

NEWSLETTER

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ANTITRUST LAW

New antimonopoly control mechanism in M&A area

On 26 January 2016, the Verkhovna Rada of Ukraine amended the Law of Ukraine «On protection of economic competition». The amendments increased the existing thresholds for merger control by the Antimonopoly Committee of Ukraine (the AMCU).

Background

The thresholds and procedures established in the beginning of the 21st century are outdated and do not comply with present requirements in part of ensuring the effective balance between the necessity of merger control and monopolization of the market, on the one hand, and expenses and administrative restrictions imposed on business under such procedures, on the other hand.

The need to change the current approaches to merger control was also envisaged under the Ukraine–European Union Association Agreement.

Increase of thresholds for mergers

The Law envisages the following:

- Increase of thresholds necessary for obtaining of the relevant merger clearance;
- Implementation of flexible, expedient and simplified procedures for obtaining of a merger clearance.

In order to implement the abovementioned, the Law introduces a two-tier control model over concentrations:

1. The first tier is concerned with control over concentrations of large Ukrainian companies, whose combined worldwide turnover or value of assets exceeds EUR 30 million and turnover or value of assets in Ukraine of each of at least two parties exceeds EUR 4 million;
2. The second tier is concerned with control over concentration in which Ukrainian companies, whose turnover for the previous financial year exceeds EUR 8 million in Ukraine (the value of assets is not taken into consideration), are acquired by companies, whose turnover exceed EUR 100 million worldwide.

Merger control continues to apply to concentrations by large international investors, which could easily enter into Ukrainian markets through mergers and acquisitions of Ukrainian entities due to openness and small size of markets. The other relevant problem is concentrations concluded by offshore companies, especially during privatization of strategic state entities or those that are significant for markets functioning.

Therefore, the Law provides that a concentration between a foreign company and a Ukrainian company shall require a merger clearance from the AMCU, if the turnover of the Ukrainian company for the previous financial year exceeded EUR 8 million in

Ukraine, and the turnover of a foreign company exceeds EUR 100 million worldwide. Taking into account that the Law has simultaneously introduced the expedient procedure for such concentrations and high thresholds, such approach allows to prevent acquisition of powerful Ukrainian entities by their foreign competitors or by way of purchase of Ukrainian companies acting on the same market by offshore companies, as well as improve attraction of foreign investment through lifting of administrative procedures for small concentrations (in a transnational context).

The Law excluded the market share threshold of participants of the concentration (previously 35%), because it is considered as one of the least effective in the mechanism of merger control and leading to a high level of legal uncertainty.

Expedient procedure for merger clearance

For a number of merger cases, which will not cause a negative effect on the markets of Ukraine (including with foreign companies) due to market characteristics or market positions of the participants of the concentration, an expedient simplified procedure is introduced similar to that specified in the Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation). In particular, such procedure provides for minimum amount of information, necessary for confirmation of circumstances for application of the expedient procedure, and the reduced term for the procedure of 25 days (previously 45 days).

It is prescribed that such expedient procedure will be applied mainly to economic concentrations with participation of foreign companies when the market shares of the participants of concentration are insignificant or the economic concentration is performed on different markets.

The other important feature aimed at effectiveness of the expedient and general procedures is the requirement for the AMCU to conduct, upon a request from the participants of the prospective concentration, preliminary consultations in order to enhance legal certainty concerning information and documents for submission along with the application for a merger clearance, and also timely settlement of all possible shortcomings of such application following its submission.

The merger clearance is deemed to be automatically issued in the event that no proceedings on concerted actions or economic concentration have been opened by the AMCU during the term for consideration of the application. The AMCU is responsible for determining the applicable procedure.

Payment for consideration of application is increased

The Law also envisages increase of payment for consideration of application on concentration or concerted actions, approximately in four times. Such payment should cover expenses incurred for consideration of application and the amount of payment had not been changed since 2002.

The Law awaits presidential approval. It is highly probable that the Law will be signed by the President of Ukraine and become effective in April 2016.

Following entry into force of this Law, DLF attorneys-at-law is planning to cover in detail the newly adopted issues of the antimonopoly law in the area of mergers and acquisitions with in-depth presentation of the conditions for obtainment of a merger clearance and respective procedures.

DOING BUSINESS

Hygienic requirements for dietary supplements

On 24 January 2016, the Order of the Ministry of Health of Ukraine No. 1114 dated 19 December 2013 «On approval of Hygienic requirements for dietary supplements» became effective. This Order establishes requirements for dietary supplements, their labelling and advertising, and also provides for the lists of vitamins and minerals and their forms, which are allowed for use in dietary supplements.

Thus, in particular, it is established that dietary supplements shall contain a wide range of nutrients and other ingredients, including vitamins, minerals, amino acids, essential fatty acids, fibre, various plants and herbal extracts. The minimal amount of each vitamin and/or mineral in the recommended daily amount of dietary supplement shall be not less than 15% of the recommended daily amount of consumption (daily need) of the vitamin and/or mineral.

Dietary supplements shall be delivered to the final consumer exclusively in the dosage form and packed with the label, which specifies: the name of a food product; the name of the individual categories of nutrients or other substances that characterize the product or indicate the origin of individual nutrients or other substances; quantity (portion) of dietary supplement recommended for daily consumption; warning not to exceed the recommended amount (portion) for daily consumption; indication that dietary supplements should not be a substitute for balanced diet; warning that the product should be stored out of reach of children.

In addition, it is prohibited to use statements about the possible healing effect or those which cause or contribute to the occurrence of negative psychological state of feeling, publish information about letters of gratitude, recognition, tips, if they are related to treatment or relief of disease conditions, as well as any direct or indirect (veiled) statements on impossibility to ensure the necessary amount of nutrients by following the balanced diet on the label or in any other advert of dietary supplements.

The operators of the market shall have the means to identify a person, who is responsible for delivering dietary supplement, and also have systems and procedures in place for identifying other operators of the market, to which they supply their products. It should be possible to trace dietary supplements and any substances therein at all stages of production and circulation of dietary supplements.

Dietary supplements that do not comply with the Hygienic requirements and are produced and/or circulated within 12 months following the effective date of the Order shall remain in circulation in Ukraine until their expiration date.

Action plan for improvement of doing business in Ukraine

On 13 January 2016, the Cabinet of Ministers of Ukraine published its resolution, which approves a roadmap for facilitation of doing business in Ukraine. As expected, following implementation of measures included in the programme, in 2017 Ukraine will enter into top-50 and in 2018 into top-20 countries of the World Bank Doing Business ranking.

The Cabinet of Ministers of Ukraine specified as its main priorities for 2016, inter alia, creation of online service for registration of legal entities within 24 hours, provision of real-time access to the State register of encumbrances over movable property, facilitation and acceleration of court cases in relation to monetary claims, etc. In addition, with the aim of improvement of protection of rights and interest of investors, it is proposed to oblige the potential purchasers of 50% of shares/participatory interests in the joint stock companies/limited liability companies to make an offer to all shareholders/participants.

Also, the Cabinet of Ministers of Ukraine identified as urgent the need to simplify and accelerate the procedure for accession of the entities to electric networks, reduction of cost and terms for permits in construction activities and terms for transfer of ownership to the immovable property, facilitation of import and export of goods, lowering the amount of time spent on tax calculation and fiscal payments by the companies, etc.

We note that in accordance to the annual World Bank Doing Business ranking, in 2015 Ukraine managed to improve its positions by 13 spots and climbed to the 83rd place.

PHARMACEUTICALS

Procurement of drugs in 2016

On 12 January 2016, the Resolution of the Cabinet of Ministers of Ukraine No. 396 dated 4 November 2015 "On procurement of drugs, medical devices and related services through specialized procurement organizations" came into force. Pursuant to this Resolution, the Ministry of Health of Ukraine shall procure all respective products exclusively through international specialized organizations.

As of now, procurement of drugs, medical devices and related services, which is financed from the state budget, shall be fully performed through the specialized procurement organizations.

We note that in 2015 the respective agreements were concluded with three specialized procurement organizations, which comply with the requirements specified by the Cabinet of Ministers of Ukraine, namely the United Nations Children's Fund (UNICEF), UNDP, and Crown Agents.

The Cabinet of Ministers of Ukraine believes that procurement of drugs, medical devices and related services exclusively through international specialized

organizations will reduce risks of corruption during tender procedures and ensure timely performance of the procurement process in order to secure provision of necessary and quality drugs and vaccines to the citizens.

REAL ESTATE

Changes in state registration of proprietary rights to real estate

On 25 December 2015, the Cabinet of Ministers of Ukraine adopted its Resolution No. 1127 «On state registration of proprietary rights to real estate and their encumbrances», which became effective on 1 January 2016.

This resolution is adopted with the aim of decentralizing the powers of state registration of legal entities and individual entrepreneurs, as well as proprietary rights to real estate and their encumbrances. Thus, it establishes transfer of rights to provide administrative services of state registration of legal entities and individual entrepreneurs, as well as proprietary rights to real estate and their encumbrances to local authorities, local state administrations, notaries and other accredited persons. Registration of civil organisations shall continue to be carried out by the Ministry of Justice of Ukraine and its authorities.

Pursuant to the Resolution, the Cabinet of Minister approved the following procedures:

1. Procedure for state registration of proprietary rights to real estate and their encumbrances, which specifies terms, grounds, list of required documents, and procedure for state registration of proprietary rights to real estate, unfinished constructions and their encumbrances, etc., in accordance with the Law of Ukraine «On state registration of proprietary rights to real estate and their encumbrances»;
2. Procedure for provision of information from the State register of proprietary rights to real estate, which specifies terms, grounds and procedure for provision of information from the State register of proprietary rights to real estate;
3. Procedure for access to the State register of proprietary rights to real estate, which specifies terms, grounds for direct access to the State register of proprietary rights to real estate by the officials of the state and local authorities, attorneys and notaries.

The Resolution also provides that as of 1 January 2016:

- Applications in the area of state registration of proprietary rights to real estate and their encumbrances, which were submitted before 1 January 2016 to the Ministry of Justice and its authorities, shall be considered by the Ministry of Justice and its authorities under the terms and procedure effective at the date of submission of such applications;

- The Ministry of Justice and its authorities, until termination of provision of their services in the area of state registration of proprietary rights to real estate and their encumbrances, shall ensure formation and maintenance of registration files pursuant to the effective legislation, including in the event of state registration by the notaries;
- In the event of termination of provision of services in the area of state registration of proprietary rights to real estate and their encumbrances by the authority of the Ministry of Justice, such authority shall ensure transfer of all relevant applications and registration files for further consideration to the relevant provider of the administrative services, and inform the applicant about such transfer.

TAX LAW

Transport duty for expensive vehicles

Pursuant to changes to the Tax Code of Ukraine, the tax object of the transport duty has been changed. In 2016 the duty shall apply to cars of less than 5 years old with the average market value of more than 750 minimal wages as of 1 January 2016 (approx. USD 41,300).

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This newsletter is intended to provide a brief overview of current changes to the Ukrainian legislation and should not be viewed as legal advice. For more details or if you would like a specific advice, please, e-mail the named contact persons or use our contact form.

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