

THE ANTIMONOPOLY COMMITTEE OF UKRAINE SHEDS LIGHT ON JVS NOTIFIABILITY

On 26 September 2019, the Antimonopoly Committee of Ukraine (the "**AMC**") approved the Guidelines providing some insights into merger control rules related to establishment of joint ventures (the "**Guidelines**").

According to the Guidelines, formation of JVs shall be notifiable if all below criteria are met:

- **Newly Created Entity**

Formation of a JV must be structured as establishment of a new entity by two or more parties, which, in turn should contribute financial, production, R&D or the like assets to a JV and jointly control it. Meanwhile, according to Ukrainian competition laws such control is not required.

If formation of a JV is structured as acquisition of joint control in an existing entity, such transaction shall be treated as "shares acquisition" constituting a separate notifiable event.

In case one of parents ceases to exist post JV formation, such transaction shall qualify as acquisition by a surviving parent of assets belonging to a ceasing parent, but not JV creation.

Parties cooperation set up according to R&D or the like agreements should not be treated as JV creation as well.

- **Full-Functionality**

Under the Guidelines, a JV must be engaged in economic activities, performing the functions normally carried out by undertakings operating on the same market. Consequently, a JV should have access to essential resources (i.e. finance, staff, and assets (both

tangible and intangible) as well as a separate management to conduct its activities.

Meanwhile, a JV shall not be treated as full-function if it has just one function within parent companies` business and does not have comprehensive market access. This may be the case when a JV is engaged in R&D and/or production activities for its parents only.

- **Operation on a Lasting Basis**

Pursuant to the Guidelines a JV must operate on a lasting basis. To this end, less than a 3-year period shall not be treated as sufficiently long. However, when assessing this criterion, a JV purpose (i.e., establishment for a certain project or sustainable activity) is more essential than its operation period.

- **No Coordination of Competitive Behaviour**

Creation of a JV shall not be treated as a concentration if it results in coordination of competitive behaviour by its parents in relation to each other or to the JV.

To this end, the Guidelines clarify that formation of a JV generally does not lead to such coordination and, consequently, will qualify as a concentration if:

1. a JV and its parents are not active on the same, neighbouring or upstream/downstream market(s);
2. a JV takes over pre-existing activities of its parents which virtually exit from the relevant market(s);
3. a JV acquires control over its parents (i.e., de facto merger).

Nevertheless, the Guidelines, leave much discretion to the AMC. Given a wide variety of cooperation, the coordination forms this must be assessed on a case-by-case basis.

It is worth remembering that JVs that result in coordination should be assessed as concerted practices that require a separate antitrust clearance.

Conclusion

The Guidelines are non-binding but, as expected, will be further followed by the authority. Generally, adoption of the Guidelines is a good step forward towards harmonization of Ukrainian merger control regime with respective practices of the European Commission. In particular, the Guidelines exempt from merger control purely technical JVs. However, there are still some unclear approaches as to assessment of JVs notifiability, especially those related to functionality criteria, which is introduced rather ambiguously. Thus, the parties should be careful when making notifiability analysis.

If you have any questions or need more details, please contact us.



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