

Ukraine

Denis Y. Lysenko



Mariya V. Nizhnik



Vasil Kisl & Partners

1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The authorities responsible for applying merger legislation are:

- (i) the Antimonopoly Committee of Ukraine (the “AMC”); and
- (ii) the Cabinet of Ministers of Ukraine (the “CMU”) (to the extent provided under the Laws of Ukraine).

1.2 What is the merger legislation?

The fundamentals of merger control regulation in Ukraine are established in Article 42 of the Constitution of Ukraine and in Chapter 3 of the Commercial Code of Ukraine of 1 January 2004. There are two special legislative acts governing merger clearance: the Law of Ukraine No. 22-10 “On Protection of Economic Competition”, dated 11 January 2001, and the Law of Ukraine No. 3659 “On Antimonopoly Committee of Ukraine”, dated 26 November 1993.

In addition, there are several regulations of the AMC, including:

- regulation on the procedure for filing an application to the AMC to obtain prior approval for concentration of business entities, as approved by the AMC as of 19 February 2002, No. 33-p (“Regulation No. 33”);
- regulation on the procedure for filing an application to the AMC to obtain the prior approval for concerted practices of business entities, as approved by the AMC as of 12 February 2002, No.26-p;
- procedure for granting a permit for concerted practices, a concentration of legal entities, by the Cabinet Ministers of Ukraine as approved by Decree No.219 of the CMU as of 28 February 2002;
- model requirements for establishment of business associations for general release from obtaining a prior permit of the AMC to their establishment, as approved by the AMC as of 30 November 2006, No.511-p; and
- methods of determination of a monopoly (dominant) position of legal entities on the market as approved by the AMC as of 5 March 2002 No.49-p.

1.3 Is there any other relevant legislation for foreign mergers?

The applicable legislation of Ukraine provides no specific requirements in the case of foreign-to-foreign mergers.

1.4 Is there any other relevant legislation for mergers in particular sectors?

No specific requirements, including specific procedure for mergers in particular sectors are established under the laws of Ukraine.

However, in respect of jurisdictional thresholds for application of merger clearance, specific rules for the calculation of the value of assets/volume of sales are applicable when the participant to a concentration is a bank or an insurance company (for banks - 1/10 of the bank’s assets for both the assets and sales amounts; for insurance companies – 1/10 of its assets for the assets amount, and all profit obtained from insurance activities for the sales amount).

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of “control” defined?

The following transactions may be subject to prior merger clearance:

- (i) the merger or consolidation of a business entity;
- (ii) the acquisition of direct or indirect control over a business entity, by means of: (i) the acquisition of title to those assets comprising the integral property complex or its part (structural subdivision), as well as the rent, lease, concession or acquisition by other means of the right to use such assets, including the acquisition of such assets from the business entity being liquidated; (ii) the appointment/election to the top management position of an individual that already holds one of top management positions in another legal entity; and (iii) causing the cross-over of more than half of the members of the supervisory board, management, or another supervisory or executive body of two or more business entities);
- (iii) the establishment of a business entity, a joint venture (“JV”) by two or more business entities that are independently engaged in business activities for an extended period of time, provided that establishment of such JV is not aimed at, and shall not result in, the coordination of competitive behaviour (i) of its founders; or (ii) of the legal entity and its founders; and
- (iv) the direct or indirect acquisition, obtaining of ownership of, or management over, the shares (participation interest) of the business entity, if such acquisition results in the obtaining of over 25 or 50 percent of the voting rights of the target business entity.

The concept of “control” provided under the applicable legislation is based on the principle of the “possibility of exercising a decisive influence” and, thus, allows for quite a broad interpretation of the

existence of relations of control. However, it is only used for the purpose of defining the companies' groupings which are constrained by relations of control; it is not applicable for defining the types of transactions which are subject to mandatory merger clearance.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes, it can. Direct/indirect acquisition of shares (participation interest) of the business entity resulting in obtaining 25 percent or more of the voting rights of the business entity is considered as concentration and requires prior approval of the AMC even if no change of control is occurred.

2.3 Are joint ventures subject to merger control?

The JV may be subject to merger control in the following cases:

- (1) when the establishment of a JV by two or more parties is considered to be an *economic concentration* – if the newly-established JV carries out its business activities independently for an extended period of time, and the establishment/incorporation of such JV does not aim at, and shall not result in, the coordination of competitive behaviour (i) of its founders; or (ii) of legal entity and its founders; and
- (2) when the establishment of a JV by two or more parties is considered to be the *concerted practice* of its founders – if the establishment /incorporation of such JV aims at, and shall result in, the coordination of competitive behaviour (i) of its founders; or (ii) of the legal entity and its founders. Pursuant to the applicable legislation, "concerted practice" is: (i) the entry into any agreement; (ii) the adoption of any decisions by associations; (iii) any other agreed competitive activities of business entities; or (iv) the establishment of a JV which aims at, or results in, the coordination of the competitive activities of either the JV or its founders.

2.4 What are the jurisdictional thresholds for application of merger control?

According to the applicable Ukrainian legislation, the transactions referred to in question 2.1 above require merger clearance if the following thresholds are met:

- (1) Either the worldwide aggregate value of assets or sales over the last financial year, by participants to the transaction, taking into account their control relations (groupings), exceeds an amount equivalent to **EUR 12 million**; and, simultaneously:
 - (i) the worldwide aggregate value of assets or sales, by at least two participants to the transaction, taking into account their control relations, exceeds an amount equivalent to **EUR 1 million**; and
 - (ii) the aggregate value of assets or sales, in Ukraine by at least one participant to the transaction, taking into account its control relations, exceeds an amount equivalent to **EUR 1 million**.

Furthermore, merger clearance in Ukraine is mandatory where either participant (including its grouping) has a market share over 35 percent, or when the combined market share of the participants to the transaction exceeds 35 percent; and the transaction takes place in the same market or in adjacent markets, regardless of fixed thresholds.

In addition, please see question 2.6 hereof.

The geographical bounds of the affected market may be defined

either (i) as one or several regions; or (ii) as the whole territory of Ukraine. As a matter of practice, for the purpose of notification, the bounds of the affected market may not be considered as wider than the territory of Ukraine.

2.5 Does merger control apply in the absence of a substantive overlap?

Merger control applies regardless of whether an overlap exists. The criteria of both (i) the absence/presence of a substantive overlap on the affected market; and (ii) the influence on competition in the affected market are rather regarded as a substantial test for merger assessment.

2.6 In what circumstances is it likely that transactions between parties outside Ukraine ("foreign to foreign" transactions) would be caught by your merger control legislation?

The Ukrainian competition rules are applicable to any transactions which affect or could affect the economic competition in Ukraine. However no specific test to be used by AMC for the determination of actual or possible influence of a foreign-to-foreign transaction on economic competition in Ukraine is envisaged by law. In fact, according to the existing practice and approach adopted by the AMC, if the parties technically meet the thresholds envisaged by law, receipt of the prior approval of AMC is required even in case of pure foreign-to foreign transaction with relatively small revenue generated in Ukraine by one party only.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

No such mechanisms are provided under the applicable laws of Ukraine.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

No specific rules are established with respect to the transactions that take place in stages to identify such transaction either as a single transaction, or as series of subsequent actions each requiring the merger clearance.

In practice the key test to be applied is whether the actions performed in stages are indeed related, and their sequence in the end would result in the same outcome – i.e. establishment of control over a particular target(s). Obviously, the criteria of the parties to the transaction are taken into account as well. Namely, if the parties to the said interim transactions are the same, then the merger would be considered as one transaction. However, if the control is intended to be established over a group of related entities each being targeted, then, most probably, AMC would treat such actions as separate transactions requiring merger clearances (except for the merger with respect to several target companies being under direct vertical control).

According to the applicable law, no timeframe is taken into account during such consideration. However, any merger shall be completed within one year since the permit for it is granted by AMC, unless a longer term is prescribed in such permit.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

If the fixed thresholds are met, notification with the AMC is compulsory. No deadline for application is provided. The main requirement is that the closing of the contemplated transaction is prohibited until the ACU approval is obtained (where required). The parties shall refrain from any actions which are aimed at closing the transaction until they have obtained the approval (where required).

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

The following actions are specially exempted from the prior merger clearance with the AMC:

- (i) the acquisition of shares (participation interest) of a business entity by a person (entity) whose principal business is the performance of financial or securities operations, provided that such acquisition has been undertaken for the purpose of the subsequent resale of the shares and such person does not vote on any governing body of the business entity. Such transaction may be carried out without the prior approval of the AMC, subject to the resale of such shares (participation interest) within one year after their purchase;
- (ii) the transaction between business entities associated by relations of control are not subject to prior AMC approval, provided that the relations of control were initially established in accordance with the requirements of Ukrainian competition legislation; and
- (iii) the acquisition of control over a business entity or a division thereof, including the right to manage and to administer the property of such business entity, by an appointed receiver in bankruptcy proceedings or by a State official, does not require prior AMC approval.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Failure to obtain the prior approval of the AMC for a transaction (when applicable) under Ukrainian law can be subject to penalties of up to 5 percent of the turnover of the purchaser-party to the transaction from its worldwide sales as of the last financial year. In practice, the maximum amount has never been imposed in the case of foreign-to foreign transactions, and generally the amounts of fines have been rather moderate given the minimal effect on competition in Ukraine. However, if failure to file is discovered by AMC itself or upon information provided by a third party, the parties to concentration will be rather considered by AMC as acting in “bad faith” that may negatively affect the amount of fine to be imposed and the AMC attitude in respect of future transactions involving the parties concerned.

In addition to fine, the AMC is authorised to oblige the parties to eliminate the negative consequences (losses) of the failure to receive prior merger clearance (if any).

The transaction which is closed without Ukrainian merger clearance is legally binding on the parties. However, the AMC may apply to the court in order to recognise the transaction as invalid, if such failure has adversely affected, or could adversely affect, the competition in Ukraine.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

The scenario involving closing of the foreign-to-foreign transaction before Ukrainian clearance to avoid delaying global completion and obtaining post-closing approval shortly after the closing (providing AMC with the reasonable justification of failure to pre-notify) may be applicable. Given the technical failure to receive merger clearance before closing, the AMC usually will (i) issue post-closing clearance (unless there are legal grounds to reject the clearance) and (ii) impose the fine as envisaged by law. However in such case, the parties will be rather considered by the AMC as acting in “good faith” and the amount of fine to be imposed will not be critical. Moreover, despite the respective technical breach, the parties’ voluntary reference to the AMC should sustain the existing good track record of the respective parties with the AMC.

3.5 At what stage in the transaction timetable can the notification be filed?

No deadline for notification is provided. The notification can be filed at the stage when the substantial terms and conditions of the transaction become known (in particular, the transaction structure, participants and financial matters).

The applicable legislation allows a draft merger agreement to be filed to the AMC, which, as a rule, needs to be signed at least by one party. Based on the existing practice, it is also possible to provide a letter of intent or memorandum of understanding. However, it is very likely that the draft agreement will be requested.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Ukrainian merger clearance procedure takes up to 45 calendar days - Phase I:

- filing of notification;
- acceptance of the notification - the notification is accepted if no refusal to its acceptance is issued by AMC within 15 calendar days, - the date of filing + 15 calendar days; and
- receipt of the AMC approval – acceptance of the notification + 30 calendar days.

In practice, the AMC would normally issue the approval within 30 calendar days from the date of notification.

Furthermore, if within 45 days after filing no decision of the AMC is received, the transaction is considered as cleared.

If more in depth investigation is required with respect to the transaction, the AMC may initiate Phase II, which commences only upon providing the AMC with full set of information/documents additionally requested and shall not exceed three months.

The applicable law does not enable AMC to suspend the said time frame.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

No completion of the transaction before AMC approval is allowed. In addition, please see question 3.4 hereof.

3.8 Where notification is required, is there a prescribed format?

The requirements of the notification form are stated in Regulation No. 33.

Notification includes the application itself, and the annexes thereto containing a substantial amount of information/documents, which may be grouped as follows:

- (i) corporate documents of the participants (the general requirement for such documents issued outside Ukraine is that they should be notarised at the place of issuance and legalised/apostilled; all the documents filed with ACU should be translated into Ukrainian);
- (ii) documents confirming the financial potential of the parties (the same requirements as to the corporate documents);
- (iii) information related to the parties, taking into account their control relations (including registration data, officers and amount of shareholdings/votes) and their commercial activity (both worldwide and in Ukraine) that includes, without limitation, their turnover data, data on the main suppliers, customers and competitors of each company from the groupings active in Ukraine; information on affected markets (if any) and market share(s) for the two years preceding the year of notification; information related to the transaction structure, etc.; and
- (iv) the economic substantiation of the merger.

The AMC is authorised to request extra information, provided that the given information/documents do not suffice. Usually, it takes 14-21 days to compile the information required for filing.

3.9 Is there a short form or accelerated procedure for any types of mergers?

No short form or accelerated procedure is available for notification (neither depending on the type of merger, nor on the category of cases).

Applicants (especially in case of foreign-to-foreign transaction and lack of overlapping markets), may ask the AMC to be exempted from filing some information, providing the AMC with sufficient reasoning that respective information does not influence the AMC while granting or rejecting prior approval. Generally, the AMC will not require detailed information on non-overlapping product markets.

3.10 Who is responsible for making the notification and are there any filing fees?

The parties are legally responsible for filing the notification. The applicable legislation provides that the notification may be filed by either party. At the same time, according to the existing practice, the notification is to be filed jointly by the parties.

The fee for notification amounts to 300 times the non-taxable minimum personal income, which is currently equivalent to approx. EUR 700.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed? Are non-competition issues taken into account?

The AMC grants its approval as long the transaction will not result in the emergence of a monopoly in the affected market and will not

materially restrict competition in the affected market or in its substantial part. In the case of overlapping market(s), the emergence of a monopoly is tested through the expected aggregated market share(s) (the entity holding 35% in the market may be considered as having a monopoly position on the market).

The AMC considers competition issues only, including consumers protection. The public interest is of substantial concern when the merger is assessed by the CMU.

As of the current date, no guidelines on the approach to substantial merger assessment have been issued.

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

The applicable legislation provides a possibility of involving a third party at the stage of case consideration. The third parties which may be potentially affected by the contemplated transaction are able to file with the AMC any objections and information they possess for the latter to have comprehensive and independent data to appropriately evaluate the impact of the transaction on the relevant markets and competition.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The following actions are considered as the violation of competition legislation regarding information:

- (i) not furnishing of the information or furnishing incomplete information within the term provided by the AMC or its local bodies, as well as the term envisaged by the applicable legislation;
- (ii) furnishing inadequate information; and
- (iii) impeding the AMC employees from conducting the inspections, examinations, taking out and distraining the property, documents or devices carrying the information.

The penalty for the said violations is set as up to one (1) percent calculated on the basis of the grouping's worldwide turnover in the year preceding the year in which the penalty is to be imposed.

The AMC is authorised to obtain the required information through official inquiries to different State bodies, within the limits of their powers.

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The AMC is entitled to publish certain information on the transaction subject to merger clearance and on the parties concerned. Considering that the transaction parties are usually very sensitive in respect of disclosure of certain key commercial information, they may indicate the information (whole or part) filed with the AMC as confidential and the latter will not be published or otherwise disclosed. In particular, the information to be furnished by the parties to the AMC may be identified as "information with limited access" that results in the AMC's obligation to keep it strictly confidential. Moreover, as a matter of practice, if the merger clearance application is labelled as "information with limited access", the AMC officers, before publishing any information in respect of the contemplated transaction, usually discuss the scope of disclosure as well as the very possibility of such publication with the respective parties.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The AMC decides whether to grant the approval to/refuse the concentration at its regular meetings (twice a week), whereupon the AMC issues the respective decisions to be delivered to the applicants. In addition, please see question 3.6 hereof.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The "remedies" to be imposed in the case of competition are not provided under the relevant Ukrainian legislation.

5.3 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The applicable merger clearance regulations do not envisage list of remedies as well as the timeline for their negotiation and imposition. However, given that "remedies" may be imposed only within Phase II, generally the parties start negotiating after initiation of Phase II.

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

There is no unified approach to the terms and conditions of divestment implementation. The law provides that any divestment remedy should eliminate or mitigate the negative consequences of a merger for the competition. The remedies may provide for the limitation of rights to manage, use or dispose of any assets, as well as for the forced disposition of the assets concerned.

Whenever the participant holds the monopolistic (dominant) position on the market, the AMC is entitled to decide on a compulsory split of such monopolist. At the same time, the split is not applicable under the circumstances when (i) there is no possibility to separate the company, its organisational units due to certain organisational or territorial reasons; and (ii) a close technological connection within the company or between its organisational units exists (e.g. if the company utilises more than 30 percent of the products produced by itself or its organisational unit). Furthermore, the company subject to split may, at its discretion, decide on its transformation, instead of a split, provided that its monopolistic (dominant) position would be eliminated.

5.5 Can the parties complete the merger before the remedies have been complied with?

A general rule is that a merger may be conditional upon a divestment (or another remedy imposed by AMC). At the same time, the applicable law provides no specific requirement to have the divestment remedy complied in full before the merger is completed. However, the AMC is entitled to reconsider its decision on granting the permit to concentration, whenever the divestment remedy is not complied with by the applicant / parties to the concentration.

5.6 How are any negotiated remedies enforced?

This is not applicable in Ukraine.

5.7 Will a clearance decision cover ancillary restrictions?

The AMC is entitled, simultaneously with the granting of its permit, to oblige the parties to the allowed transaction to take certain actions that eliminate or extenuate a negative impact of the transaction on competition in Ukraine. Such obligations may, in particular, provide for certain limitation of management, of administration or of disposal of assets; as well as, on the contrary, setting the obligation to dispose of the company's assets. However, no guidelines in this respect are issued.

5.8 Can a decision on merger clearance be appealed?

Yes, it can. The negative decision of the AMC may be appealed to the Cabinet of Ministers of Ukraine (the "CMU"). In this case, the CMU may grant its approval of the performance of certain transactions under specific circumstances. Such circumstances are limited to those cases where the parties can prove that the positive effect of the transaction on the public interest is much greater than its negative consequences. However, even in this case, the CMU will refuse to grant the permit if such negative consequences would threaten the existence of the market economy in Ukraine.

5.9 Is there a time limit for enforcement of merger control legislation?

The limitation period shall be five (5) years as of the day of violation and in case of lasting violation – as of the day of its actual completion.

6 Miscellaneous

6.1 To what extent does the merger authority in [country] liaise with those in other jurisdictions?

As for now, the AMC performs international cooperation in three directions:

- cooperation on the basis of bilateral agreements signed with several European states (Central and Eastern Europe);
- cooperation on the basis of multilateral international treaties between CIS member states (Multilateral Treaty on Performance of Agreed Antimonopoly Policy); and
- cooperation with specialised international organisations (CIS International Council for Antimonopoly Policy, International Competition Network).

Moreover, in case of foreign-to foreign transaction, especially involving European countries, the AMC, upon request of the parties concerned, consider the approach adopted by competition authorities in other relevant jurisdictions.

6.2 Please identify the date as at which your answers are up to date.

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**Denis Lysenko**

Vasil Kisil & Partners
17/52A Bogdana Khmelnytskogo St.
Kyiv 01030
Ukraine

Tel: +38 044 581 7777
Fax: +38 044 581 7770
Email: lysenko@vkp.kiev.ua
URL: www.kisilandpartners.com

Denis Lysenko, Partner

Denis Lysenko has been a partner with Vasil Kisil & Partners since 2006; he joined the firm in 1999. His practice focuses on mergers and acquisitions, banking and corporate law, antitrust law, investments, privatisation.

Mr. Lysenko has wide experience in representing interests of foreign investors (lenders) in cross-border transactions involving Ukrainian assets, as well as of Ukrainian companies - strategic investors in privatisation projects of Central and Eastern Europe, and experience of cooperation with the European Commission on competition matters. Mr. Lysenko successfully led the team of the firm's lawyers in multiple M&A and investment projects in the following industries: banking and insurance, real estate, steel, machine- and shipbuilding, telecommunications etc.

The firm's Competition and M&A practice groups led by Mr. Lysenko have been continuously ranked as highly recommended by Chambers Europe, IFLR 1000, Legal 500, PLC and other recognised international legal directories.

**Mariya Nizhnik**

Vasil Kisil & Partners
17/52A Bogdana Khmelnytskogo St.
Kyiv 01030
Ukraine

Tel: +38 044 581 7777
Fax: +38 044 581 7770
Email: nizhnik@vkp.kiev.ua
URL: www.kisilandpartners.com

Mariya Nizhnik is a counsellor with Antitrust and Competition Practice of Vasil Kisil & Partners. Ms Nizhnik focuses on general corporate and competition matters. Mergers and acquisitions, commercial agreements (such as joint ventures, distribution and licensing arrangements, development activities, or strategic alliances), abuse of dominance or other competition investigations are her key areas of competition practice. Ms Nizhnik has gained extensive experience through advising the firm's foreign and domestic clients on private or/and government competition issues in a number of global M&A transactions. Ukrainian Law Firms, a Handbook for Foreign Clients named her one of the best lawyers practicing the antitrust law and commercial law. In 2009 International Legal Guide Legal500 recommended Mariya Nizhnik for her professional qualities. Mariya is co-chair of Legal Committee of the American Chamber of Commerce in Ukraine, a member the Non-Commercial Association "Promotion of Competition Development in CIS" and a member of Ukrainian Bar Association.

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