LEGISLATION AND JURISDICTION

1. What is the relevant merger control legislation? Is there any pending legislation that would affect or amend the current merger control rules described below?

The Law of Ukraine on Protection of Economic Competition of 2001 (the LPEC) provides for a basic set of rules regulating, inter alia, merger control issues. In particular, the LPEC defines the concept of a concentration, whereby certain mergers and acquisitions, acquisitions of control over an undertaking or a part thereof, as well as some other types of transactions are subject to merger control in Ukraine (see question 3 for detail). Notifiability thresholds, exemptions, basic procedural rules, sanctions, etc are also covered by the LPEC. The LPEC is available in English at www.globalcompetitionforum.org/regions/europe/Ukraine/LEGISLATION.pdf.

Detailed filing procedure is outlined in the Resolution of the Antimonopoly Committee of Ukraine Approving the Regulation on the Procedure for Filing Applications with the Antimonopoly Committee of Ukraine for Obtaining its Prior Approval of the Concentration of Undertakings of 2002 (the Concentrations Regulation).

Other applicable laws and regulations include:
- the Law on the Antimonopoly Committee of Ukraine of 1993;
- the Commercial Code of Ukraine of 2003;
- the AMC Methodology for Establishment of the Monopoly (Dominant) Position of the Undertakings on the Market of 2002.

The main proposal for reform in the area of merger control concerns the increase of turnover/assets notifiability thresholds in merger cases (see question 5 for detail). The relevant draft law has been developed and submitted to the Ukrainian Parliament in late 2008. Although it is almost two years since the draft law passed its first reading, the prospects of its adoption by the Ukrainian Parliament are unclear.

2. What are the relevant enforcement authorities, and what are their contact details?

The Antimonopoly Committee of Ukraine – АНТИМОНОПОЛЬНИЙ КОМІТЕТ УКРАЇНИ – (the AMC) together with its territorial divisions and administrative boards is the principal state authority responsible for enforcement of merger control rules in Ukraine. Its responsibilities include review of the
merger control notifications and authorisation/prohibition of transactions, market research, definition of the product and geographical markets, investigation of violations, as well as general supervision of compliance by the undertakings and state authorities with Ukrainian competition laws.

The contact details of the AMC are as follows:
Antimonopoly Committee of Ukraine
Address: 45 Urytskogo Street, Kyiv 03035, Ukraine
Tel: +38 044 251-62-62
Fax: +38 044 520-03-25
E-mail: mail@amc.gov.ua
Website: www.amc.gov.ua
(the website is available in Ukrainian, English, and Russian languages).

If the AMC refuses to authorise a concentration, the Cabinet of Ministers of Ukraine – Кабінет Міністрів України – may overrule such decision.

The contact details of the Cabinet of Ministers of Ukraine are as follows:
Cabinet of Ministers of Ukraine
Address: 12/2 Grushevskogo Street, Kyiv 01008, Ukraine
Tel: +38 044 256-76-24 (Secretariat of the Cabinet of Ministers of Ukraine)
Fax: N/A
E-mail: pr@kmu.gov.ua
Website: www.kmu.gov.ua
(the website is available in Ukrainian, English, and Russian languages).

3. What types of transactions are potentially caught by the relevant legislation?

Pursuant to the LPEC, the following transactions are considered to be concentrations:

• merger of two or more previously independent undertakings or takeover of one undertaking by another;
• acquisition of direct or indirect control over an undertaking, including through: (i) acquisition or lease of a significant part of the assets of an undertaking (including in the process of its liquidation); or (ii) appointments to certain positions, etc;
• establishment by two or more undertakings of a new undertaking that will independently pursue business activity on a lasting basis, while its establishment should not result in co-ordination of competitive behaviour of either its parents or of the new undertaking, on the one hand, and its parents, on the other;
• direct or indirect acquisition(s) of shares whereby certain thresholds (25 per cent or 50 per cent of the votes in the highest governing body of the undertaking concerned) are reached or exceeded.

The following 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 of the new
undertaking, on the one hand, and its parents, on the other (such establishment is generally regarded as concerted practices);

- acquisition of shares qualifying as a financial buyer transaction (i.e., the shares are acquired by a financial institution for the purposes of further resale within one year (extendable further), provided the acquirer does not exercise the voting rights attached to the acquired shares);
- intra-group transactions (unless control links within the group were established in violation of the Ukrainian merger control rules);
- acquisition of control over an undertaking or a part thereof by a receiver or a representative of the state authority.

A change of control is not necessarily required for a transaction to qualify as a concentration (e.g., crossing of 25 per cent of the votes does not necessarily bring (negative) control). Though, in practice the majority of notifiable transactions result in the change of control. Ukrainian merger control rules define control as the ability to exercise decisive influence (including via blocking rights) on the strategic decisions related to business activity of an undertaking. In particular, control is deemed to exist if an undertaking: (i) directly or indirectly holds/manages more than 50 per cent of shares/votes in another undertaking; (ii) is entitled to receive at least 50 per cent of profit in another undertaking; (iii) is authorised to appoint CEO, deputy CEO or more than 50 per cent of the members of another undertaking’s corporate bodies (or if the same persons hold positions of CEO, deputy CEO, the Chairman, the Deputy Chairman or more than 50 per cent of members of said board(s)/committee/etc in two undertakings); (iv) otherwise controls another undertaking (through contractual (e.g., management, joint activity) arrangements, etc).

Notifiability of joint-to-sole control change is legally unclear under Ukrainian merger control law. On one hand, the LPEC does not clearly differentiate between joint and sole control; thus, it may be argued that the change of control from joint to sole should not trigger any re-qualification of control in terms of Ukrainian definition of control and, consequently, the transaction should be regarded as intra-group. For quite some time it has been the AMC’s prevailing practice to treat joint-to-sole control changes as intra-group transactions requiring no merger clearance. However, there has also been a number of cases of a different interpretation by the AMC – it considered joint-to-sole control changes as notifiable transactions, accepted relevant applications for review, and issued merger clearances.

4. Are joint ventures caught, and if so, in what circumstances?

As explained above in the answer to question 3, establishment of a joint venture though creation of a new undertaking may qualify as a concentration, provided the following criteria are met (cumulative):

- it is established by two or more independent undertakings (whether any of the parents of such new entity will acquire control is not relevant for the present analysis);
- it will be able to independently pursue business activity on a lasting basis; and
its establishment will not result in co-ordination of competitive behaviour of either the joint venture’s parents or the joint venture, on the one hand, and its parents, on the other.

Establishment of a joint venture (a jointly owned/controlled entity) through the acquisition of shares/assets may be regarded as a concentration depending on whether such transaction contains elements which qualify as ‘concentration’ (eg, whether 25 per cent/50 per cent votes’ threshold is reached/exceeded or whether control is acquired, etc - see question 3 for the full list).

5. **What are the jurisdictional thresholds?**

As a general rule, a concentration is notifiable and requires prior merger clearance if the following thresholds are exceeded:

- **Turnover/assets-based:** the combined worldwide asset value or turnover of the participants to the concentration (including their respective groups) in the financial year preceding the year of the transaction exceeded EUR 12 million according to the official exchange rate of the national Bank of Ukraine applicable on the last day of such financial year; and (i) each of the participants to the concentration (including their respective groups) had worldwide asset value or turnover in the financial year preceding the year of the transaction in excess of EUR 1 million according to the official exchange rate of the national Bank of Ukraine applicable on the last day of such financial year; and (ii) the value of assets located in Ukraine or Ukrainian turnover of either of the participants to the concentration in the financial year preceding the year of the transaction exceeded EUR 1 million according to the official exchange rate of the national Bank of Ukraine applicable on the last day of such financial year; or

- **Market share-based:** either the individual or combined market share of the participants to the concentration in the market concerned or the adjacent market exceeds 35 per cent.

For turnover calculation purposes the figures of the participants to the concentration include those of all entities of their respective groups, ie, including the ultimate controlling parent and all entities directly/indirectly solely/jointly controlled by such parent. There are no specific rules regulating allocation of turnover of the entities jointly controlled with third parties (since the LPEC does not clearly differentiate between joint and sole control, the prevailing practice is to count all of the joint venture’s turnover towards the turnover of the controlling undertaking concerned).

Sales revenues figures should be used excluding VAT and other turnover-based taxes and contributions. Revenues generated via intra-group sales should not be counted.

As regards the geographical allocation of turnover for the purposes of ascertaining whether the local threshold is met, generally, there is no legislative guidance on the issue. The prevailing practice to date is to attribute the sales by customer location. In order for either party to meet the ‘local presence’ test, indirect sales to Ukrainian customers (ie supplies from abroad) suffice.
Special rules apply to the calculation of turnover/assets of commercial banks and insurance companies.

Currently, it is proposed that the turnover/asset notifiability thresholds in merger cases be increased, according to which a concentration would have to be notified and require prior merger clearance if the following thresholds were met:

- the combined worldwide asset value or turnover of the participants to the concentration (including their groups) exceeded EUR 50 million and the value of the assets located in Ukraine or Ukrainian turnover of at least two of the participants to the concentration exceeded EUR 4 million; or
- the value of assets located in Ukraine or Ukrainian turnover of at least one participant to the concentration exceeded EUR 50 million and the worldwide asset value or turnover of at least one other participant to the concentration exceeded EUR 50 million.

6. Are these thresholds subject to regular adjustment?  
No. The above turnover/assets thresholds have applied since the LPEC has come into force in 2002 and the relevant article was last revised in 2005 when the market share-based test was introduced.

7. Are there any sector-specific thresholds?  
No. However, as indicated in the answer to question 5, special rules apply to the calculation of turnover/assets of commercial banks and insurance companies. Thus, if a commercial bank is a participant to the concentration, the bank’s tenth fraction of the assets should be considered for the purposes of turnover/asset threshold. If an insurance company is a participant to the concentration, net assets of an insurance company are considered for the purposes of the asset value calculation and the revenues from insurance activities are considered for the purposes of the turnover calculation.

8. In the event the relevant thresholds are met, is a filing mandatory or voluntary?  
Once the relevant jurisdictional thresholds are met, the filing is mandatory, unless the transaction qualifies for an exemption (e.g., as an intra-group transaction or a financial investor transaction, etc).

9. Can a notification be avoided even where the thresholds are met, based on a ‘lack of effects’ argument?  
Generally, it is presumed that once the applicable thresholds are met, the concentration is notifiable and requires prior AMC clearance.

However, pursuant to general provisions of the LPEC, an argument can be made that application of the turnover/asset thresholds should be qualified by the effects-doctrine. Under this interpretation, it may be argued that clearance is not required as the transaction lacks reasonable local nexus and cannot have any anticompetitive effect. Still, this argument runs contrary to the current approach of the AMC in application of merger control rules.
The AMC has on several occasions expressed its unofficial position on the issue: it claimed that such transactions are subject to clearance since: (i) the AMC has exclusive authority to determine whether a particular transaction may or may not impact competition in Ukraine; and (ii) verification of such impact is in fact conducted while reviewing a merger case and granting the clearance.

There have been cases where the AMC has accepted and reviewed applications for clearance of transactions lacking reasonable local nexus, thus indirectly confirming its jurisdiction over such transactions. Moreover, on several occasions the AMC imposed (nominal) fines for implementation of transactions lacking reasonable local nexus.

10. Are there special rules by which a notification of a ‘foreign-to-foreign’ transaction can be avoided even where the thresholds are met?
No, prior AMC clearance is required irrespective of whether the parties are foreign or local entities. There have been a number of cases when the AMC imposed fines for implementation of notifiable foreign-to-foreign transactions prior to/without clearance.

11. Does the relevant authority have jurisdiction to initiate a review of transactions which do not meet the thresholds for a notification?
No.

NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES

12. Is there a specified deadline by which a notification must be made?
There is no specific deadline for submitting a notification requesting merger clearance. AMC clearance must be obtained prior to closing (e.g., transfer of the title to shares, acquisition of control or registration of a new entity).

13. Can a notification be made prior to signing a definitive agreement?
Yes. A notification can be submitted based on a draft agreement or other transactional documentation (including drafts) showing in sufficient detail the intention of the parties (e.g., the memorandum of understanding, letter of intent, heads of terms, etc).

14. Who is responsible for notifying?
It is a joint obligation of the participants to the concentration to file a notifiable transaction.

In the case of a merger, the notification should be filed by the merging entities. In the case of a takeover, acquisition of control or acquisition of shares resulting in reaching or exceeding of applicable thresholds, the notification should be filed by the acquiring entity and the target/seller (pursuant to Ukrainian merger control rules). In the case of establishment of a new entity, the founding parent entities will be under the obligation to file.
Though, in certain cases the AMC may agree to accept a notification filed by one of the participants to the concentration, for instance:

- in the case of a hostile takeover; or
- if there is a lack of co-operation between the parties to a concentration in relation to filing in Ukraine.

In the above cases the AMC will either proceed based on the information that is available to and submitted by the notifying party or send a separate information request to the other party.

15. **What are the filing fees, if any?**
The filing fee is UAH 5,100 (approximately EUR 450).

The LPEC does not provide guidance on which participant to the notifiable concentration is responsible for the payment of the filing fee. The filing fee should be paid to the AMC’s account and the confirmation of the payment should be attached as an annex to the notification; otherwise the AMC will not proceed with the review of the notification until the payment is made (or for another term, as may be established by the AMC).

16. **Where a notification is necessary, is approval needed before the transaction is closed/implemented (is there a waiting period or a suspension requirement)?**
Yes. A notifiable concentration cannot be implemented until the AMC clearance is granted. Further, the parties to a notifiable concentration must refrain from any actions that may restrict competition and render it impossible to restore the initial position (pre-clearance gun-jumping).

17. **If there is a suspension requirement, is it possible to apply for a derogation in order to close before approval is granted? If so, under what circumstances?**
The suspension requirement applies globally and Ukrainian merger control law does not provide for any possibilities to obtain derogation. So, there is no way to carve out Ukrainian closing of the transaction without risk. However, in practice the AMC may under exceptional circumstances accept a hold-separate/carve-out agreement which may mitigate the liability for early closing, as such agreement would clearly show parties’ *bona fide* intention to comply with Ukrainian merger control law.

18. **Are any other exceptions (carve-outs, etc) available to allow parties to close/implement prior to approval?**
No. See also the answer to question 17.

19. **What are the possible sanctions for failing to notify a transaction?**
For failure to obtain prior clearance for a notifiable concentration its participants may be fined up to 5 per cent of their turnover in the year immediately preceding the year when the fine is imposed (in practice starting from approximately EUR 500 and reaching EUR 17,000 recently). Generally, the LPEC provides for the fine to be imposed on the entire
group of entities whose actions/inactions have lead to the violation. This essentially means that the fine may be imposed on the acquiring party and the target/seller (or the founding partners in case of establishment of a joint venture or the merging entities) and calculated based on their combined turnover (in case of the target – including the seller’s group turnover). The LPEC is silent on whether ‘turnover’ refers to local or global sales. Though, it has been the AMC’s prevailing practice to interpret this provision as reference to worldwide turnover.

Moreover, pursuant to the LPEC, any member of the infringer’s group which benefited or might have benefited from the unauthorised transaction may be subject to fines at par with the principal infringer. This allows the AMC to impose fines immediately on the parties’ local subsidiaries. In such case, the AMC would stand a very good chance of forcible collection of the imposed fines.

If not timely paid, the fine is subject to late payment fee accruals (1.5 per cent per day, but not to exceed the principal amount of the fine imposed).

In addition to the financial sanctions the following may apply:
- a ban on the companies’ cross-border activities with Ukraine such as importing/exporting goods, performing under cross-border contracts, etc (can be imposed by the Ministry of Economy of Ukraine at the AMC’s request);
- third party damages claims; and/or
- invalidation of the transaction.

The AMC may learn of the transactions that should have been notified from its own market surveys, third parties’ (eg, competitors’) or state authorities’ complaints or while reviewing subsequent notifications of either party to the past transaction. Also, recently the AMC has run an electronic database consolidating the majority of the information from the filings (including the data on the composition of the groups involved) allowing it to compare the data submitted by respective groups for the purposes of various filings and to identify the changes.

20. What are the possible sanctions for implementing a transaction prior to receiving approval (so-called ‘gun-jumping’)?

The same sanctions apply as in the case of early closing, as outlined in the answer to question 19. Also, the AMC may request the infringing party(ies) to stop the violation and to remove its consequences.

21. What are the possible sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision?

Implementation of a transaction despite a prohibitive AMC decision or only partial compliance with the decision may result in a fine in the amount of up to 10 per cent of the concentration participants’ turnover in the year immediately preceding the year when the fine is imposed. Failure to comply with the obligations imposed by a conditional AMC clearance decision may result in a fine in the amount of up to 5 per cent of concentration
participants’ turnover. As discussed above in the answer to question 19, the fine can be based on the global turnover of the infringing party(ies). This applies irrespective of whether the transaction is foreign-to-foreign or involves a direct transfer of Ukrainian assets.

There is no public record of transactions having been implemented in violation of a prohibition decision or in breach of conditions.

Similar to the above, if the parties close despite a prohibition decision the fine may be imposed on the participants to the concentration: the acquiring party and the target/seller in case of acquisition of control (shares, etc), the founding partners in case of establishment of a joint venture, or the merging entities in case of a merger, and calculated based on their combined turnover (including the seller’s group turnover, where applicable). As regards implementation of the transaction in breach of conditions imposed by the AMC, it is conceivable that the authority will regard such implementation as the one without clearance and, thus, will be inclined to hold both notifying parties liable for such implementation, as having contributed to implementation of the transaction in violation of the AMC clearance decision. In such case the liability of the target would most likely extend to the sellers.

Other sanctions may include the abovementioned ban on the companies’ cross-border activities with Ukraine, third party damages claims, and/or invalidation of the transaction. In addition, a de-merger order may be issued.

Ukrainian laws also provide for individual administrative liability of the infringing parties’ top managers: these may be subject to a nominal administrative fine for a failure to implement the AMC decision.

22. What are the different phases of a review? Is there any way to speed up the review process?

A merger case review includes: (i) a preview period (15 calendar days); (ii) a phase I standard review period (30 calendar days); and (iii) a phase II in-depth review period (three months extendable further if by the end of the phase I review period the AMC has identified grounds to prohibit the concentration or an in-depth investigation or expertise is required).

The preview period is intended for the AMC to ‘preview’ the notification and decide on whether it is complete and may be passed for substantive review. Additional questions and/or information/documents requests from the AMC during the preview period do not stop the clock, though the AMC may decline the notification as incomplete if such questions and/or requests are not addressed within the specified period and in the manner satisfactory for the AMC.

Following the lapse of the preview period (it cannot be shortened) the AMC will proceed to the phase I review period analysing the substance and the effects of the transaction on the local market(s). Additional questions and/or information/documents requests during this period also do not stop the clock. However, untimely and/or incomplete responses may motivate the authority to initiate a more thorough investigation and open phase II. The Ukrainian competition laws do not specifically require the authority
to inform the notifying parties of the competition concerns once they are identified in phase I. Though, these usually become known to the parties already within phase I in the process of regular communications with the AMC’s officers responsible for the review of the notification. At the end of the period the authority will issue the clearance decision or initiate phase II if the transaction raises competition concerns or further investigation is required. If, nevertheless, the authority does not take any decision within this period, the transaction is considered cleared on the last day of the phase I review period (there is no public record of such instances though).

Along with initiation of phase II the authority will officially inform the notifying parties of such development and will send the additional information request. Although the review period is limited to three months, in practice the investigation may take much longer – if additional documents, information and/or expert analysis are required, the term may be suspended or even restarted, in which case a new three-month period commences from the date on which these documents, information and/or expert analysis have been filed with the AMC. This essentially means that the AMC may extend the phase II review period for as long as it deems necessary. During this stage the authority may also request information from competitors, customers of the notifying groups or third parties whose opinion may be relevant for the case assessment. Remedies – if available – are usually discussed during the phase II review (see question 38 for detail). At the end of phase II review the authority will have the option to clear the transaction (conditionally or unconditionally) or prohibit it.

Ukrainian competition laws do not provide for official fast track or simplified procedure. Though, as a practical matter it may be possible to negotiate a more expedited (eg, one to two weeks shorter) review with the authority if the transaction is straightforward and does not raise any competition concerns.

23. Is there a possibility for a ‘simplified’ procedure or shorter notification form and, if so, under what conditions would this apply?
No. Ukrainian competition laws do not provide for a simplified procedure, although the issue has been widely discussed in legal circles for years.

24. What types of data and what level of detail is required for a notification?
Although there is no fixed form for a merger notification (the Concentrations Regulation only sets requirements on the filing depending on the type of the concentration), the notifying parties are usually required to provide information on the following:
• detailed outline of the transaction structure, indicating various transaction stages, financial aspects of the transaction, and the applicable timeline;
• respective groups’ composition and brief outline of worldwide activities;
• detailed information on Ukrainian activities of the parties, including the details of the companies acting in (selling to) Ukraine, volumes of
supply per market, market shares (calculations, if available, or at least estimates), names and contact details of the customers, competitors, and suppliers on all markets where the respective parties are active in Ukraine (including those which may be not directly relevant to the transaction):

- detailed outline regarding the markets involved: how the market(s) is(are) defined and the market structure prior to and post-closing (though as a practical matter, it may be possible to negotiate certain limitation of information on non-relevant markets), etc.

25. In which language(s) may notifications be submitted?
The notification and the annexes to it should be submitted in Ukrainian or accompanied by Ukrainian translations. As a practical matter, the AMC sometimes agrees to accept Russian-language documents (this mostly concerns the applicants’ corporate documents and transactional documentation).

26. Which documents must be submitted along with a notification?
In a standard merger case the notifying parties will be required to submit the following documents with respect to:

The transaction:
- copies or drafts of transactional documentation (usually a copy/draft of a share purchase agreement, a joint venture agreement, a shareholders or investment agreement, public offer documentation in case of a public bid or similar);
- copies of the notifying parties’ decisions to implement the transaction, if applicable (usually a copy of the decision of the company’s Board of Directors or the minutes of the Shareholders meeting, etc);

The notifying parties:
- copies of the notifying parties’ articles of association or similar;
- copies of Certificates of Incorporation or excerpts from the trade/commercial/court/banking register evidencing due incorporation and existence of the notifying parties;
- copies of the acquiring party’s accounts for the most recent calendar year (additional financial documentation may be further requested);
- powers of attorney (if the notification is filed by the notifying parties’ authorised representatives).

Out of the above documents, a notarisation and (unless the requirement was lifted and depending on the issuing jurisdiction) legalisation/apostil requirement strictly applies with respect to the powers of attorney and excerpts from the register (or similar documents) only. Thus, at the time of writing, the documents originating, in particular, from the Czech Republic, the Commonwealth of Independent States (CIS) countries, Poland, Romania or several other countries needed to be notarised only (based on the respective bilateral agreements lifting the legalisation requirement), from
Germany, UK, USA, etc – notarised and apostilled (based on the Hague Convention abolishing the requirement of legalisation for foreign public documents of 1961), from Canada – notarised and legalised by the consulate of Ukraine.

As a general rule, all attachments to the notification should be translated into Ukrainian. Though, as mentioned in the answer to question 25 above, in certain cases the authority may agree to accept documents in Russian.

27. What are the possible sanctions for providing incorrect, misleading or incomplete information in a notification?

In the context of the AMC’s review of a merger case there may two scenarios of submission of incomplete information:

- If the notification is incomplete from the start: such notification may be declined by the authority within the 15 day preview period and will have to be submitted anew once supplemented with the missing information. In such scenario no sanctions are imposed on the notifying parties.

- If the notification is complete, but the authority requests further information: submission of incomplete information upon request and without justifying reasons is punishable by a fine of up to 1 per cent of the respective party’s turnover in the year immediately preceding the year when the fine is imposed (in practice usually ranging from EUR 100 to EUR 1,500). Nominal administrative fines on the company’s top management are also possible.

Provision of incorrect information may result in a fine of up to 1 per cent of the respective party’s turnover in the year immediately preceding the year when the fine is imposed (in practice also usually ranging within EUR 100 and EUR 1,500). Likewise, nominal administrative fines on the company’s top management are possible.

Provision of misleading information is not specifically addressed in the Ukrainian merger control rules. Though, if a fair interpretation of such misleading information enables a conclusion that submission of such information effectively amounted to submission of incorrect information – the sanctions outlined in the immediately preceding paragraph may apply.

Also, failure to provide requested information within the deadlines specified by the authority is subject to the same sanctions as described above.

The sanctions are imposed on the party submitting the information in case of untimely and/or incomplete submission of the information upon the authority’s request; in case of submission of incorrect (misleading) information – on one of the notifying parties (ie, on the party submitting the information) or on both (several) notifying parties, depending on by whom submission of incorrect (misleading) information was authorised.

28. To what extent is the relevant authority available for pre-notification discussions? Are pre-notification consultations customary?

Although pre-notification contacts are not regulated by the Ukrainian merger control rules, the AMC officials are usually available for brief
unofficial discussions regarding notifiability of a proposed transaction or technical issues related to a future notification.

29. Where pre-notification consultations are possible, what measures does the relevant authority take to ensure that such discussions are treated confidentially?
Not applicable.

30. At what point and in what forum does the relevant authority make public the fact that a notification has been made?
Unless the notifying parties object, the AMC may publish a very general outline regarding submission of the notification (ie, general information on the transaction, groups involved, relevant markets, and similar). Also, some further data may be disclosed by the AMC (usually on its website) to the extent the notifying parties authorised the disclosure.
If not published at submission, such information may be disclosed by the AMC if: (i) it believes that third parties may object to the transaction; or (ii) phase II is opened.

31. Once the authority has issued its decision, what information about the transaction and the decision is made publicly available?
The AMC decisions – whether clearing or prohibiting the transaction – are not published in their entirety. However, the authority may disclose certain information regarding its decision (including certain data on the transaction, groups involved, relevant markets, etc) as agreed with the notifying parties (usually published as a press-release on the AMC’s website). As a practical matter, before scheduling the case for final consideration at the AMC panel hearing the authority would normally ask the parties to grant their consent for such basic disclosure.

SUBSTANTIVE ASSESSMENT OF THE MERGER, ROLE OF THIRD PARTIES AND REMEDIES

32. What is the substantive test for assessing the legality of a notified transaction?
The authority will issue clearance for the transaction if it does not result in the monopolisation (ie, creation, maintenance or strengthening of a monopolistic (dominant) position on the market) or substantial restriction of competition on the Ukrainian market or its significant part. Otherwise the transaction will be prohibited unless the parties offer sufficient remedies. Although the Ukrainian competition laws provide the definition of dominance and set out the relevant benchmarks (ie, above 35 per cent market share if held individually or above 50 per cent or 70 per cent if held collectively), no further guidance is provided on, inter alia, how effects of the maintenance of a monopolistic (dominant) position should be assessed or where is the borderline beyond which restriction of competition becomes substantial. Thus, each transaction is assessed on a case-by-case basis.
33. What theories of harm are considered by the authority in assessing the transaction? How concerned are the authorities with non-horizontal (eg, vertical or conglomerate) effects, and are any other theories of harm analysed (eg, coordination in the case of joint ventures)?

Generally, the AMC is more concerned about horizontal mergers resulting in market share increases. Though it also tends to take potential vertical effects into account, especially in transactions involving establishment of a joint venture.

34. Are non-competition issues, such as industrial policy or labour policy, commonly taken into account in the assessment of the transaction?

The issue is not specifically regulated by the Ukrainian merger control rules. Although, in complicated cases requiring industry expertise the authority may take account of non-competition issues. Usually the AMC would involve the relevant competent authority a consulting agency.

35. Are economic efficiencies considered as a mitigating factor in the substantive assessment?

The authority may take account of economic efficiencies when reviewing the notification. Though in cases posing serious competition concerns adequate remedies would nevertheless be required.

However, economic efficiencies will be taken into account by the Cabinet of Ministers of Ukraine which may still authorise a transaction that has been prohibited by the AMC. Such decision is possible if the positive effects of the transaction on the public interest outweigh the negative impact of the restriction of competition caused by the transaction, unless such restriction:
- is not necessary for attaining the purpose of the concentration;
- jeopardises the market economy system.

36. Does the relevant authority typically cooperate/share information with authorities in other jurisdictions?

The AMC perhaps most commonly co-operates with the CIS competition authorities within the Interstate Council for Antimonopoly Policy (especially with the Russian Federal Antimonopoly Service). The Council and its respective working groups primarily function as fora for information exchange on the overall competition law tendencies and current national developments, including discussions on current approaches to substantive assessment in merger cases and most recent investigations.

Further, it is an appropriate venue to work on future joint action plans aimed at prevention and/or investigation of violations in various multi-national industries (most widely discussed cases concerned the areas of air transportation, telecommunications, and pharmaceuticals, as well as large-scale cartels).

Cooperation with other competition authorities is usually based on bilateral treaties (Ukraine entered into cooperation agreements with Bulgaria, Hungary, Latvia, and the Slovak Republic). The AMC also cooperates with the international organisations (Organisation for Economic Cooperation and
Development, United Nations Conference on Trade and Development, the International Competition Network, etc).

37. To what extent are third parties involved in the review process?
The AMC may involve third parties (e.g., competitors, large customers of the notifying parties) in the review of the merger cases if the AMC's decision with respect to the notified transaction may significantly affect their rights and interests in competition. Third parties may be involved during either phase I or phase II and the AMC acts in its full discretion when deciding on this issue. This decision is then communicated to the notifying parties.

Third parties can submit their observations, in particular, relating to the notified transaction and its impact on the market. Such observations are then attached to the case as evidence and must be taken into account when the AMC decides on the case.

The AMC may request the information, documents or opinions of third parties if it considers such data relevant and necessary for the case assessment. Normally, when issuing such an information and/or documents request, the authority would indicate the deadlines for provision of the requested data. Non-compliance with such information/documents request may result in imposition on a third party of the sanctions outlined in the answer to question 27 above.

38. Is it possible for the parties to propose remedies for potential competition issues?
Pursuant to the LPEC, the AMC clearance decision may be made conditional upon compliance by the notifying parties with certain additional undertakings which may remove or at least mitigate the adverse effects the transaction may have on the market. Generally, such undertakings may be behavioural or structural (e.g., divestitures). Remedies and the relevant procedures are not comprehensively regulated by Ukrainian competition laws and are usually negotiated with the authority on a case-by-case basis.

Generally, remedies may be offered at any time after submission of the notification. Usually these are formally offered by the notifying parties, as the authority procedurally does not have powers to request remedies. Though, in cases clearly raising competition concerns the AMC may informally start such discussions prompting the parties to negotiate the remedies more actively.

In practice the remedies are usually offered and discussed in phase II. It is conceivable that offering the remedies in phase I (which implies the absence of any competition concerns) would automatically bring the case to phase II, as the authority would most likely perceive such discussions during phase I as the parties’ clear indication that they see competition concerns.

In the absence of detailed regulation on the issue, the type, scope, specific conditions, as well as various technicalities of the remedies are discussed with the authority in each case individually. Generally, to be acceptable, they must remove competition concerns or mitigate the adverse effect of the transaction on the market.
39. What types of remedies are likely to be accepted by the authority (eg, divestment remedies, other structural remedies, behavioural remedies, etc)?

The LPEC specifies the following types of available remedies:

- restrictions on the administration, use or disposal of certain property (behavioural remedies); and/or
- undertakings to divest certain assets (structural remedies).

The above list is not exhaustive and usually other options are also debatable with the authority. In the cases where only conditional clearance was possible, it has been the authority’s prevailing practice to impose behavioural restrictions rather than structural remedies. In any event, as mentioned above, irrespective of their type the remedies must remove competition concerns or mitigate the adverse effect of the transaction on the market.

40. What power does the relevant authority have to enforce a prohibition decision?

According to the LPEC, the AMC has powers to issue a decision prohibiting a concentration and if the relevant parties do not comply with such decision, it may be enforced through the courts.

Since the LPEC applies to any relations that have or may have an impact on economic competition in Ukraine irrespective of the parties’ domicile, the AMC regularly acts extraterritorially with respect to foreign-to-foreign transactions; though we are not aware of any cases where the AMC has prohibited a foreign-to-foreign transaction. As for extraterritorial enforcement of AMC decisions, it is not practicable due to a number of legal uncertainties and technical complications associated with cross-border reciprocal recognition of court judgments.

JUDICIAL REVIEW

41. Is it possible to challenge decisions approving or prohibiting transactions? If so, before which court or tribunal?

The LPEC sets out the right to challenge the AMC decision in court. There is a legal uncertainty which court – commercial or administrative – has jurisdiction over such appeals, although it has been prevailing practice for a decade to appeal through commercial courts (though a draft law resolving this uncertainty in favour of commercial courts has recently passed its first reading). The relevant statement of claim indicating the grounds for invalidation of the AMC decision should be filed within two months from the date of receipt of the decision. Given the jurisdictional uncertainty the AMC decisions may be challenged in a commercial court (eg, the Commercial Court in the City of Kyiv, Sevastopol, Crimea, etc) or an administrative court (eg, the District Administrative Court in the City of Kyiv).

Both courts’ decisions may further be appealed to the competent appellate instance within a certain period (in an administrative proceeding: 10 days to initiate the appeal by filing a pro forma application plus 20 days to have it supported by the substantive petition; in a commercial proceeding: 10 days).
The relevant courts would be the Kyiv Administrative Court of Appeal in the administrative proceeding and the Kyiv Commercial Court of Appeal – in the commercial.

Further, if the second appeal is unsuccessful, the claimant may go to higher courts for cassation – the Higher Administrative Court of Ukraine for the administrative or the Higher Commercial Court of Ukraine for the commercial proceeding.

Finally, the cassation court's award may be challenged in the Supreme Court of Ukraine if there is a good reason for that (if the decision is not in the line with the usual court practice for such type of disputes, etc).

Generally, the court (in any instance) can suspend the AMC decision until the final judgment is rendered. However, to protect the public interest or prevent the possible negative impact of the violation(s), the AMC can declare its own decision unsuspendable.

42. What is the typical duration of a review on appeal?
The applicable Ukrainian procedural codes regulating commercial/administrative court proceedings establish a two-month term for consideration of cases in the first instance. Review on appeal should not exceed a two-month term after the claim has been accepted by the court for review; the review on cassation should not exceed one month after the claim has been accepted by the court for review. Review of the case by the Supreme Court of Ukraine should not exceed one month from the date when the proceeding was initiated.

However, from a practical perspective such terms are rarely met due to courts’ heavy workload, insufficiency of personnel, necessity of conducting additional investigations, collection of documents and information, etc. Thus, the review on appeal may last for up to several years. Expedited review is not available.

43. Have there been any successful appeals?
Since there have been very few AMC prohibition decisions and in each of these cases the authority has thoroughly and deliberately assessed the facts and the potential impact of the transaction on the relevant markets, there have been no instances of successful appeals in merger cases (although not all court decisions are publicly available). Further, there is no public record of successful appeals against the AMC clearance decisions.

Nevertheless, there have been several notable appeal cases (including with respect to the AMC clearance decision in *Procter&Gamble/Olvia Beta Cleaning Products assets* case) with the definition of the relevant product market as the central and most disputable issue. However, to our knowledge, all such cases stood on appeal.

**STATISTICS**

44. Approximately how many notifications does the authority receive per year?
In 2010 the AMC reviewed 697 merger notifications (out of which 559
were authorised and 138 withdrawn by the notifying parties), which is by 16.4 per cent higher than in 2009 (599 notifications out of which 480 were authorised and 118 were withdrawn, and one was prohibited) and by 31.7 per cent lower than in 2008 (1,021 notifications out of which 815 were authorised and 206 withdrawn).

45. Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?
In the past five years there have been seven cases when the AMC prohibited the concentration submitted for its review, which represents approximately 0.18 per cent of all notifications submitted within that period (3,859).

In 2006 the AMC prohibited two concentrations: in Antonov Corporation case (whereby several undertakings engaged in aircraft repair works proposed to establish a single association) and in Ukrmorport case (whereby the Ministry for Transport and Communications proposed to establish an association of sea ports); in both cases the AMC concluded that establishment of such associations would eliminate effective competition on the markets involved.

In 2007 the AMC prohibited four concentrations which would have resulted in monopolisation of the product markets involved (the proposed establishment of the State aircraft construction concern ‘Aviation of Ukraine’ and of the State concern ‘Ukrtorf’; the proposed acquisition by IBE Trade Corp of a controlling stake in a joint American-Ukrainian venture ‘IBE - Stirol’; and the proposed takeover of six municipal enterprises in the town of Slavuta).

One transaction was prohibited in 2009 concerning a proposed establishment of ‘Ukrvetsanzavod’ consisting of 23 veterinary-sanitary enterprises which, according to the AMC, would result in monopolisation of regional markets for recycling of animal waste.

46. Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?
Over the past five years the AMC cleared transactions subject to binding commitments in approximately 0.9 per cent of cases.

47. How frequently has the authority imposed fines in the past five years?
In the past five years the AMC has imposed fines for failure to notify a notifiable transaction in 204 cases (in particular, the highest fines in merger cases were imposed in 2010: EUR 17,000 on Marksuille Investments Limited for a concentration on the market for retail petrochemicals and EUR 16,500 jointly on ALSTOM Holdings SA and CJSC Transmashholding for establishment of TMH-ALSTOM B. V.

Also, the AMC quite frequently imposes fines for failure to provide information upon request and provision of incomplete or knowingly false information. Such infringements are usually punishable in the amount of up to approximately EUR 1,500.