The Merger Control Review

Fifth Edition

Editor
Ilene Knable Gotts

Law Business Research

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EDITOR'S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for a transaction develops a comprehensive plan prior to, or immediately upon, execution of the agreement concerning where and when to file notification with competition authorities regarding the transaction. In this regard, this book provides an overview of the process in 45 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany, for instance, provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require

that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture (JV) that produced no effect in Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

The potential consequences for failing to file in jurisdictions with mandatory requirements varies. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; and Hungary, Ireland and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, India and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., United States, Ukraine, Greece, and Portugal). Brazil issued its first 'gun jumping' fine this year. In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the European Union model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales

in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in merger hearings before the Competition Tribunal, and the Tribunal will typically permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection to a clearance decision.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, in that the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, Canadian, Mexican and EU authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with Chile. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011. The US also has recently entered into a cooperation agreement with India.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include as a reportable situation the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., EU and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and

insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. Several agencies in the past few years have analysed partial ownership acquisitions on a standalone basis as well as in connection with joint ventures (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. As discussed in the last chapter, International Merger Remedies, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or US. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past year have imposed a variety of such behavioural remedies (e.g., China, the EU, France, Netherlands, Norway, South Africa, Ukraine and the US). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2014

Chapter 42

UKRAINE

Dmitry Taranyk and Valentyna Hvozd[1]

I INTRODUCTION

The Antimonopoly Committee of Ukraine (AMC) is the authority exclusively responsible for dealing with mergers.

i Concentrations

Merger approvals are required whenever a concentration is consummated, provided that the parties thereto meet or exceed the relevant financial thresholds. In particular, for the purposes of the Ukrainian merger control rules, a concentration is deemed to occur, *inter alia*, in cases of:

a mergers between undertakings (i.e., when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities);

b absorption of one undertaking by another (with one retaining its legal identity and the other ceasing to exist as a legal entity);

c acquisition of control directly or through other persons or entities by one or more undertakings over one or more undertakings, including by the way of:
- direct or indirect acquisition (gaining control over or acquiring a lease) of assets that amount to a going concern or a structural subdivision of an undertaking;
- appointment to the post of a chair or deputy chair in the supervisory council, the executive (management) board or any other supervising or executive body of an individual who already occupies one or more such positions in another undertaking; or

1 Dmitry Taranyk is a counsel and Valentyna Hvozd is a senior associate at Sayenko Kharenko.

- composition of the supervisory council, the executive (management) board, or any other supervising or executive body of an undertaking, in such a manner so as to enable the same individuals to represent more than 50 per cent of the members of such bodies in two or more undertakings;

d establishment by two or more undertakings of a joint venture, which in turn is intended to perform on a continuing basis all the functions of an autonomous economic entity; and

e direct or indirect acquisition of assets or participation interests (including shares) in an undertaking that allows the acquirer to reach or exceed 25 per cent or 50 per cent of the votes in the target undertaking's highest management body.

ii Definition of control

Ukrainian competition laws contain a very broad definition of control that is largely based on the EU example, but in practice is even wider in scope. Control is broadly defined in the Law of Ukraine 'On Protection of Economic Competition' as follows:

> *[…] decisive influence by one or more related legal entities and/or individuals over the business activity of an undertaking or its part, which is exercised directly or through other persons, in particular due to: the right of ownership or use of all assets or a major portion of them; a right that ensures a decisive influence over the formation, voting results or decisions of the managing bodies of the company; conclusion of agreements or contracts which allow the determination of the conditions of business activity, the giving of mandatory instructions or the performing of the functions of a managing body of the company; or the occupation of the position of chairman or deputy chairman in the supervisory council, the executive (management) board, or any other supervising or executive body of an undertaking by a person who already occupies one or more of the listed positions in another business entity. Related undertakings are those legal entities and/or individuals that perform business activity jointly or in coordination, including if they jointly or in coordination exercise influence over the business activity of an undertaking. In particular, spouses, parents, children, brothers and sisters are considered to be related.*

The local competition legislation provides a number of criteria based on which an undertaking is deemed to have or to be subject to a 'decisive influence', including:

a undertakings in which the acquirer or the target undertaking directly or indirectly:
- owns more than 50 per cent of the authorised capital;
- holds more than 50 per cent of the votes of the managing bodies;
- has the right to appoint the director, vice-director, chief accountant or more than 50 per cent of the members of the supervisory council, the managing body (e.g., the board of directors) or the audit committee; or
- has the right to receive not less than 50 per cent of the net profits;

b undertakings that have the rights and powers mentioned in (a) above in relation to the acquirer or the target undertaking;

c undertakings that:
- are managed by the acquirer or the target undertaking pursuant to a trust agreement, joint cooperation agreement, lease agreement or other agreement; or

- have the same persons holding the positions of director, vice-director or chief accountant, or not less than 50 per cent of the members of the supervisory council, the managing body or the audit committee; and

d undertakings that provide financial assistance that is used to achieve the concentration, if this may result in a decisive influence of one undertaking over another.

In addition, related entities of the party concerned may include any affiliates that might have an ability to influence the respective party or to be so influenced, as follows:

a undertakings in which the acquirer or the target undertaking and their related entities, as defined above, directly or indirectly:
- own more than 25 per cent of the authorised capital;
- hold more than 25 per cent of the votes of the managing bodies;
- have the right to appoint the director, vice-director, chief accountant or more than 25 per cent of the members of the supervisory council, the board (or other management body) or the audit committee; or
- have the right to receive not less than 25 per cent of the net profits; and

b undertakings that have the rights and powers mentioned in (a) above with respect to either the target undertaking or the acquirer or any of their respective related entities.

It therefore follows that, under Ukrainian merger control rules and local practice, the ability to exercise *de jure* or *de facto* control (including negative control) is the prerequisite for establishing a control relation between undertakings. Namely, if an undertaking can, on the basis of rights, contracts (shareholders' agreement, etc.), historic pattern of attendance at annual general meetings or other means, obtain any form of control (including the possibility to exercise veto rights over strategic commercial decisions such as the budget, business plan, appointment or removal of senior management, major investments) over undertakings, it necessarily follows that a control relation between such undertakings will be established.

It should be noted that the list above is not exhaustive, leaving the AMC with full discretion to find other cases where a control relationship may arise.

iii Financial thresholds

Wherever a transaction gives rise to a concentration as described above, the Ukrainian filing requirement would be triggered if the parties meet all of the following financial thresholds:

a the aggregate worldwide value of assets or sales for all parties to the concentration, including related entities, exceeds €12 million;

b the aggregate worldwide value of assets or sales for each of at least two of the parties to the concentration, including related entities, exceeds €1 million; and

c the value of assets or sales in Ukraine of at least one party to the concentration, including related entities, exceeds €1 million.

iv Market shares threshold

In addition to the above financial thresholds, the Ukrainian merger control rules also establish a market share threshold that, if met, also triggers the Ukrainian merger filing requirement. Thus, irrespective of whether the financial thresholds are exceeded by the parties to the concentration, a requirement to seek a merger approval in Ukraine would arise if the market share of any party or the combined market share of all parties to the concentration on any product market in Ukraine exceeds 35 per cent, and the concentration takes place on the same or a neighbouring product market.

v Block exemptions

It should also be mentioned that the Ukrainian competition laws provide for certain specific exceptions from the notion of a concentration. They are intended to provide clarity and legal certainty, outlining which sorts of transactions do not amount to concentrations and therefore do not trigger the Ukrainian filing requirement, which include, in particular, the following:

a establishment of a joint venture undertaking by two or more undertakings that, in turn, results in the coordination of activities among the founders or between the founders and the new undertaking (such actions are instead treated as concerted practices and may also require a separate approval from the AMC);

b acquisition of shares or other equity interest in an undertaking by a person or entity, whose main activities are financial or securities transactions, for the purpose of reselling such shares or other equity interest within one year, provided that the acquirer does not participate in the undertaking's managing bodies;

c actions otherwise constituting a concentration that occur between undertakings connected by control relations, provided that the latter were established in compliance with the Ukrainian merger control rules; and

d acquisition of control over an undertaking by an insolvency administrator or a state official.

The Ukrainian merger control rules also provide for a pre-notification procedure. Unlike some other jurisdictions, there is no requirement to make a pre-notification filing in Ukraine provided certain conditions are met. Instead, the procedure is generally used by the parties to ascertain whether a particular transaction requires a merger filing in Ukraine. In other words, the parties can seek a comfort letter (in Ukraine, 'preliminary conclusions') from the AMC to confirm whether a merger filing is required under particular circumstances.

No statutes, regulations or guidelines relating to merger control issues were issued during 2013. However, important legal developments are in the pipeline that may have far-reaching consequences regarding when the Ukrainian merger filing requirement is triggered. These are considered in Section V, *infra*.

II YEAR IN REVIEW[2]

The level of market consolidation in 2013 did not change materially from 2012. Namely, 962 merger filings were made to the AMC in 2013, which is approximately only a 2 per cent increase over 2012 and a 27 per cent increase over 2011. In turn, out of the 962 filings submitted to the AMC in 2013, 184 were returned by the authority for being incomplete and were therefore not reviewed. In terms of these 2013 filing returns, there was a slight decline in the number of filings compared with the number of filings that were opposed and returned in 2012 (which amounted to 194). Further, out of 779 reviewed merger filings, 756 did not contain any threats to Ukrainian economic competition and were approved within a Phase I review, while the remaining 23 required greater scrutiny under a Phase II review. Compared with 2012, the AMC conducted half as many investigations for clearing transactions in 2013.

In 2013, the AMC issued several merger approvals that contained behavioural remedies concerning prices, sales tariffs, conditions of sale, the methodology behind price setting as well as conditions of market entry of other undertakings.

It is interesting to note that in 2013, out of 962 applications received by the AMC, 685 applications were filed by foreign applicants; this represents an increase of approximately 49 per cent in the number of foreign applicants when compared with 2012. This trend can be explained by the AMC's public statements regarding its intention to increase the fines it will impose in cases where undertakings fail to seek merger clearance, coupled with the AMC's active monitoring of mergers and acquisitions (M&A), reported by the mass media, and numerous examples where multinational companies have been contacted with a reminder about the merger filing requirement immediately after an M&A transaction has been announced, and prosecuted for their failure to seek merger clearance. This trend may continue until the relevant law is amended by the Parliament to increase the merger notification thresholds, which is expected to eliminate the currently existing obligation to notify transactions that have minimal nexus to Ukraine.

As mentioned above, during 2013 the AMC focused its efforts on discovering past violations consisting of completing a concentration without the prior approval of the AMC when such approval was necessary. As a result, the AMC discovered 38 cases of such violations, and prosecuted the violators by imposing fines. In reviewing such concentrations, the AMC granted its approval *post factum*.

Despite numerous declarations by the AMC that it would significantly increase the level of the fines and start imposing maximum statutory fines (up to 5 per cent of the gross global group-wide annual turnover) for unauthorised mergers from 1 July 2012, 2013 saw a rather low level of fines for such types of violations, with the average level of fines for such type of violation amounted to approximately €3,000. At the same time, in the first part of 2014 the AMC once again declared its intention to increase fines, and we cannot exclude the possibility that the regulator will impose a fine that will significantly exceed the highest fine imposed to date (a €60,000 fine imposed in 2011).

These observations apply equally to domestic and foreign-to-foreign transactions, irrespective of the actual presence of the parties in Ukraine.

2 Statistics presented in this chapter are based on the 2013 Annual Report of the AMC.

III THE MERGER CONTROL REGIME

i Waiting periods and time frames

Similarly to the European Merger Control Regulation,[3] the merger review process is split into two stages – Phase I and Phase II reviews. Each denotes a different time frame, and a different level of scrutiny of a particular concentration and the parties' activities in Ukraine.

The Phase I review is supposed to be completed by the AMC within 45 days from the date of submission. During the first 15 days, the AMC will conduct an initial review, called a formal examination, and it may return the filing without considering it if it determines that it is incomplete. During the subsequent 30-day period, the AMC analyses the submitted information *per se* and decides whether to grant or deny the approval.

On the other hand, the Phase II review may last up to three months, and this period can be suspended until the AMC receives any subsequently requested information. The authority generally tends to open this second review stage if it discovers any grounds based on which the concentration can be prohibited or needs to engage in complicated research (i.e., if the AMC comes to the conclusion that the relevant market is an important one, or that the concentration involves parties with very high market shares). Thus, the possibility of a Phase II review largely depends on how wide the relevant product market is, as well as the relevant market shares of the parties to the concentration. If the parties' combined market share is close to 35 per cent of the relevant product market, denoting dominance (monopoly), it will be highly likely that the AMC will initiate a Phase II review. In addition, if the authority comes to the view that the relevant concentration may lead to the creation or strengthening of a dominant (monopoly) position, or to the significant restriction of competition on any market, or a part thereof, in Ukraine, it will not issue an approving decision.

ii Accelerated review procedures, tender offers and hostile transactions

The Ukrainian competition laws provide no special procedure for tender offers or hostile transactions. Equally, there is no explicit possibility to accelerate the review procedure. This is primarily because the AMC has historically been suspicious of undertakings attempting to accelerate the merger review process; the prevalent view within the authority is that such intentions represent covert attempts to obscure the merger review process and distract the AMC's attention from some important facts, or even anti-competitive effects, of the merger. In practice, however, a possibility exists to obtain a clearance decision on an expedited basis.

The success of efforts to accelerate the merger review procedure exclusively depends on the strength of the arguments put forward by the undertakings. Successful arguments include the concept of 'failing firm' and the necessity to complete a tender offer to avoid bankruptcy, insolvency. In other words, to obtain a clearance decision on an expedited basis, applicants must make the AMC's involvement as easy as possible. In

3 Council Regulation (EC) 139/2004 of 20 January 2004.

relation to the frequency of expedited reviews, there are periods where approximately half of all the AMC's clearances are obtained on an accelerated basis.

iii Third-party access to files and rights to challenge mergers

The Ukrainian competition laws do not allow third parties to, on their own initiative, become involved in the merger review process. However, this does not prevent third parties from filing a complaint or providing information for the AMC to take into account when making a decision on whether to approve a concentration. Indeed, the AMC itself may, during the Phase II review, contact any third parties, including customers and competitors, with the aim of collecting any information it requires to conduct its review.

iv Appeals and judicial review

Parties to concentrations (including third parties, if they can prove that their rights have been violated) can appeal against AMC decisions to the appropriate economic and administrative courts within a two-month period after the respective decision has been issued.

AMC decisions can also be appealed by the parties to the Cabinet of Ministers within a 30-day period of receiving the authority's decision. If an AMC decision is appealed to the Cabinet of Ministers, the latter creates a special commission, which includes a number of independent experts from different industries and authorities as well as the AMC's senior officers. The commission analyses the positive and negative effects of implementing the concentration using the same substantive test employed by the AMC. The Cabinet of Ministers then prohibits or approves the reviewed concentration.

v Effect of regulatory review

The Ukrainian competition laws provide for a possibility for a merger review being conducted by another body. However, such review is not concurrent with the review carried out by the AMC; as mentioned above, parties to the concentration can address the merger to the Cabinet of Ministers within 30 days of the AMC's blocking decision, and the Cabinet of Ministers can, in turn, approve the merger. Nevertheless, this procedure is very rarely resorted to, since the AMC very rarely blocks concentrations (i.e., no more than once a year).

Parties must refrain from consummating the concentration until the AMC's approval is obtained.

IV OTHER STRATEGIC CONSIDERATIONS

i Coordination with other jurisdictions

The Ukrainian merger review procedure is very specific, making it particularly difficult to coordinate with other jurisdictions. However, there is the possibility to make the most of the similarities between Ukraine and Russia, both in terms of language and the requirements set by the countries' respective competition authorities. For instance, applicants can benefit from certain synergies, as the Federal Antimonopoly Service in Russia and the AMC largely require the same information and documents to be

submitted for their review. Moreover, when dealing with manifold cross-border merger reviews, parties can usually benefit from reduced costs if translations into Ukrainian are made from Russian rather than other languages.

In addition, when faced with relevant markets that it has not had a chance to scrutinise and review, the AMC has shown itself to be flexible enough to consider market definitions used by other regulators, particularly the EU Commission. Indeed, the AMC's efforts to increase coordination with other regulators are widely apparent, with the authority organising panels and forums that are consistently visited by senior members of competition authorities worldwide.

Moreover, the AMC cooperates on the basis of bilateral and multilateral agreements with the competition authorities from the Commonwealth of Independent States (CIS) countries, the US and the EU, as well as some other regulators from central and eastern Europe. The AMC has also established good rapport with international organisations such as the International Competition Network, the United Nations Conference on Trade and Development, and the CIS International Council for Anti-monopoly Policy.

ii Special situations

As mentioned above, when one of the parties to the concentration is under financial distress, facing insolvency or bankruptcy, or is in the middle of tender offer proceedings, the AMC has usually been lenient in its *modus operandi*, allowing for an expedited review.

In cases of hostile takeovers, where the acquiring party cannot obtain the target's documents or the necessary information for the Ukrainian merger filing, the AMC can rely on a special procedure and address the target with the necessary requests. However, this would inevitably mean that the parties would need to allocate significantly more time for the Ukrainian merger review process to account for potential delays in information and document gathering. The Ukrainian merger control rules do not provide a special procedure to deal with cases where minority ownership interests are involved.

V OUTLOOK AND CONCLUSIONS

Important legal developments are currently in the pipeline that may have far-reaching consequences on when the Ukrainian merger filing requirement is triggered. The first development relates to the financial thresholds, which is the triggering factor of the Ukrainian filing requirement. It seems that the Parliament is very likely finally to enact amendments to the financial thresholds that were instigated in 2007. The amendments are intended to acknowledge fully recommendations issued by the International Competition Network, requiring that merger notification thresholds should have an appropriate level of local nexus, such as material sales or assets within the respective jurisdiction.

Under the first proposed set of amendments, the combined total value of assets or combined sales (turnover) sufficient to trigger the Ukrainian filing requirement should be increased from €12 million to €30 million. The amendment also envisages that at least two of the parties to the concentration should have assets or sales in Ukraine amounting to a minimum amount of €2.5 million, instead of €1 million by only one of the parties. The proposal effectively changes the current status quo, where a merger filing

may be required if only one party to the concentration generates sufficient sales or owns sufficiently large assets in Ukraine.

Alternatively, the second proposed amendment provides for the AMC's approval in cases where the aggregate Ukrainian asset value or sales turnover for one of the parties to the deal exceeds €30 million, while the aggregate worldwide asset value or sales turnover of any other party exceeds €30 million.

The increase of the existing thresholds by 2.5 times and, most importantly, the fact that two parties should meet this threshold, is supposed to exclude a number of deals having no significant impact on competition in Ukraine from the need to seek merger clearance in Ukraine.

We hope that in 2014, the lawmakers will return to the original agenda, and that the expectations of the business community will be finally rewarded by the adoption of the respective amendments to the Competition Law.

Appendix 1

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