

TO: Clients and Friends of the Firm
FR: Frishberg & Partners
RE: Antimonopoly Legislation

I. Introduction

The following key pieces of legislation govern competition issues in Ukraine: (i) the Economic Code of Ukraine; (ii) the Law of Ukraine No. 3659-XII “On the Antimonopoly Committee of Ukraine,” dated November 26, 1993 (as lastly amended on April 24, 2007); (iii) the Law of Ukraine No.2210-III “On Protection of Economic Competition,” dated January 11, 2001 (as lastly amended on February 23, 2006) (“Law No. 2210”); (iv) the Law of Ukraine No. 236/96-VR “On Protection From Unfair Competition,” dated June 7, 1996 (amended on May 15, 2003); and (v) Order No. 33-r “On Approval of the Regulations on the Procedure for the Submission of Applications to the Antimonopoly Committee for Preliminary Receipt of Permission for Concentration of Business Entities (Regulations on Concentration),” dated February 19, 2002 and registered with the Ministry of Justice on March 21, 2002 under No. 284/6572 (“Order No. 33-r”). Additional subordinate legislative acts must be taken into consideration.

The Antimonopoly Committee of Ukraine (hereinafter the “AMC”) is responsible for ensuring the state protection of competition in business activities within Ukraine. As part of the executive branch of government with a special status, the AMC’s role is to protect Ukrainian business from unfair competition and trade practices. Importantly, the AMC’s consent is required if a transaction may or will lead to an economic concentration on a specific segment of the Ukrainian market.

Below we describe the thresholds for receiving the AMC’s consent to move forward with a transaction, as well as a summary of the practices, which the AMC considers to be unfair to competition.

II. Discussion

The good news is that the AMC’s consent to a transaction is required only upon the occurrence of certain triggering events, including mergers, the direct or indirect acquisition of shares of stock or assets, the acquisition of control in any manner, the expansion of an association of businesses and the creation of a business entity. For each category, Law No. 2210 and Order No. 33-r set forth the thresholds which require companies to receive the AMC’s preliminary consent.

In practice, the parties to a potentially “monopolistic” transaction usually include a provision in the relevant agreement to the effect that the closing of the transaction (i.e., the date when the agreement comes into force) is contingent upon procurement of AMC consent if applicable. Since the procedure for receiving the AMC’s consent is complicated and lengthy, the parties should begin procurement in the early stages of the transaction. Accordingly, the closing of a transaction will be suspended until the AMC clears the transaction and puts forth its consent in writing.

In order to receive the AMC’s consent, the relevant party must submit an application in the required form in accordance with Order No. 33-r. The party must include a vast amount of information about itself in the application, including, but not limited to, the applicant’s founding documents; the relevant agreement that could possibly result in a concentration on a market; registration, statistic, economic and financial information about the parties to the transaction; a description of the transactions and its targeted results; the principal activities of the parties; the applicant’s balance sheet; information on the entities controlled by the applicant, etc. On the whole, the process of simply gathering the above information and properly filling out the application itself is both daunting and cumbersome.

A. Jurisdictional Thresholds

The need for preliminary AMC consent for a specific transaction arises when a so-called “concentration” may be reached on a particular market. Article 24 of Law No. 2210 and Article 2 of Order No. 33-r provide that a business may attain a specific market concentration only after receipt of preliminary permission from the AMC *if* the aggregate value of assets or aggregate volume of sales of the participants to a possible concentration, taking into consideration relations of control, over the past fiscal year (which also includes operations abroad) exceeds an amount equivalent to 12 million EURO, as determined at the exchange rate of the National Bank of Ukraine effective on the last day of the fiscal year, *and if*:

- a) the value (aggregate value) of the assets or the volume (aggregate volume) of sales, including operations abroad, for at least two participants to the concentration, including the relationship of control, exceeds an amount equivalent to 1 million EURO, as determined by the exchange rate of the National Bank of Ukraine effective on the last day of the fiscal year for each participant, *and if*
- b) the value (aggregate value) of the assets or the volume (aggregate volume) of sales in Ukraine for at least one participant to the concentration, including the relationship of control, exceeds an amount equivalent to 1 million EURO, as determined by the exchange rate of the National Bank of Ukraine effective on the last day of the fiscal year.

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