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INTERNATIONAL CONVENTION CENTRE (ICC SYDNEY)

IBA 2017 Sydney

8-13 OCTOBER

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



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IN THIS ISSUE

From the Co-Chairs	4
Committee officers	5
Conference report	
20th Annual Competition Conference, Florence, 14–15 October 2016	6
International reports	
Argentina	9
Australia	10
Belgium	12
Brazil	14
Bulgaria	15
Canada	17
China	19
Croatia	21
Czech Republic	23
Denmark	24
Ecuador	26
Estonia	27
European Union	30
France	32
Hong Kong	33
India	35
Ireland	38
Israel	39
Italy	40
Japan	43
Kenya	45
Netherlands	46
New Zealand	47
Poland	49
Portugal	52
Russia	54
Singapore	56
Spain	58
Sweden	60
Taiwan	63
Turkey	65
Ukraine	68
Uruguay	73
Venezuela	75

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This newsletter is intended to provide general information regarding recent developments in antitrust. The views expressed are not necessarily those of the International Bar Association.

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A year of merger control reform

The year 2016 was eventful for competition lawyers in Ukraine. Many improvements were initiated and implemented by the new leadership of the Anti-Monopoly Committee of Ukraine (AMCU) that was appointed just over a year ago and immediately took steps to transform the AMCU into a modern and effective competition agency. This reform was supported by the Parliament of Ukraine that adopted important amendments to competition laws.

Methodology on fines calculation

The reform started with the development of the Guidelines for the Calculation of Fines for Violation of Ukrainian Competition Law (the 'Guidelines') in September 2015. These Guidelines were designed to increase the transparency and predictability of fines imposed by the AMCU. Ukrainian law allows the AMCU to determine, at its own discretion, the amount of the fine up to a maximum cap calculated as a percentage of the worldwide turnover of the undertaking (eg, five per cent for merger control violations). To make fines more predictable, the Guidelines introduced a methodology which the AMCU should follow when determining the amount of a fine for a violation. The process consists of two phases: (1) determination of the basic amount of the fine, depending on the income achieved in the market affected by the violation; and (2) adjustment of the basic amount taking into account mitigating or aggravating circumstances.

Amnesty for merger control violations

Along with the methodology for fines calculation, the Guidelines introduced an amnesty programme for past merger control violations. The amnesty programme was initially supposed to last for one year until 15 September 2016. Following numerous discussions and in response to petitions from the business community, the AMCU has extended the amnesty period for another half a year, until 15 March 2017.

Under the amnesty programme, in case an undertaking discovers that it failed to seek merger clearance approval from the

AMCU for one of its past M&A transactions completed prior to 15 September 2015, such undertaking may apply to the AMCU to obtain the approval *post factum*. In this case, the AMCU undertakes to impose a relatively small fixed fine of UAH 102,000 (approximately €3,600), irrespective of the turnover of the violator.

Publication of decisions

Another step towards transparency of the AMCU's procedures was the decision of the AMCU to publish extracts from its decisions starting from July 2015. This practice later became mandatory, following the amendments to the law which obliged the AMCU to publish the following information on its official website:

- information on the initiation of the concentration or concerted practices investigations;
- full text of decisions as a result of a review of applications, cases on concentration or concerted practices (except for information with limited access); and
- full text of decisions as a result of a review of cases on the violation of competition legislation (except for information with limited access).

New merger filing thresholds, fast-track review and other procedural changes

Major changes to the merger control regime stem from the Law of Ukraine 'On Amendments to the Law of Ukraine "On Protection of Economic Competition" Concerning the Increase of Efficiency of Control over Economic Concentrations' (the 'Law'), which was adopted by the Parliament of Ukraine on 26 January 2016 and came into force on 18 May 2016. This Law increased the financial thresholds and introduced a number of other important improvements to the merger control regime.

Filing thresholds

According to the Law, merger clearance, in the form of approval of the AMCU for concentration, is now required in the following two cases:

A YEAR OF MERGER CONTROL REFORM

- the combined worldwide turnover or value of assets of all the parties to the concentration exceeds €30m and at the same time the turnover or value of assets in Ukraine of each of at least two parties exceeds €4m; or
- an undertaking, being the target of acquisition, the seller of assets or one of the joint venture's founders has turnover or value of assets in Ukraine exceeding €8m, while the turnover of at least one other party to the concentration exceeds €150m worldwide.

All thresholds are calculated for the previous financial year on a group-wide basis, which means that the turnover and value of assets for all undertakings connected by a control relationship must be added together, including for the seller that controls the target.

In addition to raising financial thresholds, the Law also abolished the market share threshold that was used in the past (the merger filing was required in case the market share of any party to the concentration, or combined market share of all parties, exceeded 35 per cent on the relevant market).

Fast-track review option

The Law also introduced an expedited review procedure that should be applied to transactions with no or insignificant effect on competition in Ukraine. According to this procedure, the AMCU will review a merger filing and grant the approval for concentration within 25 calendar days (reduced from the usual 45 days) in any of the following cases:

- only one party is active in Ukraine;
- the combined market share of the parties on the same product market in Ukraine does not exceed 15 per cent; or
- the combined market shares or shares of the parties do not exceed 20 per cent on the vertically integrated Ukrainian market(s).

Other procedural changes

In addition to the aforementioned improvements, the Law introduced the following procedural changes to merger control process in Ukraine:

- The applicants now have a possibility to approach the AMCU and ask for preliminary consultation before submitting the merger filing. Such a procedure permits the applicants to clarify the scope of the information and documents to be

submitted to the AMCU and check their completeness beforehand.

- A new procedure for offering remedies to the AMCU was introduced. In case the AMCU discovers grounds for prohibition of a concentration, the parties will have 30 calendar days (extendable) to offer the AMCU remedies that would eliminate the negative impact of the concentration on the market.
- The Law imposed a mandatory requirement to disclose beneficial owners of each party to the concentration in the notification. Failure to comply with this requirement is sufficient for the AMCU to reject the notification as being incomplete.
- The filing fee to be paid for the review of a merger filing application by the AMCU was increased by four times to UAH 20,400 (approximately €720).

New regulation on concentration

In order to implement the Law, the AMCU adopted amendments to its main procedural merger control document entitled the Regulation on Concentration, the restated version of which came into effect on 19 August 2016. The amended regulation abolished numerous formalistic requirements and significantly reduced the list of required information and documents for filing. These changes were aimed at making merger clearance less burdensome for those transactions that have no impact on competition in Ukraine. At the same time, for the transactions that may potentially influence Ukrainian markets, the AMCU requires more thorough and comprehensive economic analysis of market information and the expected consequences of the concentration. The amendments to the Regulation on Concentration could be summarised as follows:

- *Market analysis:* The AMCU significantly changed its approach to the market study. Profound economic analysis of the relevant markets is now required for those transactions that may have an impact on competition in Ukraine. In particular, in order to comply with the amended Regulation on Concentration, the applicants are obliged to provide detailed market information, including analysis of market structure, competitors' market shares, information on exports and imports, distribution chain, demand and supply structure, market barriers, customers and suppliers, and so on. However, a 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 the markets unrelated to the concentration.

- *Corporate information:* The AMCU abolished the requirement to submit corporate information, which is irrelevant for market analysis, including the full list of controlled entities, information on officers, and so on, and now pays more attention to the beneficiary owners of the parties to the concentration.
- *Documents:* The requirement to submit a number of documents was abolished for certain types of transactions, for example, articles of association are no longer required. In addition, the AMCU will not require provision of specially produced files for the electronic database, although all filing materials should be also submitted to the AMCU in electronic form.

What to expect next?

The merger control reform clearly shows the intention of Ukraine to harmonise the merger control regime with best practices of other European countries. Improvement of nexus requirements along with simplification of the filing process will allow the AMCU to

efficiently perform its tasks aimed at control over markets and to reduce unnecessary attention to transactions that do not affect competition in Ukraine.

The recent legislative and regulatory changes show a remarkable improvement in comparison with the previous merger control regime in Ukraine that saw no changes for over a decade. The AMCU is also expected to align its other procedural documents in order to achieve synergy and efficiency in notifications and case review. In particular, the procedure for the review of cases on the violation of economic competition requires certain immediate improvements. Current procedural rules allow the AMCU to investigate cases for as long as it deems necessary and do not impose any deadlines on the AMCU's officials. Furthermore, the procedural rights of the parties in the process should be extended and should be spelled out more thoroughly. In addition, the AMCU's procedural documents governing the review of notifications for approval of concerted practices, including the Concerted Practices Regulation, were not amended in the first stage of the reforms. In this area, the AMCU continues to apply formalistic requirements and low filing thresholds, which should be addressed in the next phase of reforms.

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Leading case on bid rigging versus cooperation efforts

By Decision No 48/016, dated 4 May 2016 (the 'Decision'), the Commission for the Promotion and Defence of Competition (the 'Commission') rendered a decision on a case related to anti-competitive behaviour allegedly incurred by Ducelit SA, Trenal SA and Att Ambiental (the 'Defendants') related to public invitations to tender called by the Administracion de los Servicios de Salud del Estado (ASSE (State Health Services Administration)).

In that regard, a private company (the 'Claimant'), which was a bidder in public tenders for the provision of transport and treatment services for contaminated sanitary

waste, appeared before the Commission and filed a complaint stating that the Defendants – its competitors on said public tenders – had allegedly incurred a collusive agreement, simulating competition, when in fact they were actually reacting to the entrance of a new competitor, with the intention of excluding it from the aforementioned public tendering market. The collusive agreement would supposedly consist of: (1) offering excessive prices in order to illegally achieve 'extraordinary profits'; and (2) setting a market allocation scheme.

Initially, the Commission defined the relevant markets as: (1) collection and