Merger Control 2016

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Trends & Developments

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Ukraine

Ukrainian Merger Filing Thresholds: On the Rise

Times are changing, but Ukrainian merger control law requirements, renewed and shaped back in 2001 by the adoption of the Law of Ukraine “On Protection of Economic Competition” dated 11 January 2001 (the Law), did not undergo any sustained changes up to now. Inspired mostly by German merger control rules, the Law still contains certain concepts which were considered to be quite progressive in the early 2000s in Germany, but which were withdrawn by German lawmakers several years ago.

Low financial thresholds

One of the problems of the Law, first identified a year or two after the adoption of the law, was inadequately low financial thresholds for an M&A deal to fall under the filing requirement in Ukraine. Calculated based upon Ukraine’s GDP pro rata to the average ratio of other European countries’ GDPs to their filing thresholds, those in Ukraine proved to be low, becoming less and less adequate year on year. This was, not least, because of the growth in Ukraine’s GDP that was demonstrated in the latest decade.

For illustration purposes, pursuant to the Law, a merger, either a domestic or a purely foreign-to-foreign one, would require the prior approval of the Anti-monopoly Committee of Ukraine (the AMC) if the parties to such a merger met all of the following financial thresholds for the last financial year preceding the transaction: (a) the aggregate worldwide value of assets or sales for all parties to the merger, including related entities, exceeded EUR12 million; (b) the aggregate worldwide value of assets or sales for each of at least two of the parties to the merger, including related entities, exceeded EUR1 million; and (c) the value of assets or sales in Ukraine of at least one party to the merger, including related entities, exceeded EUR1 million. As may be seen from the above, the thresholds are ridiculously low and, thus, it would be a rare occasion for a medium-sized cross-border merger not to fall under the filing requirement in Ukraine.

More importantly, the merger filing obligation in Ukraine arises in cases when only one party to the deal (even a seller) meets the domestic turnover threshold of EUR1 million. As is evident from the

financial thresholds, the local activities of one of the parties to the merger are sufficient to trigger the filing requirement.

Moreover, the Law does not provide any exemptions for those deals that have no effect on competition in Ukraine, ie mergers where the target has no sales in Ukraine whatsoever. No de minimis exception, applicable if the EUR1 million threshold is exceeded even by one euro, is stipulated by the Law either. Considering the above, the filing obligation in Ukraine indeed arises even in cases when only one party to the merger meets the domestic turnover threshold of EUR million.

Finally, the last straw of the issue is that, according to the Law, parties' control relations have to be borne in mind while calculating their financial indices. In other words, this means that, when assessing, for example, a target's turnover in order to determine whether filing is required in Ukraine or not, the turnover of the seller and all of its affiliates must be added to that of the target.

Taking into account all of the above, ie low thresholds and local nexus being applicable to only one party of the merger, over these years it was a great piece of luck for any merger to escape the Ukrainian filing requirement.

Problem not solved

The problem was soon recognised by the international community. In its Recommended Practices for Merger Notification and Review Procedures, the International Competition Network (ICN) set out a requirement that jurisdiction over a merger should be asserted on the basis of the appropriate nexus between the transaction and the jurisdiction, including the operations of the target in that jurisdiction. The Organisation for Economic Co-operation and Development (OECD) in its Overview "Competition Law and Policy in Ukraine" of 2008 heavily criticised Ukrainian threshold amounts and the form of local nexus applicability. Moreover, in 2013, the experts of the United Nations Conference on Trade and Development (UNCTAD) expressed their conviction over the necessity of a significant increase in the merger filing thresholds in Ukraine. These clear messages were, unfortunately, ignored by the Ukrainian lawmakers and the AMC itself.

Needless to say, business had to respond to such a formalistic and reluctant stance on the issue one way or another. In this regard, many cases have been observed where multinational companies with a small presence or low sales, though exceeding the thresholds, in Ukraine decided to ignore filing in the Ukrainian jurisdiction despite the requirement to do so. This was not least because of the fact that the AMC in practice lacked resources to monitor all foreign-to-foreign deals worldwide; thus, many of them, especially non-European ones, passed the regulator's eyes unnoticed.

Being consequently blamed for low thresholds by business circles, and facing refusal to fulfil the merger filing requirements on the part of certain major multinationals, the AMC remained reluctant to address the issue of merger filing threshold increase and the Law remained unchanged during the last decade. The last attempt to increase thresholds was taken in 2009; however, the bill did not pass the Ukrainian parliament. Since that time and until recent political changes in Ukraine, it appeared that the whole issue was written off.

Expected changes

However, in 2014, after the recent political changes the situation transformed dramatically in Ukraine. First of all, it was observed that the AMC began functioning more effectively and started its communications with business more sensitively. What is more, the obligations that Ukraine undertook before the European Union in the Association Agreement explicitly stipulate an increase in the merger filing thresholds. As these obligations have to be fulfilled by the end of 2015, the whole issue appears to have found a second wind. In this respect, Ukrainian competition law practitioners view this as a clear message that the problem may be finally solved.

Currently, the proposed draft bill aims to cure the entire problem. It is planned to change the existing simplistic approach towards the thresholds in the Law into a more sophisticated, two-level model.

The first level of control provides that a merger would require prior approval of the AMC if the parties thereto meet the following financial thresholds: (a) the aggregate worldwide value of assets or sales for all parties to the merger, including related entities, exceeds EUR30 million and (b) the aggregate worldwide value of assets or sales in Ukraine for each of at least two of the parties to the merger, including related entities, exceeds EUR4 million.

At the same time, the second level of control sets up a filing requirement for mergers where the parties meet the following financial thresholds: (a) the sales of one party to the merger in Ukraine, including related entities, exceed EUR8 million, and (b) the worldwide sales of at least one other party to the merger, including related entities, exceed EUR100 million.

As may be seen from the above, the proposed amendments to the Law achieve the increase in the financial thresholds by about four times. Simultaneously, the draft bill solves the issue of local nexus, excluding mergers where the parties have minor sales in Ukraine from the filing obligation.

The proposed amendments are widely supported by the lawmakers and, while they are to be revised slightly during its review in the parliament, the core principles identified above are expected to stay.

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