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Record-Breaking Fines and Top Trends in Ukrainian Merger Control

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While Ukraine has been making headlines over the past few months with the presidential elections, there have also been several notable news items regarding Ukrainian merger control. At the end of April, two record fines for merger control violations – in the amounts of EUR 1.9 million and EUR 1.8 million – were imposed by the Antimonopoly Committee of Ukraine (the “AMC”). In this article we will examine these extraordinary fines and other recent trends in the Ukrainian merger control.

New Record Fines for Merger Control Violations

At the end of April, the AMC imposed a new record fine of approx. **EUR 1.9 million** on a Cyprus subsidiary of the DCH group for the acquisition of control over Dnipro Metallurgical Plant (“DMP”), active in production of pig iron, coal coke and various steel products, from the Evraz group. The DCH group is controlled by Mr Oleksandr Yaroslavsky, ranked #17 among the richest people in Ukraine.[1]

Under the Law of Ukraine “*On Protection of Economic Competition*” (the “**Competition Law**”), the maximum amount of a fine is up to 5% of the group’s consolidated worldwide turnover for the financial year preceding that in which the fine is imposed. When calculating the amount of the fine in this case, in particular, the AMC took account of:

- the DCH Group having committed a repeat offence during the same year; and
- the merger filing being filed with the AMC before it opened a case on infringement, although only after the DCH Group received the AMC’s request for information on the acquisition of the DMP shares.

While the transaction attracted a record fine, it was unconditionally cleared by the AMC *ex post* as the activities of the parties did not overlap, the parties had insignificant market shares, and the transaction did not raise any competition concerns.

The second largest fine, of some **EUR 1.8 million** was imposed on an Estonian subsidiary of the financial-industrial TAS group for the acquisition of control over Dniprometyz, a Ukrainian manufacturer of low-carbon metal products, from the Russian Severstal group. TAS is controlled by Mr Sergiy Tigipko, [Ukrainian](#) politician and finance specialist who was Vice Prime Minister of Ukraine during [December 2010](#) – [December 2012](#). According to public announcements, the TAS

group is to challenge the AMC decision in the courts.

Unlike the DCH case, apart from the fine, the AMC did not grant an *ex post* merger clearance due to the economic sanctions^[2] imposed on Mr Alexey Mordashov, Severstal's controlling shareholder. In particular, Mr Mordashov is subject to sanctions in the form of the blocking of assets (a temporary limitation of rights of use and disposal of the property). Although Mr Mordashov was not a direct party to the concentration, according to the Competition Law the AMC closed the case on concentration without issuing the decision on its merits since the group of the seller included a sanctioned individual related to it by control relations.

Fines for Foreign-to-Foreign Concentrations

In 2018, over a third of the decisions of the AMC to impose fines for merger control violations (9^[3] of 25 decisions) were issued in relation to foreign-to-foreign concentrations. The largest and smallest fines for failure to notify foreign-to-foreign concentrations were **EUR 16,000** and **EUR 5,400^[4]**, respectively.

Contrary to relatively small fines previously imposed on foreign-to-foreign transactions, in 2018 the largest fine for transactions involving Ukrainian entities for failure to notify a concentration amounted to **EUR 473,000**. The fine was imposed on a sanctioned individual, an associate of former President of Ukraine Mr Viktor Yanukovich, for failure to notify an indirect acquisition in 2013 of some 80% of the shares of Brokbusinesbank – one of the largest Ukrainian banks at that time. When calculating the amount of the fine, the AMC took into account the fact that the parties were active in overlapping markets, as well as aggravating circumstances such as the creation of obstacles to the investigation.

Focus on cross-directorship

In its recent merger control reviews, the AMC has paid more attention to the facts of cross-directorship that result in the establishment of control relations between previously independent undertakings. In particular, the fourth largest fine in the history of Ukrainian merger control, of some **EUR 110,000**, was imposed by the AMC in 2016 for a concentration where control was acquired over a company through the appointment of a member of the supervisory board who already held a director's position in another, unrelated, company.

In 2018, in another case, the AMC imposed a fine of **EUR 31,500** for failure to notify the acquisition of control over a Ukrainian energy distribution company by creating a situation where more than half of the members of that company's supervisory board simultaneously held equivalent positions in the supervisory bodies of other, unrelated, companies.

The above examples highlight that “cross-directorship checks” have become an imperative before making appointments to management positions of the undertakings which potentially trigger the financial thresholds requiring notification of the concentration.

Limitations on Sanctioned Companies and Individuals

Apart from the Dniprometyz transaction mentioned above, in 2018 the AMC blocked three transactions^[5] relating to the establishment by three independent founding parents (all foreign parties) of a joint venture outside of Ukraine as a beneficiary (a citizen of the Russian Federation) of one of the founders was included in the Ukrainian economic sanctions lists.

Beginning in December 2017, a concentration shall not be cleared by the AMC if it is prohibited under the Law of Ukraine “*On Sanctions*“. As part of merger filing, each applicant should indicate if any individuals and/or legal entities related to it by control relations are or are not included in the Ukrainian economic sanctions lists.[6] If they are included, it must then be justified that such sanctioned entity and applicable economic sanctions, introduced in connection with the Russian occupation of Crimea and the Donetsk region of Ukraine, have no impact on the transaction. The AMC will then decide if, given the sanctions, the transaction should be blocked or not.

The relevant sanctions lists are amended and supplemented from time to time. Therefore, to identify potential risks and avoid complications during the review, when planning the transaction it is necessary to check if any of the parties to the transaction (at their group level) is subject to economic sanctions.

Phase II Cases and Remedies

In 2018, the AMC received 532 merger applications (compared with 666 in 2017) and considered 453 of these; almost 15% (79 applications) were rejected by the competition authority as incomplete or were withdrawn by the parties.[7]

The AMC initiated Phase II in 25[8] cases in 2018, which related to 13 transactions structured in such a way that they each required the formal submission of several merger applications. Amongst 25 applications that were reviewed in Phase II, the AMC granted clearance in 19 cases, while the remaining six were closed without issuing a decision, including three due to economic sanctions.

Interestingly, in 2018, all deals reviewed in Phase II received unconditional clearance. In 2017, amongst 11 Phase II decisions[9] there were only three clearances with behavioural remedies. One of them related to the Bayer-Monsanto mega-merger approved by the AMC in August 2017. Unlike the EU, where the USD66 billion takeover was conditional on the divestiture of an extensive remedy package worth over EUR 6 billion, the Ukrainian competition authority confined its remedy to behavioural commitments such as (i) not to engage in input foreclosure by unreasonably restricting access to the relevant markets of crop protection products, seeds for vegetables and row crops or by eliminating competitors from these markets; and (ii) for a period of three years after completion of the transaction to submit to the AMC copies of all agreements relating to distribution of the above-mentioned products in Ukraine. As a matter of practice, the AMC tend to impose behavioural rather than structural remedies.

Starting from mid-May 2016, Phase II can be launched only if a concentration may lead to a monopolisation (reaching, maintaining or strengthening of monopoly (dominant) position) or a significant restriction of competition in the overall Ukrainian market, or a significant part of it. In practice, the AMC is quite likely to open Phase II if the parties’ combined market share reaches or exceeds 35% in overlapping markets in Ukraine.

Conclusion

What can be done if, after a successful closing, the parties discover that the transaction had to be cleared by the AMC? Is there any way to remedy the breach? In brief, yes; a party which failed to seek merger clearance for its past M&A transactions may apply to the AMC to obtain the merger approval post-closing. Submission of a so-called “retrospective” corrective application before the AMC opens a case on violation serves as a mitigating circumstance for determination of the magnitude of a fine.

It is clear that the AMC tends to impose higher fines for merger control violations, and the trend of stricter enforcement is expected to continue. Accordingly, rigorous merger control assessment at early stages of due diligence and transaction planning will save time, money, and headaches.

[1] <https://www.epravda.com.ua/news/2018/10/25/641980/>

[2] For more details, please see section “*Limitations on Sanctioned Companies and Individuals*” below.

[3] According to our internal calculations based on the decisions published on the AMC’s website.

[4] According to the Annual Report of the AMC for 2018, the decisions and information notices published on the AMC’s website, as well as publicly available information.

[5] According to the Annual Report of the AMC for 2018.

[6] The lists of the sanctioned individuals and companies are publicly available but only in Ukrainian.

[7] According to the Annual Report of the AMC for 2018.

[8] According to our internal calculations based on the decisions and information notices published on the AMC’s website.

[9] According to the Annual Report of the AMC for 2017.

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