TERRALEX®

2016
Pre-Merger Notification Manual

A practical guide to understanding merger regimes in multiple jurisdictions.

UPDATED 2016 EDITION

INTRODUCTION

This TerraLex Pre-Merger Notification Manual has been created to assist all TerraLex members in understanding the merger regimes of jurisdictions in which TerraLex members practice. It has been intentionally drafted with less formality, although not less accuracy, than a guide for general publication. This is with the aim of providing more practical guidance than a more formal publication.

Perhaps of greatest utility, each of the contributors to the Handbook (57 jurisdictions this year) have agreed that they are, subject to conflict issues, willing to provide brief oral guidance to other TerraLex members, as to the likely application of their respective notification regimes to a proposed transaction, on a without-charge basis. Such advice must be both brief and oral, and not be in the nature of a formal opinion, but in the Editors' experience such quick advice on a particular fact pattern can be invaluable. It is often sufficient to determine, on an expedited basis, where merger filings are required.

This edition contains a short reference list that is intended to help sort out the countries where mandatory pre-merger notification duty might apply, even if the nexus to the relevant jurisdiction is low.

Finally, it goes without saying that this Handbook contains advice of a general nature, and is not a substitute for specific legal advice related to particular facts.

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DISCLAIMER

The materials in this handbook are up to date as of May 2016 (except where noted otherwise at the top of the country chapter), and are designed to provide a convenient reference for TerraLex members. They are not legal advice or a substitute for legal advice with respect to any particular factual circumstance, and cannot be relied upon in lieu of legal advice. You should consult with qualified counsel in the relevant jurisdictions for legal advice with respect to particular situations.

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TERRALEX PRE-MERGER NOTIFICATION MANUAL

SHORT REFERENCE LIST

The short reference list shall help to find those countries that require an individual evaluation of per-merger notification requirements. In some countries, the necessary nexus to the respective jurisdictions is very low and the risk to oversee notification duties in such countries is consequently high.

The following questions shall be answered with "yes" or "no". "Yes" means that a notification duty cannot be excluded and the relevant chapter should be consulted. "No" means that no circumstances exist under which a notification duty arises in the case asked for.

The questions asked for in the table below are:

Is it possible at all that a pre-merger notification is mandatory in the respective country, if

1. *none of the parties to the merger is active in that country at all;*
2. *only one party is active in that respective country;*
3. *the target or joint-venture company is not active in that respective country.*

"Active" shall mean any form of activity including turnover in the country, ownership of assets in the country including shares of subsidiaries domiciled in the country.

"Party" usually includes the party to the transaction itself and any undertaking directly or indirectly controlled by the party, any undertaking that directly or indirectly controls the party, and any undertaking controlled by an undertaking that directly or indirectly controls the party.

Country	Filing duty possible, if no party active in country?	Filing duty possible, if only one party active in country?	Filing duty possible, if target / JV not active in country?
ARGENTINA	No	Yes	No
AUSTRALIA	No	No	No
AUSTRIA	No	Yes	Yes
BELGIUM	No	No	Yes
BOLIVIA	No	Yes	No

Country	Filing duty possible, if no party active in country?	Filing duty possible, if only one party active in country?	Filing duty possible, if target / JV not active in country?
BRAZIL	Yes	Yes	Yes[1]
BULGARIA	No	Yes	No - for target Yes - for JV
CANADA	No	Yes	No
CHILE[2]	No	Yes	Yes[3]
CHINA	No	Yes	Yes
CYPRUS	No	No	Yes
CZECH REPUBLIC	No	Yes	No
DENMARK	No	Yes	Yes
ESTONIA	See Chapter		
EUROPEAN UNION	No	No	Yes
FINLAND	See Chapter		

[1] Even if the joint venture is not incorporated and organized under the laws of Brazil, the filing duty is possible whenever such transaction produce effects, whether directly or indirectly, in Brazil. Direct effects are deemed to occur whenever there are local subsidiaries, distributorship or agency agreements, and other associative agreements; indirect effects are deemed as sales through third parties to Brazil.

[2] Merger control is currently voluntary in Chile. However, there is Law Bill soon to be enacted which shall establish a mandatory merger control regime in Chile. We expect this mandatory merger control regime to be operative by 2017.

[3] Only if some of the effects take place in Chile

Country	Filing duty possible, if no party active in country?	Filing duty possible, if only one party active in country?	Filing duty possible, if target / JV not active in country?
FRANCE	No	No	No
GERMANY	No	No	Yes
HONG KONG	No	No	No
HUNGARY	No	No	Yes
INDIA	No	Yes	Yes
IRELAND	No	Yes[4]	Yes
ISRAEL[5]	No	No	No
ITALY	No	Yes	No
JAPAN	No	No	No
JERSEY	See Chapter		
LATVIA	Yes	Yes	Yes
LITHUANIA[6]	No	No	Yes
LUXEMBOURG	No	No	No

[4] Require two active, but low threshold for "activity".
[5] "a party to a merger" is considered as any of the companies/entities included in each of the merging parties' group.
[6] **IMPORTANT NOTE**. Answer to the third question applies in case the „target" and the „JV" includes all associated undertakings of the respective party involved. Otherwise, it could happen so that the specific target is not present in Lithuania (does not derive any income from Lithuania) but its associated undertakings do. In the latter case the notification might be necessary (provided the acquiring company is also present in Lithuania).

Country	Filing duty possible, if no party active in country?	Filing duty possible, if only one party active in country?	Filing duty possible, if target / JV not active in country?
MALAYSIA	No	No	No
MALTA		See Chapter	
MAURITIUS	No	No	No
MEXICO	No	Yes	No
NETHERLANDS	No	No	Yes
NIGERIA	No	No	Yes
NORWAY	No	No	Yes
PERU	Yes[7]	Yes	Yes
POLAND	Yes[8]	Yes[9]	Yes[10]
PORTUGAL	Yes	Yes	Yes
ROMANIA	Yes	Yes	Yes
RUSSIA[11]	Yes	Yes	Yes

[7] **IMPORTANT NOTE**. Regardless of the filling procedure, please consider that per-merger notification is required when the merger involves companies of the electrical sector only. See chapter for further details.
[8] If any of the parties directly or indirectly controls an entrepreneur in Poland and the respective turnover threshholds are reached and there are no grounds for exclusion of the notification.
[9] If the respective turnover threshholds are reached and there are no grounds for exclusion of the notification.
[10] If any of the parties involved directly or indirectly controls an entrepreneur in Poland and the respective turnover threshholds are reached and there are no grounds for exclusion of the notification. In particular where the target or JV has a Polish subsidiary.
[11] Russian anti-monopoly law applies to any kind of transactions (even made between foreign entities outside Russia) or actions which could somehow affect the competitive situation in the territory of Russia.

Country	Filing duty possible, if no party active in country?	Filing duty possible, if only one party active in country?	Filing duty possible, if target / JV not active in country?
SINGAPORE[12]	No	No	No
SLOVAKIA	Yes[13]	Yes[14]	Yes[15]
SOUTH AFRICA	Yes	Yes	Yes
SPAIN	No	Yes	No
SOUTH KOREA	Yes	Yes	Yes
SWEDEN	See Chapter		
SWITZERLAND	Yes	Yes	Yes
TANZANIA	Yes	Yes	Yes
THAILAND	See Chapter		
TURKEY	No	Yes	Yes
UKRAINE	No	Yes	Yes[16]
UNITED	No	Yes	No

[12] Please note that our short answers in the table have been premised on the fact that there is no mandatory pre-merger notification regime in Singapore.
[13] Under Slovak law a concentration is subject to notification if the turnover criteria are met. So, if the required thresholds are met (even without "physical" presence in the local market), the notification is necessary. On the other hand, under the set thresholds (see point 4 of the updated manual) at least one of the parties is anticipated to have turnovers in Slovakia
[14] (e.g. in case of merger or amalgamation)
[15] Target must have the required turnover in Slovakia in any case, but in case of JV being established in Slovakia it is sufficient, if one of the parties creating JV is active here.
[16] However, it is possible only if their affiliated persons, directly or indirectly controlling or being controlled by respective group of companies, are active in Ukraine. Where neither target/JV/JV founders, nor their affiliated persons are active in Ukraine, there is no filing duty. This is according to amendments to the competition law effective from 18 May 2016.

Country	Filing duty possible, if no party active in country?	Filing duty possible, if only one party active in country?	Filing duty possible, if target / JV not active in country?
KINGDOM[17]			
UNITED STATES		See Chapter	
URUGUAY	Yes	Yes	Yes
VENEZUELA	No	No	No
VIETNAM	Yes	Yes	Yes

[17] NB: the UK operates a voluntary merger control system. See Chapter on UK Merger Control.

JURISDICTION: UKRAINE

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Merger Notification Requirements

1. Is there a mandatory merger notification regime?

Yes.

2. Is there a voluntary merger notification mechanism, and if so, what advantages does it offer?

Yes. The parties may apply to the Antimonopoly Committee of Ukraine (hereinafter – the "**AMC**") in order to receive preliminary rulings even if a merger (i) falls below thresholds set forth by applicable legislation, or (ii) specifically exempted from the prior merger clearance in order to remote the risk of post-closing challenge or imposing penalties in case of any subsequent filings related to the same party.

Covered Transactions

3. If there is a mandatory notification system, what types of transactions are caught?

Pre-merger notification is mandatory in Ukraine. The following types of transactions are caught:

(i) the merger or consolidation of a business entity;

(ii) the acquisition of direct or indirect control over a business entity, in particular by means of: (i) acquiring title to those assets comprising the integral property complex or its part (structural subdivision), as well as the rent, lease, concession or acquiring the right to use such assets by other means, including the acquisition of such assets from the business entity being liquidated; (ii) appointing or electing to the top management position of an individual that already holds one of top management positions in another legal entity; and (iii) causing the cross-over of more than half of the members of the supervisory board, management, or another supervisory or executive body of two or more business entities;

(iii) the establishment of a business entity, a joint venture ("JV") by two or more business entities that are independently engaged in business activities for an extended period of time, provided that establishment of such JV is not aimed at, and shall not result in, the coordination of competitive behaviour (i) of its founders; or (ii) of the legal entity and its founders; and

(iv) the direct or indirect acquisition, obtaining of ownership of, or management over, the shares (participation interest) in the business entity, if such acquisition results

in the obtaining of over 25% or 50% of the voting rights of the target business entity.

Thresholds and Jurisdiction

4. If there is a mandatory notification system, what are the threshold tests, above which a notification is required and below which it is not?

In accordance with the very recent amendments to the competition laws of Ukraine effective since 18 May 2016, in case of any transaction indicated in item above, the prior merger clearance is required if:

(i) either aggregate value of assets, or aggregate volume of sales over the last financial year, including those abroad, by participants to the transaction, i.e. the buyer and the target company, taking into account their control relations, exceeded an amount equivalent to EUR 30 million under the exchange rate of the National Bank of Ukraine (hereinafter – the "**NBU'**) effective on the last day of the financial year, and, simultaneously, aggregate value of assets or aggregate volume of sales, including those abroad, over the last financial year by at least two participants to the transaction, taking into account their control relations, exceeded an amount equivalent to EUR 4 million under the exchange rate of the NBU effective on the last day of such preceding financial year;

OR

(ii) aggregate value of assets, or aggregate volume of sales, in Ukraine over the last financial year by the target company, or by at least one of the joint venture founders, taking into account their control relations, exceeded an amount equivalent to EUR 8 million under the exchange rate of the NBU effective on the last day of such preceding financial year and, simultaneously, volume of sales by at least one other participant to the transaction, taking into account its control relations, exceeded an amount equivalent to EUR 150 million under the exchange rate of the NBU effective on the last day of such preceding financial year

The abovementioned concept of "control" originates from the principle of the "possibility to exercise decisive influence" over a company, namely the parties are considered to be connected by relations of control in case of the possibility to exercise decisive influence by way of, among others:

(i) holding or managing 50% or more of shares or votes in a company; or

(ii) designating members of governing bodies, which includes, among others, the right to designate a chairman or more than a half of the members of the supervisory board or management board in a company. The right to designate more than 25% of members to the supervisory board or management board in a company in certain cases also may result in establishment of decisive influence and control, respectively.

Specific rules for calculating the value of assets and volume of sales are applicable when the participant to a concentration is a bank or an insurance company. For banks – 1/10 of the bank's assets for both the assets and sales amounts; for insurance companies – 1/10 of its assets for the assets amount, and all profit obtained from insurance activities for the sales amount.

5. What is the necessary nexus with the jurisdiction to require a filing?

The Ukrainian competition rules apply to any transactions which affect or might affect the economic competition in Ukraine. However, the law does not provide for any specific test for the AMC to determine the actual or possible influence of a foreign-to-foreign transaction on economic competition in Ukraine.

In fact, according to the existing practice, if the parties meet the above thresholds, they should receive the prior approval of the AMC, including in case of any foreign-to-foreign transactions.

Required Information

6. What sort of information is required in a merger notification, and how long does it typically take to compile such information?

Notification includes the application itself, and the annexes to it containing a substantial amount of information and documents, which may be grouped as follows:

(i) corporate documents of the participants. The general requirement for such documents issued outside Ukraine is that they should be notarised at the place of issuance and legalised or apostilled; all documents filed with the AMC should be translated into Ukrainian;

(ii) documents confirming the financial potential of the parties – same requirements as with corporate documents;

(iii) information related to the parties, taking into account their control relations, including registration data, officers and amount of shareholdings or votes, and their commercial activity, both worldwide and in Ukraine, that includes, without limitation, their turnover data, data on the main suppliers, customers and competitors of each company from the groupings active in Ukraine; information on affected markets, if any, and market shares for the two years preceding the year of notification; information related to the transaction structure, etc.;

(iv) documents and information related to the contemplated transaction: a draft merger agreement or other documents the transaction is based on, means of financing of the transaction, etc.:

(v) the economic substantiation of the merger; and

(vi) information regarding beneficial owners of the parties of the transaction, and documents confirming the respective relations of the companies – parties of the transaction are registered in offshore states.

The AMC may request additional information, provided that the given information and documents do not suffice. Usually, it takes 14-21 days to compile the information required for filing.

Furthermore, the parties to the transaction falling under merger clearance thresholds shall file certain parts of their applications with the AMC, e.g. information on the participants of the transaction, their relations of control, activity and officials, using special software. The respective software provides for the establishment of an electronic database, available only at the AMC's disposal, which contains unified information on the relation of control for all merger clearance and concerted actions applicants that have ever applied to the AMC.

To note, a new AMC regulation on filing procedures is anticipated to be published and become effective in the nearest months. The last draft of the said regulation available provided for substantial cut in information volume, especially in respect of foreign-to-foreign transactions, and also cancels the necessity to use special software mentioned above. At the same time, the economic substantiation of the merger would be much more complicated, transaction charts and documents to confirm the financials of the transaction would be also required.

7. Are there ways to minimize the required information filing?

Applicants, especially in the case of foreign-to-foreign transactions and an absence of overlapping markets, may ask the AMC to release them from filing some information, and provide the AMC with sufficient reasoning that respective information does not influence the AMC while granting or rejecting prior approval. Generally, the AMC will not require detailed information on non-overlapping product markets.

Fees

8. Are there fees with respect to merger notification?

Yes.

The fee for notification amounts to 1200 non-taxable minimum personal incomes, which is currently equivalent to approx. USD 800.00. There are no exceptions or reductions of this fee. Preliminary ruling – 880 non-taxable minimum personal incomes – approx. USD 600.00.

Deadlines

9. Is there any deadline within which a notification must be filed, and what is the earliest time a filing may be effected?

There is no specific deadline for application (see also item 10 below).

The parties may file the notification at the stage when they agree the substantial terms and conditions of the transaction, in particular, the transaction structure, participants and financial matters.

The parties may file a draft merger agreement to the AMC with a signature of at least one party, as a rule. Based on the existing practice, it is also possible to provide a letter of intent or memorandum of understanding. However, it is very likely that the AMC would request draft agreement. The applicable legislation does not establish any peculiarities of notification timeline with respect to the public offers or bids.

The merger clearance is given by default for a year, however, the longer period may be fixed by the AMC in its decision on granting clearance. If parties do not close the transaction within the period of time the clearance is given for, they have to file the transaction once again.

Waiting Period

10. If there is a mandatory notification system, are the parties required to wait a certain period of time before completing the transaction, or can the transaction proceed without a waiting period?

The main requirement is that the closing, both Ukrainian and global, of the contemplated transaction may not occur before obtaining the AMC approval, where required.

Time Frame

11. What are both the statutory and the practical time periods necessary in order to "clear" a transaction?

Ukrainian merger clearance procedure takes up to forty-five (45) days – Phase I:

(i) filing of notification;

(ii) acceptance of the notification – the notification is accepted if the AMC issues no refusal to its acceptance within 15 calendar days – the date of filing plus 15 calendar days; and

(iii) obtaining the AMC's approval – acceptance of the notification plus 30 calendar days.

In practice, the AMC would normally issue the approval within 30 calendar days from the date of notification.

If upon expiration of 30 calendar days after acceptance of application the AMC does not decide upon the transaction, it is considered as cleared, i. e. the AMC prior approval is granted.

The fast track procedure of twenty-five (25) days from the day of the merger clearance application receipt by the AMC will be available in case of a contemplated transaction where:

(i) only one party operates in Ukraine; or

(ii) the aggregate parties' share in any market is less than 15%; or

(iii) the aggregate parties' share in any adjacent markets is less than 20%.

If more in-depth investigation is required with respect to the transaction, the AMC may initiate Phase II, which commences only upon providing the AMC with a full set of additionally requested information and documents, and shall not exceed three months. Together with the time period when requested information and documents are being prepared by the parties, Phase II shall not exceed six (6) months.

Sanctions

12. What are the consequences of failing to notify if a transaction is in excess of the relevant thresholds, or closing a transaction without notification, or before the expiry of the waiting period?

If the AMC detects the parties' failure to notify, when required, including cases where concentration has minimal or no effect on Ukrainian competition, the following negative consequences may entail.

(i) Fine of up to 5% of the total worldwide turnover of the parties in the year preceding enforcement of the fine. Limitation period for such fines in Ukraine is 5 years. It is a common practice of the AMC.

In practice, the maximum amount has never been imposed in the case of a foreign-to-foreign transaction, and generally the amounts of fines have been rather moderate given the minimal effect on competition in Ukraine. However, if the AMC discovers the failure to file itself or upon information provided by a third party, the AMC may consider that the parties to concentration are acting in "bad faith", which may negatively affect the amount of fine to be imposed and the AMC's attitude in respect of future transactions involving the parties concerned. Such amounts are also significantly higher if defaulting parties reject to cooperate with the AMC. In case no overlapping markets between the participants in concentration, the AMC, according to its own recommendations, imposes fine in the amount from 10 to 30 thousand non-taxable minimum personal incomes, which is currently equivalent to approx. USD 6,800.00 and USD 20,500.00 respectively, In case there were overlapping markets, however, the concentration has not distorted the competition, the AMC imposes fine from 30 thousand non-taxable minimum personal incomes, which is currently equivalent to approx. USD 20,500.00, up to 5% of the sales in the markets involved in concentration and adjacent markets for the period from closing to filing or other action to mitigate the consequences of violation, or for last financial year is no such action was taken.

Moreover, starting from 15 September 2015, the AMC introduced so-called the "fine amnesty" for those who applied for clearance to transactions already closed before the mentioned date. Till 15 April 2016 a fixed fine amount was approx. USD 850.00, and from that date to 15 September 2016 it constitutes approx. USD 4,250.00. The amnesty regime does not apply to those companies, which closed their transactions without necessary merger clearance permit, and such violation has been revealed by the AMC. Thus, during this year a lot of companies, which failed to obtain a necessary merger clearance, have applied to the AMC for the merger clearance to the transactions closed with the mentioned violation. The overwhelming majority of them have been granted with the respective AMC's approval and get their closed transactions cleared after payment of the fixed fine in the above-mentioned amount. Since the mentioned amnesty is quite popular among the business community, the AMC may consider its extension for another year.

In any case, imposition of a fine does not release the parties concerned from obtaining a post-closing approval.

(ii) Invalidation of the transaction by the court, if the AMC proves that respective transaction harmed competition in Ukraine. A rather theoretical risk.

(iii) Recovery of double damages, if any, incurred by any third party as a result of the unauthorized transaction. Happens very rarely.

(iv) Export or import ban, if the imposed fine is not duly paid by the defaulting party. Happens extremely rarely, a rather theoretical risk.

(v) Publication of the information on the defaulting parties at the AMC official web site. Common practice of the AMC.

(vi) Ukrainian law does not provide for criminal liability.

Please also see item 15 below.

Post-Closing Challenges

13. If the statutory waiting period expires without a challenge, is there any possibility of post-closing challenge?

Generally, no. If the transaction has been reviewed and approval is granted, post-closing challenge is very unlikely. However, there are some grounds when the AMC may challenge the transaction cleared with the AMC, e. g. in case it discovers that information on transaction provided for its review was not accurate or complete.

14. Are there ways to protect a transaction from post-closing challenge?

Yes. Even if merger clearance is not required, the parties may still receive preliminary ruling of the AMC confirming that contemplated transaction does not require Ukrainian merger clearance. While such preliminary ruling does not preclude from any further challenge of the transaction, as a practical matter, transaction which has been not challenged by the AMC within review period will not be subjected to subsequent challenge.

Competent Agency

15. What is the nature of the Agency which reviews merger transactions, and what are its powers to move against anti-competitive transactions?

The authorities responsible for reviewing merger transactions are:

(i) the AMC; and

(ii) the Cabinet of Ministers of Ukraine (hereinafter – the "**CMU**") – to the extent provided under the laws of Ukraine.

A transaction which is closed without merger clearance is legally binding on, and fully enforceable against, the parties. The AMC may apply to the court in order to recognize the transaction invalid, given the parties' failure to receive prior AMC approval, if such failure has adversely affected, or could adversely affect, the competition in Ukraine. However, we are unaware of any cases regarding the foreign-to foreign transactions when the court, at the request of the AMC, held invalid the transaction that required the merger clearance. On the contrary, there are many cases when the AMC has issued approval to transaction that was already closed, but has imposed the fine as envisaged by law.

Confidentiality

16. What level of confidentiality does a merger notification filing enjoy?

In accordance with the very recent amendments to the competition laws effective since 03 March 2016, the AMC is obliged to publish all their decisions, including, those in relation of granting the merger clearance permit. The AMC may publish certain information on the transaction, subject to merger clearance, and on the parties concerned. Considering that the transaction parties are usually very sensitive in disclosure of certain key commercial information, they may indicate that the information, in whole or in part, they file with the AMC is confidential; the AMC will normally not publish or otherwise disclose such information. In particular, the parties may identify the information they furnish to the AMC as "information with limited access", which means the AMC has an

obligation to keep it strictly confidential if parties provide sufficient substantiation of a confidential nature of this information. Also, the parties may furnish the limited access information separately from each other.

Moreover, if the applicant labels the merger clearance application as "information with limited access", the AMC officers, shall, before publishing any information in respect of the contemplated transaction, discuss such publication with the respective parties.

Substantive Appraisal

17. Are there any rules of thumb or general guidance as to when mergers are likely to face challenge?

The AMC grants its approval as long as the transaction does not result in the emergence of a monopoly in the affected market or materially restrict competition in the affected market or in its substantial part. In the case of overlapping markets, the emergence of a monopoly is tested through the expected aggregated market shares. The entity holding 35% and more in the market may be considered as having a monopoly position in the market.

The AMC considers competition issues only, including consumers' protection. The public interest is of substantial concern when the merger is assessed by the CMU.

As of the current date, no guidelines on the approach to substantial merger assessment are available. Generally, if aggregated market share less than 35 %, the merger is unlikely to be challenged.

Practical Recommendations

18. What is the typical or recommended approach in dealing with the reviewing agency?

It is advisable to file notification at earliest stage as possible and within 15 days reviewing period, i.e. from the date of filling application until its acceptance for consideration, – to communicate with representatives of the AMC in order to avoid application being rejected from consideration on some technical basis.

Other Notifications

19. Other than antitrust/competition review, are there other investment controls or similar regimes to be aware of?

Generally, there are no other investment control or similar regimes applicable to merger transactions. However, depending on the type of activities conducted by the relevant persons, e. g. banking, finance, telecommunication, additional approvals from different state authorities may be required. Moreover, such persons are usually subject to specific foreign ownership controls.