restriction of competition on the Ukrainian market or a significant part of it.

Under the Competition Law, the relevant benchmarks to establish a monopolistic (dominant) position are as follows:

- more than 35% market share if held individually;
- more than 50% if held collectively by not more than the three largest undertakings; and
- more than 70% if held collectively by not more than the five largest undertakings.

The CMU may still approve a transaction that was prohibited by the AMC if the positive effects of such transaction on the public interest outweigh the negative impact of the restriction
of competition, provided that such restriction is necessary for achieving the purpose of the concentration and does not jeopardise the market economy system.

4.2 Markets Affected by a Transaction
The Concentrations Regulation defines the markets affected by the transaction as those where a target, the merging parties or a joint venture is (would be) active, as well as vertically related (adjacent) markets. In practice, the authority is unlikely to see competition concerns if the parties’ combined market shares do not exceed 15% on the overlapping markets or 20% on vertically related markets.

4.3 Reliance on Case Law
The AMC usually relies on case law (precedents) of the European Commission and the competition authorities of EU countries and the USA, mainly with respect to the approach to market definition.

4.4 Competition Concerns
Under the Guidelines on the Assessment of Horizontal Mergers and the Guidelines on the Assessment of Non-Horizontal Mergers, the authority shall investigate the following main competition concerns. While reviewing the concentrations, the AMC should take into account countervailing factors such as countervailing buyer power, the likelihood that entry would maintain effective competition on the relevant markets, and the “failing firm” defence.

Unilateral or Non-coordinated Effects
- The elimination of important competitive constraints on one or more firms, which consequently would have increased market power (in case of horizontal mergers);
- upstream or downstream foreclosure (in case of vertical mergers); and
- foreclosure in related markets (in case of conglomerate mergers).

Co-ordinated Effects
These change the nature of competition in such a way that undertakings that did not previously co-ordinate their behaviour would be significantly more likely to co-ordinate (including by tacit co-ordination) and raise prices or otherwise harm effective competition (in the case of horizontal and vertical mergers).

4.5 Economic Efficiencies
The AMC may take into account efficiency arguments and any positive effect on the public interest (such as the modernisation and rationalisation of production, purchase or sales, technical and product standards, the promotion of technical, technological or economic development, etc) but they are not likely to be decisive.

Still, this factors will be relevant for the CMU analysis, which can authorise a transaction prohibited by the AMC even though there are no public records of any recent transactions cleared in such a way.

4.6 Non-competition Issues
The AMC should predominantly consider competition issues, while non-competition issues may be used as supporting (but not decisive) arguments. Still, the non-competition issues may serve as grounds for the CMU when overruling the AMC prohibition decision (see 4.5 Economic Efficiencies).

4.7 Special Consideration for Joint Ventures
There are no special substantive tests/considerations for joint ventures. However, in practice, the authority also tends to consider potential vertical effects in such types of transactions.

If the establishment of the joint venture results in the co-ordination of competitive behaviour either of its parents or the joint venture, on one hand, and its parents, on the other, then such transaction will be treated as a concerted practice (rather than a concentration), requiring individual antitrust clearance by the AMC (subject to certain conditions).

5. Decision: Prohibitions and Remedies

5.1 Authorities’ Ability to Prohibit or Interfere with Transactions
The AMC may prohibit a transaction if it leads or may lead to monopolisation (ie, the creating or strengthening of a monopolistic (dominant) position) or to a substantial restriction of competition on the Ukrainian market or a significant part thereof. In practice, the AMC rarely imposes a blanket ban and completely refuses to authorise a transaction; rather, it may require that the parties propose remedies (accept certain obligations) in order to ensure a sufficient level of competition in the market.

5.2 Parties’ Ability to Negotiate Remedies
According to the Competition Law, if the AMC identifies any grounds for a transaction to be prohibited during the Phase II review, it shall inform the parties of these grounds and the parties, in turn, can propose remedies (structural or behavioural) to be further negotiated with the AMC.

5.3 Legal Standard
The Competition Law provides for structural remedies (eg, divesting overlaps) or behavioural remedies (eg, restrictions on the use or management of certain assets, or price increases), although there are no comprehensive rules regarding scope, specific conditions, or the various technicalities of the rem-
edies. The only relevant requirements are that remedies should alleviate competition concerns and be proportionate, and that supervision of their implementation should be reasonable. Therefore, in practice, the remedies are usually negotiated on a case-by-case basis.

5.4 Typical Remedies
In practice, remedies are most often behavioural (and often accompanied by reporting obligations that allow the authority to monitor compliance). There are no public records of non-competition issues being addressed in remedies.

5.5 Negotiating Remedies with Authorities
Under the merger control rules, discussions on remedies start at Phase II when the authority identifies the grounds to prohibit the transaction. Procedurally, the authority should notify the parties of such grounds, and in turn the parties can propose the remedies to the AMC within a 30-day period (extendable upon the parties’ request). The AMC does not formally propose remedies on its own motion, but is required to carry out consultations with the parties in order to agree the terms and conditions of the remedies, where it can outline the scope of remedies in order for them to be acceptable. The AMC cannot impose remedies not agreed by the parties.

5.6 Conditions and Timing for Divestitures
There is no standard approach, as the remedies are usually negotiated with the AMC on a case-by-case basis. All relevant conditions and timing (including the possibility to complete the transaction before remedies are complied with) should be set out in the AMC clearance decision. Non-compliance with remedies may result in a fine of up to 5% of the parties’ worldwide turnover in the year immediately preceding the year when the fine is imposed. In practice, and according to the Guidelines on Fines, the fine for this violation is limited to 10% of the turnover on the relevant (and/or adjacent) Ukrainian market (if it resulted in monopolisation or a significant restriction of competition).

5.7 Issuance of Decisions
Upon review of a filing, the AMC issues a formal decision permitting or prohibiting the transaction, and publishes the non-confidential version of the decision on its website.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions
The AMC imposed behavioural commitments on the parties in a number of recent foreign-to-foreign transactions, including the Bayer/Monsanto deal (2017), the GSK/Novartis deal (2015) and the Whirlpool/Indesit deal (2015). There are no recent decisions prohibiting foreign-to-foreign transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications
A merger clearance decision does not cover ancillary restraints (such as non-compete, non-solicitation), which may formally require separate (antitrust) clearance.

7. Third-Party Rights, Confidentiality and Cross-border Co-operation

7.1 Third-Party Rights
Third parties (eg, customers, competitors, complainants) can be involved during the Phase II investigation if the AMC believes that the notified transaction may significantly affect their rights and interests. Such third parties have the right to be heard, and to have limited access to the case materials.

7.2 Contacting Third Parties
The AMC contacts third parties in Phase II, typically publishing a statement regarding the instigation of Phase II and inviting all interested parties to provide their comments or objections concerning the effect of a concentration on the market; it may also send written requests for information.

As regards a “market test” of remedies offered by the parties, the Concentrations Regulation provides for consultations between the AMC and the parties, but is silent on the possibility of approaching third parties. Still, recently the AMC started to publish information re remedies offered by the parties on its website and invite public opinion on them.

7.3 Confidentiality
The fact of the notification and a description of the transaction is made public upon either the adoption of the clearance decision or the initiation of Phase II, as the AMC is required to publish the non-confidential version of its decisions, as well as brief notes regarding its resolutions on the initiation of Phase II review within ten working days.

The parties may request that commercial information, including business secrets, is kept confidential, if it can provide a grounded justification for doing so.

7.4 Co-operation with Other Jurisdictions
The AMC may co-operate with the competition authorities in other jurisdictions, based in particular on the respective bilateral or multilateral treaties (such treaties are entered into with EU, certain CIS countries, Bulgaria, Hungary, Latvia, Lithuania and Slovakia, for example), as well as international organisations.
such as the Organisation for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD) and the International Competition Network (ICN). Such co-operation is usually limited to general policy matters and experience sharing, but may also involve the sharing of information (including confidential information).

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review
The parties may appeal the AMC decision in whole or in part to the commercial court.

8.2 Typical Timeline for Appeals
The AMC decision may be appealed within two months of its receipt by the respective party. There have been no instances of successful appeals in merger cases, although it should be noted that not all court decisions are in the public domain.

8.3 Ability of Third Parties to Appeal Clearance Decisions
Formally, third parties can appeal a clearance decision to the commercial court, although there is no public record of any such appeal being successful.

9. Recent Developments

9.1 Recent Changes or Impending Legislation
Recent changes to the legislation/regulations include:

- the adoption of the Guidelines on the definition of control in November 2018, which consolidates AMC practice on the definition and assessment of control. The Guidelines contain the concept of control that is similar to the one in EU competition law, and provide clarifications on other relevant issues, such as changes in the quality of control, control through investment funds, outsourcing arrangements, etc; and
- the adoption of the Guidelines on the assessment of joint ventures in September 2019, which clarify applicability of merger control rules to joint ventures. The document introduces the concept of full-functionality, as well as clarifies other criteria for joint ventures that should be regarded as concentrations (such as creation as a new entity, operation on a lasting basis, absence of coordination).

Both guidelines mentioned above closely follow the lines of the EC Consolidated Jurisdictional Notice regarding definition of control and assessment of joint ventures.

There are also several alternative drafts of the amendments to the Competition Law, which suggest, among others, the following changes to the current merger control regime:

- the figures (assets and turnover) of the controlling seller/shareholder that will cease control over the target post-concentration will no longer be added to the figures of the target for the purposes of the thresholds calculation exercise;
- introduction of the deal value threshold, whereby a concentration would require clearance if the deal value exceeds EUR20 million and the target has substantial nexus to Ukraine (similar to what is in place in Germany);
- increase of the filing fee for submission of the notification from UAH20,400 (approximately EUR700) to UAH42,500 (approximately EUR1,460) for simplified procedure filings and to UAH76,500 (approximately EUR2,640) for standard procedure filings;
- one of the drafts suggests also applying a 25-day simplified procedure to the transactions where:
  (a) none of the parties to the concentration is active in the same product and geographical market, or in upstream or downstream markets; and
  (b) parties submit voluntary filings (ie, where the concentration does not require clearance); and

- one of the drafts suggests that the clearance for the concentration would also cover any ancillary restrictions (non-competes or the like).

9.2 Recent Enforcement Record
Fining decisions have been publicly available since mid-July 2015. Since then, the AMC has imposed fines for failure to notify/closing without clearance in more than 100 instances. In almost all of these cases, the amount of the fine was between EUR5,000 and EUR16,000, and the fines were imposed for implementing non-problematic transactions (some of them were foreign-to-foreign deals). The largest fines were imposed in 2019 and amounted to EUR1.9 million and EUR1.8 million – both concerned local deals.

As far as is known, there have been no cases where the AMC prohibited a foreign-to-foreign transaction.

In a number of foreign-to-foreign transactions potentially raising concerns, the AMC imposed only behavioural commitments. As far as is known, there have been no structural remedies in foreign-to-foreign transactions (although please note that there is no public register of AMC decisions issued before mid-July 2015).

9.3 Current Competition Concerns
The AMC is currently focusing predominantly on analysing parties’ market shares prior to and after implementation of the
transaction. If combined shares exceed 30%, the AMC is likely to initiate Phase II to analyse thoroughly the transaction and possible competition concerns. The AMC also analyses the possible unilateral and/or co-ordinated effects of the transaction, as well as countervailing factors (such as buyer power, market entry, and the “failing firm” defence).

In terms of trends, the AMC imposed two largest fines in 2019, which amounted to EUR1.9 million and EUR1.8 million. These two cases demonstrate change in the AMCs approach, as before 2019 the highest fines were EUR500,000 and less.

9.4 COVID-19
The AMC introduced remote working for a number of case-handlers working on merger filings (on a weekly rotation basis). Otherwise, the authority keeps working as usual and these measures do not have much impact on the deadlines and the overall process in merger control.
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Trends and Developments

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On the Road of Another Reform of Merger Control Rules

In January 2020 a draft law proposing fundamental changes to the Competition Law and the Law on Antimonopoly Committee of Ukraine was submitted to the Parliament. The intention behind the draft law is to overhaul and modernise the legal framework for functioning of the Ukrainian competition authority and improve competition regulation and enforcement.

The draft law touches upon a variety of issues related to merger control and, if passed, is expected to tackle some important problems of Ukraine’s merger control regime.

Ukraine’s merger control regime was first comprehensively introduced in 2002, when the Law of Ukraine on Protection of Economic Competition (the Competition Law) entered into force. The Competition Law defined the notion of a concentration and set the notifiability thresholds in respect of mergers, acquisitions, and JVs. It also laid down the review procedure and sanctions for failure to comply with the clearance requirement.

Since the very beginning, the Competition Law was criticized for being excessively “exterritorial” – merger control thresholds were very low and could be exceeded by almost any transaction where at least one party (purchaser, target, or even the seller) had minor presence/activity in Ukraine. This allowed the AMC to claim jurisdiction over transactions reasonably lacking sufficient local nexus.

The situation remained unchanged until 2014, when Ukraine signed the Association Agreement with the EU. After that, the Ukrainian merger control legislation went through a number of updates and changes in order to comply with the European standards. Most notable changes of the recent years include:

Increased Thresholds
In May 2016 the new law reforming the merger control regime came into force, the main changes including:

- the increase of notifiability thresholds (although some transactions without a nexus were still captured, eg, where only the seller has Ukrainian turnover or assets);
- the introduction of a fast-track 25-day procedure for transactions raising no competition concerns (eg, where only one party is active in Ukraine or parties’ combined market shares do not exceed certain thresholds);
- the introduction of formal consultations with the AMC during the review of the merger notifications; and
- an increase of the filing fee amount.

Amendments to the Merger Regulation
Later the same year the AMC revised its procedural rules applicable to merger notifications. This resulted in significantly reduced disclosure requirements and simplified filing forms, especially in case of non-problematic mergers. More specifically, under the new rules, the filing parties were no longer required to provide the following:

- detailed information on non-relevant markets – instead, the parties must give only a summary of such activities;
- list of all group subsidiaries – instead, only Ukrainian subsidiaries and those with Ukrainian turnover need to be listed;
- list of minority shareholdings;
- detailed information on the officers, directors and relatives; and
- some of the documents previously filed alongside the notification.

However, a more detailed information is required on the financing of notified transactions and parties’ ownership structure. Further, in case of transactions raising competition concerns, the filing parties must provide more extensive and substantiated economic justification.

Transparency
In 2016 another law – on transparency of AMC’s activity – came into force. The law requires the authority to publish the following resolutions/decisions on its website within ten working days of the adoption:

- short notes regarding the AMC’s resolutions on the initiation of Phase II;
- non-confidential versions of the AMC’s merger/antitrust decisions; and
- decisions in cases on competition offences.

The new rules enabled interested third parties to submit their opinions for Phase II review and also brought more transparency and predictability to AMC’s practice, including as regards market definition and substantive assessment.
**Fining Guidelines**
In September 2015, the AMC published its Guidelines on the Calculation of Fines (last revised in August 2016). The document provides for the methodology of calculation of the basic amounts of fines for the violation of competition law, including in merger cases. Although the guidelines are non-binding, the AMC has publicly committed to follow. This was a great relief for many international filers – the Guidelines set definitive ranges of possible fines for “technical” violations, i.e., those which clearly raise no substantive competition concerns, such as transactions lacking sufficient nexus to Ukraine.

**Assessment of Mergers**
The AMC adopted the Guidelines on the Assessment of Horizontal Mergers and the Guidelines on the Assessment of Non-horizontal Mergers in December 2016 and March 2018, respectively. These documents provide for general rules and the procedure of review of different types of concentrations and identify typical issues on which the authority focuses its analysis.

**Law on Sanctions.**
In December 2017 the amendments to the Competition Law dealing with notifications by sanctioned (Russia-related) parties entered into force. Pursuant to the amended law, the AMC will reject notifications or drop their review (if they have already progressed to Phases I or II) if the concentration is prohibited by the Law on Sanctions. The AMC additionally clarified that these 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., the prohibition on the disposal of assets or equity).

Under adverse interpretation, the new rules may apply on a group-wide basis – for example, in cases where a party is not on the list but belongs to a group controlled by or controlling the sanctioned individuals or entities.

**Guidelines on Definition of Control**
In November 2018 the AMC adopted the Guidelines on the Definition of Control. The document provides comprehensive guidance on how the AMC will treat different transaction structures and explains rules applicable to specific deals. In general, the guidelines provide for a concept of control that is similar to that under EU competition law and closely follow the EU Consolidated Jurisdictional Notice.

**Guidelines on JVs**
In September 2019 the AMC published Guidelines, which clarified the criteria applicable to joint venture transactions that may qualify as concentrations, namely: creation as a new entity; full-functionality; operation on a lasting basis; and absence of co-ordination.

**Focus on EU Approaches and Practice**
Currently in cases of uncertainty, or where the relevant issue is not regulated by the Ukrainian law, the AMC tends to follow approaches and practice of the EU.

The most important and anticipated proposals to change the merger control regime, including those appearing in draft law of January 2020, may be summarized as follows:

**Calculation of Target Assets and Turnover**
Currently, the assets and turnover of the controlling shareholder or controlling seller need to be counted towards the target, although control link may be lost after closing. Thus, the local filing threshold is often met only formally, for example, by the exiting seller rather than by the target. The 2020 draft amendment to the Competition Law should exclude figures of the seller/shareholder that will cease to control target post transaction.

**Introduction of Deal Value Threshold**
The mentioned draft amendment to the Competition Law also suggests introducing the deal value threshold, whereby a concentration would require clearance if the deal value exceeds EUR20 million and the target has substantial nexus to Ukraine (similar to what is in place in Germany).

**Ancillary Restraints**
Currently, ancillary restraints such as non-compete obligations are often formally regarded as anticompetitive concerted practices requiring a separate clearance. The draft amendment suggests that any such ancillary restraints are cleared along with the merger in a single procedure.

**Guidelines on Remedies**
The AMC is working on Guidelines on the remedies in merger control cases, which should clarify the procedure of applying the structural remedies (for example, divestitures), as well as the procedure for monitoring compliance with those remedies.

**Market Definition**
The AMC presented drafts of the Methodology on the Market Definition and Methodology on Establishment of the Monopoly Position of the Undertakings on the Market. These documents should replace the regulation originally adopted in 2002 and improve the relevant rules on defining the relevant market and
establishment of the monopoly position of the undertaking on that market.

The Ukrainian merger control regime was substantially improved over the last few years and further changes are in the pipeline. The new legislative changes proposed in 2020 have been under review of the Parliamentary Committees for almost half a year already. This gives reasons for cautious optimism that 2020-2021 will see real progress in aligning Ukrainian legislation and enforcement practice in merger control with those of the EC and national EU competition agencies.
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