Ukraine

Mariya Nizhnik & Sergey Denisenko
Vasil Kisil & Partners

Overview of merger control activity during the last 12 months

The number of concentrations filed with the Antimonopoly Committee of Ukraine (the "AMC") in 2011 was a bit higher than in 2010, but still significantly lower than in 2008 and 2007.

The below statistics clearly evidence that almost all transactions filed with the AMC were successfully cleared, except for a few transactions that involved market players holding dominant positions in Ukraine, and transactions that might substantially restrict the competition in Ukraine.

In 2011, 52 transactions out of 756 were cleared after a deeper investigation had been initiated by the AMC with respect to the transaction. In practice, the AMC generally initiates deeper investigation if the transaction concerned may potentially negatively affect competition in Ukraine, e.g. when the parties to the concentration have relatively high market shares in Ukrainian markets (e.g. exceeding 15%).

In 171 cases the applications filed with the AMC for a concentration in 2011 were either returned by the authority or withdrawn by the applicants for their own reasons.

According to the applicable legislation, a transaction prohibited by the AMC may be approved by the Cabinet of Ministers of Ukraine if the parties concerned can prove that the positive effect of the transaction on the public interest is much greater than its negative consequences. However, there were no transactions prohibited either by the AMC or by the Cabinet of Ministers of Ukraine in 2011.

AMC official statistics: merger clearance applications[1]

Year	Applications filed with AMC	Approved transactions (unconditional clearances)	Approved transactions (conditional clearances)	Prohibited transactions
2011	756	585	0	0
2010	697	559	0	0
2009	599	476	4	1
2008	1,021	814	1	0
2007	911	715	4	4

New developments in jurisdictional assessment or procedure

Filing requirements. A great number of global transactions with no effect on the competition environment in Ukraine still trigger local merger control thresholds, and there are no actual factors evidencing any forthcoming changes in the near future. Based on the recent statements of AMC officials, the latter are interested in simplification of Ukrainian merger clearance procedure - which, in certain cases, should provide some efficiency gains and in turn, increase the amount of transactions that are voluntarily cleared with the AMC, and as a result benefit competition as a whole.

Under applicable merger clearance regulations,[2] both parties are responsible for merger clearance in Ukraine. Based on the existing practice, the parties concerned file a joint application with the AMC.

No *de minimis* rule is still applicable in Ukraine, therefore there is no exclusion in case of absence of the substantive overlap[3]. The applicable merger control rules require a substantive amount of information to be included in AMC filing forms. In particular, the notification must include detailed information on the transaction parties, taking into account their control relations, including registration data, contact details, officers, amount of shareholdings/votes, and the Ukrainian turnover of each entity of the entire target and acquirer groups.

Despite the broad definition of the target group (extended to the sellers), the AMC, considering the international practice, has recently adopted a position allowing the parties to limit the definition of, and respectively the information on, a target group to companies that are subject to direct/indirect acquisition. Such limitation is only applicable if the seller loses any control over the target as of the date of closing, and the parties provide sufficient information and documents confirming termination of such control. However, such position is not applicable for the purpose of calculation of triggering thresholds, i.e. in order to find out whether the transaction requires Ukrainian merger clearance or not (whether the thresholds envisaged by law are met), the entire seller group shall be considered.

Furthermore the notification shall necessarily include the definition of the relevant product and geographical markets, the contact information of the Ukrainian competitors, customers and suppliers, and the volume of sales/gains in respect of each customer/supplier. Having said that, notably, such information shall be filed with the AMC in respect of each company of the target/acquirer group generating Ukrainian turnover, regardless of the markets concerned. In other words, even in the absence of the overlapping markets, the parties are bound to file detailed information about their activities in Ukraine.

Strengthening of the information exemption rules. The applicable rules allow parties to request from the AMC to be exempted from filing certain information, if the latter does not affect the decision to be adopted by the AMC. However, in practice, the information regarding the parties' activities in Ukraine (including the above information regarding customers, competitors and suppliers) is treated by AMC officials as mandatory and, even in the absence of substantial overlaps, to receive any exemption in respect of such information is scarcely possible. Moreover, recent trends in 2012 show that the number of exemptions granted by the AMC to parties' requests on information limitation has significantly decreased, while the number of applications returned by the AMC without consideration due to incompleteness of documents/information has increased.

Global closing. Producing respective information at an early stage of a transaction often requires substantial time and costs that, in turn, give one score in favour of the parties' choice to close the transaction, especially a global one, without Ukrainian merger clearance. At the same time, recently, market players more often use the scenario for allowing the avoidance of any delay regarding the closing of a transaction globally that has minimal Ukrainian "negative consequences".

The applicable provisions do not allow the parties to close a foreign-to-foreign transaction globally prior to obtaining AMC approval (where required), even if the parties commit to refrain from any actions in respect of Ukrainian markets (subsidiaries). The scenario involving closing of the foreign-to-foreign transaction before a Ukrainian clearance and obtaining post-closing approval shortly after the closing (providing the AMC with a reasonable justification for the failure to pre-notify) moderates the above strict rule. Given the technical failure to receive merger clearance before closing, the AMC usually (i) issues post-closing clearance (unless there are legal grounds to reject the transaction); and (ii) imposes a fine as envisaged by law. However in such case, the parties are usually considered by the AMC as acting in "good faith", and the amount of fine to be imposed is rather technical in nature and not material.

Consideration procedure. Based on the Economic Competition Act[4], the Ukrainian merger clearance procedure (Phase I) takes up to 45 (forty-five) calendar days. If a deeper investigation or expertise is required with respect to the transaction, the AMC may initiate a case on concentration (Phase II), which commences upon providing the AMC with a full set of information/documents additionally requested and shall not exceed 3 (three) months after the AMC has obtained all additionally requested documents/information.

Given the recent AMC practice, within Phase II, the AMC (among other actions) generally requests

certain information from the following third parties in order to confirm the existence of strong competition and the lack of a negative effect on the:

1. territorial (regional) departments of the AMC;
2. independent external experts specialising in dairy markets (in practice, these are non-commercial associations of dairy sector companies);
3. major consumers of the parties involved in the concentration; and/or
4. major competitors of the parties involved in the concentration.

In addition, within Phase II, the AMC generally requests from the parties:

1. a business plan for a medium-term period (2–3 years) regarding the markets affected by the transaction (including respective calculations); and
2. an estimation of any negative impact of restriction of competition and the positive effect for the public achieved by means of:
    - improvement of production, purchase or sale of products;
    - technical and technological, as well as economic, development;
    - optimisation of the export or import of products;
    - development that unifies the technical conditions or standards of products; and/or
    - rationalisation of production, etc.

Recently the AMC has changed its approach to applications' consideration with respect to foreign-to-foreign transactions. Previously foreign-to-foreign transactions raising no competition concerns were in practice cleared by the AMC before expiration of the statutory consideration period (i.e. earlier than 45 days). Currently the AMC tends to formally wait for expiration of a 45-day period before the authority issues its clearance.

Sanctions for failure to notify. If the parties' failure to notify (when required) is detected by the AMC, the following negative consequences are to be considered:

- Fine of up to 5% of the total worldwide turnover of the parties in the year preceding enforcement of the fine (the limitation period for such fines in Ukraine is five years). This is a common AMC practice.
- Invalidation of the transaction by the court (if the AMC proves that the respective transaction has harmed competition in Ukraine). This is a rather theoretical risk.
- Recovery of double damages (if any) incurred by any third party as a result of the unauthorised transaction. This rarely happens.
- Export/import ban (if the imposed fine is not duly paid by the defaulting party). This happens extremely rarely; it is a rather theoretical risk.
- Publication of the information on the defaulting parties on the AMC's official website. This is a common AMC practice.

The applicable merger clearance regulations do not provide for any mechanism or rules applicable for the determination of the amount of a fine; it depends on the impact of the transaction on the competition situation in Ukraine. As a matter of practice, the AMC applies its internal guidelines to determine a specific amount of fine on a case-by-case basis. However, even if the party in breach is subject to a fine in the amount of 5% of the worldwide turnover as of the last financial year, such a fine would arguably still remain in line with the applicable Ukrainian legislation.

There are certain cases when fines were imposed on parties to foreign-to-foreign transactions when the said transaction did not raise any material competition issues in Ukraine. The amounts of the fine in such cases generally did not exceed €20,000. However, one can observe the apparent and progressive tendency to increase fines applied by the AMC. Such amounts are significantly higher if defaulting parties refuse to cooperate with the AMC.

Detection risks

The AMC representatives regularly announce that one of the AMC's key tasks is the identification of breaches of competition legislation in historical M&A transactions, i.e. the review of historical

structuring of target groups of companies for the purpose of checking compliance with the domestic competition legislation.

The risk of detection of foreign-to-foreign mergers where there are some purchaser group revenues in Ukraine mostly depends on the following: a) whether the parties are recorded on the AMC's database (this database contains snapshots of parties to mergers at the time of each transaction they are involved with. If the parties make subsequent transactions requiring filing in Ukraine, the AMC will ask questions, e.g. when did each portfolio company join the group, and was AMC approval required); and b) sensitivity of the relevant market. If the AMC detects violation, the risk of fine imposition is high, especially in cases where either party has any assets in Ukraine.

Therefore, in cases where the group of companies already has certain filing history in Ukraine and its group structure is available in the AMC's database, the detection risk (whether immediate or during any future substantive/unavoidable Ukrainian filing involving such group) is much higher.

Based on the applicable law, both parties (i.e. buyer and seller) are responsible for merger clearance. Therefore, the below risks are applicable to the seller as well. However, the AMC will usually only fine the seller where it is more convenient for the authority to do so (e.g. where only the seller has a subsidiary in Ukraine). The AMC is technically unable to enforce fines outside Ukraine in case of foreign-to-foreign mergers. The risk of enforcement therefore depends on whether the parties have subsidiaries in Ukraine (if they do, the risk of enforcement will be higher).

Moreover, we are aware of certain situations where the AMC initiated cases on violation of competition legislation for failure to notify the AMC following the monitoring of the public announcements of M&A transactions through the internet. During 2011 the AMC identified 86 failures to notify the reportable transaction, which is 19% higher than in 2010.

Advance ruling. There is no commonly-established practice to have a pre-notification meeting with the competition authority to discuss the proposed transaction. Indeed, the possibility to receive informal guidance in respect of a particular transaction without any filings is very limited.

The applicable legislation provides for the possibility to receive preliminary rulings (formal guidance) from the AMC in respect of the contemplated transaction, i.e. a preliminary ruling from the AMC which determines whether prior approval is required, and whether it is likely to approve the contemplated transaction. However, given that the preliminary ruling procedure: i) takes up to one month; ii) requires submitting with the AMC almost the same information as for the actual filing; and iii) legally does not relieve the parties of the need to receive the approval itself, when required, (which takes up to an additional 45 days (Phase I) as described above); such procedure is not commonly used in practice.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects

As of the current date, no guidelines on the approach to substantial merger assessment have been issued. The AMC grants its approval as long as the transaction will not result in the emergence of a monopoly in the affected market, and will not materially restrict competition in the affected market or in its substantial part. In the case of overlapping market(s), the emergence of a monopoly is tested through the expected aggregated market share(s) (an entity holding a 35% share of the market may be considered as having a monopoly position in the market).

Given the lack of accepted substantial merger assessment tests, the AMC usually applies market share assessment to also identify the effect on competition, i.e. the ability to substantially restrict competition.

Please note that under internal "unpublished" AMC guidelines, the AMC generally estimates the level of competition (and respectively adopts its decision to approve or to prohibit the transaction) based on the market shares held by the parties, presuming that:

1. there is strong competition when neither entity has a market share exceeding 5%;
2. there is sufficient competition when neither entity has a market share exceeding 15%;
3. there is weak competition when one or more entities have a market share exceeding 15% but less than 35%; and

4. there is extremely weak or no competition when one or more entities have a market share exceeding 35%.

In case of strong competition, the merger clearance procedure is rather technical; in case of weak competition, generally Phase II is initiated, but approval is commonly unconditional; and if competition is extremely weak, the approval is conditional, or the transaction is prohibited.

Based on Article 12 of the Economic Competition Act, the AMC presumes the existence of collective dominance on the respective market if:

1. no more than three business entities jointly hold the market share in the amount of at least 50%; and/or
2. no more than five business entities jointly hold the market share in the amount of at least 70%.

Should the collective dominance be presumed, the parties to the transaction shall prove to the AMC that there is a strong competition between the major market players that are active on the respective market.

Generally, the main positions to be proved in respect of collective dominance and to be accepted by the AMC are the following: i) lack of any relations of control between the major players; ii) lack of any cooperation, including contractual arrangements between the major players; and iii) strong pricing competition, etc.

The transaction prohibited by the AMC may be approved by the Cabinet of Ministers of Ukraine if the parties concerned can prove that the positive effect of the transaction for public interest is much greater than its negative consequences. In the last five years, only one concentration prohibited by the AMC was approved by the Cabinet of Ministers of Ukraine.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

The "remedies" to be imposed in the case of competition issues are not provided under the relevant Ukrainian legislation. Moreover, there is no guideline or unified approach followed by the AMC with regards to the terms and conditions of divestment implementation. The law provides that any divestment remedy should eliminate or mitigate the negative consequences of a merger for the competition and can be applied only within a Phase II procedure. The remedies may provide for the limitation of rights to manage, use or dispose of any assets, as well as for the forced disposition of the assets concerned. However, such conditions are rather uncommon for AMC practice.

Whenever the participant holds the monopolistic (dominant) position in the market, the AMC is entitled to decide on a compulsory split of such monopolist. At the same time, the split is not applicable under the circumstances when: (i) there is no possibility to separate the company or its organisational units due to certain organisational or territorial reasons; and (ii) a close technological connection within the company or between its organisational units exists (e.g. if the company utilises more than 30% of the products produced by itself or its organisational unit).

Furthermore, the company that is subject to the split may, at its discretion, decide on a transformation instead of a split, provided that its monopolistic (dominant) position would be eliminated.

At the same time, the applicable law provides no specific requirement to have the divestment remedy complied in full before the merger is completed. However, the AMC is entitled to reconsider its decision on granting the concentration whenever the divestment remedy is not complied with by the applicant / parties to the concentration.

The AMC is entitled, simultaneously with the granting of its permit, to oblige the parties to the allowed transaction to take certain actions that eliminate or extenuate a negative impact of the transaction on competition in Ukraine. Such conditions are often imposed by the AMC and generally include prohibition of the following actions: establishment of barriers for the competitors; fixing unreasonably high or law prices; and division of territories, etc. In addition, in order to control the parties' compliance with such conditions, the AMC obliges the respective parties to regularly report on the status of compliance. However, no guidelines in this respect have been issued.

Key policy developments

Detailed statistics of 2011 and first results of 2012 confirm that the AMC revised its approach to the fine determination policy and clearly evidence its intention to increase the total amount of fines collected. In June 2012 the AMC informed the market players of its intention to apply maximum allowed fines to companies which fail to notify the AMC on the transactions requiring prior approval of the latter (i.e. obtaining concentration permits), starting from July 1st 2012. According to the applicable laws, said failure to notify the AMC (when it is applicable) may be subject to penalties of up to 5% of the company's (or group of companies') worldwide turnover. Previously only a few fines of maximum allowed amount were applied by the AMC within its operation history.

Given the above, and in order to minimise antitrust-related business risks, it is advisable to pay specific attention to competition compliance issues in the conduct of business in Ukraine.

Reform proposals

The changes anticipated in Ukrainian competition legislation have evolved into a list of stipulations for the last couple of years. Respective changes are promoted in connection with Ukrainian obligations to adapt its domestic legislation to EU standards. In this respect the most anticipated changes are the following:

The development and adoption of the AMC official guidelines for setting fines in competition cases. The guidelines shall ensure the implementation of a transparent and impartial approach by the AMC in penalising infringements of the competition rules and assessing the amount of fines.

The implementation of the 'slim' application procedure for those transactions which technically (i.e. that have no or minimal effect on competition in Ukraine, or no competition concerns) fall under the merger control regulation.

The unification and disclosure, on a regular basis, of the actual AMC practice and information on AMC decisions. The respective process towards transparency and availability is already on the move and will most likely be further extended.

* * *

Endnotes

1. Source: AMC 2011 Annual report available in Ukrainian at AMC official website http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=212425&cat_id=212422. Please note that the annual report is available in the Ukrainian language only.
2. Law of Ukraine No. 22-10 "On Protection of Economic Competition," dated January 11, 2001 (the "Economic Competition Act").
3. Based on applicable law, the Ukrainian merger control rules are applicable to any transactions which affect or could affect 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 national competition authorities in Ukraine. In fact, according to the existing practice and the recent approach adopted by AMC officials, if the parties technically meet the thresholds envisaged by law, receipt of the prior approval of AMC is required even in case of a pure foreign-to-foreign transaction with minimal (no) effect on Ukrainian competition.
4. The Law of Ukraine "On Protection of Economic Competition" No. 2210-III dated 11.01.2001, as amended.

Mariya Nizhnik
Tel: +38 044 581 77 77 / Email: Nizhnik@vkp.kiev.ua

Mariya Nizhnik is a partner at Vasil Kisil & Partners' competition and antitrust practice group. Ms Nizhnik focuses on general corporate and competition matters. She specialises in mergers and acquisitions, commercial agreements (such as joint ventures, distribution and licensing arrangements, development activities or strategic alliances), and abuse of dominance or other competition investigations. Ms Nizhnik has gained extensive experience through advising the firm's foreign and domestic clients on private and government competition issues in a number of global M&A transactions. Ukrainian Law Firms: A Handbook for Foreign Clients named her one of the best lawyers practising antitrust law and commercial law, and has repeatedly mentioned Mariya as an experienced practitioner for antitrust and competition law in Ukraine. PLC Which Lawyer? 2012 mentions Mariya Nizhnik as a recommended practitioner for antitrust and competition law in Ukraine. The International Who's Who Legal: CIS 2011 recommended Mariya as a Ukrainian antitrust law expert of choice. In 2011, Ms Nizhnik was nominated by Global Law Experts international review as the best lawyer practising antitrust and competition law in Ukraine.

Sergey Denisenko
Tel: +38 044 581 77 77 / Email: s.denisenko@vkp.kiev.ua

Sergey Denisenko is a leading associate at Vasil Kisil & Partners' competition and antitrust practice group. He has extensive experience in Ukrainian antitrust regulations and focuses on the antitrust aspects of mergers and acquisitions, as well as advising businesses on regulatory investigations and other compliance issues. Mr Denisenko has written numerous articles in the aforementioned areas.

Vasil Kisil & Partners

17/52A Bogdana Khmelnytskogo St., Kyiv 01030, Ukraine
Tel: +38 044 581 7777 / Fax: +38 044 581 7770 / URL: http://www.kisilandpartners.com/