

# market intelligence

GETTING THE  
DEAL THROUGH 

## Merger Control

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# 2019

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# market intelligence

Welcome to GTDT: *Market Intelligence*.

This is the 2019 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.

*Market Intelligence* is available in print and online at  
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# MERGER CONTROL IN UKRAINE

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Maksym Nazarenko is a partner at Sayenko Kharenko, focusing on antitrust and competition matters, with more than 15 years of legal practice. Maksym has extensive experience in antitrust law issues related to multinational and domestic M&A and joint ventures, including merger and ancillary restriction clearances with the AMC. He regularly advises clients on a wide variety of antitrust law matters involving merger control, concerted practices in agreements, cases on cartels, abuse of dominance and unfair competition. Maksym acts regularly for clients in the agriculture, automotive, banking, chemicals, electronics, FMCG, food and beverage, heavy machinery, insurance, IT, pharmaceuticals, retail, shipping, tobacco and transportation sectors, such as AB InBev, Actavis, Bayer AG, Boehringer

Ingelheim, Hewlett-Packard, Kimberly-Clark, Lufthansa, Japan Tobacco, Maersk Line, Novartis AG, Samsung, Sanofi, Solvay, Philips and Western Union. His recent experience includes advising AB InBev on its acquisition of SABMiller (deal value US\$103 billion), DuPont on its merger with DOW Chemicals (deal value US\$130 billion) and Maersk Line on its acquisition of Hamburg Süd (deal value €3.7 billion).

Valentyna Hvozd is a counsel at Sayenko Kharenko. She focuses on antitrust and competition matters, advising clients on a wide range of antitrust law matters, including merger control, cartels, abuse of dominance, antitrust investigations and advice, distribution agreements, and unfair competition. She has extensive experience advising multinational and domestic clients on complex and high-profile cases, including AbbVie Inc, Shire plc, Archer Daniels Midland Company, Procter & Gamble Co, Dell, EMC, Merck KGaA and Solvay.

Julia Kuyda is a senior associate at Sayenko Kharenko. She regularly advises clients on a wide variety of antitrust law matters involving merger control, cartels, abuse of dominance and unfair competition. She has been involved in a number of complex transactions requiring competition clearance from the Ukrainian regulator, including for AB InBev, Boehringer Ingelheim, Glencore, HP, Imerys, Maersk Line, Sandvik and Syngenta.



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

**Vladimir Sayenko, Maksym Nazarenko, Valentyna Hvozda and Julia Kuyda:** In line with previous years, the Antimonopoly Committee of Ukraine (AMC) continued reforming and improving Ukrainian competition laws, including merger control rules, in accordance with the best practices around the world.

During the year, the authority drafted and introduced a number of regulations and guidelines to bring more clarity to fundamental merger control issues. The most notable development was the AMC's guidance on the notion of control. This document provides business and its advisers with comprehensive descriptions of various types of control and how the authority interprets the control concept. It is fair to note that such guidance was inspired by the relevant Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 of the European Commission (EC), and is therefore easily comparable with the approaches applied by the latter. The AMC also introduced block exemptions for technology transfer agreements called on by the European Union. Finally, draft changes were introduced to the existing Regulation on Concentration allowing for the abolition of the seller's financial results in merger control assessment.

In terms of statistics, 2018 saw a decrease in the number of merger filings submitted to the AMC, from 666 in 2017 to 532. The authority explains this 20 per cent decline as a downstream trend owing to the fact that a lower number of complex global transactions (requiring multiple approvals) were performed last year. The AMC vehemently continues to treat complex multistep transactions as manifolds of separate notifiable events, notwithstanding their economic substance. Applicants are therefore still required to submit multiple applications and receive multiple clearance decisions clearing one deal. The alternative way out for applicants in Ukraine is to structure the transaction properly in its initial stage in order to avoid multiple submissions. To illustrate, in 2018, five such transactions encompassing from eight to 29 applications per transaction were approved, while, in 2017, 18 multistep deals were reviewed by the authority.

As usual, foreign applicants took the lead and filed 314 applications out of 532 in 2018. The final amount of mergers approved by the AMC in 2018 constituted 447. According to the Annual Report of the AMC, 79 out of 532 notifications were returned as incomplete. Almost 90 per cent of notified mergers were cleared within Phase I. Contrary to the decrease in notifications submitted, there was a clear increase in the number of Phase II investigations, from 11 cases in 2017 to 25 cases in 2018. Not all in-depth investigations were

finalised successfully. The competition agency did not complete its review and, therefore, did not clear six out of 25 cases, three of which concerned parties subject to sanctions.

Meanwhile, the AMC continued working with the business community and its counsel on questionable issues. In particular, the AMC issued 41 preliminary conclusions clarifying whether or not a particular transaction required notification under the circumstances described by the parties. Such preliminary conclusions enable the parties to comply with Ukrainian competition law and to proceed with filing where necessary.

In 2018, the most popular sectors applying for AMC approval were the agriculture, chemical products, finance and insurance sectors.

**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, MN, VH, & JK:** 2018 saw the development and release by the AMC of important guidance explaining how the competition authority will assess non-horizontal mergers and define the notion of control. The AMC's guidance on assessment of non-horizontal mergers provides merging parties and their legal counsel with an understanding of criteria applied by the AMC for the purpose of assessment of possible anti-competitive effects of non-horizontal mergers and its treatment of conglomerate concentrations (ie, those where the parties do not compete with each other on any product market and, at the same time, have no incentive to be involved in vertical relationships). In its guidance on the notion of control, the AMC explains various ways of acquiring control, peculiarities of sole and joint control, aspects of change of control and the means to determine whether control is present or not. Taking into account the significance to determine existence or absence of control between certain entities at the very early stages of merger assessment, this guidance is a key tool for applicants and their advisers to be applied in the process of assessing the reportability of mergers and notification preparation.

Despite the important developments described above, some issues remain unresolved. For instance, the position of the AMC on certain criteria when applying for a fast-track review procedure is still unclear. Even if there are no overlaps between parties and the target does not conduct business activity in Ukraine, the AMC might decide to review the notification under the regular procedure if the combined or individual market share or the market share of the parties on any Ukrainian market exceeds a 15 per cent threshold. The parties and their advisers should therefore take into account this uncertainty when deciding whether or not to file under a fast-track procedure.

Vladimir Sayenko



Maksym Nazarenko



During Phase I merger review, the AMC usually sticks to formal deadlines established by Ukrainian competition law, which constitute 25 calendar days for review under a fast-track procedure and 45 days for regular review procedure from the submission date. However, parties need to take into account the inconsistency in deadlines for Phase II review set by the Regulation on Concentration and the Law of Ukraine 'On Protection of Economic Competition'. In particular, in case the AMC estimates that it will not be able to make a decision within 135 days from the date of sending Phase II notification stipulated by the Regulation on Concentration, it may stick to the deadline for Phase II review established by the Law of Ukraine 'On Protection of Economic Competition', in particular, three months from the date of submission by the parties of all information requested by the AMC or receipt of the expert's conclusion. While this does not happen on a regular basis, there were few precedents when the AMC decided to extend the Phase II review deadline beyond 135 days as prescribed by the Regulation on Concentration.

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

**VS, MN, VH, & JK:** The previous highest fine for failure to clear a notifiable transaction was imposed by the Ukrainian competition agency in December 2016 (approximately €100,000) and took the top position for almost two years, while in November 2018 the AMC broke this record and imposed the highest fine to date – approximately €500,000. The fine was imposed on Serhiy Kurchenko for his acquisition of control over Brokbusinessbank. This is the first precedent when the AMC imposed a fine on an individual as the ultimate beneficiary owner of an acquisition undertaking. The investigation of this case lasted for several years and was conducted in cooperation with the Prosecution Office of Ukraine and the National Security Service of Ukraine. Such collaboration allowed the AMC to

obtain evidence of a control chain and to identify the ultimate beneficial owner as the acquirer.

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

**VS, MN, VH, & JK:** The AMC always aims at complete comprehensive assessment of each concentration before adopting a decision. In accordance with Ukrainian competition laws, the AMC has the discretion to call for an expert examination either on its own initiative, or at the request of any party to a concentration. At the same time, recent practice shows that the AMC is also ready to consider expert examination called by the parties themselves, which was conducted without the approval of the AMC.

For example, in a recent Phase II case investigation the AMC accepted an expert examination (market study) arranged by the parties independently, as evidence and as the basis for its further decision. The reason for this was that the relevant market was quite specific and relatively small; the relevant market was unfamiliar to the AMC; public sources contained very little information on the relevant market; and the parties could potentially exploit the AMC's lack of awareness to interpret the relevant circumstances for their own benefit.

This independent expert examination clarified market volume figures, sizes of market players' shares, influence of import on the relevant market, structure of demand and supply, existence of significant buyer power, etc. Given the reasons indicated above, this examination played a key part in assessment of the concentration and allowed the AMC to adopt a weighted decision on approval of the concentration.

In cases when the AMC has limited information on the relevant market, submission of an economic expert's opinion may be an extremely helpful instrument for the parties to elaborate the review process. At the same time, expert economic opinions in some cases can be the only reliable source of market information and, subsequently,

Valentyna Hvozda



Julia Kuyda



can play a vital role in assessment of concentration by the AMC.

As to the influence of third parties, the AMC, when initiating a Phase II case investigation, completes a public survey in order to learn opinions of third parties regarding the concentration under Phase II review. The influence of such surveys is not obvious and may differ from case to case.

At the same time, within certain Phase II case investigations, the AMC sends requests for information directly to other relevant market players in order to collect more objective market information. Information collected in such a way can be helpful for the AMC, and may therefore exert huge influence on concentration assessment and, subsequently, on the outcome of its review.

***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, MN, VH, & JK:** As indicated above, 2018 saw a considerable increase in the number of Phase II investigations, namely, 11 cases in 2017 versus 25 cases in 2018. At the same time, none of these investigations resulted in either commitment from the parties (whereas three in 2017 did) or prohibition of any transaction.

While in past years the AMC has tended to impose behavioural remedies on the parties in complicated deals with a large market share in Ukraine, 2018 showed a completely different picture. The authority continued to pay much attention to those deals that could potentially result in monopolisation of the Ukrainian market, which was demonstrated by the more than double increase of Phase II investigations initiated by the AMC. However, in those transactions where the results of in-depth investigations confirmed the absence of harm for competition and the absence of need to levy structural remedies on the parties, the AMC followed a more business-oriented approach and avoided imposing behavioural remedies on the parties. Recent AMC practice

had shown such behavioural remedies to be ineffective. At the same time, in most cases they resulted in an additional burden on business, obliging it to prepare long and complicated reports requiring the engagement of numerous departments and business units. Considering all these factors and European practices, the AMC has essentially changed its approach towards Phase II cases.

At the same time, it is worth mentioning that the authority did not complete the review of all Phase II cases in favour of applicants. Last year, six out of the 25 cases remained without an AMC decision. Three of these cases related to transactions where notifying parties were subject to sanctions in Ukraine. These were obvious candidates for not obtaining the respective decisions, as the AMC is not allowed to accept or review such types of applications under the law.

In some Phase II investigations, the AMC behaved proactively and managed to reduce the review period to about one-third of the statutory review period, allowing the parties to achieve expected efficiencies from the merger. The deal concerned the sale of a controlling interest in EVO Group, which is operating marketplaces in Ukraine, Belarus, Russia and Kazakhstan, by Naspers Group to Rozetka. Following recent precedents from other European jurisdictions, the AMC decided to change its previous approach to market definition for the services provided by marketplaces and to examine the potential impact on the e-commerce market, where Rozetka is a strong local player. The parties provided extensive explanations on the competition that they face from other marketplaces, classifieds, aggregators, social networks and other similar services. The AMC held an unprecedented number of hearings and consultations in order to clarify the peculiarities of the relevant market, which was then defined as the state-wide market for the provision of services for the promotion of goods (services, works) on the internet via online platforms. The Ukrainian competition agency demonstrated a high level of efficiency in this rather hefty deal involving rapidly developing

# 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 to enable the smooth flow of the merger review process, advisers have to keep in mind all peculiarities of the anticipated transaction beforehand, including obtaining multiple approvals if necessary. They must be ready to react promptly to any unpredicted outcomes. Meanwhile, the client shall be flexible and ready to listen to the regulator's arguments with respect to market definition, boundaries, interchangeability of products, control relation structure, etc. In addition, in complicated mergers, EU case studies and the

EC approach towards different questions may significantly support the local process while building the legal position in Ukraine.

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

In 2018, Sayenko Kharenko secured 105 merger clearance decisions. One of the most interesting was clearance of the 'European competition or antitrust deal of the year according to *The Lawyer* European Awards 2019' – acquisition of Shire by Takeda. We managed to demonstrate and persuade the AMC of the absence of competition concerns resulting from the deal for Ukrainian markets. As a practical matter, horizontal mergers involving large pharmaceutical companies in Ukraine are reviewed by the AMC within Phase II in-depth investigations that could take up to 180 calendar days for completion of clearance. However, our arguments made it possible to address all the AMC's questions and concerns in a swift and complete manner. The outcome was successful clearance of the transaction within the regular Phase I review period amounting to 45 calendar days.

**Vladimir Sayenko, Maksym Nazarenko, Valentyna Hvozdiak and Julia Kuyda**  
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markets, clearing it within less than 50 days after initiation of Phase II.

## *GTD: 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, MN, VH, & JK:** Although not all of the expected changes in Ukrainian merger control rules took place in 2018, the AMC is clearly on its way towards solving one of the main concerns related to merger control regulation in Ukraine – to cut the sellers off from threshold calculation when assessing notifiability of mergers.

The business community is also expecting more clarity from the AMC on a number of other vital issues, including the application of a fast-

track review procedure, and similar treatment of non-compete obligations to ancillary restraints in the European Union.

Furthermore, the AMC is currently working on restructuring its merger control department in order to process the merger review more efficiently in terms of market analysis and timing. Such restructuring leads to an increase in the number of officers responsible for merger review, which should also benefit the process.

As to the AMC priorities for next year, the authority is planning to continue its work on the regulatory base by adopting guidance on market definition, carrying out market studies with respect to the pharmaceutical, transport, fuel and energy markets, as well as investigating unfair business practices in the retail area.

*Also available online*



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