

market intelligence

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GETTING THE
DEAL THROUGH 

Merger Control

John Davies leads the global
interview panel

'Market transformational'
deals on the rise

Activity levels • Enforcement priorities • Keynote deals • 2016 outlook
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market intelligence

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A note from John Davies, Panel Leader

A global trend towards consolidation of markets is visible in the increased volume of transactions, as well as in the proliferation of 'market transformational' deals – four to three or three to two mergers, where the transaction could be the last major consolidation possible in the relevant sector. The contributions in this issue of *GTDT: Market Intelligence – Merger Control* show that such mergers are likely to face more intense scrutiny by competition authorities, not least because of the heightened attention they may draw from third parties and from political spheres. Consequently, competition authorities are also likely to take a closer look at the kind of remedies they find acceptable.

In particular, mergers in fields as diverse as healthcare, food retail as well as media and telecoms have faced challenges in several jurisdictions. For example, in Germany, the Bundeskartellamt blocked a merger between two of the country's largest food retail chains, Edeka and Kaiser's Tengelmann (later cleared by governmental intervention). In the US, the FTC required the divestment of 330 Family Dollar stores as a condition of closing its investigation into *Dollar Tree/Family Dollar Store*. In China, MOFCOM cleared the acquisition of Alcatel Lucent by Nokia subject to conditions related to the licensing of standard-essential patents – notably after the transaction had already received unconditional clearance in the US and the EU.

In this environment, it is more essential than ever to have up-to-date advice on current trends from local experts who also understand the international landscape. This issue of *GTDT: Market Intelligence – Merger Control* presents views and observations from leading competition practitioners around the world, offering valuable insight into the evolving legal and regulatory landscapes in their respective jurisdictions.

We would like to express our gratitude to the interview panel for assisting with this project and providing their insights into major market, regulatory and enforcement trends, and the impact these are having on this complex field of practice.

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In this issue

Australia	2	Korea.....	79
Austria	8	Mexico.....	86
Belgium	12	Netherlands	92
Brazil	18	Nigeria	98
China	24	Norway	102
Denmark	29	Portugal	106
European Union.....	34	Russia	111
Finland.....	38	Spain	116
France.....	42	Sweden	121
Germany.....	47	Switzerland	126
India	53	Turkey	130
Indonesia	58	Ukraine	138
Ireland	63	United Kingdom.....	144
Italy	70	United States	149
Japan.....	74		



Dmitry Taranyk

MERGER CONTROL IN UKRAINE

Dmitry Taranyk is a partner at Sayenko Kharenko, focusing on antitrust and competition. He regularly advises clients on merger control, concerted practices, abuse of dominance, monopolisation and unfair competition issues. He counsels on antitrust matters in relation to multinational and domestic acquisitions, and joint ventures. His experience includes obtaining competition clearance for mergers and acquisitions by banks and companies including AkzoNobel, Apple, Cadbury, Citi, Coca-Cola, Comcast, Dyckerhoff, Eurobank, Ferrostaal, Goldman Sachs, Hewlett Packard, Japan Tobacco, Metalloinvest, Novartis, Philips, Philip Morris, Porsche, Royal Dutch Shell, Samsung, Société Générale, The Walt Disney Company, Visa, Western Union and Whirlpool.

Valentyna Hvozd is a senior associate at Sayenko Kharenko, focusing on antitrust and competition matters. She also practises corporate law, M&A, foreign investments,

privatisation and intellectual property. Ms Hvozd advises clients on a wide variety of matters involving merger control, concerted practices, abuse of dominance and unfair competition. She also has experience in antitrust law issues related to multinational and domestic acquisitions, and joint ventures. She has been involved in a number of high-profile cases involving obtaining competition clearance for mergers and acquisitions by banks and companies in the agricultural, chemical, electricity, food processing, insurance and tobacco industries.

Tetyana Smurova is an associate at Sayenko Kharenko, specialising in antitrust and competition matters. She advises clients on merger control rules, concerted practices, abuse of dominance and unfair competition. Tetyana has been involved in a number of matters in the agriculture, automotive, banking, chemical, food and beverages, pharmaceutical and healthcare industries.

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

Dmitry Taranyk, Valentyna Hvozď & Tetyana Smurova: The Antimonopoly Committee of Ukraine (AMC) is the only state body responsible for merger control in Ukraine. Specifically, the Concentration Department of the AMC monitors mergers and exercises control over them. Based on the past few years, the Concentration Department has considered approximately 1,000 concentrations annually. In 2015, the Concentration Department kept almost the same high level of the concentration review despite the fact that the AMC suffered significant employee losses. In mid-2015, the Ukrainian Parliament appointed a new chairman of the AMC, Yuriy Terentyev, and a new team of state commissioners of the AMC. Mr Terentyev is the first business leader rather than political leader of the AMC. He has over 18 years' experience as an in-house counsel and compliance officer of Bristol-Myers Squibb, JTI, Metro Cash and Carry, and ArcelorMittal, all of which operate in sectors that are traditionally under the close scrutiny of the Ukrainian competition agency. His appointment followed months of public deliberations and political discussions behind the scenes on how the competition agency should be reorganised and run to ensure its independence and effectiveness in protecting economic competition in the country. It is expected that a new team will update the AMC's old-fashioned approaches and introduce a more western-oriented style of work.

In 2015, the AMC continued its practice on discovering past violations consisting of completing a qualifying concentration without the prior approval of the AMC. The AMC always compares the information from past transactions with new transactions, to discover any unreported changes to control shareholdings between manifold mergers and acquisitions.

Another development in 2015 was the introduction by the AMC of a quasi-amnesty procedure for transactions that were completed without the AMC's approval for concentration when such approval was required. The respective amnesty procedure became available for one year beginning from 16 September 2015. If a company discovers that it failed to seek merger clearance approval from the AMC in its past M&A activity, such company may apply to the AMC to obtain the approval post factum under such amnesty procedure. Therefore, should a company decide to cure all past violation risks, the fines imposed by the AMC will be rather symbolic. More precisely, for violations notified within the first six months after amnesty introduction (ie, by 16 March 2016) the fine is set to 20,400 hryvnia (approximately €700), and for violations notified during the subsequent six months (ie, by 16 September 2016) the fine is set to 102,000 hryvnia (approximately

€3,500). Thus, after 16 September 2016 the amnesty option will no longer be available. As a result, the completion of a transaction without the prior approval of the AMC when such approval was required will be fined based on the general provisions of the law.

Moreover, the AMC offers confidentiality privileges for companies applying for the amnesty procedure. This means that the AMC undertakes not to publish any news on the transactions notified under the amnesty procedure, and shall keep such past violations silent.

The most significant development in Ukrainian merger control is that the Parliament has adopted an amendment to Ukrainian competition law that provides for an increase of the merger filing thresholds (as discussed below).

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?

DT, VH & TS: The applicable merger control rules require substantive amounts of information to be included in the notification submission for its filing with the AMC. Based on our experience, the most frequent questions raised by the AMC while reviewing the notification submissions involve the control relations of the parties to the concentration and their market activity in Ukraine.

As to the control relations block of the information, we usually recommend careful verification of whether the groups of the parties were initially formed in compliance with Ukrainian competition law in order to avoid any unexpected questions from the AMC, leading to delays. This is especially important for any parties that already had a filing history in Ukraine and whose group structure is available to the AMC. In this case, we compare the lists of related entities to find any differences and deal with possible past risks in advance. Similarly, for those parties that have not filed in the past in Ukraine, we also do a prior check of possible risks related to the formation of the group and in the majority of the cases any unreported transactions are discovered upfront.

As mentioned, another block of information that usually attracts the attention of the AMC is the market activity of the parties in Ukraine. In this case, it would be advisable for the parties to engage their local offices to help with the collection of such information. Based on our practical experience, local offices are well aware of the Ukrainian market environment and are able to provide more elaborate description of the local markets with more accurate assessment of the parties' presence on such markets. The participation of the local offices in the notification preparation process makes the AMC's review process easier for the parties, with fewer questions from the AMC.



Valentyna Hvozď

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

DT, VH & TS: As mentioned above, the AMC has focused its efforts on discovering past violations consisting of completing a qualifying concentration without the prior approval of the AMC. Regarding the AMC's detection capability, it should be noted that the regulator lacks the necessary manpower and resources to detect all foreign-to-foreign transactions with Ukrainian elements. Thus, the AMC has been focusing most of its attention on those transactions that have the potential to affect economic competition in Ukraine. In other words, a deal where the parties generate local sales or have a corporate presence in Ukraine is much more likely to be detected by

the AMC than a deal that merely technically meets the Ukrainian filing thresholds.

AMC officers constantly monitor press releases and websites of other competition agencies worldwide (mainly the European Commission and the Federal Trade Commission). Should any officer come across familiar brands involved in the deal, the AMC usually issues letters to the parties (usually big multinational corporations) asking whether the approval of the AMC was received for this deal or not.

At the same time, the most common way for the AMC to discover past violations consisting of completing a notifiable transaction without AMC approval is by comparing the company's business structure from past transactions with new transactions. In practice, this means that if either party to a foreign-to-foreign transaction had made



Tetyana Smurova

a merger filing to the AMC in the past, but now the parties decide not to seek its approval, and one of the parties decides to seek regulatory approval for another transaction at some point in the future, the AMC will be able to immediately compare that party's corporate structure between the two merger filings and thereby easily discover that the relevant party had failed to file on one occasion. In other words, the parties should ensure that all the data on any given concentration notified to the AMC are consistent with the data submitted in the course of previous filings, and that no changes to the corporate structures were made without the prior approval of the AMC, when such approval was required. However, at the same time, if neither party to a foreign-to-foreign transaction has previously submitted its corporate structure

to the AMC, the AMC's detection capabilities decrease significantly.

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

DT, VH & TS: Whenever the market concerned is new to the AMC, the regulator very much appreciates all the information and analysis provided by the parties, including independent market reports disclosing detailed information on the respective markets. In situations where the AMC believes that the information provided by the parties does not shed the light on the market, or the AMC does not have any of its own experts in the area, the regulator usually contacts independent external specialists to obtain more

“...the AMC has focused its efforts on discovering past violations...”

details and a better understanding. In practice, the AMC contacts state bodies or state marketing agencies depending on the area to be examined. In some cases, the AMC may even contact a university professor to get a professional opinion on the specific market. At the same time, given that such independent external specialists are usually state authorities, their involvement into the process may cause delays to the review process. The only downside to the AMC's practice of collecting evidence is that it takes the authority a long time to implement it. In particular, it may take weeks for the AMC to come up with proper questions for an expert. Preparation of the report usually takes a few weeks, and additional weeks are needed for the AMC to analyse the response and come to a conclusion. To avoid such delay, the AMC appreciates it when the parties provide an independent elaborate report from an expert in the area of the market concerned. Moreover, within the Phase II procedure, the AMC introduced into its practice a questionnaire for third parties to get their opinion on a potential deal and its effect on competition.

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.

DT, VH & TS: The AMC's annual report for 2015 will be released in March 2016. Based on the AMC's annual report for 2014, a number of concentrations filed with the AMC were lower compared to the previous years. This was caused by a general decrease in investment activity in Ukraine. In 2014, 95 per cent of reviewed merger filings did not contain any threats to Ukrainian economic competition and were approved during Phase I review. Considering the authority's recent practice, we can predict that a number of cases approved by the AMC under Phase I review were almost the same. At the same time, 5 per cent of merger filings required in-depth investigations and were approved under Phase II review. The markets investigated by the AMC were large appliances, pharmaceuticals, low-alcohol beverages, retail sale of light oil, etc. As a result of in-depth investigations, the AMC issued 11 approvals that contained behavioural remedies. The AMC concluded that in these 11 cases the transaction may have had some negative impact on economic competition in Ukraine. At the same time, none of the mergers considered by the AMC in 2014 were prohibited.

The establishment of a joint venture outside Ukraine by undertakings that are not resident in Ukraine may serve as a good example. In the process of review of the notified transaction, the AMC identified that owing to the significant market share of the parties despite non-overlapping markets, the transaction may have had a negative impact on competition on the relevant Ukrainian market. Given that fact, as well as the fact that the market concerned was new and unfamiliar to the AMC, it issued a decision clearing the transaction that contained behavioural remedies, in particular concerning prices and the terms of supplying products. In addition, the AMC obliged the parties to submit to the authority every six months for three years data regarding the volume of sale, primary consumers, the information on the average prime cost of the products, etc. In addition to this case, we had several similar deals with similar remedies imposed.

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?

DT, VH & TS: Currently, numerous foreign-to-foreign transactions having no significant impact on competition in Ukraine still trigger local merger control thresholds. However, on 26 January 2016, the Parliament finally adopted the amendments to the Ukrainian competition law. The most important changes relate to the financial thresholds, which are the triggering factor for the Ukrainian filing requirement. In particular, instead of the current financial thresholds, the lawmakers introduced a two-tiered system whereby a merger clearance will be required in any of the following two cases: (i) the combined worldwide sales or assets of all the parties to the concentration exceed €30 million and at the same time the sales or assets in Ukraine of each of at least two parties exceed €4 million; or (ii) an undertaking, being the target of acquisition, the seller of assets or one of the joint venture's founders, exceeds €8 million of sales or assets in Ukraine, including the control relations, while the sales turnover of at least one other party should exceed €150 million worldwide. It should be pointed out that while testing the assets or turnover thresholds, the AMC will continue to take into account the figures at a group level, in other words, including all companies connected to the parties by control relations. It means that, while calculating the assets or turnover of the target, the figures of the seller should also be taken into account when the seller and the target are connected to each other by control relations despite the structure of the deal. The increase of the existing thresholds by several times and, most importantly, the fact that two parties should meet this threshold, is intended to

THE INSIDE TRACK

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

One of the key skills and qualities an adviser should have in merger control proceedings is profound knowledge and comprehensive understanding of various kinds of business. This allows the adviser to properly define the market, geographic and commodity boundaries, interchangeability criteria, etc. In addition, it is crucial for the adviser to organise an effective communication channel between the parties and the regulator. On the one hand, the representatives of business absolutely need to understand the views of the regulator and reasoning of possible issues, as well as predict major issues beforehand so the parties have time to properly prepare or avoid unexpected course of action. On the other hand, it is vital for the regulator to understand the parties' business model. On a separate note, the adviser should constantly keep track of the main developments in the regulator's practice, and updates to the applicable legislation.

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 be ready to listen to the regulator's arguments with respect to the market definition, its boundaries, interchangeability of products, etc, and be able to accept different views and approaches to market definition. For those clients who follow the regulator's advice and are ready to fulfil its requirements regarding the provision of information, the review process will be much smoother than for those clients who take an aggressive approach and insist on their point of view as being the only view.

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

Last year, we had a deal involving two big international producers of home appliances. Despite the fact that the combined market shares of the parties on the markets

concerned did not reach the monopoly threshold (ie, 35 per cent under the Ukrainian competition law), but the activities of the parties were overlapping, the AMC initiated Phase II review in order to investigate possible negative impact on competition on the relevant Ukrainian markets. One of the main concerns of the AMC was the calculation of the overall market size. The AMC stated that the figures provided by the parties were inaccurate. For the record, it should be mentioned that the parties provided the AMC with both market data prepared by the State Statistical Agency of Ukraine and market reports prepared by respectable analytical companies like GfK. Despite the fact that the parties provided to the AMC market information from two separate reputable sources, the AMC believed that neither the State Statistical Agency nor GfK possessed the full picture of the local market and did not include data on black market and grey market imports.

Another peculiarity of the case was an attempt to implement a carve-out solution in Ukraine. While the AMC took too long to analyse the market and consider the case, the parties found it necessary to close the transaction prior to the AMC issuing a decision. In order to preserve the status quo during the case review, the parties undertook all possible measures to ensure that their businesses were carried on separately in Ukraine until the AMC's approval is granted. Although the parties presented the AMC with documented proofs showing that the parties did not merge their Ukrainian subsidiaries, and that activities in Ukraine were split completely and run independently, and the AMC officers were inclined to accept the evidence, the regulator took a very formalistic approach and initiated a case on violation despite all the attempts of the parties.

Ukrainian competition laws do not provide for the possibility of a hold separate arrangement (carve-out), as any transaction that amounts to a concentration is automatically subject to a regulatory approval in Ukraine once its parties exceed the relevant financial thresholds.

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exclude a number of deals having no significant impact on competition in Ukraine from the need to seek merger clearance in Ukraine. As a result, the number of transactions subject to clearance in Ukraine, especially foreign-to-foreign transactions, is likely to fall dramatically. This should free up the resources that the AMC may use to monitor ongoing transactions and review historical transactions in an attempt to find past violations within the five-year limitation period that could still be prosecuted. Violations can also be easily discovered when the AMC compares different notifications, including in the electronic database that easily tracks the corporate history of an undertaking as discussed earlier.

Another notable change to the thresholds is that the competition law has abolished the market share test of 35 per cent of the relevant market.

Along with the uplifting of the financial thresholds, the amendments to the Ukrainian competition law relate to the simplified procedure for certain transactions. In particular, the AMC will review a merger filing and grant the approval for concentration within 25 calendar days (reduced from the usual 45 days) if (i) only one party is active in Ukraine; or (ii) combined market share of the parties does not exceed 15 per cent on an overlapping market or 20 per cent on a vertically related market.

It is expected that the amendments to the law will come into force after May 2016.

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