Ukraine

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MERGER CONTROL

1. Are mergers and acquisitions subject to merger control in your jurisdiction? If so, please describe briefly the regulatory framework and authorities.

Mergers and acquisitions are subject to merger control in Ukraine. The principal legal acts regulating Ukrainian merger control are, among others, the:

The merger clearance procedure is contained in the Regulation On Rules for Submission of Applications to the Anti-monopoly Committee of Ukraine for Prior Approval of Concentration of Undertakings, approved by the Order of the Anti-monopoly Committee of Ukraine of 19 February 2002, No.33-p (Regulation on Concentration) (see Question 3, Form of notification).

The Anti-monopoly Committee of Ukraine (AMC) (see box. The regulatory authority) is the primary enforcing agency in all competition matters and has special powers of direct investigation and prosecution. The Cabinet of Ministers of Ukraine (CMU) also has authority in certain competition areas, such as approval of concentrations and concerted practices that raise serious anti-competitive concerns and that have earlier been prohibited by the AMC (see Question 10).

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events
The following actions are defined as concentrations that can trigger the need to obtain the AMC’s prior approval (Article 22, Competition Law):
- Mergers of undertakings, when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities.
- Absorption of one undertaking by another (with one retaining its legal identity while the other ceases to exist as a legal entity).
- Acquisition of control directly or through other persons or entities by one or more undertakings over one or more undertakings, including by the way of:
  - direct or indirect acquisition (gaining control over or lease) of assets in the form a going concern or a structural subdivision of an undertaking;
  - appointment or election for the position of chairman or deputy chairman in the supervisory council, the management board or any other supervising or executive body of an individual who already occupies one or more of these positions in another undertaking;
  - composition of the supervisory council, the executive (management) board, or any other supervising or executive body of an undertaking in the manner that the same individuals represent more than 50% of the members of such bodies in two or more undertakings.
- Establishment by two or more undertakings of a joint venture undertaking engaged in independent business activity for an extended period of time, under certain conditions.
- Direct or indirect acquisition of assets or participation interests (including shares) in an undertaking that allows the acquirer to reach or exceed 25% or 50% of votes in the target undertaking’s highest management body.

Triggering thresholds
A concentration must have prior approval from the AMC, if all of the following financial thresholds are met by the parties to the concentration, including all entities connected to them by a control relationship (Article 24, Competition Law):
- The aggregate worldwide asset value or sales turnover for all parties to the concentration exceeds EUR12 million (about US$17.8 million).
- The aggregate worldwide asset value or sales turnover for each of at least two parties to the concentration exceeds EUR1 million (about US$1.47 million) at the same time.
- The asset value or sales turnover in Ukraine of at least one party to the concentration exceeds EUR1 million.

A concentration must have the AMC’s prior approval, irrespective of the financial thresholds, if the market share of any of the parties to the concentration (including all their affiliates) or combined market share of all parties to the concentration exceeds 35% on any product market in Ukraine and the concentration takes place on this or a neighbouring product market.

The following transactions are exempt from qualifying as a concentration:
- Establishment of a joint venture undertaking by two or more undertakings resulting in co-ordination of activities among
the founders or between the founders and the new undertaking (such actions are treated as concerted practices and may also require a separate approval by the AMC).

- Acquisition of shares or other equity interest in an undertaking by a person or entity whose main activities are financial or securities transactions for the purpose of reselling such shares or other equity interest within one year, provided that the acquirer does not participate in the undertaking’s managing bodies.

- Actions otherwise constituting concentration, which occur between undertakings connected by a control relationship, unless that control relationship was created without required AMC approval.

- Acquisition of control over an undertaking by an insolvency administrator or a state official.

3. Please give a broad overview of notification requirements. In particular:

- Is notification mandatory or voluntary?

- When should a transaction be notified?

- Is it possible to obtain formal or informal guidance before notification?

- Who should notify?

- To which authority should notification be made?

- What form of notification is used?

- Is there a filing fee? If so, how much?

- Is there an obligation to suspend the transaction pending the outcome of an investigation?

- Mandatory or voluntary. Notification of a concentration to the AMC is mandatory.

- Timing. There is no deadline for submission of notification. AMC approval must be obtained before the actual change of control occurs, that is, before closing the contemplated transaction.

- Formal/informal guidance. Formal guidance on whether a particular transaction must be notified is available from the AMC in the form of preliminary conclusions. AMC officials are usually available to provide informal guidance on the applicable requirements.

- Responsibility for notification. The notification must be made by the parties to the concentration. In practice, the AMC usually expects a joint filing, but there are a number of precedents when the AMC has accepted filings that were signed only by the acquirer, or in exceptional cases, by the target or the seller.

- Relevant authority. The AMC. The parties may appeal the AMC’s decision to the CMU (see Question 10).

- Form of notification. The list of necessary information and documents is given in the Regulation on Concentration.

- Filing fee. The filing fee is UAH5,100 (about US$615).

- Obligation to suspend. The parties must obtain the AMC’s approval before taking any action that could result in the restriction of competition and the impossibility of restoring the undertakings’ original state.

4. Please set out the procedure and timetable.

Stage I procedure.
This lasts up to 45 days:

- Day 1. Submission of the concentration application to the AMC, accompanied by a set of documents and information.

- Day 15. Application is accepted for the AMC’s review (or returned to the parties if they have not complied with the formal notification requirements).

- Day 45 (or earlier). Either:
  - AMC approval is granted; or
  - the Stage II procedure is initiated.

If no decision is taken by the AMC within 45 days then the concentration is deemed to be approved as of the 46th day.

Stage II procedure.
This is formally referred to as the “case on concentration” and may last up to three months after the initiation of the Stage II procedure and after the AMC receives all the requested information from the parties. If the concentration is not prohibited, it is deemed to be approved on the last day of the stipulated three-month period. Possible remedies are usually negotiated during the this procedure (see Question 8).

For an overview of the notification process, see flowchart, Ukraine: merger notifications.

5. In relation to merger inquiries:

- How much publicity is given?

- At what stage of the procedure is information released?

- Is certain information automatically kept confidential?

- Can the parties request that certain information be kept confidential?

- Publicity. Some general information on the proposed concentration may be published on the AMC’s official website, usually limited to the type of the concentration, the names of the parties and the statement that approval has been granted.

- Procedural stage. The AMC usually publishes the respective information after the concentration has been cleared.

- Automatic confidentiality. There is no automatic confidentiality for filings (see below).
6. Can third parties be involved in the procedure and, if so, how? What rights do they have to make representations, access documents or be heard?

The competition laws do not provide for the involvement of third parties in the merger clearance process. However, this does not prevent any third parties from filing a complaint or providing information for the AMC to take into account when taking a decision whether to approve a concentration. The AMC itself may contact any third parties, including customers and competitors, for any information concerning the contemplated transaction.

7. What is the substantive test?

The AMC will approve the concentration unless it will:
- Lead to the creation or strengthening of a monopoly position.
- Significantly restrict competition on the entire Ukrainian market or an essential part of it.

8. What remedies can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

Ukrainian competition legislation does not specify what remedies can be imposed by the AMC as conditions for merger clearance. In practice, the parties communicate with the AMC and agree possible remedies that may be relevant in a particular situation, including divestment, limitation of sales, and other behavioural and structural remedies. Such remedies are usually negotiated only during the Stage II procedure.
9. What are the penalties for:
- Failure to notify correctly?
- Implementation before approval or after prohibition of the merger?
- Failure to observe a decision of the regulator (including any remedial undertakings)?
- Failure to notify correctly. Failure to submit required information or submission of inaccurate information to the AMC can result in a fine of up to 1% of the responsible party’s gross worldwide income, based on their sales for the fiscal year before the year in which the fine is imposed.
- Implementation before approval or after prohibition. Implementation of the concentration before its approval by the AMC may result in a fine of up to 5% of the gross worldwide income of the responsible party, based on their sales for the fiscal year preceding the year in which the fine is imposed.
- Failure to observe a decision of the regulator (including any remedial undertakings). The AMC decision prohibiting a merger can be appealed by the parties to the concentration to the CMU, within 30 days of receipt of the decision.
- If the responsible party had no income (or its amount is not known to the AMC), then the AMC imposes a fine of UAH170,000 (about US$20,500), instead of the 5% of the revenue.
- Implementation of the transaction after it has been prohibited by the AMC may result in a fine of up to 10% of the gross worldwide income, based on the responsible party’s sale of goods or services. If there are no revenues or their amount is not known to the AMC, then the AMC will impose a fine of UAH340,000 (about US$40,000), instead of the 10% of the revenue. The Ukrainian procedural laws may preclude the AMC from being able to collect any fines imposed on a foreign company, although it can initiate proceedings in a Ukrainian court against a foreign company if this company has a representative office in Ukraine. However, decisions of Ukrainian courts are not currently enforceable in most Western countries because of the absence of international treaties.
- Failure to observe. Failure to observe a decision of the regulator (including any remedial undertakings) is subject to the same penalties as for completing the transaction without the AMC’s prior approval.

10. Is there a right of appeal against any decision and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties or only the parties to the decision?

An AMC decision prohibiting a merger can be appealed by the parties to the concentration to the CMU, within 30 days of receipt of the decision.

Once the AMC decision is appealed to the CMU, the CMU creates a special commission, which includes a number of independent experts from different industries and authorities, as well as AMC officers. The CMU commission analyses the positive and negative effects of implementing the concentration from the very beginning, using the same AMC test as provided by competition laws. The CMU then prohibits or approves the reviewed concentration.

The parties to the concentration or any third parties that can prove standing (that is, rights which have been violated) can challenge the decision of the AMC and CMU in a Ukrainian court, within two months of receipt of the decision.

11. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

Merger clearance does not automatically clear any attached restrictive provisions. Restrictive provisions, such as non-compete obligations, are treated as restrictive practices (see Question 13).

12. Are any industries specifically regulated?

There is no industry-specific regulation.

RESTRICTIVE AGREEMENTS AND PRACTICES

13. Are restrictive agreements and practices regulated? If so, please give a broad overview of the substantive provisions and regulatory authority.

The implementation of restrictive agreements and practices is prohibited. However, restrictive practices may be allowed under certain circumstances, subject to AMC approval. The denial of such approval by the AMC can be appealed to the CMU. The principal laws regulating restrictive practices are the same as for merger control (see Question 1). Restricted practices are regulated as a civil (administrative) offence, but do not constitute a criminal offence.

The Competition Law defines the following as restrictive practices, when they result, or may result, in the limitation or restriction of competition:
- Agreements between undertakings.
- Decisions by associations of undertakings.
- Any other co-ordinated practice between undertakings, including establishing another undertaking or association of undertakings for the purpose of co-ordinating activities.

Prohibited restrictive practices include:
- Fixing prices or other conditions for the purchase or sale of goods.
- Limiting production, product markets, technical and technological development, investments or imposing controls over them.
14. Do the regulations only apply to formal agreements or can they apply to informal practices?

The competition legislation applies to both formal agreements and informal “gentlemen’s agreements” and practices.

15. Are there any exemptions? If so, please provide details. (Please summarise the criteria for individual exemption and any applicable block exemptions.)

Certain restrictive practices may be subject to block exemption and permitted without prior approval of the AMC, if:

- The combined market share of the parties to the restrictive practice on any relevant market does not exceed 5%.
  
  If the parties’ initial market share does not exceed 5%, but later grows up to 10%, then AMC approval must be obtained within two years of the 5% threshold being exceeded or within one year of the 10% threshold being exceeded.

- The combined market share of the parties does not exceed 15% for horizontal or mixed restrictive practices and 20% for vertical or conglomerate restrictive practices, provided that:
  - none of the parties is dominant on any affected market;
  - none of the parties was granted exclusive rights by state or municipal authorities; and
  - the parties to the restrictive practices, including related entities, do not meet the financial thresholds (see Question 2, Triggering thresholds).

- The combined market share of the parties to horizontal restrictive practices implemented in connection with specialisation does not exceed 25% on any of the affected markets. In particular, no AMC clearance is required if the parties specialise their production by agreeing on the following:
  - to stop, completely or partially, production of certain identical or similar products;
  - not to supply products to other undertakings that compete with the parties on the product’s market.

16. Are there any exclusions? If so, please provide details.

The following restrictive practices are automatically excluded from the class of agreements or practices that require prior exemption from the AMC:

- Joint purchases of goods by small and medium entrepreneurs.
- Agreements on transfers of intellectual property rights (licences) imposing limits on their use, provided that these limits comply with general legal requirements.
- Some vertical agreements on the supply and consumption of goods, provided there is no anti-competitive effect.

17. Please give a broad overview of formal notification requirements. In particular:

- Is it necessary (or, if not necessary, possible/advisable) to notify to obtain an individual exemption or other clearance?

- Is it possible to obtain informal guidance before, or instead of, formal notification? If there is no formal notification procedure, can any type of informal guidance or opinion be obtained?

- Who should/can notify?

- To which authority should/can notification be made?

- What form of notification is used?

- Is there a filing fee? If so, how much?

- Notification. The notification of restrictive (concerted) practices to the AMC is obligatory.

- Informal guidance/opinion. The applicable legislation provides the procedure for obtaining preliminary conclusions from the AMC, during which the AMC officially confirms whether the restrictive concerted practices require prior approval.

- Responsibility for notification. The parties to the restrictive (concerted) practices are responsible for notification.

- Relevant authority. The AMC. The parties may appeal the decision of the AMC to the CMU (see Question 26).

- Form of notification. The list of necessary information and documents is provided in the Regulation on the Restrictive Practices (see Question 13).

- Filing fee. The filing fee is UAH2,550 (about US$310).
18. Can investigations be started by:
- The regulator on its own initiative?
- A third party by making a complaint?

- Regulators. The AMC may begin an investigation into suspected restrictive practices or agreements (that have not been notified) on its own initiative.
- Third parties. A third party can apply to the AMC with complaints, based on which the AMC decides whether the submitted information is sufficient to start the investigation.

19. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

Third parties do not have access to case materials and documents.

Third parties that believe that their rights have been violated as the result of restrictive practices can give the AMC justified objections to the practices, as well as provide any evidence to support their position. Such third parties can ask the AMC to include them as the parties to the investigation.

20. Please set out the stages of the investigation and timetable.

Opening the investigation. Following review of an agreement or practice notified by the parties to the AMC, or during an investigation begun on its own initiative, the AMC may begin an in-depth investigation (a case on restrictive practices) if either:
- There are grounds to prohibit restrictive practices.
- They need to conduct an in-depth investigation or expert examination.

Information request. Once the investigation starts, the AMC provides the parties with the list of requested information and may request any other information during the investigation procedure.

Closing the investigation. The investigation cannot last for more than three months starting from the day when the parties have submitted all of the requested information and received an expert report on the impact of their restrictive practices. If a decision is not given the restrictive practices are deemed approved on the last day of the three-month period.

21. In relation to an investigation into a potentially restrictive agreement or practice:
- What details (if any) of the investigation are made public?
- Is certain information automatically kept confidential?
- Can the parties (or third parties) request that certain information be kept confidential?
- Publicity. Some general information on the potential restrictive agreement or practice may be published on the official website of the AMC.
- Automatic confidentiality. See Question 5, Automatic confidentiality.
- Confidentiality on request. See Question 5, Confidentiality on request.

22. Please summarise any powers that the relevant regulator has to investigate potentially restrictive agreements or practices.

The AMC, among others, has the following powers to investigate potentially restrictive agreements or practices:
- Request any information, including confidential information.
- Assign an expert to examine the restrictive agreements or practices.
- Collect necessary information from other state authorities.
- Enter and examine the entities’ office premises and transport.
- Seize or arrest property, documents, information carriers and so on.

23. Can the regulator reach settlements with the parties without reaching an infringement decision (for example, by accepting binding or informal commitments)? If so, please summarise the procedure and the circumstances in which settlements can be reached.

There is no official procedure for reaching settlements between undertakings and the AMC. In practice, settlement negotiations are possible and their outcome depends on the circumstances of each particular case.

24. What are the regulator’s enforcement powers in relation to a prohibited restrictive agreement or practice? In particular:
- What orders can be made?
- What fines can be imposed on the participating companies? What are the consequences if they are not paid?
- Can personal liability, including fines, attach to individual directors or managers?
- Is it possible to obtain immunity/leniency from any fines?
- Can an entire agreement be declared void (that is, not only any restrictive provisions)?

- Orders. The AMC can issue an orders to:
  - approve or prohibit restrictive agreements or practices;
  - cease implementation of a restrictive agreement or practice;
25. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, please summarise any special procedures or rules that apply. Are class actions possible?

Third parties harmed as a result of a prohibited restrictive agreement or practice can claim double damages from the undertaking found to be in breach.

No special procedures or rules for such claims exist. Class actions are not possible.

26. Is there a right of appeal against any decision of the regulator and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

The same procedure as for appealing AMC decisions on merger clearance applies. See Question 10.

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**MONOPOLIES AND ABUSE OF MARKET POWER**

27. Are monopolies and abuses of market power regulated under civil and/or criminal law? If so, please give a broad overview of the substantive provisions and regulatory authority.

Monopolies and abuse of market power are regulated as a civil (administrative) offence, but do not constitute a criminal offence. The AMC is the administrative authority responsible for prosecution.

28. How is dominance/market power determined?

Dominance is presumed to arise when the market share of an undertaking (including all related undertakings) exceeds 35% of the relevant market, unless it proves that it is subject to substantial competitive constraints.

An undertaking with a market share of less than 35% may also be found to hold a dominant position if it is not subject to substantial competitive constraints (if other competitors’ market shares are not significant).

An undertaking can challenge the finding of dominance by proving that it is subject to vigorous competition from other competitors due to, for example, low market entry barriers.

Collective dominance is presumed to arise when two or three undertakings have combined market share of 50% or more or when four or five undertakings have a combined market share of 70%, provided there is either no or insignificant competition between them in relation to products in the market.

29. Are there any broad categories of behaviour that may constitute abusive conduct?

The following actions are presumed to constitute an abuse of dominant position:

- Fixing prices or other terms of dealing that would have been impossible to fix under conditions of significant competition in the market.
- Applying different prices or other terms of dealing to equal agreements with other undertakings, sellers, or buyers without an objective economic reason.
- Concluding agreements that impose additional obligations on other undertakings that are not connected with the subject-matter of the agreement.
- Limits on output, product markets, or technical developments that harm or may harm other undertakings, sellers, or buyers.
- Partial or complete refusal to purchase or sell a product, provided there are no alternative sources of demand or supply.
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- Substantial limitations on the competitiveness of other undertakings on the market without justified economic reason.
- Eliminating other undertakings (buyers or sellers) from the market or obstructing their access to it.

30. Are there any exclusions or exemptions?

There is no exclusion or exemption.

31. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, please set out briefly the procedure.

There is no obligatory notification procedure for the abuse of dominance. The undertakings can only apply for the conclusions on the qualification of actions to the AMC. Such conclusions are not binding.

32. Where different than for restrictive agreements and practices, please explain how investigations are started, the procedures that apply, the rights of third parties, what details are made public and whether the regulator can accept commitments.

Please see Questions 18 to 21 and Question 23.

33. Please summarise the regulator’s powers of investigation.

Please see Question 22.

34. What are the penalties for abuse of market power and what orders can the regulator make?

Abuse of market power may result in a fine being imposed by the AMC of up to 10% of the violator’s gross worldwide income, based on their sales for the fiscal year preceding the year in which the fine is imposed. This gross income figure is the violator’s cumulative income (turnover), including all its related entities.

The AMC may also take a decision on the compulsory break-up of an undertaking abusing its dominant position. However, the break-up may not be ordered if the companies or their subdivisions cannot be separated due to their production abilities or location, or there is a tight technological link between them.

35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, please summarise any special procedures or rules that apply. Are class actions possible?

Please see Question 25.

EU LAW

36. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

JOIN VENTURES

37. Please explain how joint ventures are analysed under competition law.

A joint venture is regarded as a concentration if:
- The joint venture is established by two or more undertakings in order to be engaged in an independent business activity for an extended period.
- The joint venture does not co-ordinate anti-competitive behaviour between the founders or between them and the newly established joint venture.

A joint venture is regarded as a concerted practice if:
- The joint venture is established to co-ordinate its founders’ activities.
- The joint venture resulted or may result in limitation or restriction of competition.

INTER-AGENCY CO-OPERATION

38. Does the regulatory authority(ies) in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

The AMC co-operates on the basis of bilateral and multilateral agreements with:
- The CIS countries’ competition authorities.
- Regulatory authorities of the US and some countries of the EU, Central and Eastern Europe.
- International organisations such as the International Competition Network, the United Nations Conference on Trade and Development, and the CIS International Council for Anti-monopoly Policy.

PROPOSALS FOR REFORM

39. Please summarise any proposals for reform.

Recently, the AMC has proposed the following draft laws:
- Draft law increasing the financial thresholds and changing the necessary nexus requirement. Under these proposals the mergers would have to be notified when:
**THE REGULATORY AUTHORITIES**

**Anti-monopoly Committee of Ukraine (AMC)**

**Head.** Oleksandr I Melnychenko (Acting Chairman of the Committee - state commissioner)

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**Outline structure.** The AMC is a state body with special status. The AMC consists of the Chairman and ten State Commissioners. The AMC has territorial branches in every region of Ukraine and permanent and temporary administrative boards in the central office and territorial branches. The central office is organised into departments and sectors including:
- The mergers and restrictive practices department.
- The competition policy department.
- Five investigation departments specialised in different sectors.

**Responsibilities.** The AMC focuses on:
- Exercising state control over the implementation of the antitrust law.
- Preventing anti-competitive actions by the state and municipal authorities.
- Merger control, control of concerted practices and price regulation for products manufactured by the natural monopolies.

- both:
  - the combined total value of assets or combined sales (turnover) is EUR50 million (about US$73 million) (an increase from EUR12 million (about US$18 million)); and
  - at least two of the parties to the concentration have assets or sales in Ukraine exceeding EUR4 million (about US$5.8 million) (currently it is sufficient for one party to have assets or sales in excess of EUR1 million (about US$1.5 million)).
- one of the parties has assets or sales in Ukraine exceeding EUR50 million and at least one other party to the concentration has the combined worldwide assets or sales exceeding EUR50 million.

It is difficult to predict when the proposed amendments will come into force, as they must be adopted by the Ukrainian Parliament, which follows a lengthy procedure involving several readings.

- Draft law introducing criminal responsibility for prohibited restrictive (anti-competitive concerted) practices, in particular, related to:
  - price fixing;
  - market division;
  - limitation or cancellation of product manufacturing; and
  - limitation of sales and distribution of products.

Under the draft proposals, anti-competitive concerted practices would become punishable by:
- a fine of up to EUR7,200 (about US$10,500);
- personal restraint for up to five years;
- imprisonment for up to six years (if the anti-competitive concerted practices are committed by a person who had previously committed the same offence).

Currently, the revised draft is set for the second reading by the Ukrainian Parliament.

**Cabinet of Ministers of Ukraine (CMU)**

**Head.** Yulia Tymoshenko (The Prime Minister of Ukraine)

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**Outline structure.** The CMU is the highest executive body of Ukraine. It is comprised of the Prime Minister, First Vice-Prime Minister, Vice-Prime Ministers and the ministers.

**Responsibilities.** The CMU can grant approval for the concentrations and restrictive (concerted) practices that were initially prohibited by the AMC.

**Procedure for obtaining documents.** General information, legislation and some documents are provided on the CMU’s website (see above). The contact number for inquiries is +380 44 253 7379.

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