

market intelligence

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GETTING THE
DEAL THROUGH 

Merger Control

Pre-emptive remedies
support growth in
Phase I clearances

John Davies
leads the global
interview panel

Activity levels • Enforcement priorities • Keynote deals • 2017 outlook
Europe • North America • Asia-Pacific • Latin America

market intelligence

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A note from John Davies, Panel Leader

The past year has been one of the busiest for competition authorities around the world. The very active M&A market saw many large, cross-border transactions such as *AB Inbev/SABMiller*, *Halliburton/Baker Hughes*, *Staples/Office Depot*, *ChemChina/Syngenta*, *LSE/Deutsche Borse*, *Bayer/Monsanto* and *Dow/Dupont* reviewed by multiple agencies. In addition to managing a high merger control case load, competition authorities have also been active in protecting their mandates by investigating companies for gun-jumping and procedural failures within the merger control processes. For example, MOFCOM has shown an increased willingness to sanction companies for failure to file, as exemplified by its recent decision to fine Canon for failure to notify its acquisition of Toshiba Medical Systems Corporation. In another example, the European Commission sent Facebook a statement of objections in December 2016 alleging it provided misleading information in its acquisition of WhatsApp.

While recent political shifts have not yet seemed to chill global M&A, it is clear that merger control is sensitive to such developments. While changing economic dynamics may drive foreign investment, populist movements may bring about, for example, increased protectionism in the form of foreign investment controls and increased intervention in strategically important areas. In the US, a number of recent foreign investment transactions, in particular involving Chinese investors, were blocked on national security grounds or faced extensive reviews. Chinese investments in German technology companies have similarly led to calls for tighter foreign investment controls in key sectors. The French government changed its foreign investment regime following the *GE/Alstom* transaction and the UK government is expected to amend its regime in the near future.

This changing landscape will require stakeholders to keep a close eye on both competition and foreign investment developments. The contributions in this issue of *GTDT: Market Intelligence - Merger Control* provide a good introduction to these developments locally. We hope that this will be helpful for readers operating in this active and dynamic environment.

We are grateful 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	9	Mexico.....	85
Belgium	13	Netherlands	90
Brazil	20	Nigeria	96
China	26	Norway	99
Denmark	32	Russia	104
European Union.....	37	Spain	110
Finland.....	41	Sweden.....	114
France.....	46	Switzerland	121
Germany.....	53	Turkey	125
Indonesia	60	Ukraine	131
Ireland	64	United Kingdom.....	137
Italy	70	United States	142
Japan.....	74		



MERGER CONTROL IN UKRAINE

Vladimir Sayenko is a partner at Sayenko Kharenko who has practised law since 1994 and is admitted to practise in Ukraine and in the state of New York (USA). He specialises in competition law, M&A, corporate and securities law. He has advised extensively in the financial, energy, oil & gas, real estate and media sectors.

Vladimir is a founding member and an international relations officer at the Ukrainian Bar Association, the strongest professional association of lawyers in Ukraine; a member of the International Bar Association; a member of the Public Council at the Antimonopoly Committee of Ukraine; and the non-commercial partnership 'Supporting Competition in the CIS'.

Mr Sayenko has been named the 'best competition lawyer' in Ukraine by Ukrainian Legal Awards 2016, conducted by Yuridicheskaya Praktika; 'corporate lawyer of the year' by Best Lawyers International 2016; ranked among the leading antitrust lawyers for Ukraine by Chambers Europe 2016; recognised

among the top three lawyers in corporate, M&A and antitrust according to Ukrainian Law Firms 2016 by Yuridicheskaya Praktika; and recommended for Ukraine by IFLR1000, Expert Guides, Who's Who of competition lawyers, and PLC Which Lawyer.

Valentyna Hvozdenko is a senior associate at Sayenko Kharenko, focusing on antitrust and competition matters. She also practises in corporate law, M&A, foreign investments, privatisation, and intellectual property. Ms Hvozdenko regularly advises clients on a wide variety of antitrust law matters, involving merger control, concerted practices, abuse of dominance and unfair competition. She also has extensive experience in preparing notifications for merger clearance with the Antimonopoly Committee of Ukraine. Valentyna has been involved in a number of high-profile cases, involving obtaining competition clearance for numerous mergers and acquisitions by banks and companies in the agricultural, chemical, electricity, food processing, insurance, and tobacco industries.



Vladimir Sayenko



Valentyna Hvoz

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

Vladimir Sayenko & Valentyna Hvoz: The year 2016 has turned out to be groundbreaking for Ukraine's merger control regime. The new leadership of the Antimonopoly Committee of Ukraine (AMC), which took office in 2015, has paid a lot of attention to solving 'hot' merger control issues and has demonstrated some outstanding results within a relatively short period.

The main development has been the adjustment of financial thresholds. Ukraine's merger control rules were infamous for having extremely low monetary tests that caught every other transaction with no effect on Ukrainian competition whatsoever. On 26 January 2016, the Ukrainian parliament supported the AMC's initiative and adopted 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 Concentration' (the Law) that came into force on 18 May 2016 and finally updated the thresholds. Specifically, the AMC came up with a two-tiered system whereby merger clearance is required if 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 if the target in an acquisition or one of the joint venture founders exceeds €8 million of sales or assets in Ukraine, while the sales turnover of at least one other party exceeds €150 million worldwide.

It is worth stressing that, while testing the assets or turnover thresholds, the AMC continues to take into account the figures at group level. This includes all companies that are in control of the parties - in other words, that exercise decisive influence over them. 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, even if these control relations will terminate as a result of the proposed transaction.

Furthermore, the Law abolished the market share threshold that existed in the past (a merger filing was required in cases where the market share of any party, or combined market share of all parties, exceeded 35 per cent on the relevant market).

In addition to increasing the asset value and turnover thresholds several times, following the recommendations of the International Competition Network and the United Nations Conference on Trade Developments, the amendments also aimed to fix the local nexus



“In 2016, the AMC conducted investigations into agrochemicals, pharmaceuticals, oil and gas, seed oil, banking services, aviation fuel, tobacco and telecommunications markets.”

requirement. While there is still potential to improve the financial thresholds, the AMC succeeded in excluding a number of deals that have no significant impact on competition in Ukraine from the need to seek merger clearance in Ukraine.

The adjusted thresholds led to a 33 per cent drop in mergers cleared by the AMC. In particular, based on the AMC's annual report, in 2016 the AMC cleared 441 mergers compared to 658 clearances issued in 2015. Furthermore, at least 60 clearances in 2016 resulted from an amnesty programme introduced by the AMC at the end of 2015.

Another notable change to the merger control regime is that the AMC introduced a fast track review 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 only one party is active in Ukraine or the combined market share of the parties on the same product market in Ukraine does not exceed 15 per cent. This fast track is also available if the combined market shares or shares of the parties do not exceed 20 per cent on the vertically integrated Ukrainian market or markets. In addition to a shorter review period, the fast track review procedure allows the parties to obtain clearance on the basis of simplified documents and a simpler information package, which makes life much easier for the applicants.

The AMC has not yet published any official statistics on the fast track review procedure. However, according to the information available on the AMC's website, since launching the fast track review procedure at the end of May 2016, the regulator has reviewed 263 deals, 77 of which received clearance under fast track review, totalling approximately 30 per cent of all approved deals.

The AMC also introduced a new procedure for proposing remedies and imposing conditional decisions during Phase II investigations. As a result, the parties will have 30 calendar days (extendable) to offer the AMC remedies that would eliminate the negative impact of the concentration on the market if the AMC discovers grounds for prohibition of the concentration.

In terms of other changes, the Law now provides the possibility for applicants to approach the AMC and ask for preliminary consultation before submitting a merger filing. This procedure allows applicants to clarify the scope of the information and documents to be submitted to the AMC, and to check their completeness beforehand in order to avoid formal refusals and delays in the review process.

Another achievement towards transparency in the work of the AMC was the adoption of the law obliging the AMC to publish information on the initiation of investigations and the full text of its decisions (except for information with limited access) that entered into force in 2016. It is fair

to say that the AMC started to publish all such decisions in mid-2015.

To further simplify the merger control regime, the AMC has adopted changes to its merger control regulation that abolished numerous formalistic requirements and focused the attention of the regulator on the economic analysis of mergers. Beginning in August 2016, the parties to transactions that may potentially influence Ukrainian markets are required to submit detailed market information that includes profound analysis of the relevant market, its competitive environment, demand and supply structure, distribution chain, market barriers, assessment of impact of concentration on the relevant market, etc. With regard to transactions that have no influence on competition in Ukraine, the list of information and documents that should be submitted to the AMC has shortened significantly. Such changes have made merger filings less burdensome for transactions with zero or negligible impact on competition in Ukraine, while transactions that may affect competition on the market are subject to close analysis by the AMC.

The AMC has also introduced a number of amendments to its Guidelines for Calculation of Fines for Violation of Ukrainian Competition Law, adopted in September 2015, that were designed to increase the transparency and predictability of fines imposed by the AMC, including for merger control violations.

Finally, the AMC extended the ‘amnesty’ period for past merger control violations for half a year until 15 March 2017. The amnesty programme was introduced by the AMC on 15 September 2015, and was initially supposed to last for one year. Under the amnesty programme, an undertaking that failed to seek merger clearance approval for its past M&A transaction completed prior to 15 September 2015 may apply to the AMC to obtain approval post factum. For qualifying notifications, the AMC undertakes to impose a relatively small fixed fine of 102,000 Ukrainian hryvnia, irrespective of the turnover of the violator.

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: The year 2016 was very eventful in terms of changing the merger control regime by amending merger-related laws and regulations. Transition periods are never easy, and the same applies for the AMC. The regulator is now trying to implement the described reforms. This raises many issues and concerns during the merger reviews. For this reason, it is important for applicants to constantly monitor the latest practices of the AMC, and have the possibility to interact with the case team in order to promptly deal with any queries.

Nonetheless, to ensure timely clearance either under fast track or the general review procedure, the parties must be well prepared for the process.

In particular, many applicants have tried to benefit from the newly introduced fast track review procedure and secure clearance within 25 calendar days. However, it is necessary to check parties’ market shares on all markets in Ukraine (not only the relevant market) and make sure that the transaction qualifies for the fast track review beforehand. While the AMC widely applies the fast track review for transactions where only one party is active in Ukraine, parties that apply under market shares criteria do not always get the benefit of fast track.

If the combined market share of the parties on the same product market in Ukraine does not exceed 15 per cent, the current position of the AMC is that the fast track procedure 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 overlap. If the transaction does not qualify for fast track review, the applicants may promptly file the additional information required for regular review procedure and get the clearance within a 45-day review window. However, if such information is not readily available, the AMC returns the filing as incomplete. This requires the parties to refile the full package, restarting the clock for the 45-day review period.

Another widespread issue that many applicants face relates to the mandatory requirement to disclose the beneficial owners of each party to the concentration in the notification. Failure to identify beneficial owners is sufficient for the AMC to reject the notification as being incomplete. The regulator is very strict regarding this requirement.

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

VS & VH: In 2016, the AMC continued to investigate socially important as well as highly concentrated markets. In particular, the AMC conducted investigations into agrochemicals, pharmaceuticals, oil & gas, seed oil, banking services, aviation fuel, tobacco and telecommunications markets, among others.

It is fair to say that the AMC devoted particular attention to the pharmaceuticals market, which is traditionally subject to extensive investigations and market study. Last year, the AMC investigated several cartel cases, conducted complex market analysis and issued a report on the pharmaceuticals market. In light of such investigations, the AMC also tended to analyse all merger deals involving pharmaceutical companies more thoroughly, including within Phase II review. Applicants notifying a merger in the pharmaceuticals sector should be prepared

to answer additional questions from the AMC and to collect extensive market data relating to their operations in Ukraine. It is advisable to prepare this data in accordance with the ATC3 classification, while in the case of high market shares or other competition concerns, the AMC can also ask for further segmentation according to the active ingredients of the pharmaceuticals in question.

In the past year, the AMC continued to focus its efforts on discovering past violations in the merger control area. The detection capabilities of the AMC have not changed compared to previous years. The authority still lacks the necessary manpower and resources to detect all foreign-to-foreign transactions with a Ukrainian element. As a result, the AMC has been focusing most of its attention on 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 the 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 a deal, the AMC usually issues letters to the parties (usually big multinational corporations) requesting confirmation of whether the deal was closed without merger clearance in Ukraine.

Even though the level of fines has been historically low for merger clearance violations, the AMC recently imposed a fine of approximately €100,000 for closing a transaction without prior approval of the AMC on an undertaking active in the oil & gas sector. Interestingly, this fine was imposed for a concentration in a form of acquisition of control via appointment of management occupying similar positions in the acquirer's corporate bodies, which is a rare type of concentration.

Recent practice shows that the AMC is currently imposing higher fines than those imposed in the past. A further increase is expected after the amnesty programme period runs out in March 2017.

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

VS & VH: In line with merger control reform, the AMC has fundamentally changed its approach to market study and now insists on intense market analysis to be included in the notification submission, unless the transaction qualifies for fast track review. The regulator is appreciative when the market analysis uses market reports from trustworthy analytical agencies that conduct independent market studies.

“Recent practice shows that the AMC is currently imposing higher fines than those imposed in the past. A further increase is expected after the amnesty programme period runs out in March 2017.”

In complicated cases, the regulator usually contacts independent external specialists to obtain expert opinions on the market environment and potential influence of the concentration on competition. In practice, the AMC reaches out to other state bodies or state marketing agencies, depending on the area under examination. 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 in the process may cause delays to the review process. For this reason, the AMC appreciates it when the parties provide a market study of the relevant market from an independent expert agency themselves.

In addition, the AMC has become more innovative in terms of evidence gathering and has introduced the new practice of public surveys on its website and Facebook page. The AMC launches such public surveys during Phase II review. It aims to gather substantiated opinions on a potential deal and its effect on competition from customers and competitors of the merging parties.

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: The AMC has not released its full annual report for 2016 yet. At the same time, since the middle of 2015, the AMC has started publishing all its decisions on its website. Analysis of the AMC's reports and decisions shows that the regulator cleared 441 concentrations in 2016, compared to 658 in 2015. This 33 per cent decrease of clearances granted by the AMC is the result of merger control reforms that included the increase

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 a legal adviser should have in merger control proceedings is a profound knowledge and comprehensive understanding of economic theory, in addition to knowledge of the law. This allows the adviser to 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 one hand, representatives of the business must understand the views of the regulator and the reasoning behind possible issues. They need to be able to predict some major issues beforehand so the parties have time to prepare properly or to avoid unexpected courses 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 ready to listen to the regulator's arguments with respect to market definition, boundaries, interchangeability of products, etc. The client needs to be able to accept different views and approaches to market definition. For those clients who follow the regulator's advice and those who 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 being the only view.

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

In the past year, we obtained clearance for the largest technology merger in history. Despite the fact that the markets involved were complicated and both parties were active in Ukraine with significant operations, we managed to convince the AMC to avoid Phase II investigation and thus, we obtained clearance within the general review period

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of financial thresholds. Furthermore, none of the mergers considered by the AMC in 2015 or 2016 were prohibited. Interestingly, 72 merger filings that required in-depth investigations were approved under Phase II review in 2015, while in 2016, 31 merger filings underwent Phase II review, which is significantly lower compared to the previous year. According to publicly available information, unlike in 2015, the AMC did not impose any remedies on the parties to the concentrations and cleared all transactions unconditionally in 2016.

One of the most notable deals of the past year involved two major international producers of beer. 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 Ukrainian competition law), the activities of the parties overlapped. The AMC initiated a Phase II review in order to investigate a possible negative impact on competition on the relevant Ukrainian markets. While analysing the deal, the AMC took into account that target sales in Ukraine decreased during the past year; that the target lost control over the company generating sales in Ukraine; and that the target divested certain well-known brands at the worldwide level, implementing the remedy imposed by the European Commission. These arguments presented by our firm convinced the AMC that the transaction did not pose a threat to competition in Ukraine, and clearance was granted without any remedies in Ukraine. It is worth pointing out that several years ago a similar transaction was cleared by the AMC subject to behavioural remedies.

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: Taking into account that the AMC was very productive in changing merger control rules in 2016, we would imagine that in the near future the AMC will focus on the practical implementation of all amendments. At this stage, it is obvious that some changes require further clarification and we understand that the AMC is continuing its work in drafting guidelines that would assist in interpretation of the grey areas of new reforms. For example, the criteria and procedural documents for the fast track review process have sparked many discussions between businesses and the regulator. Recently, the AMC adopted guidelines on assessment of horizontal concentrations, where it explained how it conducts its analysis and finds out whether a deal leads to monopolisation or substantial limitation of competition on the market. In any event, we do not envisage any further radical changes to the merger control laws in 2017.

In terms of enforcement policy, the AMC's leadership has sent a clear message to the business community that it is not interested in quantity but rather in quality. This means that the AMC will focus its attention on socially important markets and 'big' players. As mentioned, such markets include pharmaceuticals, telecommunications, oil and gas and food retail.

Increased financial thresholds allow the AMC to focus more attention on transactions that may potentially affect Ukrainian markets. In order to secure a greater deterrent effect, it would not come as a surprise if the AMC escalates the level of fines for disregarding the new merger control regime.

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