

# MARCHENKO DANEVYCH

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LEGAL ALERT

## AMCU ISSUES DRAFT GUIDELINES ON THE ASSESSMENT OF NON-HORIZONTAL MERGERS

1. On December 15, 2017 the Antimonopoly Committee of Ukraine (**AMCU**) published the draft Guidelines on the Assessment of Non-Horizontal Mergers (**Draft**). The Draft clarifies AMCU's approach to assessing non-horizontal mergers in respect of their impact on market competition.
2. The Draft is issued in compliance with the requirements of *Art. 255(6) of The Ukraine – European Union Association Agreement* to ensure consistency and legal certainty of non-horizontal mergers assessment. The Draft essentially incorporates the European experience in assessing non-horizontal mergers, as it is modeled after *The Guidelines on the assessment of non-horizontal mergers*, issued by the EU Commission.
3. Since AMCU adopted *The Guidelines on the Assessment of Horizontal Mergers* on December 27, 2016, the Draft incorporates the latter's general guidance, yet is focused upon distinctive features of non-horizontal mergers in terms of their impact upon competition.
4. Non-horizontal mergers, covered by the Draft, include **vertical** and **conglomerate mergers**. Although such non-horizontal mergers are usually less detrimental to competition, as compared to horizontal ones, their influence upon the market may be quite significant.
5. Structurally, the Draft reflects the process of consideration to be followed by AMCU in assessing non-horizontal mergers with the criteria relevant for such an assessment outlined.
6. AMCU shall commence respective assessment with defining relevant product and geographical markets, as well as evaluating impact of a merger upon competition.

Such an impact is evaluated under the following criteria:

- market shares of merging undertakings and concentration levels at relevant markets;
- potential anti-competitive effects on relevant markets;
- possible balancing effects of buyer's power;
- possible balancing effects of new undertakings' entry on the market;
- risk of bankruptcy.

7. Only in case AMCU establishes the risk of market monopolization or competition restriction on the basis of the former two criteria, it proceeds with the later three criteria. Absent such a risk, merger clearance is issued by AMCU right after considering the former two criteria.

If AMCU is to consider all the five criteria, it will either approve the merger concerned upon condition of the undertakings complying with particular requirements or prohibit the merger if the mentioned compliance cannot mitigate anti-competitive effects.

8. Since market power of merging entities and their competitors is crucial for potential effects of the merger, AMCU commences the assessment with calculating market shares of the undertakings using Herfindahl-Hirschman Index (**HHI**).

If post-merger market share constitutes less than 30% of the market with HHI below 2000, the merger is unlikely to distort competition.

However, the risk of anti-competitive effects increases if at least one of the following conditions is present:

- there is significant cross-shareholdings or cross-directorships among the market participants;
- there is an entity with a high likelihood of disrupting coordinated conduct among the entities;
- there are indications of past or ongoing coordination of actions among the merging entities and competitors.

9. Generally, non-horizontal mergers may impede competition by either non-coordinated or coordinated effects.

10. In case of **vertical mergers** non-coordinated effects include input foreclosure, when the merger restricts competitors' access to important products and services thereby raising their costs at upstream market, and customer foreclosure, when competitors are restricted in their access to customers at downstream market. Both types of foreclosures shall be assessed against the merged entity's ability to increase prices for customers.

While assessing the probability of anti-competitive effects by reason of input or customer foreclosure, AMCU takes into account:

- the ability of the merged entity to foreclose access to inputs or customers;
- its incentive to do so;
- considerable detrimental impact on downstream market competition.

Coordinated effects arise out of vertical merger where it fosters and facilitates coordinated actions by undertakings not previously engaged in such actions, thereby impeding effective competition. Such coordinated effects alone are not sufficient to significantly distort competition, but shall be taken into account in case of establishing non-coordinated effects.

11. In **conglomerate mergers**, involving entities operating on different, yet closely related product markets, non-coordinated effects mainly comprise foreclosure, precluding competitors from access to the market, usually by recourse to tying or bundling of complementary products. As a consequence, the merged entity may gain ability and incentive to increase prices by exerting pressure upon its competitors.

Coordinated effects of conglomerate mergers are unlikely to significantly impede competition and they may occasionally take the form of tacit coordination due to significant decrease of the number of competitors on the market.

12. Therefore, modeled after the European approach, the Draft provides a firm and definite basis for consistent and transparent assessment of non-horizontal mergers by AMCU.

Already clear and precise enough, the Draft is not duplicating the EU Commission *Guidelines on the assessment of non-horizontal mergers* and may be further improved in the course of public consultations by comments and suggestions to be submitted within 1 month.

If you have any questions, please contact:

**Oleksandr Aleksyeyenko**

Partner

[oleksandr.aleksyeyenko@marchenkodanevych.com](mailto:oleksandr.aleksyeyenko@marchenkodanevych.com)

**Sviatoslav Henyk**

Associate

[sviatoslav.henyk@marchenkodanevych.com](mailto:sviatoslav.henyk@marchenkodanevych.com)

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