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Antitrust authority of Ukraine intends to reconsider its decision granting merger clearance on the telecommunication technologies market of Ukraine

Timur Bondaryev (Arzinger) · Tuesday, March 10th, 2015

In early November 2014 the Antimonopoly Committee of Ukraine made a statement, announcing that it was going to reconsider its position on the establishment of VimpelCom Ltd., which led to consolidation of the assets of Kyivstar JSC and Ukrainian Radio Systems JSC (the URS) in Ukraine in 2010. As the result of the transaction, Kyivstar JSC overtook the provision of the telecommunication services of the URS and now accounts for more than 25 million mobile subscribers in Ukraine, which makes it the largest mobile network operator in the country. The Committee states that while considering application for merger clearance from Telenor ASA and Altime Holdings & Investments Ltd. that were parties to the agreement establishing VimpelCom Ltd. at the time, it was not able to predict that the established company would gain competitive advantages on the market by means of implementing 3G and 4 G mobile telecommunication technologies, as the participants of the merger failed to notify the antitrust authority of their plans to develop the respective technologies in Ukraine.

As the result of the transaction Kyivstar JSC which is a subsidiary of VimpelCom Ltd. gradually gained a dominant position on the Ukrainian market of GSM-technologies leaving most of its competitors far behind. According to the information from the representatives of the Committee, Kyivstar JSC had 64% of GSM-900 and 80% of GSM-1800 Frequency Bands in the country in its use as of June 2014.

In its recommendations addressed to the company in November 2014 the authority suggested that the entity should allocate some of its GSM Frequency Bands for the benefit of the competitors. The Committee believes that it would substantially improve the state of competition on the respective market and enable other providers to compete more effectively.

For the time being it remains unknown, if Kyivstar JSC agreed to follow the recommendation of the antitrust authority. In the event of the refusal of Kyivstar JSC to do so the authority may review its decision granting merger clearance on the ground that the participants of the merger failed to provide credible information about the notified transaction and future marketing strategies of the established joint-venture company and its subsidiaries in Ukraine which, in turn, led to monopolization of the market upon the merger. For that purpose the Committee must prove that at the time of application to the Committee the applicants had an intention of hiding relevant information about the future activities of the subsidiaries of VimpelCom Ltd. in Ukraine. It is particularly difficult as long as GSM Technology, the fastest growing telecommunication

technology, is concerned. With the view to the fact that the merger clearance was obtained more than 4 years ago, it will be quite difficult for the authority to prove that participants of the merger were aiming to reach dominant position on the respective market in Ukraine at the time of application.

It is also important to mention that the current investigation is not the first investigation concerning outcome of the establishment of VimpelCom Ltd. In 2011 the Committee initiated investigation against Kyivstar JSC and Ukrainian Radio Systems JSC upon the request from the competitors, but found no grounds for cancellation of the merger clearance.

According to the provisions of the Article 58 of the Law of Ukraine “On Protection of Economic Competition”, proceedings regarding the revision of decisions of the Committee may result in decision that changes or cancels the previous decision granting merger clearance. In that event the Committee may issue the decision that establishes compulsory split-up of the entity that occupies dominant position on the market. There is only a remote possibility that it will happen, because since the time of introduction of the Law of Ukraine “On Protection of Economic Competition” no such decisions were ever made. Besides, there is no statutory procedure in Ukraine in which the entity that occupies dominant position may be split up.

As an alternative, the Committee may initiate an investigation on abuse of dominance by Kyivstar JSC if there are grounds therefor established in the Law of Ukraine “On Protection of Economic Competition”.

Should Kyivstar JSC agree to allocate its GSM Frequency Bands to the competitors on the market there is no guarantee that it would resolve the problem in question. Not all providers of telecommunication services in Ukraine have material and financial resources to maintain high quality GSM Technologies. Thus, Kyivstar JSC may be in position to preserve its dominance on the market despite the efforts of the antitrust authority.

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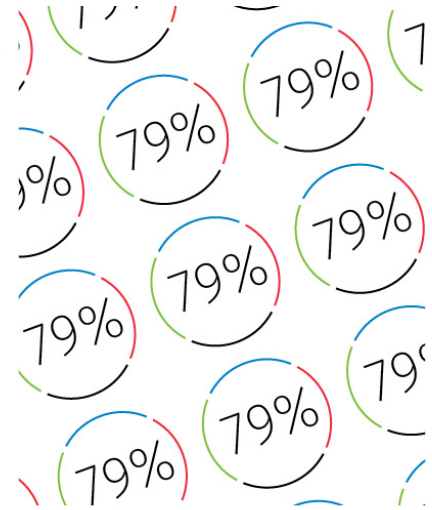
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