

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The thresholds and procedures established in the beginning of the 21st century are outdated and do not comply with present requirements in part of ensuring the effective balance between the necessity of merger control and monopolization of the market,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:

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;

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.

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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.