

e-Competitions

Antitrust Case Laws e-Bulletin

June 2019

The Ukrainian Competition Authority imposes a record-breaking fine of EUR 1.9 million for failure to obtain merger clearance for a notifiable concentration in the heavy industry sector, despite also finding that it did not raise any competition concerns (DCH group / Dnipro Metallurgical Plant / Evraz group)

MERGERS, COAL AND STEEL, HEAVY INDUSTRY, MANUFACTURING, MERGER NOTIFICATION, SANCTIONS / FINES / PENALTIES, MERGER CLEARANCE (PHASE I), UKRAINE

Ukrainian Competition Authority, Decision No 286-p, *DCH group / Dnipro Metallurgical Plant / Evraz group*, 25 April 2019

Anastasia Usova | Redcliffe Partners (Kyiv)

Nataliya Kovalyova | Redcliffe Partners (Kyiv)

e-Competitions News Issue June 2019

The facts of the case

On 6 March 2018, SENALIOR INVESTMENTS LIMITED, a Cyprus subsidiary of the DCH group (the "DCH Group", the "Acquirer's Group") indirectly acquired a controlling stake in Private Joint Stock Company "Dnipro Metallurgical Plant" ("DMP", the "Target"), a Ukrainian plant, active in the production of pig iron, coal coke and various steel products, from the Evraz group (the "Transaction").

The DCH Group is controlled by Mr Oleksandr Yaroslavsky, Ukrainian businessman ranked #17 among the richest people in Ukraine. The Target was a part of the Evraz group, a multinational, vertically integrated steel-making and mining group with beneficial owners including Mr Roman Abramovich, a citizen of the Russian Federation.

A week before completion of the acquisition, press releases were published, including on the DCH Group's website, announcing the signing of the Transaction. On the closing day, 6 March 2018, the Antimonopoly Committee of Ukraine (the "AMC") sent the purchaser an official information request on the acquisition of the DMP shares.

On 16 March 2018, the parties filed with the AMC a merger filing requesting merger clearance for the Transaction. Since the AMC received the filing post-closing, the authority opened a case on infringement for failure to notify a reportable concentration.

On 25 April 2019, after almost one year of investigation, the AMC imposed on the DCH Group the largest fine in the history of Ukrainian merger control, of some EUR 1.9 million, for failure to obtain merger clearance for a notifiable transaction, which resulted in the acquisition of indirect control over DMP, and granted unconditional merger clearance ex post.

According to the AMC's decision, the Target's market shares did not exceed 18% on any of the relevant product markets in 2016-2017. The Acquirer's Group was active in certain vertically related markets thereof, while there were no horizontal overlaps between the parties to the Transaction.

In 2017, the Acquirer's Group and the Target maintained vertical (customer-supplier) relations: the Target purchased from the DCH mining enterprise iron ore raw materials for its own production needs, and, in its turn, supplied pig iron to a tractor plant of the Acquirer's Group.

The AMC has unconditionally cleared the transaction ex post since the activities of the parties did not overlap, they had insignificant market shares, the relevant product markets were competitive, and thus, according to the AMC, the Transaction did not raise any competition concerns in Ukraine.

Unprecedented amount of fine for a merger control violation

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 the year in which the fine is imposed. However, according to the Guidelines of the AMC on Calculation of Fines in Competition Cases (the "Fining Guidelines"), the maximum fine can be imposed only in exceptional circumstances to ensure deterrence. Since the DCH Group's consolidated worldwide turnover figures have been redacted in the publicly available version of the AMC decision, it is not clear whether in this case the imposed amount of fine reached the above-mentioned 5% maximum.

When calculating the amount of the fine in this case, the AMC took particular account of:

1. the DCH Group having committed a repeat offence during one year (under the Fining Guidelines, in case of a repeat offence, the basic amount of the fine may be increased up to 100%); and
2. the merger filing being filed with the AMC before it opened the case on infringement, although only after the DCH Group received the AMC's request for information on the acquisition of the DMP shares.

According to the Fining Guidelines, if concentration did not result in monopolisation or substantial restriction of competition, and did not affect any product markets (as was the case here), a basic amount of fine should be defined in the range from UAH 510,000 (EUR 17,000) to 5% of the group's turnover on the relevant and vertically related markets in Ukraine for the period from committing the violation until the filing of the application with the AMC.

A basic amount is further multiplied by coefficients depending on the criteria of a) social importance of the relevant products, b) impact of the violation on vertically related markets, c) profitability of the relevant business. The coefficients for each of the above criteria may be set in the range from 0.05 to 2, which leaves a wide discretion in determination of the final amount of the fine by the AMC. This case demonstrates that despite the implementation of the Fining Guidelines, the practice of the AMC in determining the magnitude of a fine remains rather difficult to predict and still lacks sufficient transparency.

Furthermore, the Fining Guidelines only have a recommendatory nature. There have been recent cases, where the courts refused to annul the AMC decision based on incompliance of the calculation of the fines with the AMC Fining Guidelines referring to the fact that the Fining Guidelines are not legally binding upon the AMC. Furthermore, under the Ukrainian laws the courts do not have powers to reconsider the amounts of the fines imposed by the AMC; they can only annul the AMC's decision and return it to the AMC for reconsideration.

Conclusion

In the majority of cases, the authority detects merger control violations while reviewing new notifications from the parties which had already submitted Ukrainian merger filings in the past. The risk of detection is also rather high for those transactions which receive extensive public coverage, as it is quite common for the AMC to identify unnotified transactions through monitoring of the press and decisions on merger clearances in the EU and in other countries. While in the past such monitoring was not conducted on a regular basis, the AMC has recently created a new department on EU integration and international cooperation, which is to monitor and analyse the enforcement of competition law in the EU and other countries, including in relation to merger control violations. Thus, more attention from the AMC regarding failures to notify concentrations in other jurisdictions can be expected.

Compared with other countries, average fines for merger control violations in Ukraine may look relatively low; for example, in 2018 the fines for foreign-to-foreign transactions were in the range of EUR 5,000-16,000. However, these figures are not representative enough for the risk assessment of potential fines given that the maximum statutory fine can be up to 5% of the worldwide turnover of the group for the preceding financial year, and the wide discretion of the AMC in applying the coefficients to the basic amounts of fines.

It is clear that, overall, 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 in the early stages of due diligence and transaction planning is a must-have preventive measure against merger control infringements and costly fines.