

SECTOR SPOTLIGHT:

Merger Control - Managing Competition



Dmitry Taranyk, Counsel, and Predrag Krupez (Associate) of Sayenko Kharenko discuss Merger Control issues in Ukraine.

WHAT TRIGGERS THE FILING REQUIREMENT? WHAT ARE THE JURISDICTIONAL THRESHOLDS?

- The Ukrainian merger filing requirement is triggered by the mere consummation of a transaction which constitutes a qualified 'concentration' capable of influencing economic competition in Ukraine. Under the Ukrainian competition laws, a 'concentration' is considered to occur, in particular, when one or more undertaking directly or indirectly purchases or otherwise acquires such number of shares (or other equity interest) in ownership or management (e.g. use) that allows the acquirer to reach or exceed, when combined with all of the acquirer's prior shareholdings, a 25% and/or 50% threshold of votes in the target undertaking's highest body. The criterion that a particular concentration (including foreign-to-foreign transactions) is capable of influencing economic competition in Ukraine, thus, requiring prior approval of the Antimonopoly Committee of Ukraine (the "AMC"), is satisfied if all of the following financial thresholds are met or exceeded:

- (i) the aggregate worldwide value of assets/sales for all parties to the concentration, including related entities, exceeds EUR 12 million;
- (ii) the aggregate worldwide value/assets or sales for each of at least two of the parties to the concentration, including related entities, exceeds EUR 1 million; and
- (iii) the value/assets or sales in Ukraine of at least one party to the concentration, including related entities, exceeds EUR 1 million.

The AMC's approval is also required for any concentration, if the market share of any party or combined market share of all parties to the concentration on the relevant market (including neighbouring market) in Ukraine exceeds 35%.

DOES YOUR DOMESTIC AUTHORITY COOPERATE WITH INTERNATIONAL ANTITRUST AUTHORITIES? ARE SOME COUNTRIES MORE COOPERATIVE THAN OTHERS AND DOES THIS REFLECT IN THE OVERALL M&A PICTURE?

The AMC enjoys a degree of informal cooperation with certain CIS states, including Russia and Kazakhstan, with high profile visits and information exchanges being commonplace. The authority also monitors the activities of the European Commission and regulators from certain EU Member States. We are aware of instances when the AMC initiated investigations or issued information requests as a response to publications that appeared on the European Commission's website. In particular, if the AMC discovers that a concentration with Ukrainian elements is bound to be closed, it could approach the merging parties, requesting explanations as to why a merger approval was not sought in Ukraine.

HOW COSTLY IS THE PROCESS IN TERMS OF TIME AND MONEY?

In terms of time, the notification submission is supposed to be reviewed by the AMC within 45 days from the date of its submission (Phase I). During the first 15 days, the AMC conducts an initial review and may return the application without considering it, if it determines that it is incomplete. During the subsequent 30-day period, the AMC analyses the submitted information and decides whether or not to grant its approval. However, the AMC tries to scrutinize every application in an attempt to find an excuse for returning it as being incomplete, followed by a request for additional information to be submitted. Thus, we would recommend allocating about 60 days for the AMC approval after the filing date.

In addition, if the AMC discovers any grounds on which concentration can be prohibited or needs to engage in complicated review (i.e. if the relevant market is important or the concentration involves parties with very high market shares), it may open a Phase II review that may last up to 3 months and this period can be suspended until the AMC receives any subsequently requested information. If the merging parties are facing tight deadlines, we can usually negotiate with the AMC to expedite the process. In terms of filing expenses, merger notifications are accompanied with a filing fee, amounting to approx. EUR 500.

IN WHAT WAYS DO YOU ANTICIPATE THE LEGAL AND REGULATORY POLICY CHANGING OVER THE NEXT TWO YEARS?

When it comes to fines, the AMC issued a press release on Monday, 18 June 2012, in which the authority made its intention clear to, starting from 1 July, resort to imposing maximum statutory fines (up to 5% of gross global group-wide annual turnover) for unauthorised mergers. This caused a real stir within the legal and business communities and within two days the press release was removed from the AMC's website as misleading. Nevertheless, the message contained in the press release clearly demonstrates the change of attitude in the minds of the AMC's officials and a shift of the AMC's modus operandi, characterised by a more punitive stance. Although the imposition of maximum statutory fines is unlikely as it would significantly exceed the historical maximum of EUR 60,000, large multinational companies should expect relatively high fines for the failure to seek the AMC's approval, particularly if their transactions may lead to negative consequences in Ukraine.

ON A LIGHTER NOTE, WHAT'S THE BEST PIECE OF ADVICE YOU HAVE EVER GIVEN?

Given that a transaction allowing the acquirer to reach/exceed a 35% market threshold faces a serious risk of being prohibited by the AMC, we are regularly required to redefine the relevant market in an effort to reduce the parties' market shares. For example, when dealing with the relevant product market, by adding interchangeable products into the scope of the market definition, we have been successful in diluting the merging parties' market shares in an attempt to secure regulatory approval.

As far as the geographic scope of the relevant market is concerned, there is considerably less flexibility since the Ukrainian competition legislation defines it as either Ukraine-wide or regional-wide (territorial parts of Ukraine). Therefore, in theory, it does not provide for the possibility to define the market any wider, e.g. as European-wide. However, on one occasion, we were successful in widening the relevant geographic market to ensure that the merging parties' market shares were at a level that was acceptable to the AMC officials. Namely, the AMC threatened to prohibit a merger in the tobacco industry as its analysis concluded that the merging parties had a combined market share of 64%. We managed to persuade the authorities that the figure actually represented the market shares of the parties' Ukrainian customers and, since they were global producers, we urged the authority to calculate the market shares using their European (including Ukraine) market presence rather than Ukrainian only. This remains the only merger thus far in which the AMC accepted the argument that the relevant geographic market incorporated the European continent as a whole rather than Ukraine only.



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