§18.01 STATE OF THE LAW AND PRACTICE

[A] Brief Overview of the Existing Legislation

1) Applicable Laws and Regulations

Ukrainian competition law dates back to the beginning of the 1990s. Over approximately 20 years, it has lived through several landmarking reforms, including establishment of the central antitrust authority – the Antimonopoly Committee of Ukraine (the “AMC”), as well as introduction of major laws on competition matters: the Law of Ukraine on Protection of Economic Competition of 2001 (the “Competition Law”), the Law on Natural Monopolies of 2000, and the Law of Ukraine on Protection Against Unfair Competition of 1996.

The Competition Law is the main source of regulation which sets basic principles of protection and fostering of competition as well as enforcement of competition rules. Other relevant laws and regulations include:

- AMC Resolution on Methodology for Defining the Monopoly (Dominant) Position of the Undertakings on the Market of 2002 (Dominance Methodology).
- AMC Resolution on the Procedure for Filing Applications with the Antimonopoly Committee of Ukraine for Obtaining its Prior Approval of Concentration of Undertakings of 2002 (Merger Regulation).
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- AMC Resolution on the Procedure for Filing Applications with the AMC for Obtaining its Approval of Concerted Practices of Undertakings of 2002 (Concerted Practices Regulation).
- AMC Resolution on the Standard Requirements to Concerted Practices of Undertakings for their General Exemption from the Requirement to Obtain Prior AMC Clearance of 2002 (General Exemption Regulation).
- AMC Resolution on the Standard Requirements to Business Associations of 2007 (Associations Regulation).
- AMC Resolution on the Standard Requirements to Concerted Practices of the Undertakings concerning Specialization of Production of 2008 (Specialization Regulation).
- AMC Resolution on the Standard Requirements to Concerted Practices of Undertakings Concerning Joint R&D and/or Development and Engineering Works of 2012 (R&D Regulation).
- AMC Resolution on the Procedure for Release of Liability of 2012 (Leniency Regulation).

[2]  Soft Law and Its Role in the System

With a view to ensure uniform interpretation and implementation of the competition laws, the AMC may issue guidelines in the form of recommendations on matters requiring additional clarification or guidance.

Thus, for instance, the AMC issued the Recommendation Guidelines on the assessment of compatibility of concerted practices in the form of establishment of an association with the Ukrainian competition laws. In particular, the document clarifies requirements applicable to establishment of an association and offers discussion regarding actions within an association which are permissible or, to the contrary, are likely to raise competition concerns.

Another valuable source of AMC interpretation of Ukrainian competition laws is the Recommendation Guidelines on application of a financial buyer exemption in merger cases (see section §18.03[C]). In particular, the document clarifies who may benefit from the mentioned exemption and provides detailed guidance on the applicable requirements.

Although these guidelines are issued in the form of recommendations, they provide clear indication on the ways in which the authority is inclined to analyze relevant issues and interpret laws and regulations.

The AMC may also issue individual recommendations, especially as regards undertakings active on socially important markets (to date, it did so with respect to telecom and pharma sectors, banks, insurance companies, and retail). Although such recommendations are not part of the soft law in the strict sense, they are usually helpful to understand AMC’s interpretation and policy priorities.
[B] Process of “Criminalization” of Competition Law

There is no criminal liability for violation of competition rules. In the recent years, there have been several legislative initiatives to introduce criminal liability for cartels, though unsuccessful. In particular, recently a new draft law providing for introduction of criminal sanctions for distorting the results of auctions and tenders was rejected by the Ukrainian Parliament.

[C] Private Enforcement

The Competition Law provides that those who suffered damages as a result of a competition law violation can seek compensation in courts. In cases of anticompetitive concerted practices and abuse of dominant position, the amount of compensation may be up to twofold amount of the actual damage sustained. However, the practice of private enforcement is underdeveloped in Ukraine, in particular due to high standards of proof for calculation of losses.

The Competition Law also provides that the AMC may refuse to examine cases on violation that do not have any appreciable impact on competition. Should it be the case, the aggrieved party is still entitled to seek judicial remedies.

The courts are required to report to the AMC about civil disputes that are considered under competition laws. The AMC may step in as an interested third party in such disputes.

It has been a prevailing practice that Ukrainian courts do not examine and do not follow substantive competition issues such as market definition, position of an undertaking on the market, etc. If the AMC decision is successfully appealed in court the court would not usually restate the AMC decision but rather refers the case for consideration by the AMC and defer to the AMC to decide, having taken into account courts’ findings.

[D] Relationship between National Competition Law Regime and EU Rules

Although Ukraine is not a member of the EU, Ukrainian competition laws base on the same principles as the EU regulations and the Competition Law “is modeled on statutes adopted in European competition law regimes, and reflects Ukraine’s interest in integrating with western markets.”1

The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) was ratified by Ukraine in 1997 and is considered as a part of the national legislation. In order to facilitate its enforcement by the national authorities and courts, in 2006 the Ukrainian Parliament adopted the Law on Execution of Judgments

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and Application of Case Law of the European Court on Human Rights. The law specifically declared that Ukrainian courts should regard ECHR case law as the source of national law. In the competition law context, the ECHR case law on the following issues may be relevant: fair trial (Article 6 of ECHR), respect for private life (Article 8 of ECHR), property rights (Article 1 of the First Protocol to the ECHR), non bis in idem (Article 4 of the Protocol No. 7 to the ECHR), etc. Recently, Ukrainian courts started to refer to the provisions of ECHR and the practice of the European Court on Human Rights while examining competition law cases, in particular, when considering proportionality and reasonability of fines imposed by the AMC.

§18.02 COMPETITION AUTHORITY

[A] Structure, Human Resources & Budget

The AMC is a collective body that has the Chairman and eight State Commissioners. It has local divisions in all regions of Ukraine, as well as in Kiev and Sevastopol. Such divisions function as regional offices of the AMC and decide on cases within their geographical jurisdiction.

The AMC, as the central body, has several departments, including markets research department, investigations department, concentrations and concerted practices department, as well as various structural divisions focusing on a particular industry, e.g., energy, transport, agriculture, financial markets, etc.

The AMC is financed on a yearly basis from the State budget.

[B] Place in the Public Administration

The AMC is an independent authority within the executive branch. The Chairman of the AMC is appointed and dismissed by the President of Ukraine upon approval of the Ukrainian Parliament. The AMC reports on its activities to the Ukrainian Parliament on a yearly basis.

[C] Scope of Powers

Ukrainian competition legislation is applied to merger control, restrictive agreements and abuse of dominant position (see sections §18.03–§18.05 below), as well as regulates some aspects of state aid and other actions of state and municipal authorities that may have a negative impact on competition. It also covers issues of protection against unfair competition.

[D] Statistics on Activities for the Last Year

In 2012, the AMC investigated and found about 5,800 violations – the figure being 30% higher than in 2011.
The latest statistics released by the AMC for 2012 indicates that the vast majority of violations deal with abuse of dominant position (2,540 cases compared to 1,997 in 2011) and anticompetitive behavior of state authorities (1,281 cases compared to 994 in 2011). Other violations included unfair competition (776 cases compared to 451 in 2011) and anticompetitive concerted practices (521 cases compared to 346 in 2011).

The overall amount of fines imposed by the AMC in 2012 was approximately USD 100 million, which is 18 times higher than in 2011. The highest fine imposed for anticompetitive concerted practices amounted to approximately USD 52 million for a bid rigging case.

The statistics on court appeal against AMC decisions evidence general reluctance of the part of the market players to resort to available judicial remedies. In general, in the last years Ukrainian courts upheld AMC’s position in about 75%-80% of cases under appeal.

As regards merger control notifications, in 2012 the AMC reviewed more than 850 filings. However, a more detailed statistics on merger control notifications in 2012 is not publicly available yet.

[E] Other Regulatory Bodies that Enforce Competition Rules

The Cabinet of Ministers of Ukraine (CMU) may authorize a concentration or a concerted practice that was prohibited by the AMC if the positive effects of such concentration or concerted practice for public interests outweigh the negative impact of the restriction of competition brought about by such concentration or concerted practice, unless such restriction: (i) is not necessary for achieving the purpose of a concentration/ concerted practice, (ii) jeopardizes the market economy system of Ukraine.

No sector regulators are responsible for enforcement of the Ukrainian competition rules.

§18.03 MERGER CONTROL

[A] Forms of Concentrations

The following is considered as a concentration under the Competition Law:

(a) merger of two or more previously independent undertakings or takeover of one undertaking by another;

(b) acquisition of direct or indirect control over one or several undertakings or their parts, including via:

- direct or indirect acquisition or lease of a significant part of the assets of an undertaking (in particular, in the form of an integral property complex), including in the process of its liquidation; or
- appointment to certain positions (i.e., cross-directorship).
(c) establishment by two or more undertakings of a new undertaking that will independently pursue business activity on a lasting basis, while such establishment should not result in coordination of economic activity by (i) its parent companies or (ii) its parent companies, on the one hand, and the new undertaking, on the other; or
(d) direct or indirect acquisition of shares whereby a threshold of 25% or 50% of the votes in the highest governing body of the undertaking concerned is reached or exceeded.

The parties to a notifiable transaction are under joint filing obligation.

[B] Events Triggering the Notification Obligation and Relevant Notification Thresholds

There is no notion of a triggering event under the Ukrainian competition legislation. In accordance to the general rule, it is prohibited to implement a notifiable concentration until the clearance is issued. The parties also should refrain from any actions that may restrict competition and render it impossible to restore the pre-merger status.

A concentration is considered as notifiable if the following thresholds are met (cumulative):

- the combined worldwide assets value or revenue of the parties to the concentration (including their groups) in the preceding financial year exceeded EUR 12,000,000 (approximately USD 15,700,000);
- each of the parties to the concentration had worldwide asset value or revenue in excess of EUR 1,000,000 (approximately USD 1,300,000) in the preceding financial year; and
- the value of assets located in Ukraine or Ukrainian revenue of either of the parties to the concentration in the preceding financial year exceeded EUR 1,000,000 (approximately USD 1,300,000).

Alternatively, to the above revenue/assets test, there is also a market share test. A transaction is notifiable and requires prior clearance if either the individual or combined market share of the parties on the relevant market or the adjacent market exceeds 35%.

For the past decade, Ukrainian merger control thresholds, requiring a fair deal of nexus-less foreign-to-foreign transactions to be notified in Ukraine, have been subject to criticism from the legal community and business. Recently, in the course of the competition legislation reform in Ukraine and in response to the criticism, the AMC submitted some legislative proposals with the Ukrainian Parliament. The relevant draft law suggests to increase the merger control thresholds and set a higher standard for the local nexus requirement (combined worldwide assets value or revenue of the parties in excess of EUR 50,000,000 (approximately USD 65,600,000) and local assets value or revenue of at least two of the parties in excess of EUR 4,000,000 (approximately USD 5,200,000); or local assets value or revenue of at least one party in excess of EUR 484

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50,000,000 (approx. USD 65,600,000) and worldwide assets value or revenue of at least one other party in excess of EUR 50,000,000 (approximately USD 65,600,000)).

[C] Exemptions from the Filing Obligation

The following transactions are not considered as concentrations and, thus, do not require prior AMC clearance:

- establishment of an undertaking that aims at or results in coordination of economic activity of (i) its parent companies or (ii) its parent companies, on the one hand, and the new undertaking, on the other; such establishment qualifies as concerted practices and is assessed under the rules applicable to restrictive practices (see section §18.04);
- acquisition of shares of an undertaking by a financial institution, provided that (i) such shares are acquired with a view of their further resale during a year after the acquisition (extendable upon request) and (ii) the acquirer does not exercise voting rights attached to the acquired shares;
- intra-group transactions, unless any transactions resulting in the pre-merger group composition required AMC clearance and such clearance was not obtained; and
- acquisition of control over an undertaking or its part by a trustee in a bankruptcy proceeding or the like.

[D] Scope of Information Required for the Filing

Requirements to the information and documents to be submitted are established in the Competition Law and the Merger Regulation. The parties must submit a written notification with the required information and documents as annexes thereto. The filing fee is EUR 500 (approximately USD 650).

The list of the required information and documents is rather extensive and includes:

- detailed description of the transaction nature and the parties involved;
- outline of the parties’ groups of persons, including the data on their global activities, group composition and minority shareholdings, their assets and revenue data;
- detailed information on the parties’ activities on the Ukrainian product markets, including the data on sale of goods / provision of services to Ukrainian customers, competitors, suppliers;
- outline of the markets involved, market share calculations, as well as detailed economic substantiation of the transaction, including analysis of post-merger effects; and
- information on the composition of the parties management, supervisory and controlling bodies, as well as information on the relatives of the individuals that are parties to the transaction.

Some information regarding the transaction and the parties must also be submitted in electronic form using specific software developed by the AMC.

**[E] Procedure and Timetable for the Review of a Concentration**

As mentioned above, a notifiable transaction may not be implemented until the AMC clearance is issued. The suspension requirement is applied globally; thus, in practice, there is no possibility to execute a transaction being subject to antimonopoly clearance without risk.

The merger review consists of the following stages:

- Preview period of 15 calendar days, during which the authority reviews the notification and decides whether it complies with formal requirements and is complete and whether it can be accepted for review on the substance. If the AMC considers the notification to be incomplete, the notification is rejected on formal grounds. If the notification is then resubmitted, the clock starts running anew.
- Phase I which lasts up to 30 calendar days, during which the authority analyzes whether the clearance can be granted or whether there are grounds to prohibit the concentration, in which case an in-depth investigation is initiated.
- Phase II which lasts up to three months involves a detailed analysis of competition concerns, requesting and consideration of market experts' opinion and other additional information, etc. In practice, Phase II may take longer than three months, as requests of additional information, documents, or expert opinions may suspend or even restart the review.

**[F] Substantive Test for the Assessment of a Concentration**

The authority will grant clearance if the transaction does not result in monopolization (i.e., achievement or strengthening of a dominant position on the market) or substantial restriction of competition on the Ukrainian market or a significant part thereof.

In practice, the AMC tends to focus on market shares of the parties and often limits its substantive assessment to these issues rather than exploring potential effects the concentration may have with reference to other relevant factors. Therefore, economic analysis, being retrospective in essence, is very frequently limited to a mere comparison of existing and prospective combined market shares of the undertakings. If a party to the concentration already has a significant market share, any further increase of it, even incremental, may raise concerns of the AMC and trigger Phase II.
[G] Decisions Issued in the Course of the Review

In Phase I, the AMC can either issue clearance decision or initiate Phase II. If the AMC has not issued any decision within Phase I of the review period, the transaction is deemed to have been cleared on the last day of the review period. Though, the AMC usually does not use such tacit consent scenario but rather renders a written decision in all cases.

Following Phase II of the review the AMC can either grant clearance or prohibit a concentration. The clearance decision may be conditional upon the parties’ remedies aimed to remove or mitigate the negative impact of the concentration. Remedies may be either structural (e.g., divestitures) or behavioral (e.g., restrictions on use or management of certain assets or price increases). Ukrainian competition legislation does not define procedures applicable to remedies and these are usually negotiated with the authority on a case-by-case basis.

[H] Appeal Process

The AMC decision can be appealed by the parties or third parties whose rights are affected by the AMC decision within two months following adoption of the decision. There is a legal uncertainty as to which courts – commercial or administrative – have jurisdiction over appeals. It has been prevailing practice to use commercial courts. The court can suspend the AMC decision until the final judgment is rendered.

[I] Consequences of the Breach of the Filing Obligation

Ukrainian competition legislation establishes liability for the breach of the filing obligation by the parties to the concentration. Implementation of a notifiable transaction without (including prior to) clearance is subject to fine in the amount of up to 5% of the undertaking’s revenue in the year immediately preceding the year when the fine is imposed. Under the Competition Law, the revenue is calculated based on the financials of the whole undertaking and the AMC interprets it as the global group-wide revenue of the relevant undertaking.

The fine can be imposed on the entire group of persons of the company whose actions or omissions have led to violation of the legislation. This allows the AMC to fine any local subsidiaries of the parties to the concentration, including those that are not involved in the transaction (e.g., seller’s subsidiaries) or those that are not active on the relevant markets, etc. This also facilitates imposition of fines by the AMC. If the fine is not paid within the period specified by the AMC, late payment fee of 1.5% daily accrues. Such fee should not exceed the principal amount of the imposed fine, though.

The law also provides for the following sanctions, in addition to the above financial penalties:

- prohibition of the companies’ cross-border activities with Ukraine such as importing/exporting goods, performing under cross-border contracts, etc. This
can be imposed by the Ministry of Economy of Ukraine upon the AMC’s request if the fine is not duly paid in the first instance;
– third party damages claims. Third parties (e.g., competitors, customers) can seek to recover damages through the commercial court. The amount of compensation can be up to twice the amount of the actual damage sustained;
– invalidation of the transaction. Reasonable interpretation suggests that this possibility should be applied to transactions having appreciable effect on the competition. However, it is the recent courts’ position that even nexus-less transactions may be unwound.

[J] Special Rules

The Competition Law does not set any special regimes for merger cases, except for (i) exempting financial buyer transactions, and (ii) establishing special rules for the calculation of thresholds by banks and insurance companies (i.e., a tenth of the assets – for the banks’ assets or revenue, net assets – for the insurance company’s assets and the amount of premiums collected – for the insurance company’s revenue).

§18.04 ANTICOMPETITIVE AGREEMENTS

[A] Definition of the “Agreement”

Provisions of the Competition Law dealing with restrictive practices cover agreements, decisions of associations of undertakings, as well as other concerted practices, including establishment of an undertaking (or an association) aiming at or resulting in coordination of economic activity by (i) the parent companies or (ii) the parent companies, on the one hand, and the new entity, on the other (or entry to an association) and parallel economic activity.

The law does not provide for a specific definition of the term “agreement.” Thus, general provisions of the Ukrainian civil law apply, whereby the agreement is usually an arrangement of two or more parties aimed at establishment, change or termination of civil rights and obligations. The agreement may be unilateral if only one party undertakes to perform certain actions (or refrain from them), while the other party has the right to request performance, but does not have any reciprocal obligations. Competition rules apply to agreements and other concerted practices irrespective of their form, including formal written agreements and informal verbal arrangements, mutual understandings and so-called gentlemen’s agreements, as well as networks of agreements.

The AMC faces many difficulties in collection of evidence on concerted practices between competitors, especially, in cases of tacit collusion or coordination. In order to solve this problem in 2005 the AMC initiated amendment to Article 6 of the Competition Law so that it is supplemented with special provisions which introduce a presumption of concerted practices between competitors if the AMC proves that:
(a) competitors have a similar behavior; and
(b) analysis of the market situation shows that there are no objective reasons for such similar behavior.

Although in theory this approach may be viewed as sustainable, in practice it causes many problems since it is extremely difficult to find and assess all the relevant objective reasons. In fact, the AMC is vested with exclusive powers to decide that there are no objective reasons for a similar behavior. It often results in a factual switch of the burden of proof of absence of collusion to the undertakings that have to justify their similar behavior.

[1] Types of Agreements that are Generally Recognized as Illegal

Ukrainian competition law defines anticompetitive agreements and practices through their objective or effect: agreements and practices which resulted or may result in prevention, elimination or restriction of competition are considered anticompetitive. Anticompetitive agreements and practices are generally prohibited, unless they are covered by an exemption or are exempted individually by the AMC (see section §18.04[D]).

The Competition Law provides for a non-exhaustive list of anticompetitive agreements and practices that, in particular, may consist in:

- fixing prices or other conditions of purchase or sale;
- limiting or controlling production, markets, technical or technological development, or investment;
- sharing markets or sources of supply according to territory, type of goods, sale or purchase volumes, classes of sellers, purchasers or consumers, or otherwise;
- distorting the results of trading, auctions, competitions or tenders;
- eliminating other undertakings (sellers or purchasers) from the market or limiting their market access;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; and
- substantially limiting competitiveness of other undertakings without justifiable reasons.

[2] Arrangements Not Covered by the Prohibition

General prohibition does not apply to the following categories of concerted practices:

(a) Concerted practices of small or medium-sized undertakings concerning the joint acquisition of products, provided they do not result in substantial
restriction of competition and contribute to increasing the small or medium-sized undertakings’ competitiveness on the market.

(b) Concerted practices that concern supply and use of products which limit only:
- use of products supplied by the imposing undertaking or use of products of other suppliers;
- purchase of other products from other suppliers or sale of such other products to other undertakings or consumers;
- purchase of products that, due to their nature or trade custom and other fair business practices, are not related to the subject matter of the relevant agreement (tying); or
- price formation or establishment of other contractual terms and conditions for selling the products supplied by the imposing undertaking to other undertakings or consumers.

However, general rules will nonetheless apply if such restrictions:
- result in appreciable restriction of competition on the market or a significant part thereof, including if they result in achieving or strengthening of a dominant position of participating undertaking(s);
- limit access to the market for other undertakings; or
- result in economically unjustified price increases or product shortages.

See also section §18.04[C].

(c) Agreements concerning the transfer of intellectual property rights or the use of an object of intellectual property in the part where such agreements set restrictions on the commercial activity of the transferee, provided such restrictions do not go beyond legitimate rights of the intellectual property rights holder. Permissible restrictions include limitations on:
- scope of transferred rights;
- period and territory of permitted use of the object of intellectual property;
- type of activity, application, and the minimum production volume.

[B] **Rules Applicable to Cartels and Other Horizontal Agreements**

There are no special rules applicable to cartels. The term “cartel” is not defined in Ukrainian competition law. However, all basic types of cartels are per se prohibited under the General Exemption Regulation (see section §18.04[D]).

[1] **R&D Exemption**

In late 2012, the AMC enacted a Regulation exempting joint R&D and/or development and engineering works from the requirement to obtain prior AMC clearance. The exemption applies when the combined market share of the parties on the relevant market does not exceed 25% and the parties meet a set of other criteria (such as equal access to the results of the R&D activity, etc.).
Exemption for Associations

The Associations Regulation exempts the establishment of business associations from prior AMC clearance if certain conditions are met, including that:

- the association has a contractual basis;
- the association’s participants do not gain profit from the association’s activities;
- the association is financed solely from contributions made by its participants, donations and so on;
- the association can only co-ordinate some of its participants’ activities (their organizational, educational, and informational aspects, for example, organization of seminars or educational programs or the like, or serving as a forum for industry-specific discussions) without interference with their economic activities;
- there are no limitations on entry and exit; and
- the association is not engaged in any economic activity.

In 2012, the AMC amended the Associations Regulation expanding the list of allowed financing sources and improving the permitted information collection and exchange procedures among the participants of an association.

Rules Applicable to Vertical Agreements

Certain vertical agreements and concerted practices are not covered by the general prohibition of anticompetitive concerted practices (see section §18.04[A]). Other than that, general rules apply to vertical arrangements.

In 2011, the AMC published its long-awaited draft regulation clarifying and detailing permissible practices in vertical arrangements. The document is generally based on the principles of the EC Regulation 330/2010 of April 20, 2010, although with some local specifics:

- it allows vertical interaction between an association of retailers and its individual members provided that no such individual retailer (and its respective group) has revenue in excess of EUR 1,000,000(approximately USD 1,000,000), instead of EUR 50,000,000 in EU (approximately USD 64,500,000);
- it introduces dominance as a standalone disqualifier from the ability to benefit from the vertical exemptions.

Although the document appears to be one of the authority’s priorities, the prospects of its adoption are not clear.
Exemptions from the General Prohibition (Individual Exemptions, Block Exemptions)

[1] Individual Exemption

The parties to a concerted practice may apply to the AMC for an individual exemption. The AMC individual exemption may be granted only if:

(a) the parties can prove efficiencies for the market, in particular that the concerted practice contributes to:
   - improving or rationalizing the production, acquisition or distribution of goods;
   - technical, technological, and economic progress;
   - developing the small and medium-sized business;
   - optimizing export or import operations; or
   - developing or using uniform technical terms and goods standards.

(b) the concerted practice does not result in a substantial restriction of the market competition.

In order to apply for an individual clearance, the parties to a concerted practice must submit a written application to the AMC. The filing fee is approximately EUR 243 (USD 320).

Requirements to the information and documents to be submitted along with the application are established in the Competition Law and the Concerted Practices Regulation. Requirements to the information and documents to be submitted are very similar to those that apply in a merger clearance proceeding (see section §18.03[D]). However, in a concerted practices proceedings the parties have to additionally provide an extensive justification of the concerted practice arguing its efficiencies vis-à-vis the negative impact on the market.

Review of a concerted practices application consists of the following stages:

- Preview period of 15 calendar days, during which the authority reviews the notification and decides whether it complies with formal requirements and is complete and whether it can be accepted for review on the substance. If the AMC considers the notification to be incomplete, the notification is rejected on formal grounds. If the notification is then resubmitted, the clock starts running anew.
- Phase I of the review of up to three months, during which the authority analyzes whether the clearance can be granted or whether there are grounds to prohibit the concerted practice or an in-depth assessment is required.
- Phase II of the review of up to another three months, which involves a detailed analysis of competition concerns, requesting and consideration of market experts’ opinion and other additional information, etc. In practice, Phase II of the review may take longer than three months, as requests of additional
AMC clearance decisions allowing a concerted practice may be conditional upon remedies aimed to remove or mitigate the negative impact of the concerted practice on competition or limited in time.

[2] **General Block Exemption**

The General Exemption Regulation provides for a block exemption applicable to anticompetitive concerted practices in any form (with exceptions in case of establishment of an undertaking or an association), provided that the combined market share of the parties to a concerted practice (including their respective groups of persons) in any of the product markets concerned is less than 5%.

Also, vertical or conglomerate arrangements are exempted if the parties' combined market share is below 20% and horizontal and mixed arrangements are exempted if the parties' combined market share is below 15%, provided that neither of the parties is a dominant undertaking in any of the markets concerned or has exclusive or privileged rights or powers granted by the state authorities. This exemption does not apply if the below financial thresholds are met:

- combined worldwide revenue or assets value of the parties (including their respective groups) exceeded EUR 12,000,000 (approximately USD 15,700,000) in the preceding financial year;
- worldwide revenue or assets value of at least two undertakings which belong to the parties' groups exceeded EUR 1,000,000 (approximately USD 1,300,000) in the preceding financial year; and
- revenue or assets value in Ukraine of at least one undertaking which belongs to either party’s group exceeded EUR 1,000,000 (approximately USD 1,300,000) in the preceding financial year.

These general exemptions do not apply to horizontal or mixed (i.e., where the parties are at least potential competitors) concerted practices containing hard-core restrictions, including:

- fixing prices or other conditions of purchase or sale;
- sharing markets or sources of supply according to territory, type of goods, sale or purchase volumes, classes of sellers, purchasers or consumers, or otherwise;
- limiting [including termination of] production, distribution, or purchase of products; and
- distorting the results of trading, auctions, competitions or tenders.
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[3]  **Specialization Exemption**

Pursuant to the Specialization Regulation, horizontal arrangements contemplating that the parties' efforts and resources are focused on the production (distribution) of certain products and resulting in certain efficiencies, such as improving (rationalizing) the production, acquisition or distribution of goods, are exempted. In particular, the exemption shall apply to specialization agreements whereby the parties undertake:

- to discontinue manufacturing identical or similar products in part or in whole;
- to manufacture/sell certain products only jointly;
- not to enter into specialization arrangements with third parties regarding the same or similar products on the same product market;
- to refrain from supplying/acquiring certain products to/from competitors;
- to supply products that are covered by the specialization agreement to the other parties to a specialization arrangement; and
- to keep a minimum stock of the products that are covered by the specialization agreement, as well as their components.

The specialization exemption does not apply if:

- either of the undertakings which belong to the parties’ groups holds a dominant (or monopolistic) position;
- combined market share of the parties on any of the markets concerned exceeds 25%.

[E]  **Investigation and Procedure**

Investigation into a potentially anticompetitive concerted practice may be initiated by the AMC on its own initiative, upon the complaint of a third party or the request of state authorities if they believe that a certain arrangement may be anticompetitive. Proceedings may be administered and the decision adopted by (i) the AMC State Commissioner solely, (ii) an ad hoc temporary administrative board or regular administrative board, or (iii) by the AMC itself provided a board of all State Commissioners.

There are no clear and comprehensive procedural guidelines and the AMC is vested with a significant degree of discretion. In practice, there is no clear timeframe within which the investigation must be accomplished, as the AMC may numerously request documents and information (including from third parties and experts) and repetitively reconsider the evidence collected.

Investigations may be conventionally divided into three main stages:

- investigation, including collection of evidence, its analysis, and preparation of the preliminary conclusion on whether the investigated actions qualify for violation of competition law;
- consideration of the preliminary conclusion and, as the case may be, relevant parties' objections, followed by either (i) adoption of the final decision or (ii)
referring the case for repetitive investigation stage(s) with the subsequent adoption of the decision. Alternatively, the AMC may close the investigation without deciding on the merits, in particular, if the alleged violation has not been proven; and

- internal appeal of the decision to the AMC (where applicable).

Procedural rights in an investigation include the rights to:

- familiarize itself with the materials pertinent to the investigation (except, in certain cases, for (a) restricted access information, (b) information which may harm the interest of participants to an investigation, and (c) information which, if disclosed, may adversely affect the investigation);
- provide evidence;
- submit petitions, verbal and written testimony/objections;
- obtain a copy of the decision (or extracts therefrom, except for those containing information (a) and (b) above); and
- appeal the AMC decision.

[1] Collection of Evidence and Preliminary Conclusion

The AMC may request any information and/or documents, which allow establishing whether a violation has been committed. In this respect, the AMC has powers to conduct dawn raids with a possibility to involve police where an investigation is obstructed. Non-compliance or only partial compliance with such requests may result in imposition of fine in the amount of up to 1% of the request addressee’s global revenue. After the evidence has been collected, the AMC issues its preliminary conclusion, a copy of which should be sent to undertakings under investigation prior to the decision, so that they may object to the findings. Upon a specific request by the complaining party or a third party, the AMC may issue an “interim decision” to preclude undertakings under investigation from performing certain actions or oblige them to perform certain actions aimed at safeguarding the interests of other parties.

[2] Consideration

Once the above investigation stage is completed and the preliminary conclusion is prepared, the AMC would consider the case on the merits based on the findings contained in the preliminary conclusion and objections to or views on such findings submitted by the undertakings under investigation. The AMC may suspend consideration in the case on its own initiative or upon a third party request until the decision is issued in a related AMC or court proceeding or until a related issue is resolved by a state authority. The suspension and renewal notices shall be sent to the participants to an investigation within three business days as of the relevant decision to suspend/review the case consideration is issued.
Following the consideration the AMC may issue a decision containing either of the below or their combination:

- establishing that the undertaking(s) under investigation committed a violation of competition law;
- ordering to discontinue the violation;
- requesting a state authority to repeal or amend its decision (if an investigation was initiated against certain actions of a state authority);
- establishing that the undertaking(s) under investigation hold(s) a dominant position;
- requesting to divest a dominant undertaking;
- imposing fines;
- blocking shares;
- requesting to eliminate the negative consequences of a violation;
- requesting to publish the decision in Ukrainian printed media at the expense of the violating party.

[3] Internal Appeal

An undertaking under investigation may request that the AMC verifies the decision issued by a State Commissioner or the temporary administrative board. If adopted by the AMC itself, the decision may not be subject to further internal appeal, but may be appealed to court.

[4] Court Appeal

A decision may be appealed within two months following its receipt. There is a legal uncertainty which court – commercial or administrative – has jurisdiction over such appeals. It has been a prevailing practice to use commercial courts in similar cases. Under a general rule, the court may suspend the decision until the final award is rendered.

[F] Sanctions and Remedies

Implementation of an anticompetitive concerted practice, abuse of dominance is subject to a fine amounting up to 10% of the parties’ revenue in the year immediately preceding the year when the fine is imposed.

See section §18.03[I] for details regarding how the fine is calculated and collected, the late payment fee, as well as regarding other sanctions.
Under the Competition Law, a party to an anticompetitive concerted practice may apply for immunity. The leniency applicant should meet the following criteria (cumulative):

- be the first to voluntarily report to the AMC on the violation, unless the applicant initiated the anticompetitive arrangement or was responsible for coordination, in which case it cannot apply for immunity;
- provide the AMC with information of essential importance for finding an infringement;
- provide the AMC with all evidence and/or information concerning the anticompetitive concerted actions that were available to it or could have been made available to it by means of reasonable efforts (a detailed description of the alleged cartel arrangement; contents of agreements, notes, and correspondence; minutes of the meetings as well as the information required for securing marker); and
- take effective measures to cease its participation in the anticompetitive actions, at least after filing the leniency application.

The Leniency Regulation came into force in October 2012 detailing the rules and procedures applicable to leniency applications in cartel cases. The Leniency Regulation clarifies requirements applicable to leniency applicants, types of information and evidence an undertaking should provide for its application to be successful, review procedure, etc. It also introduces several new concepts to the existing leniency regime, in particular, the marker system equivalent to that existing in the EU.

Both the Competition Law and the Leniency Regulation provide only for a full immunity, while reductions in fines are not addressed. However, given that there are no legislative fining guidelines and the amount of fine to be imposed on the violator is always left to the AMC’s discretion, the AMC can reduce the fine where it deems appropriate. The AMC has already made public statements that it would reduce fines for the second and subsequent applicants should they cooperate with the AMC during its investigation providing evidence of the infringement and admitting their participation in the infringement.

In 2012, the AMC found a bid-ridding cartel involving 14 members of wood furniture production association. During 2011, the cartel participants allocated bids and purchased wood at the starting tender prices. The wood was sold exclusively by the state companies and only by way of tender. The cartel was evidenced with audio recordings of the meetings of cartel participants. Following the investigation, the AMC has imposed the highest fines in a single cartel and on a single company amounting to USD 52,000,000 (approximately EUR 40,000,000) and USD 24,000,000 (approximately EUR 18,000,000) respectively.
The AMC decision was appealed, *inter alia*, regarding the amount of the fine. The cartel participants have claimed that they had to act in such way since the wood industry regulation had forced wood manufacturers to artificially increase the starting tender prices. In particular, within three tenders the starting prices increased by 80%. In these conditions, the tender participants could not compete by way of increasing the starting prices. As a result, the AMC decision was revoked regarding the fines imposed. It was the first time in Ukraine when the court has stated that the fine imposed by the AMC was unjustified. Earlier the Ukrainian courts have never ruled regarding the proportionality of the AMC’s fines. The court decisions may still be challenged. However, should they remain in force, the AMC will most likely have to issue a new decision reconsidering the amount of fines.

§18.05 UNILATERAL CONDUCTS

[A] Assessment of Dominance

[1] Relevant Market Definition

The concept of the relevant product market is clarified in the Dominance Methodology through the notion of substitutable products (groups of products) that are considered such if a customer, acting in usual circumstances, can easily switch from one product to another. Substitutable products are those that are equivalent to the customer (buyer or user) and supplier (manufacturer or seller) because of:

- similar purpose of use, consumer qualities, terms of use, etc.;
- similar physical, technical, qualitative characteristics, etc.;
- stable consumer group’s demand for such products;
- no appreciable price difference; and
- supplier-side substitutability.

The relevant geographical market is defined as the minimal territory outside which the customer considers acquisition of certain substitutable products either impossible or inappropriate. In particular, the following may be considered for the purposes of the geographical market definition:

- physical and technical characteristics of the products (product groups);
- technological links between the manufacturers and customers;
- specifics of after-sale, warranty and similar servicing;
- prices, taking account of the level of prices on adjacent geographical territories and possibilities to move goods within such territories;
- products transportation specifics, i.e., whether the goods may be transported without damaging their consumer qualities; as well as transportation and similar related costs (e.g., availability of distribution channels, warehouses, loading/unloading capacities, and the like);
entry or exit barriers with respect to specific products (e.g., administrative barriers, economic or other limitations; economies of scale barriers; sunk costs based barriers, ecological or similar restrictions, etc.); and
location of specific customer groups.

In practice, the national or regional Ukrainian markets are considered. Though, in exceptional cases the AMC may accept a wider geographical market as relevant. This depends on the extent to which Ukrainian markets are open to competition from international market players. Thus, if imported goods represent more than 40% of the overall national market value (volume), there may be grounds to argue that the relevant geographical market is wider than national.

For the purposes of defining the relevant market, due account should also be taken of the time limits. Thus, a market exists if there is a stable demand for and supply of a certain product within a certain territory and for a certain period of time (usually a year). Such period may be longer or shorter depending on the specifics of the relevant goods’ production cycle or other factors.


Pursuant to the Competition Law, an undertaking holds a dominant position if:

- it has no competitors on the market;
- it does not face significant competition from other market players due to, inter alia, their limited access to raw or other materials, distribution channels, existence of entry barriers, certain privileges or the like.

An undertaking is presumed (this being a rebuttable assumption) to enjoy a dominant market position if it holds a market share in excess of 35%, unless it can prove that it faces significant competition from other market players. An undertaking with a smaller market share may also be considered dominant if there is no effective competition due to comparatively small market shares of its competitors.

Ukrainian competition law recognizes the concept of collective dominance. Thus, several undertakings may be deemed to collectively enjoy a dominant position on the market if either:

- the combined market share of not more than three undertakings exceeds 50%;
  or
- the combined market share of not more than five undertakings exceeds 70% unless they prove that they effectively compete on the market.

In September 2011 a proposal has been introduced to the Ukrainian Parliament to overhaul and simplify the definition of dominance to refer to an undertaking’s market share in excess of 50% coupled with absence of significant competition that it suffers. As of the date of the preparation of this chapter, there have been no further developments regarding the mentioned proposal.
According to the Competition Law, actions (or refraining from such) of a dominant undertaking which resulted or may result in prevention, elimination or restriction of competition or infringement upon the interests of other undertakings or customers and which would have been impossible in a highly competitive environment are considered as abuse of a dominant position. Abuses of dominance position are prohibited irrespective of their object, reasons or effect.

Below is a non-exhaustive list of practices that are regarded as abuses of a dominant market position:

- imposing such prices or purchase or sale conditions which could not have been established in a highly competitive market environment;
- applying dissimilar conditions to equivalent transactions with other trading parties without justifiable reasons;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- limiting production, markets or technical development that caused or may cause damages to other undertakings, buyers or sellers;
- refusing to purchase or sell goods in the absence of alternative sources or distribution channels;
- substantially limiting the competitiveness of other undertakings without justifiable reasons; and
- hindering market access (exit) for other undertakings or customers, or ousting them from the market.

The Competition Law does not set any special rules for specific sectors or industries.

Investigation and Procedure

Procedure outlined in section §18.04[E] applies.

Sanctions and Remedies

Abuse of a dominant position is subject to a fine amounting up to 10% of the parties’ revenue in the year immediately preceding the year when the fine is imposed.

See section §18.03[I] for details regarding how the fine is calculated and collected, the late payment fee, as well as regarding other sanctions. In addition to other sanctions, in dominance cases the AMC can also request a mandatory divestment of a dominant undertaking. Though, such divestment may not be ordered if:

- the divestment is impossible from an organizational or territorial point of view; or
- there are strong technological links among the undertakings or their units.
Precedent Cases

The typical form of abuse of a dominant position is price fixing, in particular, price increases through inclusion of unrelated expenses at the stage of price formation. Thus, State Concern “Ukrspirt,” being the only undertaking entitled to sell ethyl alcohol in Ukraine, has tripled the amount of expenses on its management, which was followed by establishment of 15% commission on sale of ethyl alcohol by its subsidiary State Enterprise “Ukrspirt.” As a result, a wholesale price for ethyl alcohol was increased without any economic justification. Following the investigation, in 2012 the undertaking was fined in the amount of USD 25,000,000 (approximately EUR 19,000,000) for abuse of a dominant position.

Another significant case in 2012 concerned PJSC “Khersonoblenergo,” which has imposed an obligation on the customers to conclude agreements regarding provision of technical conditions (including construction of substations, installment of the additional equipment, reconstruction of overhead transition lines) exclusively with PJSC “Khersonoblenergo.” As a result, the customers were deprived of a right to choose a service provider with better conditions, besides it PJSC “Khersonoblenergo” delayed provision of the respective services. Following the investigation, the AMC imposed a fine in the amount of USD 63,000 (approximately EUR 48,000) on PJSC “Khersonoblenergo” for abuse of dominance and requested to terminate the violation.