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GETTING THE
DEAL THROUGH 

Merger Control

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enforcement?

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global interview panel*

2018

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Welcome to GTDT: *Market Intelligence*.

This is the 2018 edition of *Merger Control*.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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MERGER CONTROL IN UKRAINE

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GTDT: What have been the key developments in the past year or so in merger control in your jurisdiction?

Vladimir Sayenko, Valentyna Hvozd and Julia Kuyda: Ukraine's merger control laws have continued to undergo a positive transformation in line with the overall competition law reform launched by the commissioners of the Antimonopoly Committee of Ukraine (AMC), appointed in 2015. The most noticeable development took place in 2016, when financial thresholds previously criticised for their inadequately low level and lack of local nexus were increased and improved. Less noticeable but even more important changes in terms of day-to-day practice were introduced to the implementing regulations of the AMC, eliminating numerous formalistic requirements and introducing substantive economic analysis in potentially problematic cases.

In 2017, the merger control laws were further amended, allowing the AMC to reject applications by those undertakings that are subject to sanctions, primarily in connection with the Russian occupation of Crimea and the Donetsk region of eastern Ukraine. The AMC also published its Guidelines on the Assessment of Horizontal Mergers, which are, to a significant extent, aligned with European guidelines. In addition, the AMC continued to make changes to its fining guidelines, which allow undertakings to predict the amount of the fine based on the relevant turnover and various coefficients.

Following the rapid decrease of the annual number of merger clearances to 441 in 2016 (compared to an average of about 1,000 in previous years), 2017 saw this number rise to 602. This almost 50 per cent increase can be explained by a rise in M&A activity in Ukraine, especially in the agricultural sphere, where the number of clearance decisions accounted for over 25 per cent of the total figure for 2017 (155). In addition, the amnesty programme introduced by the AMC at the end of 2015 and prolonged until March 2017 also left its imprint, as a considerable number of the amnesty applications filed in 2016 were reviewed and finally cleared in 2017. A decrease in the number of merger filings can be expected once the laws are amended to eliminate the current practice when the filing is triggered simply owing to the activities of the seller's group in Ukraine, while other parties have no connection to Ukraine whatsoever. Furthermore, the AMC continues to treat complex multistep transactions as separate notifiable events, irrespective of the economic substance of the deal in question. This approach requires the applicants to either properly structure the transaction in its initial phase or submit multiple applications and receive multiple clearance decisions in connection with one transaction. It is likely that this practice will cease to exist in future.



Vladimir Sayenko

Finally, it is fair to note that the AMC is improving its internal processes of communication with the applicants and working to make its decisions more predictable. For example, in the past, one of the biggest risks that affected the timing of clearance was the common practice of the AMC to return filings as being incomplete, often on artificial grounds. In 2017, the AMC returned only 64 notifications because of their incompleteness, while the respective figure for 2016 totalled 106. In practice, this means that the procedure of preliminary consultations introduced in 2016 effectively allows the applicants to clarify the scope of information and documents to be submitted to the AMC and to check their completeness beforehand in order to avoid unexpected delays in the review process.

Moreover, the number of Phase II investigations decreased from 54 cases in 2016 to 11 in 2017. These figures are fully in line with the message communicated by the new leadership of the AMC that the agency is more interested in quality than quantity.

GTDT: What lessons can be learned from recent cases to help merger parties manage the review process and allay authority concerns at an early stage?

VS, VH & JK: Since 2015, the AMC has demonstrated unprecedented transparency and openness for communication with parties in non-contentious matters. Its decisions are now publicly available, together with guidelines that demonstrate how it conducts its analysis and calculates fines. It is very important for market players and their legal counsel to monitor the latest practices of the AMC and to be in constant



communication with the case handler's team in order to promptly deal with any requests for additional information and other questions that inevitably arise in the review process.

Historically, the AMC has always been good at meeting formal deadlines. This is particularly true of the 45-calendar-day review period in Phase I merger reviews. Some procedural tricks allowed officials to delay the process, where necessary, without breaking any rules, including by returning the application for allegedly being incomplete or by opening Phase II proceedings because of the supposed complexity of the case. These practices have been largely eliminated in recent years, significantly improving the predictability of the process and reducing the burden on the applicants.

Furthermore, based on 2016 legislative amendments, the AMC has introduced a fast-track review procedure that allows clearance within 25 calendar days based on a reduced volume of documents in simple cases. However, the eligibility for the fast-track procedure encompasses numerous uncertainties. One criterion is clear: applicants can benefit from the fast-track option if only one party is active in Ukraine. However, application of the other criteria based on market shares (combined market share of the parties on the same product market in Ukraine should not exceed 15 per cent) is more uncertain. For example, the position of the AMC is that fast track is not available if any party (even the seller) has a market share exceeding 15 per cent on any product market in Ukraine, irrespective of the absence of overlap or even complete absence of the buyer's activities in Ukraine.

In practice, controversies surrounding eligibility for the fast-track option may have a negative impact on the timing of the review process. If the AMC does not agree with the parties' arguments

it will deal with the notification under the regular procedure, which, as stated, usually means that it will return the filing as being incomplete. The solution in this scenario is to prepare in advance and promptly file the additional information required for the regular review procedure. Otherwise, the return of the notification would require the parties to refile the full package, restarting the clock for the 45-day review period. This problem is supposed to be resolved by legislative amendments that are currently being reviewed by the Ukrainian parliament, together with an extended list of criteria for fast-track eligibility.

GTDT: What do recent cases tell us about the enforcement priorities of the authorities in your jurisdiction?

VS, VH & JK: Traditionally, the AMC pays close attention to socially important and highly concentrated markets, such as pharmaceuticals, telecommunications, fast-moving consumer goods, oil and gas, tobacco and energy. In the pharmaceutical industry, for example, the AMC imposed a fine on pharmaceutical producer Sanofi and two of its Ukrainian distributors, declaring that some vertical agreements that were considered normal market practice in the distribution industry were illegal. In parallel with the investigation of pharmaceutical companies, the AMC also tend to analyse all merger deals involving the pharmaceutical industry more thoroughly, including within the Phase II review. Applicants notifying a merger in the pharmaceuticals sector should be prepared to answer a number of additional questions from the AMC and to collect extensive market data relating to their operations in Ukraine.

The new leadership of the AMC (appointed in 2015) devotes a lot of attention to international cooperation. There is a significant amount of formal and informal contact with the competition authorities from other jurisdictions, including during exchanges, training programmes and conferences. The AMC's officers constantly monitor the press releases and websites of other agencies worldwide (mainly the European Commission and the Federal Trade Commission). Should any officer come across familiar brands involved in a deal, the AMC will contact the parties (usually big multinational corporations) requesting confirmation of whether a particular deal was closed without merger clearance in Ukraine.

The highest fine for a merger control violation – €100,000 – was imposed in 2016 on an undertaking active in the oil and gas sector. Interestingly, this fine was imposed in a gun-jumping context, when the buyer appointed some of its officers to executive positions within the target company before merger clearance. Under Ukrainian law, such cases are qualified as concentrations in the form of acquisition of control via appointment of management occupying similar positions in the acquirer's corporate bodies.

In general, the AMC tries to increase fines for merger control violations in order to have a greater deterrent effect. However, it is fair to say that fines are still very far from the legally permitted maximum of 5 per cent of the annual worldwide turnover, as merger control violations are deemed to have lower social importance than cartels, abuses of dominance and some other typical antitrust violations.

GTDT: *Have there been any developments in the kinds of evidence that the authorities in your jurisdiction review in assessing mergers?*

VS, VH & JK: A clear shift towards increased use of economic analysis and economic evidence occurred in 2015–2016. Prior to that, it was merely a formality. Now the AMC insists on intense market analysis to be included in the notification submission, except for transactions qualifying for fast-track review. In particular, the applicants are obliged to provide detailed analysis of market structure, competitors' market shares, information on exports and imports, distribution chain, demand and supply structure, market barriers, and customers and suppliers. However, one major improvement compared to the previous regime is that this market analysis is limited to the relevant markets and there is no longer a requirement to disclose detailed information on unrelated markets where certain companies of the group are active. Moreover, the AMC is appreciative when market analysis uses market reports from trustworthy analytical agencies that conduct independent market studies.

In complicated cases, the AMC usually contacts independent external specialists to obtain expert opinions on the market environment and potential influence of the proposed concentration on competition. In practice, it usually reaches out to other state bodies or state marketing agencies, depending on the area under examination. In some cases, it may even contact a university professor to get a professional opinion on a specific market. At the same time, given that such independent external specialists are usually state authorities, their involvement in the process may cause delays to the review process. For this reason, it is usually more efficient for the parties themselves to order a market study from an independent expert agency respected by the AMC.

While conducting Phase II reviews, the AMC launches public surveys in order to seek the opinion of the consumers and the competitors of the merging parties. A third-party opinion is not only taken into consideration in the review process, but also may be quoted in the decision when describing the potential effect of the concentration on the Ukrainian market. These market surveys also impose certain timing delays on the overall process, as they usually last from two to four weeks and additional time is necessary for the analysis of the results.

Julia Kuyda



GTDT: *Talk us through any notable deals that have been prohibited, cleared subject to conditions or referred for in-depth review in the past year.*

VS, VH & JK: At the end of 2016, the AMC approved guidelines for the assessment of horizontal mergers (the Guidelines). The Guidelines were developed by the AMC on the basis of the EU Horizontal Merger Guidelines, with contributions from top Ukrainian law firms and representatives of competition authorities in Germany, Lithuania and the United States. The Guidelines aim to increase the transparency of the assessment of horizontal concentrations by the AMC.

The Guidelines were tested by the AMC for the first time shortly after their adoption at the beginning of 2017, while reviewing HP Inc's US\$1.05 billion acquisition of Samsung Electronics Co, Ltd's global printer business. Despite the fact that the combined market shares of the parties in the market of regular format printers did not reach the monopoly threshold (35 per cent under Ukrainian competition law), the activities of the parties overlapped and the AMC insisted on further segmentation of the market, which demonstrated significant market shares of the parties in some subsegments. The AMC initiated a Phase II review as it considered that the anticipated deal may have a negative impact on competition in the relevant Ukrainian markets and may be subject to prohibition. While analysing the deal, the AMC took into account the numerous factors and arguments of the parties. Thus, as a result of the Phase II investigation, it came to the

THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

One of the key skills a legal adviser should have in merger control proceedings is profound knowledge and comprehensive understanding of economic theory, in addition to knowledge of the law. This allows the adviser to define the market, the geographic and commodity boundaries, interchangeability criteria, etc. It is also crucial for the adviser to organise an effective communication channel between the parties and the regulator. On one hand, representatives of the business must understand the views of the regulator and the reasoning behind the issues raised. This allows the parties to predict some major issues beforehand, and allows them sufficient time to prepare properly, and to avoid unexpected courses of action. On the other hand, it is vital for the regulator to understand the parties' business model.

What are the key things for the parties and their advisers to get right for the review process to go smoothly?

In order for the merger review process to go smoothly, the client should be flexible and ready to listen to the regulator's arguments with respect to market definition, boundaries, interchangeability of products, etc. This can be achieved through preliminary consultations and constant dialogue with the handling officer and superiors. For those clients who follow the regulator's advice and are ready to

provide the requested information, the review process will be much smoother. An aggressive approach sometimes helps in antitrust investigations, but it does not help in merger clearance.

What were the most interesting or challenging cases you have dealt with in the past year?

In 2017, Sayenko Kharenko secured 116 clearance decisions for mergers of businesses in all parts of the world. Perhaps the most challenging was the clearance for HP Inc's acquisition of Samsung Electronics Co, Ltd, where we managed to convince the AMC to issue the clearance decision without any remedies despite a lengthy and complex investigation. We supervised a number of other outstanding deals such as the combination of container liner shipping assets of Maersk Line A/S and Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG, where we represented both parties. We also supported private equity investors Bain Capital and Cinven in their acquisition of German pharmaceutical group Stada, which was an enjoyable and interesting experience even though the regulator closely scrutinised the Ukrainian pharmaceutical sector.

Vladimir Sayenko, Valentyna Hvozdz and Julia Kuyda
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conclusion that the parties will continue to face strong competition in the regular format printers market in Ukraine, both distributors (retailers) and end consumers enjoy strong buying power in the relevant market, the market is well developed, and supply exceeds demand. The AMC concluded that the implementation of the said transaction would not raise any anticompetitive concerns. Clearance for this transaction was granted without any remedies in Ukraine despite a long and complex investigation.

Overall, the implementation of the Guidelines had a positive effect in 2017. Only 11 concentrations were referred for in-depth review (the equivalent of Phase II proceedings in the EU), and no concentrations were prohibited.

GTDT: *Do you expect enforcement policy or the merger control rules to change in the near future? If so, what do you predict will be the impact on business?*

VS, VH & JK: It is expected that some changes will be made to Ukrainian merger control laws in 2018. A number of statements were made by the senior officials of the AMC to confirm that the agency

is working on the further adjustment of financial thresholds for merger control, including removal of the seller from the calculation of turnover and assets, as recommended by the Organisation for Economic Co-operation and Development in its 2016 Review of Competition Law and Policy in Ukraine. As mentioned previously, lawmakers suggest extending the list of criteria when a transaction could qualify for fast-track review (eg, if the parties have no overlaps or if control changes from joint to sole assuming that joint control was achieved in compliance with Ukrainian competition law). Further changes are expected in the AMC's guidelines for the calculation of fines. There may also be changes in the treatment of non-compete obligations, which are common in M&A deals and now require a separate filing to the AMC for approval of concerted practices.

Some of these initiatives will require a legislative amendment, while others can be implemented by the amendment of the AMC's regulations. The timing of implementation of the aforementioned initiatives is not certain, as the AMC has a long list of planned competition law reform going far beyond merger control.

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