

The intricacies of Ukrainian merger control

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Last year saw a proliferation of debates on Ukrainian merger control policies, with the Antimonopoly Committee of Ukraine (the “AMC”) adopting a more investigative and aggressive stance. Firstly, the recent introduction of an electronic database for merger control purposes indicates that the AMC pays greater attention to corporate structures and control relations than was previously the case. Secondly, the debates about financial thresholds are still very much alive and efforts to have them increased have not been fruitful, meaning that many concentrations with absolutely no effect on competition in Ukraine will still have to be cleared by the regulator. Thirdly, the full effect of this increasingly investigative scrutiny will be perfectly illustrated by the more onerous sanctions that the AMC officials are expected to unveil in 2012.



Increased attention to corporate structures and control relations

The AMC has recently introduced a requirement for merging parties to submit information on their activities on a CD – enabling the AMC to automatically compare businesses’ corporate structures, thereby allowing it to uncover any unreported changes to control shareholdings between manifold mergers and acquisitions. This increases the detection risks for any concentration that a business group undertook on the assumption that such concentration does not require merger clearance in Ukraine.

The electronic database has made the AMC’s *modus operandi* much more investigative, increasing the authority’s oversight over undertakings’ organisation structures for future review processes. In other words, the handling officers are now in a better position to scrutinise concentrations. In addition, they are increasingly coming to the view that more and more documents need to be submitted for their review so as to allow them to make a well-informed decision about whether or not to approve a particular merger.

What this means in practice is that a higher than usual number of applications are being returned as incomplete, which may even increase the timing required for merger approvals. The demand for an increasing volume of documents particularly applies to off-shore companies, which are now subject to tighter scrutiny than before. Also, the electronic database will facilitate the forthcoming legislative amendments which will place the AMC in a better position to collect fines, imposing them on any member of the group. Effectively, having businesses’

corporate structures in a user-friendly electronic format means that AMC officials can pierce corporate veils much more effectively.

In response to this increased scrutiny, legal advisors often recommend amending the usual timelines in the transaction documents to allow more time for merger notifications in Ukraine. As far as phase I investigations are concerned, it would be prudent to allocate approximately 60 days for the AMC approval after the filing date, instead of the 45-day period that was sufficient in the past. Naturally, should the regulator discover any grounds based on which a particular concentration can be prohibited or it needs to be subject to complicated scrutiny, it may open an in-depth investigation that may last up to three months (or longer, under certain circumstances) and this period can be suspended while the AMC is waiting for yet even more information to be submitted. However, it is also possible to obtain regulatory approval on an expedited basis, provided that the parties can demonstrate clear justifications, such as the need to avoid bankruptcy, meeting tender offers, etc. As there is no clear legislative basis for such expedited review, significant lobbying efforts may be necessary to achieve the result.

Nexus requirement

Despite many years of criticism, the financial thresholds in Ukraine remain extremely low. Coupled with a very strict nexus requirement, this creates a situation where numerous transactions technically require merger clearance in Ukraine, even if they have virtually no connection with Ukraine. The requirement that a particular concentration is

deemed to be capable of influencing economic competition in Ukraine, and is therefore subject for regulatory approval, is triggered if all of the following financial thresholds are met or exceeded:

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

Based on black letter law, the AMC should technically only be concerned with relations that “influence or may influence economic competition in Ukraine” (Paragraph 2 of Article 2 of the Law of Ukraine “On Protection of Economic Competition” of January 11, 2001 (the “Competition Law”). As established by international practice, it can hardly be said that a transaction to which less than two parties have a corporate presence in Ukraine is capable of exerting adverse effects on competition

in Ukraine. While that is a well founded view, it is not the official view of the AMC.

The good news is that the officials are currently amending the Competition Law in an attempt to address and deal with the local nexus issues. Under one such amendment, the combined total value of assets or combined sales (turnover) sufficient to trigger the filing requirement has been increased from €12m up to €50m. At the same time, at least two of the parties to the concentration should have assets or sales in Ukraine exceeding €4m (removing the requirement for filing obligation in cases when only one party meets the domestic turnover).

Alternatively, the proposed amendment provides for the AMC approval if one of the parties has assets or sales in Ukraine exceeding €50m and the other party has assets or sales exceeding €50m worldwide. It is difficult to give a conclusive prediction as to when the proposed amendments will come into force and whether the thresholds will stay as suggested, but they clearly demonstrate the intention of the legislator to only ‘catch’ those transactions that have a considerable local nexus to Ukraine.



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It is worth mentioning that the AMC approval is also required for any concentration if the parties thereto, individually or collectively, have a market share of 35%, or more, on any product or geographic market in Ukraine, and the concentration takes place on the same or neighbouring product market. The market share threshold remains unchanged following the proposed amendments.

Consequences of the failure to file

A more investigative approach adopted by the AMC means that more undertakings are likely to be subject to fines, which, in turn, are expected to increase considerably in 2012. As stipulated under Article 52 of the Competition Law, the maximum fine that can be imposed for the consummation of a concentration without the required prior approval of the AMC amounts to 5% of the gross worldwide income (sales) of the responsible party (usually the acquiring party) for the fiscal year preceding the year in which the fine is imposed. This gross income figure is determined as the cumulative income (turnover) of the relevant party to the concentration, including all its related entities.

Previous years saw the maximum fine of approximately €20,000 imposed on one party by the AMC for closing a transaction without the required regulatory approval. However, that figure was increased threefold in December 2011 when the AMC opened an investigation in relation to a high-profile foreign-to-foreign concentration, closed without its clearance, imposing a fine of around €60,000 on the responsible party.

What is more, the officials are internally coming to the view that their fines generally need to be much more substantial in order to have a greater deterrence effect, especially for large multinational companies. They have informally indicated that figures of €100,000 to €200,000 constitute a reasonable fine in cases when there are no negative consequences for economic competition in Ukraine. Their views apply equally to domestic and foreign-to-foreign transactions, irrespective of the actual presence of the parties in Ukraine. As mentioned above, the electronic database will enhance the AMC's ability to collect fines and impose them on any member of the group.

When setting the fine, the AMC officials take different factors into account, such as the deterrence effect, the intention of the violator; the consequences for the Ukrainian market, any measures undertaken to remedy the violation after it is discovered, and cooperation with the AMC in its investigations. For example, if the transaction is closed prior to clearance, the fact that the violator took every step to demonstrate an intention to fully cooperate with the regulator may be used as argumentative evidence that there was no direct motive to violate Ukrainian competition law, resulting in a reduced fine.

In addition, it should be mentioned that the AMC also has the power to request the Ministry of Economy to impose a special sanction against a foreign company, temporarily prohibiting it to import into or export out of Ukraine. Another punitive measure that the AMC can theoretically resort to is to invalidate transaction documents (e.g. share purchase agreement) if "the concentration causes or may cause the monopolisation or the essential limitation of the competition in the whole market or in its substantial part", as provided in one of the AMC regulations.

Conclusively, the year of 2012 is destined to mark certain policy shifts in Ukrainian merger control regime that are set to have far-reaching effects on the international business community, including those undertakings that lack a corporate presence in Ukraine. With fines set to increase considerably, it is advisable that legal counsel double-check if their clients meet local nexus criteria, particularly since the AMC has adopted a more investigative approach.

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