

Competition clearance in Ukraine

Those involved in merger and acquisition activities need to consider Ukraine's Competition Law requirements. The very low thresholds that trigger reporting and clearance obligations in Ukraine mean that even when two company's businesses do not overlap in the Ukrainian market, or their combined Ukrainian market share is negligible, clearance may still be required.

This client briefing considers the competition law reporting obligations imposed in Ukraine on those involved in mergers and acquisitions.

What transactions require approval?

The following types of transactions are subject to prior notification and approval of the Antimonopoly Committee of Ukraine (the "AMC") **if no exemption applies and the monetary and jurisdictional thresholds are met:**

- the merger of two or more entities;
- the takeover of one entity by another;
- the acquisition of direct or indirect control over an entity or a part of it;
- the establishment of an entity by two or more entities; or
- the direct or indirect acquisition of shares (or management rights over shares) in an entity, where, as a result, a person acquires either 25% or more or 50% or more of the voting rights in the entity's highest management body.

For the purposes of the Competition Law, an entity (Person A) may be considered to have "**control**" over another entity (Person B) if:

- Person A has the right to own or use all or a significant part of the assets of Person B;
- Person A has the right to affect the membership, the voting results and decisions of management bodies of Person B;
- Person A has the right to (i) conclude agreements, (ii) dictate business activities, or (iii) issue binding instructions in relation of Person B;
- someone who holds a position of chairman or deputy chairman of the supervisory board, management board or other similar body of Person

Key issues

- Foreign-to-foreign transactions must still be notified if the thresholds are met.
- Very low turnover thresholds apply.
- Target's turnover is aggregated with that of the seller(s) group when determining turnover thresholds.
- The electronic database allows the AMC to better monitor and penalise participants.
- The AMC has very broad authority and discretion to block transactions. However, in practice the AMC rarely uses these powers.
- The AMC can impose substantial fines.
- The AMC has wide powers to request additional information, a power it often exercises.
- The process can be lengthy

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A is appointed to a similar position in Person B; or

- people who hold positions on the supervisory board, management board or other similar bodies of Person A are appointed to more than 50% of the total number of similar positions in Person B.

Which transactions are exempt?

The following transactions are exempt from notification or approval:

- the acquisition of shares by someone, if (i) that person's principal activity is trading in shares, (ii) the acquisition is made for the purpose of resale (and such resale occurs within one year of the acquisition), and (iii) no voting rights are exercised by that person or on its behalf in any management bodies of the company;
- internal reorganisations within a corporate group, provided that all necessary AMC approvals were obtained for the previous external acquisitions or divestments made by the group; or
- situations where control is acquired by a person appointed in connection with the liquidation or insolvency of the company, or where control is acquired by a representative of a state authority.

What are the thresholds?

If a person is involved in a transaction of the type mentioned above (and no exemption applies) then prior notification to and approval of the AMC is required if either one of the following two tests below is met.

Test One

The turnover (or value of assets):

- **worldwide** of any two participants to the transaction (based on the consolidated accounts of their ultimate parent company) exceeds EUR 12,000,000; **AND**
- **worldwide** of any two participants to the transaction (based on the consolidated accounts of their ultimate parent company) exceeds EUR 1,000,000 each; **AND**
- **in Ukraine** of at least one participant to the transaction (together with any other related companies in its group) exceeds EUR 1,000,000,

in the previous financial year.

Test Two

The aggregate market share in Ukraine of the participants to the transaction (including their corporate groups) exceeds 35% of a particular product market.

A draft law increasing the turnover thresholds has been before the Ukrainian Parliament since 2008. However, whether such law will be passed and in what form remains unclear.

Treatment of foreign-to-foreign transactions

Due to the wide ambit of the thresholds, a transaction completed outside Ukraine between non-Ukrainian entities, where neither party has a Ukrainian subsidiary, may still require approval if the thresholds above are met.

When to apply

In order to comply with Ukrainian law the approval of the AMC is required prior to the completion of the transaction. If approval is not obtained before completion there is no process by which it can be remedied retrospectively.

What needs to be submitted and how

A significant amount of information needs to be submitted to the AMC together with the application, including:

- information about the ownership of the participants (including specifics related to the legal form of the company, their addresses, shareholders, and members of the governing bodies);
- information about the transaction (including details of any financing and an assessment of the economic benefit of the transaction and its impact on the market);
- information about the business activities of the participants in Ukraine (including the value of their assets and turnover and a description of their activities, market share (in national and regional Ukrainian markets), major competitors, consumers and suppliers); and
- hard copies of certain documents (including any power of attorneys, corporate documents, financial statements of the acquiring party and documents confirming the transfer of title).

Approval process, timing and fees

After receipt of a notification, the AMC has 15 calendar days to decide whether or not it will accept the application. It will refuse to accept any application if it believes that not all information required to be submitted is included.

If, during the 15 calendar day period, the AMC raises any questions or requests any additional information then the 15 calendar day period starts again from date when the revised application (which includes the answers to their questions or the additional information) is submitted.

Once the application itself is accepted then, unless the AMC believes that further investigation is required, it must either approve or reject the transaction within 30 calendar days. The AMC usually issues its decision towards the end of the 30 calendar day consideration period.

If the AMC decides that further investigation into the transaction and its ramifications is required then it can ask for additional information or reports to be provided. If it does this then the AMC has three months commencing on the date when all additional information requested is submitted, to consider the transaction.

There is no procedure to speed-up the process. While it may be possible to submit abridged forms of documents, if all the required information is not available or does not exist (especially relevant where non-Ukrainian entities are involved), this does not speed up the review process and the applicable time periods commence from the date that all information is provided.

The filing fee for a notification is currently UAH 5,100 (or approximately EUR 500).

When notifying a transaction, participants are typically required to file a joint application to the AMC. As some of the information which needs to be submitted can be confidential or sensitive information, the AMC permits participants to submit such confidential information directly to the AMC.

AMC power to block transactions and appeal rights

The AMC has very broad authority and discretion to block a transaction or to revert with numerous questions, thus extending the time for review of any application.

Recent practice shows that the AMC rarely uses its powers to block transactions. Where it does, this is generally stated to be due to issues related to market concentration.

The AMC has the power to provide its approval subject to conditions. Examples of conditions imposed by the AMC include an obligation on the participants:

- to refrain from increasing product prices without objective justification;
- to maintain certain production volumes on the market;
- to report to the AMC price levels and production volumes;
- not to create constraints on market access to competitors; and
- to maintain similar product price levels when selling to consumers.

An applicant or a third party has the right to appeal against all or a part of a decision of the AMC. Appeals are made to the

commercial court and must be lodged within two months after the date when the decision was made.

In addition, the applicants (but not third parties) may appeal to the Cabinet of Ministers of Ukraine (the "CMU") if they believe that the transaction will result in benefits that outweigh the negative consequences of any restriction on competition. The CMU can overrule the AMC's decision.

Consequences for failing to notify

The consequences for breaching the competition clearance rules can include:

- fines;
- a direction to unwind the transaction; or
- the initiation of legal proceedings to render the transaction invalid.

The general limitation period for breaching the Competition Law, including a failure to make a filing, is five years. For certain breaches, including failing to supply information to the AMC, or providing incomplete or misleading information, the limitation period is three years.

Fines

The AMC has the power to impose a fine in an amount up to 5% of the worldwide turnover of a group, for failure by an entity within that group to make a filing when required.

Until recently, the fines actually imposed have been rather low, with most fines between EUR 1,000 to EUR 35,000.

However, the AMC recently stated that starting from 1 July 2012 its stance will change and that it will not hesitate in imposing the maximum fines available when it deems necessary.

Due to the recent implementation of a requirement to submit certain information through an electronic database, the AMC is able to more closely monitor the consistency of information which is being submitted. As a result, the AMC has been able to more easily spot misleading information and has recently been imposing fines of up to EUR 10,000 for submission of misleading information.

Administrative and Criminal Sanctions

There are no criminal offences for breaches of the Competition Law.

There are administrative offences though. For example, the CEO of a company can be fined personally if the company fails to submit any required information or submits inaccurate information. However the fines that may be imposed for such breaches are currently relatively low (up to approximately EUR 15). We are not aware of any cases where a foreign company's CEO was fined.

Other Potential Sanctions

The AMC has the power to request that the Ministry of Economy impose sanctions against a Ukrainian company, the effect of which would be a temporary prohibition on it importing or exporting goods or services into or out of Ukraine. However, we are not aware of any cases where the AMC has sought to apply such a sanction.

Validity of contracts

The validity of a transaction can be challenged in court by the AMC, or any other interested party. Recently, courts in Ukraine have been prepared to invalidate transactions where AMC approval was required but not obtained.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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