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Ukraine merger control (2016)

Produced in partnership with Sayenko Kharenko

A conversation with Vladimir Sayenko, partner at Ukrainian law firm Sayenko Kharenko, on key issues on merger control in Ukraine.

NOTE–to see whether notification thresholds in Ukraine and throughout the world are met, see Where to Notify.

1. Have there been any recent developments regarding the Ukrainian merger control regime and are any updates/developments expected in the coming year? Are there any other 'hot' merger control issues in Ukraine?

Major changes to the Ukrainian merger control regime were approved by the Ukrainian Parliament on 26 January 2016, amending the Law of Ukraine 'On Protection of Economic Competition' (the Competition Law). The amendments were signed by the President of Ukraine on 16 March 2016 and were duly published on 18 March 2016. It follows that the amendments come into force on 18 May 2016.

In addition to increasing the asset value and sales thresholds, following the recommendations of the International Competition Network and the United Nations Conference on Trade and Development, the amendments are supposed to improve the local nexus requirement.

The new notification thresholds will be :

- combined worldwide total turnover or total assets of all the parties to the concentration exceeds €30m and at the same time at least two parties have more than €4m of sales or assets in Ukraine, or
- the target in an acquisition, seller of assets or one of the joint venture founders have turnover or value of assets in Ukraine exceeding €8m, and the turnover of at least one other party exceeds €150m worldwide.

It is important to note that the amendments abolish the current market share threshold (ie the market share of any party of the concentration, or combined market share, exceeds 35%).

It should be pointed out that the mere signing of the transaction agreement does not constitute a concentration under Ukrainian laws. The concentration takes place when the transaction is closed and title to shares passes to the acquirer or control is acquired in any other way. This means that the amended thresholds should be applied to any transaction which is closed after 18 May 2016, irrespective if the signing of the transaction takes place before or after 18 May 2016.

Other amendments to the merger control regime include:

- the introduction of the possibility for preliminary consultations with the AMC
- the introduction of an expedited review procedure limited to 25 days (as opposed to the regular review period of 45 days) that will apply where:
  - only one party to the transaction is active in Ukraine
  - in horizontal mergers, if the combined market share of the parties does not exceed 15%, or
  - in non-horizontal mergers, if the market shares of the parties in a market that is downstream or upstream to that in which another party operates does not exceed 20%
- new procedure for proposing remedies and imposing conditional decision during phase II investigations
- a requirement that the notification should include information on ultimate beneficiary owners of the merging parties

- increased filing fee
- publishing decisions adopted by the AMC with proper treatment of the confidential information as defined by the involved undertakings, and
- introduction of a limit of 180 days for the review of the merger transaction, including in phase II, counting from the very first notification to the AMC.

In other developments, on 15 September 2015, the AMC issued guidelines on the application of fines for breaches of competition law (the Guidelines), which were subsequently amended on 16 February 2016. In order to achieve predictability and consistency of fines, the AMC's decision making process now consists of two phases: (1) calculation of the basic amount of the fine based on disclosed methodology, including as percentage of income achieved in the market affected by the violation, and (2) adjustment of the basic amount of the fine taking into account mitigating or aggravating circumstances.

In addition, the Guidelines introduced a limited time period during which fines for the past failures to obtain merger control clearance will be limited to a fixed amount (commonly referred to as amnesty or quasi-amnesty proceedings):

- a fine for the failure to obtain the approval of the AMC for concentrations (ie merger control clearance) voluntarily reported to the AMC before 15 March 2016 shall be limited to UAH 20,400, and
- any such violation reported to the AMC after 15 March 2016 but before 15 September 2016 will be subject to a fine of UAH 102,000.

A number of multinational and local companies have already voluntarily reported violations to the AMC in order to qualify for amnesty and to clear historical risks in anticipation of higher fines that may generally result from the application of the Guidelines.

In terms of 'hot' issues, the Chairman and Commissioners of the AMC continue to face a tough challenge to complete the ongoing investigations and clearances, while the business community and general public expect zero tolerance to corruption and some liberalisation, including simplification of review proceedings, transparency of the decision making process, predictability and consistency of fines and openness of the AMC's staff to consultations with applicants.

2. Under Ukrainian merger control law, is the control test the same as the EU concept of ‘decisive influence’? If not, how does it differ and what is the position in relation to 'minority shareholdings'?

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 Competition Law as:

> '*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 a 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 regulation provides a number of criteria based on which the undertaking is deemed to have or be subject to a ’decisive influence‘, which amongst other are:

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

- undertakings which have the rights and powers mentioned in the first bullet point above in relation to the acquirer or the target undertaking
- undertakings which:
  - 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, chief accountant or not less than 50% of the members of the supervisory council, the managing body or the audit committee, and
- undertakings which 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, undertakings may be connected by a control relationship in the following cases:

- undertakings in which acquirer or the target undertaking and their related entities, defined above, directly or indirectly:
  - own more than 25% of the authorised capital
  - hold more than 25% of the votes of the managing bodies
  - have the right to appoint the director, vice-director, chief accountant or more than 25% 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% of the net profits, and
- undertakings which have the rights and powers mentioned in item (1) above with respect to either the target undertaking or the acquirer or any of their respective related entities.

Thus, under Ukrainian merger control rules and local practice, the ability to exercise decisive influence de jure or de facto is the prerequisite for establishing that a control relation between undertakings exists. 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 the rights of veto over strategic commercial decisions such as the budget, business plan, appointment/removal of senior management, major investments) over undertakings, it follows that a control relationship between such undertakings is deemed to exist.

It is worth pointing out that the examples indicated above are not exhaustive, leaving the AMC with full discretion to find other instances where a control relationship may arise.

In the context of the acquisition of minority shareholdings, this means that there is no 'safe harbour'. No matter how small a minority shareholding is, if the minority shareholder can block important business decisions by virtue of his or her shareholding; agreement or otherwise, a control relationship (known as 'joint control' in this case) is likely to exist. Moreover, one should bear in mind that for the purposes of determining whether an acquisition of a minority stake constitutes a notifiable concentration, an acquisition of a stake that allows the acquirer to reach or exceed a 25% threshold of votes in the target's highest governing body triggers the filing requirement automatically, no matter whether any control relationship arises as a result of the transaction.

3. Are joint ventures caught by the national merger control provisions (including non-structural, cooperative joint ventures)?

Under the Competition Law, the establishment of a joint venture could fall either under the definition of:

- a concentration, or
- concerted practices.

In each case a prior approval from the AMC may be required for the establishment of a joint venture.

Treatment as concentration

Similarly to the approaches used in the EU Merger Regulation, the establishment of a joint venture by two or more undertakings would fall under the definition of a 'concentration' and be caught by the national merger control regime if such a joint venture is intended to perform on a continuing basis all the functions of an autonomous economic entity. The establishment of such joint venture would be subject to the AMC's prior approval, provided that its parties meet/exceed the respective financial or market thresholds.

Treatment as concerted practices

In cases where the joint venture is not intended to perform on a continuing basis all the functions of an autonomous economic entity and is formed to coordinate competitive behaviour between the founders, it would be treated as a concerted practice, rather than a concentration, which may also require the AMC's approval.

The procedure for the receipt of the AMC approval for concerted practices is similar to the one for concentrations, but the review period is longer and the approval test may be more difficult to meet. Therefore, such approvals are less common, as parties usually prefer to notify joint ventures as concentrations, rather than concerted practices.

4. What are the merger control thresholds and would a purely foreign-to-foreign transaction be caught (commenting on any 'effects' doctrine/policy if relevant)?

In Ukraine, a merger filing for a concentration is required when either the financial or the market share thresholds are met:

Financial thresholds:

- combined worldwide assets or sales of the undertakings concerned for the last financial year exceed €12m, and at the same time
- individual worldwide assets or sales of at least two of the undertakings concerned each exceed €1m, and
- individual domestic assets or sales of at least one of the undertakings concerned exceed €1m.

Market share thresholds:

- market share of any party of the concentration (or combined market share) exceeds 35%, and
- the deal takes place on the same or the neighbouring product market.

Due to the extremely low level of financial thresholds in Ukraine, there are a number of cases when purely foreign-to-foreign transactions with limited (over €1m) assets/sales in Ukraine achieved by only one party to the transaction are caught by the Ukrainian merger control regime. This in practice leads to a conclusion that a transaction, which does not influence competition in Ukraine, may require a merger clearance in Ukraine.

A good argument for not seeking a merger clearance in Ukraine could be built based on Paragraph 2 of Article 2 of the Competition Law, which states that the Competition Law as a whole applies to relations that '*influence or may influence economic competition in Ukraine*'. One may argue, based on this general provision, that a foreign-to-foreign transaction involving only one party with assets or sales in Ukraine does not influence competition in Ukraine and should not trigger any filing requirements in Ukraine. This approach would be similar to the 'effects doctrine' that has been developed in some jurisdictions.

However, unfortunately the effects doctrine has not been properly reflected in the Ukrainian laws or administrative and court practice. Instead, the predominant view is that in a situation where the law imposes a filing requirement based on the specified thresholds (including assets or sales of at least one party to the concentration in excess of €1m), this probably creates an irrebuttable presumption that such actions may influence economic competition in Ukraine. Thus, where at least one of the parties to the concentration actually sells goods to consumers in Ukraine, the requirement of Paragraph 2 of Article 2 of the Competition Law ('*may influence economic competition in Ukraine*') arguably it appears to be met. Such interpretation has been confirmed to us in some conversations with the AMC's officials and we think that it might be upheld by the Ukrainian courts, which are known for their formalistic attitude, although we do not believe that this issue was ever litigated.

As described in the answer to question 1 above, the amendments to the Competition Law amending the notification thresholds will enter into force on 18 May 2016. These new thresholds are supposed to significantly decrease the number of merger filings for those foreign-to-foreign transactions that have limited nexus to Ukraine. The new thresholds are:

- combined worldwide total turnover or total assets of all the parties to the concentration exceeds €30m and at the same time at least two parties have more than €4m of sales or assets in Ukraine, or
- the target in an acquisition, seller of assets or one of the joint venture founders have turnover or value of assets in Ukraine exceeding €8m, and the turnover of at least one other party exceeds €150m worldwide.

5. Are there any specific issues parties should be aware of when compiling and

calculating the relevant turnover for applying the jurisdictional thresholds?

All the thresholds must be calculated on the group-wide basis, including all undertakings connected by a control relationship.

The applicable competition laws do not provide sufficient clarity on the procedure for the calculation of the assets and turnover figures of the parties concerned, especially when foreign undertakings are involved. This creates a lot of uncertainties in some cases.

While in some jurisdictions parties do not attribute the assets/sales of the sellers when applying the financial thresholds, the AMC's officers traditionally insist on a different approach. They take the position that any undertaking connected to the target by a control relationship should be included into the calculation, even if this undertaking is the seller.

Given this, one could imagine a situation where even the revenues of the acquirer would be taken into account as well while calculating the financial results of the target entity. For example, this would be the case if the acquirer already has joint control over the target and intends to change this joint control into sole, eg acquiring the rest of the target's shares.

Specific rules for the calculation of financial thresholds exist for banks, insurance companies and some other financial institutions.

6. Where the jurisdictional thresholds are met, is notification mandatory and must closing be suspended pending clearance?

The notification of a qualifying concentration with the AMC is mandatory. The AMC approval must be obtained prior to taking any action that could result in the restriction of competition and the impossibility of restoring the original state. In other words, approval shall be obtained before the actual change of control occurs, ie before closing of the contemplated transaction.

At the same time, the Competition Law provides for several exemptions allowing applicants not to obtain the approval when the parties pass the threshold test. In particular, the following transactions are specifically excluded from the notion of concentration and from the need to obtain prior AMC approval:

- acquisition of shares or other equity interest in an undertaking by a person whose main activities are financial or securities transactions for the purpose of reselling such shares or other equity interest within one year, provided that such a person does not participate in the managing bodies of the undertaking (commonly known as an exemption for financial intermediaries)
- actions otherwise constituting a concentration, which occur between undertakings connected by a control relationship, provided that such a control relationship was initially created in compliance with competition laws
- establishment of an undertaking by two or more undertakings resulting in the coordination of activities between the founders or between the founders and the new undertaking (such actions are treated as concerted practices under the Competition Law), and
- acquisition of control over an undertaking by an insolvency administrator or other state official.

7. Is it possible to close the deal globally prior to local clearance?

Closing the qualifying concentration before Ukrainian clearance would definitely be viewed by the AMC as a violation of the Ukrainian merger control rules. Should this happen after the filing was made, this may be even viewed by the AMC as a direct intention of the applicant to violate the relevant competition laws and would, therefore, serve as an aggravating circumstance, in the absence of any reasonable explanation from the application proving the objective need to complete the transaction by a certain deadline.

Ukrainian merger control rules do not provide for the possibility of a hold separate arrangement, the so-called 'carve-out' solution, because any transaction that amounts to a concentration is automatically subject to a regulatory approval in Ukraine once its parties meet the relevant financial thresholds. Despite the fact that in many jurisdictions such a transactional structure is rather commonplace, the applicable legislation makes it practically and technically impossible to restructure a transaction in such a way that it would meet the filing thresholds. Quite simply, there are no specific rules for foreign-to-foreign transactions that would allow the parties to close a transaction globally and suspend the implementation of the concentration in Ukraine until the AMC's approval is obtained. Instead, one of the few available solutions could be to park the Ukrainian assets and Ukrainian turnover generating subsidiaries of the parties with a financial intermediary based on the exemption described above, assuming this is feasible.

8. Is there a deadline for filing a notifiable transaction and what is the timetable thereafter for review by the Antimonopoly Committee of Ukraine?

The applicable competition legislation does not provide for a specific deadline to submit the filing. As already mentioned, the AMC's approval must be obtained before the actual change of control occurs, that is, before closing the contemplated transaction.

Similar to the EU Merger Regulation, 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.

A Phase I review is supposed to be completed by the AMC within 45 calendar days from the date of filing the notification. During the first 15 calendar days, the AMC conducts an initial review, a so called 'formal examination', and it may return the filing without considering it if it determines that it is incomplete. During the subsequent 30 calendar days, the AMC analyses the submitted information per se and decides whether to grant or deny the approval.

A Phase II review may last up to three months. 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 into complicated research (ie if the AMC comes to the conclusion that the relevant market is of high importance, or that the concentration involves parties with 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% of the relevant product market, denoting presumed dominance (a monopoly position), it is very 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 may even prohibit implementation of the concentration.

Note–deadlines run from the day of the registration of the application by the AMC.

Note–the investigation process will be changed once the amendments to the Competition Law enter into force (see question 1 above).

9. Who is responsible for filing a notifiable transaction (noting also whether there is a specific form/document used and an applicable filing fee)?

The actual requirement is quite vague and the Competition Law does not specifically indicate who is responsible for the filing. It generally refers to the undertakings that implement the concentration.

In practice, while a considerable number of filings in the past were made by the acquirer alone, the AMC usually expects to see a joint filing, co-signed by the acquirer and the target.

This obligation to have each party to the concentration as an applicant may also be viewed as an issue of distribution of liability for the accurateness of information that is being provided to the competition authorities. By having the target co-sign the application, the acquirer shares some of that responsibility with the target. Otherwise, hypothetically, the acquirer could be held liable for the accurateness of the information submitted by the target. From this point of view, in cases where a majority stake is being sold, it may be more feasible for the seller to act as one of the applicants, rather than the target. In the past, the AMC accepted such an approach where the seller and the target were part of one undertaking.

The application and documents attached to it have to fully correspond to the requirements provided by the merger clearance regulation. Additional formalistic requirements exist with respect to how the documents need to be prepared and submitted. For example, each document in the application should be signed, each page of the document set shall be cross-numerated with a pen, all sheets shall be stitched together or connected in any other way to prove that no pages could have been replaced. In addition, the paper form notification shall be accompanied with the completed electronic database on a CD prepared using special software that was specifically created by the AMC for the merger control regime.

The Competition Law provides that for the submission of the application for the concentration a filing fee shall be paid by the applicants. The amount of the filing fee currently equates to UAH 5,100. The filing fee will be increased once the amendments to the Competition Law enter into force (see question 1 above). Note–for the last several years, the foreign currency account of the AMC has remained closed and the filing fee can be paid in local currency only.

10. Please confirm/comment on the penalties for failing to notify or suspend transactions pending clearance and the Antimonopoly Committee of Ukraine's record/stance in terms of pursuing parties for failing to notify relevant

transactions (commenting, if relevant, on any statute of limitations regarding sanctions for infringements of the applicable law).

Completion of a concentration without the prior approval of the AMC (including if the closing takes place after the notification is filed with the AMC but before the clearance is granted) may result in a fine being imposed by the AMC of an amount of up to 5% of the gross worldwide income of the responsible party (usually the acquiring party) based on the sale of goods or services 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, arguably together with all of its related entities.

As a practical matter, in the past, the fines for violations of merger control laws have been reasonably low. So far, most fines for the failure to obtain a regulatory approval for a concentration, where the concentration did not have any negative impact on competition in Ukraine, have not exceeded €20,000. However, motivated by the view that its fines generally needed to be much more substantial in order to have a greater deterrence effect (especially for larger corporate groups), the AMC imposed a fine of approximately €60,000 for the failure to notify a high-profile transaction in the IT industry-sector (despite the fact that the parties fully cooperated with the AMC's officers and that their concentration did not have any negative effect on economic competition in Ukraine).

An increase of the actual fines imposed by the AMC can be expected in the near future based on the application of the filing Guidelines described in question 1 above. In the meantime, until 15 September 2016, the AMC has committed itself to applying lower fines for past violations voluntarily reported by the parties, namely:

- a fine for a past failure to obtain approvalvoluntarily reported to the AMC before 15 March 2016 shall be limited to UAH 20,400, and
- any such violation reported to the AMC after 15 March 2016 but before 15 September 2016 will be subject to a fine of UAH 102,000.

In general, it is fair to say that the AMC directs some of its efforts at discovering high profile transactions, while it lacks sufficient resources to effectively monitor all foreign-to-foreign transactions that technically require its approval and failed to obtain one. For example, we understand that the AMC monitors websites of the European Commission and a couple of other regulators from EU Member States. We are also aware that an informal exchange of information existed in the past between the AMC and the competition authorities of certain CIS states, although recently these contacts were largely terminated. This data is then compared to the database of the State Customs Service of Ukraine that monitors the imports of goods, as well as to some other sources that confirm the activity of the undertakings in Ukraine.

Lately the AMC began closely monitoring the business news for any major transactions involving foreign undertakings that operate in Ukraine. In case it discovers any transaction that potentially may require or might have required its approval, it may send an official letter either to inform the company on the need to obtain the approval or to request a confirmation whether the transaction was closed in compliance with the applicable competition laws. Often, such letters are sent to the local Ukrainian subsidiary of the company, rather than the headquarters.

In addition to all of the above, it should be emphasised that the AMC operates an electronic database requiring merging parties to submit the required data on a CD. This enables the regulators to automatically compare the composition of corporate groups, allowing them to uncover any unreported changes in shareholdings. What this means in practice is that if either party to a foreign-to-foreign transaction had made a merger filing to the AMC in the past, but then at some point in time decided not to seek its approval for some concentration, then in the future such failure can be easily discovered when a filing is submitted to the AMC by any member of the corporate group. In other words, one should be prudent to ensure that all the data provided to the AMC in the context of a merger filing is consistent with the data submitted in the course of previous filing(s) and that no changes to the corporate structures were undertaken without a prior approval of the AMC, when such approval was required. At the same time, however, if neither party to a foreign-to-foreign transaction has submitted its corporate structure to the AMC before, the AMC's detection capabilities decrease significantly.

The limitation period within which the AMC may prosecute a violation of merger control law is five years from the date when the violation was committed or, in case of a prolonged violation, from the date when the violation was terminated (ie when the share transfer was recorded in the case of an acquisition or when the merger became effective in the case of a merger or amalgamation).

11. Are there any other 'stakeholders' other than the Antimonopoly Committee of Ukraine (for example, any 'sector regulators' who might have concurrent powers)?

The Cabinet of Ministers of Ukraine has some limited powers to approve concentrations that were

prohibited by the AMC. Such approval can be granted only if the positive social effect from the concentration significantly outweighs its negative impact on competition.

In addition to the merger control regime supervised by the AMC, some specific sectors have their own regulators and independent regimes designed to monitor changes of control. For example, an acquisition of 'significant interest' in a Ukrainian bank requires an approval from the National Bank of Ukraine. Similarly, an acquisition of significant interest in a financial institution or a securities broker also requires an approval from the Financial Services Commission (if the target is a non-banking financial institution other than a professional participant of the stock market) or the Securities Commission (if the target is a professional participant of the stock market).

Getting The Deal Through guide

A copy of the latest Getting The Deal Through merger control guide for Ukraine is available here:

GTDT Merger Control 2016 Ukraine

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