Ukrainian Sanctions List and Merger Control – Atomic Bomb for Global Transactions?

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Background
Significant amendments to the Law of Ukraine "On protection of economic competition" came into force on 17 December 2017. The changes are aimed at prohibiting transactions involving persons included in the Ukrainian sanctions list (the Sanctions list).

The Sanctions list was introduced by the Law of Ukraine "On Sanctions" following the annexation of Crimea by Russia, and the main focus of the law is on major Russian businesses and individuals, who have been somehow involved in the Russian-Ukrainian conflict.

The list is very "fluid", being regularly amended and updated; therefore it is very important to regularly review it to ensure, that neither party to transaction is "blacklisted".

Substance

According to the newly introduced piece of legislation, the notifiable transactions *should not be cleared* if special economic and other restrictive measures (sanctions) apply to the merging parties or control related persons (including UBOs).

Below is a brief summary of expected outcome of merger review from the sanctions angle:

…relevant sanctions come into force	***Consequences***
before the submission of merger notification	application is being returned without consideration, – no clearance
during application review	application is being returned without consideration, – no clearance
during phase-II investigation	case is being closed without a decision on the merits, – no clearance
If merger clearance is granted without taking into consideration relevant sanctions	Merger clearance decision may be reviewed and even cancelled anytime ***within 5 years*** following its adoption!

No tacit agreement

By general rule, merger clearance is considered to be granted and a transaction is considered to be cleared if the respective consideration timeframe expires and a formal respective decision is not taken by the Ukrainian agency (the AMCU). The new law clearly provides that tacit agreement is not applicable when it comes to parties included in the Sanctions list.

Additional requirements

By virtue of the new regulation, from now on any merger clearance application should be accompanied by a statement with regard to the applicability of sanctions to the merging parties and their group members. If a merger involves sanctioned individuals/entities after all, the applicants may argue that relevant sanctions should not be applied in the particular case due to the circumstances (e.g. the sanctioned participant has no influence on the proposed merger).

Relevant practice

Following adoption of the abovementioned change,s the AMCU has already closed three cases on merger clearance without taking a decision on the merits (de-facto refused merger clearance). Those merger cases were part of one complex transaction. In the course of consideration the AMCU found that the UBO of one of the merging parties was a citizen of the Russian Federation mentioned in the Sanctions list.

Conclusions

This important new development is another very clear confirmation of vesting the Ukrainian agency with "unnatural" and much broader powers, normally attributed to investment-control councils, which is the case in many other countries. Ukraine doesn't have such a state body in place and AMCU is in fact the only state agency, allowing transactions happen. Trends of last years have shown that AMCU has always played a much bigger and more significant role than "classical" competition agencies all over the world.

The sanctions issue should from now on be evaluated much more carefully along with the usual preliminary analysis of control relations within merging groups. Even minor Russian elements of a transaction would exclude chances for a simplified procedure and complicate transactions, which obviously do not have antitrust concerns. In certain cases it is worth thinking of the pre-transactional corporate restructuring of the group and carve-out of potentially "dangerous" elements to avoid unnecessary clearance delays.