

## THE HORIZONTAL MERGER GUIDELINES INTRODUCED BY THE UKRAINIAN COMPETITION AUTHORITY

Ukrainian competition law and practice continues to improve. This also includes the actual practice of law application, interpretation and clarification by the Ukrainian competition regulator – the Antimonopoly Committee of Ukraine (the "**AMC**").

Aiming to bring transparency to the assessment of mergers involving actual or potential competitors, the AMC approved the Horizontal Merger Guidelines (the "**Guidelines**") at the end of 2016. The Guidelines were developed by the AMC with assistance from the competition institutions of Lithuania, Germany and the USA, and are based on the Horizontal Merger Guidelines of the EU.

According to the Guidelines, the merger assessment by the AMC will include:

- (i) product and geographic market definition and
- (ii) assessment of a merger's impact on competition.

While assessing a merger, the AMC will usually take into account a number of factors, including:

- (i) market shares of the parties to the merger and concentration levels defined by Herfindahl–Hirschman index ("**HHI**") in the markets concerned;
- (ii) potential anticompetitive effects of the merger;
- (iii) the likelihood that buyer power and/or entry of new participants into the market would act as factors countervailing anticompetitive effects of the merger; and
- (iv) conditions for using the "failing firm" defense.

The AMC should approve the merger if the market shares of the parties hereto and/or HHI do not exceed the specifically defined thresholds.

The Guidelines also introduced a number of concepts to the Ukrainian competition framework. Among them are the unilateral and coordinated effects of mergers, countervailing buyer power and the "failing firm" defense. Importantly, the document explains how the AMC will apply the above notions in practice.

While analysing possible unilateral effects of a merger, the AMC will consider possibilities of (i) production cuts and increase in prices in the markets of homogenous products and (ii) establishment of an undertaking able and willing to restrain competition as a result of the merger as well as (iii) customers' preferences and expenses connected with change of a supplier in the markets of differentiated products.

As to coordinated effects, the authority will analyse whether (i) competitors can reach terms of coordination and (ii) whether such coordination will be stable.

The above lists of factors are non-exhaustive and other circumstances may be taken into account, given the particularities of a specific transaction.

The buyer power (as well as market entry by new market players) is specified by the Guidelines as a factor countervailing the anticompetitive effects of a merger. The countervailing buyer power takes effect if the buyer is able (i) to switch to other sources of supply promptly and easily, (ii) to become vertically integrated in the relevant market or (iii) to facilitate an expansion of the market of suppliers or entry of new suppliers into the market.

The "failing firm" defense may be used in case of an acquisition of a company facing financial difficulties, given that (i) the "failing firm" together with its assets will be driven out of the market due to financial difficulties if no acquisition takes place, and (ii) there is no other (less anticompetitive) solution than the proposed acquisition.

Overall, we expect that further application of the Guidelines by the AMC will assist practitioners in finding optimal ways to present the planned mergers to the Ukrainian competition authority.

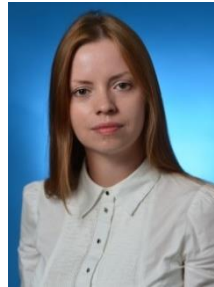
ABOUT WOLF THEISS

Wolf Theiss is one of the leading law firms in Central, Eastern and South-Eastern Europe. Our reputation rests on a combination of unsurpassed local knowledge and strong international capabilities. The first Wolf Theiss office opened in Vienna over 55 years ago, and today our team is comprised of more than 320 lawyers and jurists in different practice areas working from offices in 13 countries throughout the region.

For more information about our services, please contact:



**Taras Dumych**  
Partner  
[taras.dumych@wolftheiss.com](mailto:taras.dumych@wolftheiss.com)  
T: +38 044 3 777 517



**Olga Ivlyeva**  
Associate  
[olga.ivlyeva@wolftheiss.com](mailto:olga.ivlyeva@wolftheiss.com)  
T: +38 044 3 777 500

This alert has been prepared solely for the purpose of general information and is not a substitute for legal advice.

Therefore, WOLF THEISS accepts no responsibility if – in reliance on the information contained in this alert – you act, or fail to act, in any particular way.

If you would like to know more about the topics covered in this alert or our services in general, please get in touch with your usual WOLF THEISS contact or with:

Wolf Theiss LLC  
9A Khoryva Str.,  
Kyiv 04071  
Ukraine

Tel.: +38044 3 777 500  
Fax: +38044 3 777 501

[www.wolftheiss.com](http://www.wolftheiss.com)