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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Suspensory Effects of Merger Notifications and Gun Jumping - Note by Ukraine

27 November 2018

This document reproduces a written contribution from Ukraine submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

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Ukraine

1. Unlike many jurisdictions where the obligation is to notify rather than apply for approval, Ukraine requires market players to refrain from any actions that are aimed at closing the transaction until they have obtained merger clearance (where required) from the antitrust authority. Given the above, a well-developed conduct is required from the parties in order to avoid negative consequences resulting from non-compliance with Ukrainian merger control regulations. Generally, it is a rather technical issue when dealing with the transactions on a local level; however, the completion of global transactions (considering the number of jurisdictions involved, timing issues and often the technical requirement of obtaining clearance in Ukraine) raises a lot of specific issues to be considered.

2. The Ukrainian merger control rules are applicable to any transactions that affect or could affect the economic competition in Ukraine. At the same time, there is no specific legal doctrine or rules of law demonstrating how the effect test shall be applied by the AMCU. In fact, according to the existing practice and adopted approach, if the parties technically meet the thresholds provided for by law, then prior approval by the AMC is required even in cases of a pure foreign-to-foreign transaction that has minimal effect on Ukrainian competition. As a result, the Ukrainian merger control rules often capture transactions with no reasonable likelihood of an anti-competitive effect on Ukrainian markets (eg, a transaction with relatively small revenue generated in Ukraine). A number of global transactions that require Ukrainian merger clearance raise the issue of global closing before Ukrainian approval, ie, in order to proceed with the scheduled global closing and avoid contractual sanctions for the delay, the parties consider the possibility of carve-out arrangements regarding Ukraine.

3. However, the parties are not prevented from asking the AMCU for an earlier clearance. In this case, the parties may apply to the authority with a motion justifying the need for an earlier closing (eg, the global nature of the transaction, received clearances in other jurisdictions, absence of any competition concern in Ukraine, potential financial losses, etc). Notwithstanding that such option is not a common practice for the authority and there is no officially established procedure for submission and consideration of such kind of parties' requests by the AMCU, a well-grounded justification may still influence the terms of approval. Regarding carve-out arrangements, it is worth noting that, based on applicable rules, no completion of the transaction before the AMC approval is allowed (on either a global or local Ukrainian level). Therefore, formally, no carve-out arrangements are provided for by law. This means that, if the AMCU discovers that a global closing of the transaction requires Ukrainian merger clearance, it is very likely that such closing will be treated by the Ukrainian competition authority as a violation even in case of some sort of contractual guarantee regarding Ukraine.

4. Based on applicable laws, detection of an economic concentration without prior approval may be caused by:

1. notifications of economic entities, citizens, associations, institutions, organizations to the Committee on the commission of a violation in the form of concentration without permit;
2. submissions of bodies of state power, local government, etc.;

3. own initiative of the Antimonopoly Committee of Ukraine if the Committee detects a violation while considering applications for economic concentration permit submitted by economic entities.

   For each application, the Committee carries out the verification of the control relations of the concentration participants. In the course of such verification (if a concentration participant has already applied in the past to the Committee) the control relationship of the concentration participant could be detected, for which he/she should have obtained the permit of the Committee. Or, in the case of doubts as to the formation of a concentration group, the Committee may ask for information on compliance with the economic competition protection legislation in the formation of its group.

4. detecting violations by the Committee through monitoring of the media and web sourses.

   The Committee constantly monitors media and web-sources [both national and foreign] regarding the availability of information on Mergers and acquisitions agreements (hereinafter – M&A). If the relevant information is revealed and the application for concentration is not submitted to the Committee, the Committee starts an investigation and sends a letter (with a proposal to comment on the revealed M&A agreement) to an economic entity that could potentially violate the legislation on the protection of economic competition in the form of concentration without permission.

Non-standard cases of consideration of applications for a concentration permit (de facto legalization of control relations, after the implementation of the concentration without permit)

5. In the practice of the Committee, cases of detection of violations in the form of concentrations without authorization are also encountered in which the applicant applies for a concentration permit when the concentration is *de facto* implemented.

6. The Committee considered the application of one Ukrainian financial-industrial group (hereinafter referred to as FIG), which submitted to the Committee an application for obtaining a concentration permit in the form of acquisition in the company “A” (a professional securities trader and is a member of the FIG), shares of the company “B”, which owns shares of “C” plant.

7. Prior to receiving the said application from the FIG, company “A” acquired shares of company “B”, which owns shares of the plant “C” for the purpose of resale. Also in its submition to the AMCU company “A” reported that:

8. It is a company whose main activity is carrying out financial and securities transactions;

9. Company “A” and the FIG should be considered as a single economic entity as defined in Article 1 of the Law of Ukraine “On Economic Competition Protection”;

10. company “A” abstains from voting in a higher body or other management bodies of company “B” and factory “C”, and also refrain from exercising control over company “B” and factory “C”;

11. In addition, company “A” in writing informed the company “B” of its intention not to participate in voting in a higher body or other management bodies of the company “B”,

and in turn the company “B” notified about its intention not to participate in voting in the higher body or other control bodies of the plant “C”.

12. Acquisition of shares of “B” was made for the purpose of further reselling to FIG.

13. Based on applicable law, the concentration does not constitute (and therefore does not require the approval of the bodies of the Committee) the acquisition of shares of a business entity by a person whose main activity is carrying out financial transactions or transactions with securities, if this acquisition is carried out for the purpose of their subsequent resale, provided that the said person does not vote in a higher body or other management bodies of the entity. In this case, the next resale must be made within one year from the date of purchase of the shares (stocks). The authorities of the Antimonopoly Committee of Ukraine may decide to extend this term to the petition of the said persons with the justification for the impossibility of reselling them.

14. At the same time, during the consideration of application, it was established that after the acquisition by A company of shares of company “B” to the Supervisory Board of the plant “C” in order to coordinate economic activities, 3 representatives of the FIG were appointed.

15. According to Article 22 of the Law, the concentration is direct or indirect acquisition, acquisition of ownership by other means or receipt of shares, which ensures achievement of 50 percent of the votes in a higher management body of the relevant entity.

16. On the basis of the above, the Committee started a case on failure to receive prior appeoval.

17. According to the results of the investigation, it was confirmed that after the acquisition by company “A” of shares of the company “B”, representatives of FIG to the Supervisory Board of the plant “C” were appointed (and constituted the majority of the board) in order to coordinate the plant’s economic activities. Subject to the statute of the plant “C” control over its activities is carried out by its Supervisory Board. The Supervisory Board, in its turn, controls and regulates activities of the Director General – the sole executive body of the Company.

18. Consequently, the companies “A” and “B” in the interests of FIG directly and indirectly controlled the plant “C” and the management of the plant, before obtaining the pior approval of the Committee.

19. That is, according to the results of the consideration of the case, it was proved that company “A” committed a violation stipulated by clause 12 of Article 50 of the Law in the form of implementation of a concentration by indirectly gaining control over the plant “C” , without obtaining the prior approval of the Committee.

20. For the said violation, a fine of up to five percent of the entity’s income from the sale of products (goods, works, services) for the year preceding the year of imposition of a fine can be imposed on the company “A”.

21. In addition, according to the results of the consideration of the case the analysis was also conducted of the influence of concentration participants’ actions on the relevant commodity market where the concentration is carried out. As the considered concentration did not lead to monopolization or a significant restriction of competition in the commodity market the Committee approved the transaction.