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Ukrainian Merger Control Developments

Timur Bondaryev (Arzinger) · Monday, November 23rd, 2015

On 12 November 2015, Ukraine's Parliament adopted in the first reading a bill amending the merger control rules. This initiative addresses most of the problems that had been requiring an adequate solution for a long time yet remained disregarded till now. A brief overview of the contemplated novelties is provided below.

Financial Thresholds Increase

The bill both increases and structurally amends the respective thresholds as follows:

Current financial thresholds to be met cumulatively (1+2+3)

1. Euro 12 million worldwide **in either assets or in revenue** for all merging parties; and
2. Euro 1 million worldwide **in either assets or in revenue** for each of at least two merging parties; and
3. Euro 1 million in Ukraine **in either assets or in revenue** for at least one merging party.

Expected financial thresholds to be met cumulatively (1 + 2(a) **or** 1+ 2(b))

1. Euro 30 million worldwide **in either assets or in revenue** for all merging parties; and 2 (a) or 2 (b)

2 (a) Euro 4 million in Ukraine **in either assets or in revenue** for each of at least two merging parties.

2 (b) Euro 8 million in Ukraine **in revenue** for at least one merging party, and Euro 100 million worldwide **in revenue** for at least one other merging party.

In all cases above a merging party means either purchaser's group of companies or target's & seller's group of companies (or each JV partners' group of companies in case of a joint venture establishment).

Thus, the bill partially amends the basis for the threshold calculation, increases figures and provides more nexus for Ukrainian markets.

Preliminary consultations and simplified procedure introduction

Upon request of the merging parties the AMCU will have to give preliminary consultations on the scope of the information to be submitted for the application review. Moreover, the merging parties will be able to obtain a consultation from the AMCU on how to eliminate some deficiencies in their submission within a 15-day preview period. In other words, the AMCU will have fewer chances to reject an

application due to some small technical errors in the documents.

Additionally, the parties will be able to arrange for the simplified procedure lasting only 25 instead of 45 days. To apply the simplified procedure, the transaction in question has to meet one of the following criteria:

1. only one merging party is operating on the Ukrainian market, or
2. the aggregate market share of the merging parties on the same commodity and geographical market does not exceed 15%, or
3. the market shares or the aggregate market shares of the merging parties operating on higher or lower product markets compared to the market of the other merging party's operation does not exceed 20%.

At the same time, the bill does not specify in detail the simplified procedure itself. It is understood that the merging parties will negotiate the scope of necessary documents and information with the AMCU on a case-by-case basis.

Phase II review

In accordance with the new law, the AMCU will be able to launch the Phase II review only after detecting any reasons to block the notified merger. Currently, the AMCU is also entitled to do so ***if there is a necessity to conduct an in-depth investigation or an expert examination***. This provision should be actually applied if the AMCU suspects that a merger might harm competition. However, in practice it is used frequently to delay the review process even if transactions raise no antitrust concerns at all.

Remedies negotiation

The bill introduces a remedy negotiation procedure which has been poorly regulated by the current laws. Upon detecting any reasons to block a transaction, the AMCU shall notify the merging parties accordingly. The merging parties, in their turn, may suggest some reasonable and proportional remedy to eliminate the potential harm to competition resulting from the merger. Further, the parties may participate in remedy-related consultations with the AMCU to achieve an optimal result.

State fee increase

It is planned to quadruple the state fee for all merger control-related issues (review of a merger clearance or a concerted actions clearance application, preliminary conclusions on the necessity to obtain a clearance). For instance, the current state fee for the merger application review amounts appr. to Euro 200 but is expected to be increased up to Euro 800.

We expect the bill to be passed into law by the Parliament and signed by the President by the end of the year, at the latest. Thus, the chances that the new rules will come

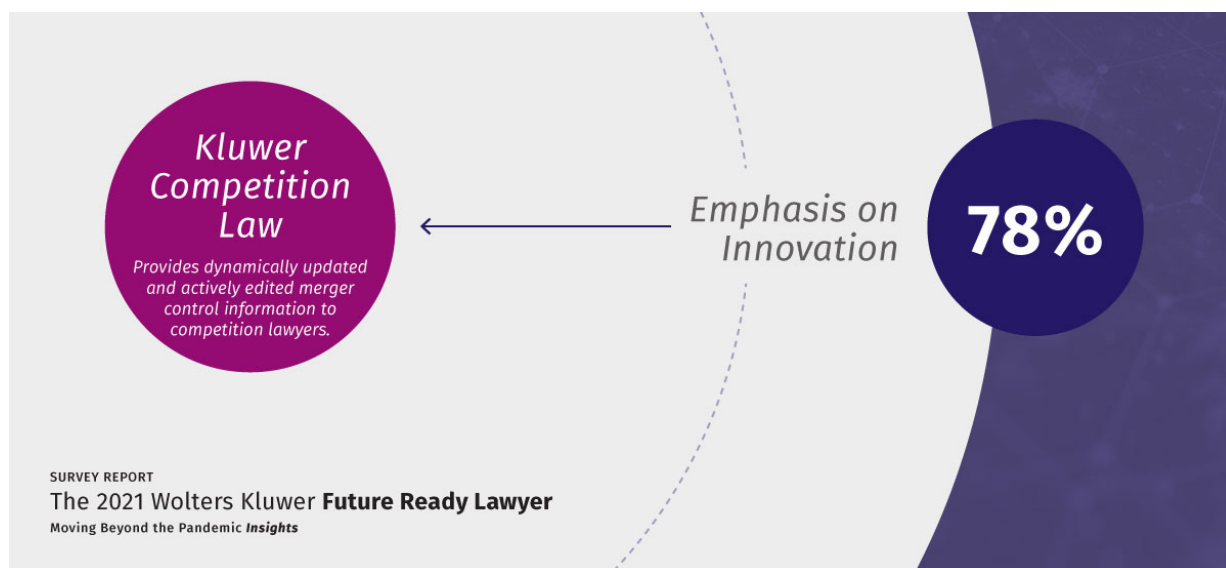
into force as soon as on 01.01.2016 are very high.

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