

# COMPETITION ENFORCEMENT AGENCIES

## HANDBOOK 2019

Published in association with:

Atsumi & Sakai

Bowmans

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ELIG Gürkaynak Attorneys-at-Law

Lapidot, Melchior, Abramovich & Co

Morrison & Foerster LLP

SRS Advogados

Van Bael & Bellis



# Competition Enforcement Agencies Handbook 2019

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A Global Competition Review Special Report

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*Global Competition Review's* 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

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## Questions and answers

### How long is the head of agency's term of office?

The term of office of the chairman of the Antimonopoly Committee of Ukraine (AMCU) is seven years, according to article 9 (2) of the Law on Antimonopoly Committee of Ukraine (AMCU Law).

### When is he or she due for reappointment?

The chairman of the AMCU may be reappointed upon the expiry of the seven-year term of office. However, the chairman shall not be appointed for more than two consecutive terms (article 9 (2) of the AMCU Law).

**Which posts within the organisation are political appointments?**

The posts of the chairman, the first deputy chairman, the deputy chairman and state commissioners are political appointments.

The chairman is appointed by the Ukrainian parliament upon the submission of the Prime Minister. Deputies and state commissioners are appointed by the President at the recommendation of the Prime Minister which is submitted upon the proposal made by the AMCU chairman.

**What is the agency's annual budget?**

The annual AMCU budget for 2019 is 220 million Ukrainian hryvnia.

**How many staff is employed by the agency?**

There are 761 members of staff (including 318 staff members in the central office and 443 in regional offices).

**To whom does the head of the agency report?**

The chairman annually reports on the AMCU activities in parliament (article 9 of the AMCU Law).

**Do any industry-specific regulators have competition powers? If so, how do these relate to your agency's role?**

No. Although there is a law regulating natural monopolies. It is AMCU who monitors the compliance of the natural monopolies' activities with the legislation on protection of economic competition.

**May politicians overrule or disregard authority's decisions? If they have ever exercised this right, describe the most recent example.**

In general, there is no such possibility. At the same time, the Cabinet of Ministers of Ukraine may authorise concentrations (article 25 (2) of the Law on Protection of Economic Competition (LPEC)) or concerted practices (article 10 (3) LPEC) that were not authorised by the AMCU (due to a threat of monopolisation or material restriction of competition) if the participants of such concentrations or concerted practices prove that a positive effect of the concentration (concerted practices) in question on the public interests outweighs their anticompetitive effects.

However, there have been no such cases recently.

**Does the law allow non-competition aims to be considered when your agency takes decisions?**

Yes, the AMCU can take into account such aims when authorising concerted practices. In particular, concerted practices may be authorised by the AMCU if their participants prove that the concerted practices in question facilitate:

- the improvement of the production, purchase or sale of a product;
- technical, technological and economic development;
- the development of small- or medium-sized enterprises;
- the optimisation of the export or import of products;
- the elaboration and application of unified technical conditions or standards for products; and
- the rationalisation of production.

Besides this, as mentioned above, concentrations or concerted practices that are capable of leading to monopolisation or significant restriction of competition and on this ground were not authorised by the AMCU, may nevertheless be authorised by the Cabinet of Ministers of Ukraine if positive effects of the concentration (concerted practices) on the public interests outweigh its anticompetitive effects.

**Which body hears appeals against the agency's decisions? Is there any form of judicial review beyond that mentioned above? If so, which body conducts this? Has any competition decision by the agency been overturned?**

Most appeals against the AMCU's decisions are considered by the Commercial Court. Decisions of the AMCU have been overturned in numerous cases.

One of the main problems in this context is a judiciary's limited expertise in the field of competition law and economics basics that prevents courts from making well-founded decisions in cases.

The judicial system of Ukraine consists of local courts (courts of the first instance); appellate courts (courts of the second instance); and the Supreme Court (its Cassation Commercial Court limb, the court of third instance). At the Supreme Court, the cases related to antimonopoly and competition laws are considered by the specialised panel of the Cassation Commercial Court.

**Has the authority ever blocked a proposed merger? If yes, please provide the most recent instances.**

There have not been any recent cases where the AMCU has blocked a proposed merger.

**Has the authority ever imposed conditions on a proposed merger? If yes, please provide the most recent instances.**

There have been cases where the AMCU imposed commitments on the participants of a concentration as a condition for authorisation of the mergers. For instance, in 2017 such commitments were defined in three cases (see below). There were no such cases in 2018.

Notably, according to the 2016 amendments to LPEC, the parties were granted the right to propose such remedies to AMCU as a condition for authorisation.

**Has the authority conducted a Phase II investigation in any of its merger filings? If yes, please provide the most recent instances.**

In 2017 the AMCU conducted Phase II investigations in the following.

In the acquisition by Kronospan Holdings PLC (Nicosia, Cyprus) of the shares of the private limited company Korostenskiy Factory MDF (Kiev, Ukraine), which provides for exceeding 50 per cent of the votes in the supreme body of the company's management.

Taking into account structural indicators (a significant market share) of the participants of concentration on the markets of MDF/HDF, LMDF, L-HDF and laminated floors, and defined by the legislation on the protection of economic competition, the implementation of the concentration was allowed by the AMCU only on condition of compliance with the requirements, which will remove the negative impact of concentration on competition.

Phase II investigations were also conducted in the acquisition of control by Bayer Aktiengesellschaft over Monsanto Company.

Taking into account the structural indicators (a significant market share) of the concentration participants of crops and vegetables seeds, in particular, cucumbers; chemical means of plant protection (pesticides), herbicides (selective, nonselective), defined by the legislation on the protection of economic competition, the concentration was authorised by the AMCU, on condition of compliance with the requirements, which will eliminate the negative impact of concentration on competition.

**Has the authority ever pursued a company based outside your jurisdiction for a cartel offence? If yes, please provide the most recent instances.**

The AMCU has recently passed a decision in a bid-rigging case involving two foreign respondents, UK and Seychelles companies. The respondents rigged bids at the 2015 tender of a Ukrainian state enterprise UkrGasVydobuvannya for the purchase of a block-modular complex of a coiled tubing installation. Both companies were fined for this infringement (and now are effectively barred for three years from participating in other public procurement tenders). Currently, the respondents are seeking to annul the AMCU decision in the court.

**Do you operate an immunity and leniency programme? Whom should potential applicants contact? What discounts are available to companies that cooperate with cartel investigations?**

Under article 6 (5) LPEC, if a person who has committed anticompetitive concerted practices, but earlier than the other participants of such actions, voluntarily informed the AMCU on such a fact and submitted important information, such a person is exempt from liability for anticompetitive concerted practices.

Current leniency provisions provide an exemption for the first applicant only, with no relief for subsequent applicants. However, the 2019 amendments to LPEC (which were passed by the Ukrainian parliament but have not been signed into law by the President yet), extend the leniency programme to subsequent applicants who will enjoy significant reductions of a fine (50 per cent, 30 per cent, 20 per cent). The leniency programme amendments are generally based on the EU model.

**Is there a criminal enforcement track? If so, who is responsible for it? Does the authority conduct criminal investigations and prosecutions for cartel activity? If not, is there another authority in the country that does?**

Ukrainian law provides no criminal liability for competition-related infringements.

**Are there any plans to reform the competition law?**

Currently, the AMCU is in the middle of a comprehensive process of numerous reforms. Some of them have been already implemented, while a number of significant reforms are still ongoing.

Most of the AMCU's initiatives in the field of future reforms of competition legislation will focus on the following:

- increasing AMCU discretion in prioritising cases for investigation;
- introducing a procedure for imposing commitments in dominance abuse cases;
- clarifying the scope of application of merger rules;
- clarifying and strengthening AMCU investigation powers (dawn raids, seizure of evidence, among others);
- improving procedures for handling merger applications;
- improving and simplifying procedures for enforcement of AMCU decisions; and
- establishing a fully operational EU-model state aid office.

**When did the last review of the law occur?**

In August 2017, the state aid control system was introduced. The main procedure for application of state aid has been implemented. Currently, the AMCU works on different types of criteria for assessing admissibility of state aid. The AMCU has prepared draft amendments to the State Aid Law aimed at implementing the EU acquis under the EU-Ukraine Association Agreement. Amendments are also being drafted in order to bring the Tax Code and the Customs Code in conformity with the State Aid Law.

In February 2019, the parliament passed important amendments to LPEC strengthening procedural rights of respondents and, in particular, introducing settlement procedure as well as expanding leniency procedures to subsequent applicants (currently waiting to be signed into law by the President).

In addition, the AMCU has adopted guidelines on the concerted practices of business entities in the scope of technology transfer, which does not request the permission of the AMCU.

**Do you have a separate economics team? If so, please give details.**

Before December 2015, there was no separate economic analysis unit in the AMCU. Partially the issues related to strategic analysis, case-related economic questions, economic impact assessment, actual reporting of Committee's activities were dealt by the Department of Competition Policy. The specific Economic Analysis and Methodology unit within Competition Policy Department was established in December 2015.

Since July 2017, the Chief Economist Unit became an autonomous unit responsible for economic

analysis, planning and reporting of the AMCU's activity with 11 employees. The chief economist directly reports to the chairman.

**Has the authority conducted a dawn raid?**

Yes, to some extent. Under article 7 (7) of the AMCU Law, the AMCU has the power to inspect the premises and vehicles of undertakings as well as seize and arrest evidence (assets, documents or other data media).

However, the inspections procedure differs from searches conducted by law enforcement agencies in criminal cases. For example, during AMCU inspections, an undertaking may refuse to grant access or provide necessary documents or information. In this case, the AMCU may qualify such actions as creating impediments in investigation and may only impose a fine (up to 1 per cent of the annual income of the undertaking).

**Has the authority imposed penalties on officers or directors of companies for offences committed by the company? If yes, please provide the most recent instances.**

Formally, the LPEC authorises the AMCU to impose administrative fines on officers public authorities for a failure to provide information upon the AMCU request, comply with the AMCU decision as well as for creation of impediments in investigation (in the latter case, such a fine may also be imposed on officers of undertakings). However, numerous inconsistencies with other laws (first of all with obsolete rules of the Code of Ukraine on Administrative Offences) and insignificant amounts of such fines render imposition of such fines either impossible or ineffective. Currently, the AMCU is drafting respective amendments to the laws, to be submitted to the parliament in 2019.

**What are the pre-merger notification thresholds, if any, for the buyer and seller involved in a merger?**

According to article 24 of the Law on Protection of Economic Competition, concentrations may be carried out only after economic entities have attained a prior authorisation granted by the AMCU if the cost parameters of the participants exceed the following thresholds:

- the total cost of assets or the total product sales of the participants in the concentration, with relations of control being taken into account, in the past financial year, including those abroad, exceed the sum equivalent to €30 million, defined in accordance with the official exchange rate to be established by the National Bank of Ukraine and to be effective on the last day of the financial year

while the assets (total assets) or sales (total sales) of products in Ukraine, of at least two participants in the concentration, with relations of control being taken into account, exceed the sum equivalent to €4 million, defined in accordance with the exchange rate to be established by the National Bank of Ukraine and to be effective on the last day of the financial year; or

- the total cost of assets or the total product sales of market participant in Ukraine, for which control is acquired, or the participants whose assets (stocks, shares) are acquired in the property or control or received in use, or minimum one of the founders of producing subject, with relations of control being taken into account, in the past financial year, including those abroad, exceed the sum equivalent to €8 million, defined in accordance with the official exchange rate to be established by the National Bank of Ukraine and to be effective on the last day

of the financial year while the assets (total assets) or sales (total sales) of products, including those abroad, minimum one of the other participants of in the concentration, with relations of control being taken into account, in the last financial year, including those abroad, exceed the sum equivalent to €150 million, defined in accordance with the exchange rate to be established by the National Bank of Ukraine and to be effective on the last day of the financial year.

**Are there any restrictions on investments that involve less than a majority stake in the business?**

All cases where it is necessary to apply to the AMCU for the authorisation of a concentration are defined by articles 22 and 24 LPEC. There are also different ways of acquiring the control than the acquisition of a majority stake (for example, the acquisition of right to veto). Such cases are also defined by the LPEC.

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