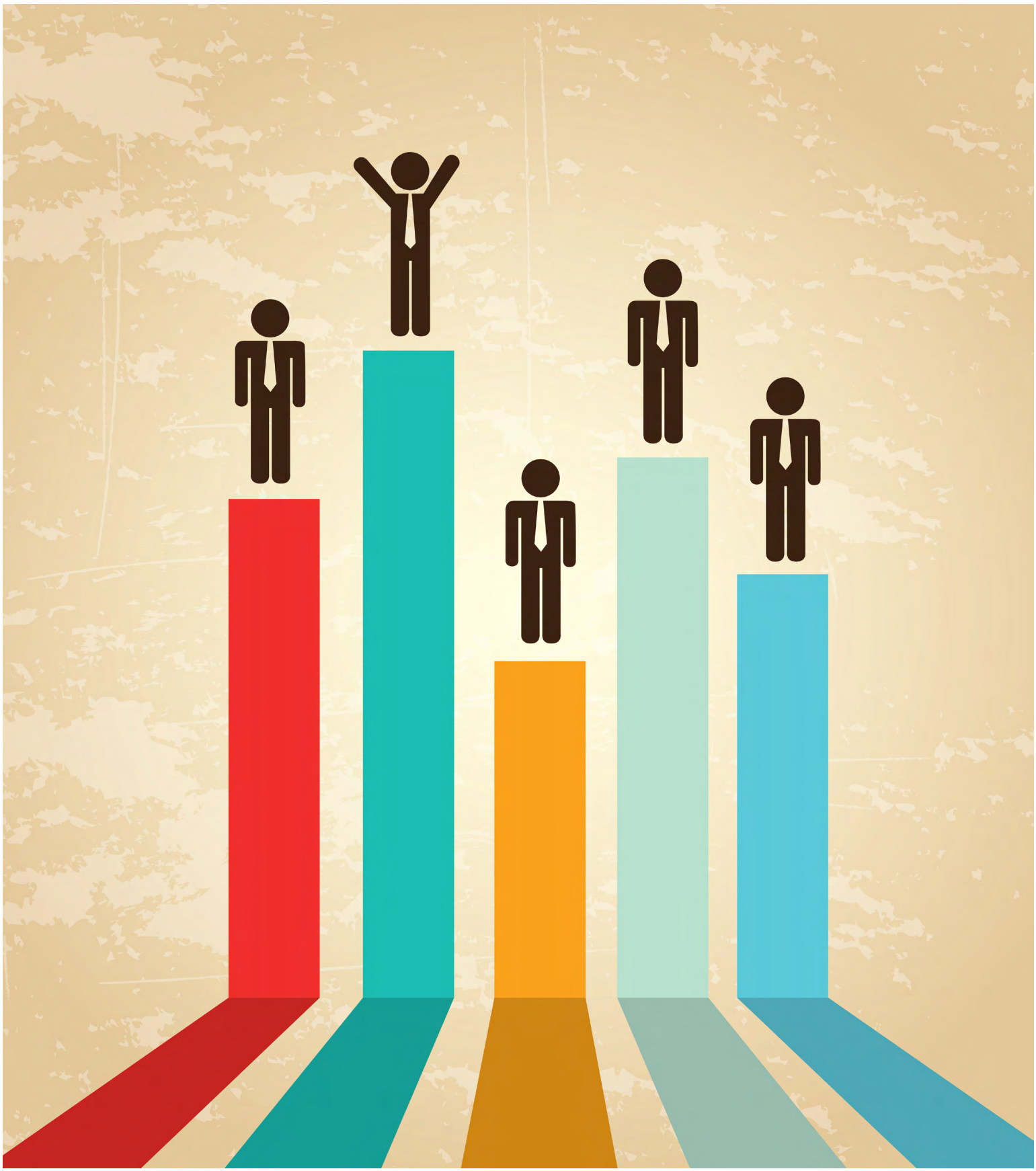
EXPERT GUIDE

CorporateLiveWire

September 2015

Competition & Anti-trust 2015



Olexander Martinenko
olexander.martinenko@cms-cmck.com
+380 44 391 33 77

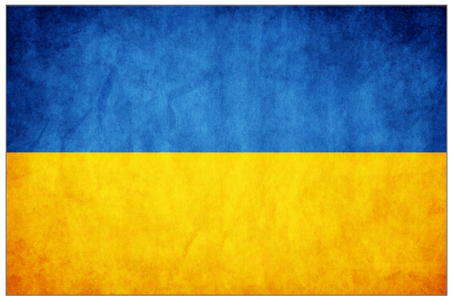
Olga Belyakova
olga.belyakova@cms-cmck.com
+380 44 391 3377

Nataliya Nakonechna
nataliya.nakonechna@cms-cmck.com
+380 44 391 3377

Merger Control In Ukraine - The Elusive Balance Of (In)Justice?

By Olexander Martinenko, Olga Belyakova & Nataliya Nakonechna

The apparent frustration of many multi-national companies is in the air – Ukraine is a major stumbling block in their global M&A activity. The reason is simple; the Ukrainian Competition Authority – the Anti-Monopoly Committee of Ukraine (the "AMCU") – wishes to control every single concentration in the world. As the chief compliance officer of a world's major put it: "*I have to apply to the AMCU for its merger control consent even if I would like to buy a hot-dog stand somewhere in Puerto-Rico.*"



The Trap

Under the Ukrainian Competition Act (the "Competition Act") prior merger control of the AMCU is due if any of the following two sets of requirements is met.

A. Quantitative Requirements

Parties to a concentration that takes place anywhere in the world meet all of the following financial thresholds:

i. all parties to a concentration have worldwide turnover/assets in excess of €12 million for the most recent financial year that precedes the transaction;

ii. at least two parties to a concentration have worldwide turnover/assets in excess of €1 million for the most recent financial year that precedes the transaction; and

iii. at least one party to a concentration has Ukrainian turnover/assets in excess of €1 million for the most recent financial year that precedes the transaction.

B. Qualitative Requirements

Irrespective of the Quantitative Requirements above, parties to a concentration that takes place anywhere in the world are obliged to file for and seek prior Ukrainian merger control approval if both of the below conditions are met:

i. at least one party to a concentration has market share in Ukraine in excess of 35% or combined market share in Ukraine of parties to a concentration (including their group entities) is in excess of 35%; and

ii. the concentration takes place on the same and/or adjacent markets.

No doubt that many international executives find the above legislative requirements terribly unjust given that the Ukrainian law simply twists their arms by requiring approval through the AMCU for almost every single M&A transaction in the world. The most loud business outcry is directed against the extremely low financial thresholds provided under the Quantitative Requirements. Indeed what does €12 million (not to mention a €1 million sum) in turnover/assets mean for a global company? Almost pocket money we guess.

On that scale the Ukrainian merger control requirements seem nothing but a nuisance for big multinational players – a time-, money- and effort-consuming nuisance. Sometimes a very painful one, especially when the days before scheduled closing are quickly running by while the perspectives of getting Ukrainian merger control clearance remain dim.

Because big multibillion multinationals have to live under the ever-hanging axe of up to 5% fine for gun-jumping. Under the Competition Act the AMCU is authorised to impose such a fine calculated on the basis of the perpetrator's global group turnover/assets for the most recent financial year preceding the year of the fine. All parties to a concentration remain jointly liable for such a violation. And what is worse, the AMCU can formally go for the easiest prey and to impose/collect the whole amount of the fine from it (typically that would be a Ukrainian subsidiary of a party to a concentration) instead of apportioning the fine among all parties to a concentration.

For that reason some international executives nicknamed Ukraine 'The Trap'. And many of them try avoiding Ukrainian merger control filings at all costs – anything between being in gross violation of their companies' own compliance policies and blatant violation of the public information disclosure obligations if their companies/corporations are publicly listed ones.

C/M/S/ Law.Tax

Unwinding the Trap

There are several grounds for the above misery.

The first and foremost relates to the fact that there is no hidden trap in the Competition Act. People tend to selectively read the law. They see the very low financial thresholds under the Quantitative Requirements and they panic. Then they see the no-matter-what-turnover Qualitative Requirements and they panic again.

For some reason people fail to ask very simple questions like "*Do all those merger control requirements apply at all to my concentration at hand?*" or "*Am I required by law to file for Ukrainian merger control clearance even if my company meets those Quantitative/Qualitative Requirements?*"

Those are very basic questions and it may be surprising to many but the applicable Ukrainian legislation provides clear-cut answers to those questions.

The Competition Act eliminates all doubts at the very outset. Its Article 2, part 2 clearly provides that the Competition Act shall apply only to those relations that can actually or potentially affect the competition situation on Ukrainian markets. In other words, it reflects the so-called 'doctrine of effects'.

When reading carefully the Competition Act one will undoubtedly arrive at a conclusion that the above provision is nothing but the very initial filter that should apply to the merger control analysis in all cases. What does it mean in reality? It means that if the concentration has no effect (whether actual or potential) onto the competition situation on Ukrainian markets, then the Competition Law simply ***does not apply*** to such concentration. That means that the AMCU stays ***away*** from that concentration and that is has no authority to rule on it unless the parties to such a concentration ***voluntarily*** approach it with a request to provide its prior consent for such a concentration.

A simple conclusion follows – if one would wish to acquire a hot-dog stand in Puerto-Rico, one would arrive at the conclusion that the concentration will have no effect in the Ukrainian markets. It follows that the Competition Act does not apply to such a concentration and that no prior Ukrainian merger control consent should be sought for its closing.

When raising the above argument within the business/professional communities one may easily hear various counter-arguments ranging from "*That is an odd provision of the law*" to "*The AMCU does not pay attention at all to Article 2, part 2 of the Competition Act; what matters to it is only the Quantitative Requirements or Qualitative Requirements.*"

For what it is worth, we can only ridicule the latter statement. Under Article 19, part 2 of the Ukrainian Constitution, every state body/official are obliged to act (i) on the basis of, (ii) within the boundaries of authority, and (iii) in the manner prescribed by the Constitution and law. Frankly, we can hardly imagine a state servant saying something like "*Ah, that is an unimportant rule of law, we ignore it*", or "*Yeah, it provides indeed for the boundaries of our authority, but we do not pay attention to it.*" Our take is that any state servant attempting to demonstrate such an attitude to the law would end up in jail.

As to the former statement, be that known to the business community and competition law practitioners that the Competition Act is not the only one legislative act regulating competition law matters (including merger control) in Ukraine. For some reason people tend completely to forget about the Commercial Code of Ukraine (the "Commercial Code"). Its Chapter 3 is devoted solely to regulating competition law matters in Ukraine.

And it may come out as an utter surprise to people that Article 41, part 2 of the Commercial Code provides for even more restrictive initial filter for the analysis of concentrations. It literally says that the rules established in Chapter 3 of the Commercial Code do NOT regulate relations of the parties if the result of such parties' activity becomes apparent only ABROAD. As we can see, the Commercial Code goes even farther than the Competition Act – it completely eliminates

the mere 'doctrine of effects' with respect to Ukrainian markets. For its purposes it is sufficient to demonstrate that the results of the parties' interaction materialise outside of Ukraine to exclude the application of Ukrainian competition legislation to such concentration.

And yes, Commercial Code is *lex posteriori* if compared to the Competition Act. Hence, its respective provisions have precedence over the respective provisions of the Competition Act.

Conclusion

People, do not be misguided by occasionally inadequate local competition law counsels in Ukraine. Please read the laws in full, comprehend them and do your homework diligently. Do not rush to the AMCU with your merger control applications when it is not necessary. The AMCU is such a shy body that it simply cannot say "No" when people ask it to consider their merger control applications. And what is important – it is barred from saying "No" by the above provisions of the Constitution, the Competition Act and the Commercial Code when people approach it ***voluntarily*** with such merger control applications.

Olexander is Senior Partner of, and Head of the Commercial, Regulatory and Disputes Practice Group in, the Kyiv office of CMS Cameron McKenna. His experience includes advising multi-national and local companies, institutions and organisations on their business activities in Ukraine for almost three decades. Olexander is a highly acclaimed and recommended expert in competition, corporate and commercial law, as well as mergers and acquisitions, and a number of sector practices.

As a top-ranked competition professional, Olexander acted for many large companies needing advice on how to deal with domestic and cross-border competition law matters in Ukraine including merger control, concerted actions, misuse of dominant position, unfair competition and state support ones. Additionally, being an active member of the Public Council of the Anti-Monopoly Committee of Ukraine (as a delegate of the American Chamber of Commerce in Ukraine) he regularly takes part in various projects aimed at improving the national competition legislation.

Olga is a Counsel in the Kyiv office of CMS Cameron McKenna. Olga's practice includes M&A, corporate, competition and general commercial issues as well as data protection. As a competition lawyer, Olga advises foreign and local clients on merger control issues, concerted actions, and anti-competitive conduct on the market. Olga has in-depth knowledge of how the competition rules apply in practice in Ukraine and can help clients to navigate the difficult paths. She is constantly recommended in the Chambers Europe edition in the field of competition law in Ukraine, which describes her as "knowledgeable, service-minded and extremely impressive."

Nataliya is a Senior Associate in the Kyiv office of CMS Cameron McKenna. Nataliya advises clients on a range of issues relating to competition, labour and work safety, data protection and privacy, and contract law matters. Nataliya has expert knowledge in competition law, gained through her vast experience of dealing with the competition authorities in Ukraine. For more than nine years she has been advising a number of international clients on a variety of competition issues in Ukraine, such as, merger control issues, concerted actions and unfair-competition.