Merger Control

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Belarus

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The basic normative legal acts in the sphere of antimonopoly regulation are:
- the Constitution of the Republic of Belarus;
- the Civil Code of the Republic of Belarus;
- Law of the Republic of Belarus of 10 December 1992 No. 2034-XII 'On Counteraction to Monopolistic Activity and Competition Development' (Law on Antimonopoly Activity); and
- Law of the Republic of Belarus of 16 December 2002 No. 162-Z 'On Natural Monopolies' (Law on Natural Monopolies), etc.

Whereas the Constitution and Civil Code provide the general principles of antimonopoly regulation (such as the prohibition to execute civil rights for the purposes of restraining competition, abuse of a dominant position and ensuring the equal right to perform economic activity), the Law on Antimonopoly Activity has the leading role in the national legislation related to antimonopoly issues. It provides for the basic notions of antimonopoly regulation, grants competence to the antimonopoly authorities and sets out the framework for state control over the activity of subjects of commercial activities and relevant markets for goods and services.

Belarusian merger control issues are primarily regulated by:
- the Law on Antimonopoly Activity;
- the Edict of the president of the Republic of Belarus of 28 December 2009 No. 660 'On Certain Issues of Creating and Operating Holding Companies in the Republic of Belarus' (the Edict);
- the Resolution of the Council of Ministers of the Republic of Belarus of 29 October 2007 No. 1406 'On Approving the List of Administrative Procedures Accomplished by the Ministry of the Economy with Respect to Legal Entities and Private Entrepreneurs' (Resolution on Administrative Procedures); and
- the Resolution of the Ministry of the Economy of the Republic of Belarus of 30 November 2009 No. 188 'On Approving the Instruction on the Rules of Performing Administrative Procedure 'Issuing Document on Consent for Performing a Transaction with Stock, Pays, Shares in Statutory Funds of Legal Entities' and Changing and Amending Certain Resolutions on the Issues of Antimonopoly Regulation' (Instruction on Receiving Antimonopoly Approval).

Merger control legislation is enforced by the antimonopoly authorities, namely:
- the Department of Pricing Policy of the Ministry of the Economy (Department of Pricing Policy); and
- departments of pricing policy under the committees of the economy of local executive committees.

The overall control of fulfilment of merger control requirements is executed by the Ministry of the Economy.

2 What kinds of mergers are caught?

Merger control regulation embraces the following transactions:
- transactions where the company and the target occupy the same commodity market (all of the following conditions should be met):
  - the intended transaction relates to the acquisition of shares of the target;
  - the acquirer and the target perform their activity at the same commodity market;
  - the acquirer's activity covers more than 30 per cent of a certain commodity market; and
  - the acquirer is a business entity or an individual entrepreneur;
- transactions with shares of the target holding dominant position (all of the following conditions should be met):
  - the intended transaction relates to the acquisition of at least 25 per cent of shares of the target;
  - the target holds a dominant position in any commodity market; and
  - the acquirer is a legal entity or an individual or a foreign state or an international organisation or their bodies;
- acquisition of right to influence the decisions of the target holding dominant position (all of the following conditions should be met):
  - the intended transaction leads to the possibility for the acquirer to influence the making of decisions by the target;
  - the target holds a dominant position in any commodity market; and
  - the acquirer is a legal entity, an individual, a foreign state or an international organisation or their bodies;
- acquisition of control over the target (all of the following conditions should be met):
  - the intended transaction feasibly allows the acquirer to determine conditions of carrying out business activity of the target or to perform functions of the managing body; and
  - the acquirer is a legal entity or an individual, or a group of legal entities or individuals or a foreign state, or an international organisation, or their bodies.

Apparently, a great number of transactions can be regarded as acquisition of control over the target due to the ambiguous wording of the law. However, the recently adopted Edict of the president of the Republic of Belarus No. 499 (in force since 14 January 2010) (Edict No. 499) provides for a limited number of conditions when the acquirer is considered to obtain control over the target's business activity, namely:
- the intended transaction relates to the acquisition of rights to use or dispose of at least 20 per cent of the shares or stock in the statutory fund of the legal entity;
- the transaction is based on one of the following agreements: a contract of sale, a contract of trust management, a joint activity agreement or a commission agreement; and

- the book value of the target's assets for the latest reporting date exceeds 3.5 billion Belarusian rubles, or the proceeds from sales for the previous financial year exceeds 7 billion Belarusian rubles.

The wording of Edict No. 499 leaves it open to argue whether indirect acquisition of Belarusian entities (eg, if shares of a foreign parent company are purchased) is subject to Belarusian merger notification. Therefore, before entering into a transaction it might be expedient for the interested party to address local antimonopoly authorities with a preliminary inquiry requesting an opinion regarding whether the transaction falls within merger notification requirements.

If a particular transaction meets the above criteria, approval of the antimonopoly authority should be obtained before a merger or acquisition of control occurs. Otherwise, the transaction can be found invalid.

Transactions with assets usually do not fall within the scope of antimonopoly regulations, except for transactions including a unitary enterprise as an asset complex.

3 Are joint ventures caught?

Creation of a new joint venture or reorganisation of an existing joint venture is subject to merger control under the Law on Antimonopoly Activity, provided that the transaction contemplated with regard to the joint venture is one of those listed in question 2.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

There is no an explicit definition of 'control' in Belarusian merger control legislation. Based on a cumulative analysis of the applicable legislation it may be concluded that 'control' exists whenever there is as a possibility for one party to make or determine decisions that are binding upon another party. Following the logic of Edict No. 499, such a possibility emerges when an entity holds 20 per cent or more of the shares or stock of another legal entity.

Although as a general rule minority and other interests less than control are not caught by merger control regulations, the acquirer in particular transactions (eg, if there is a possibility for the buyer to determine the conditions in which the target carries out business or to perform functions of the managing body) will be obligated to pass through merger clearance procedures.

5 What are the jurisdictional thresholds?

In transactions where the company and the target operate on the same commodity market the jurisdictional threshold is set with regard to the share of the acquirer's activity on the relative commodity market. The threshold is 30 per cent.

With regard to transactions with shares of a target holding a dominant position, the threshold is 25 per cent of shares of the target.

In transactions that contemplate the acquisition of control over the target the transaction should meet the following criteria:

- at least 20 per cent of the shares or stock of the target should be involved; and
- the book value of the target's assets for the latest reporting date should exceed 100,000 basic units, or the proceeds from sales for the previous financial year exceeds 200,000 basic units.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If the transaction meets the requirements outlined in question 2 the filing is mandatory with no exceptions.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

According to the Law on Antimonopoly Activity, foreign-to-foreign mergers have to be notified if the transaction may result in the restriction of competition in Belarus or entail other adverse consequences in commodity markets.

There is no local effect test in Belarus.

Notification and clearance timetable

8 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

It is stipulated by the Law on Antimonopoly Activity that filing is to be carried out for the purposes of performing contemplated transactions. Based on analysis of the Belarusian legislation it can be ascertained that the filing is therefore to be made before entering into the transaction (ie, signing the transaction documents). There is no deadline set in terms of days, etc.

If the transaction that is subject to be cleared by an antimonopoly authority was made without merger clearance, and resulted in the emergence or strengthening of a dominant position on the relative commodity market or restriction of competition, then such a transaction may be found invalid by a court decision upon a claim filed by the antimonopoly authority. There is, however, no information on any such claims filed.

9 Who is responsible for filing and are filing fees required?

According to Belarusian legislation the filing is to be made by the interested party or by a number of interested parties. In the case of the latter, the filing can be performed by one of the interested parties in the name of all of the parties to the transaction or by a representative respectively authorised by all of the parties. Therefore, merger clearance filings in Belarus can be done either by a seller or by a buyer. In practice, the filings are mostly done in the name of the buyer whereas an application dossier is prepared by both parties to the transaction. Filing is free of charge: no state fee is to be paid.

10 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The waiting period is 30 days after filing all the documents with the antimonopoly authority. However, the antimonopoly authority is allowed to extend this term to request additional documents and conduct additional research. According to the Law on Antimonopoly Activity no transaction can be made prior to receiving the decision of the antimonopoly authority allowing execution of the transaction.

11 What are the possible sanctions involved in closing before clearance and are they applied in practice?

The legislator does not provide for a specific sanction for closing before clearance. Antimonopoly authorities will treat such a situation as a breach of the merger clearance procedures; if the transaction leads to the emergence or strengthening of a dominant position on a relevant commodity market or restriction of competition, such a transaction can be found invalid by a court decision upon a claim filed by the antimonopoly authority. In addition to that, failure to meet the requirements of the antimonopoly legislation (eg, those issued within clearance and subject to be followed by the parties to the transaction) entails administrative liability for the legal entity within the range of 700,000 to 1.75 million Belarusian rubles. We are not aware of any cases in which a transaction was claimed invalid by antimonopoly authorities due to it being signed before closing.

12 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Subject to a preliminary coordination with the antimonopoly authority (please see paragraph 4 section 4 of answer to question 2) it may be possible to structure the transaction so that Belarusian entity's shares are not acquired directly.

13 Are there any special merger control rules applicable to public takeover bids?

Belarusian legislation does not provide for any special merger control rules applicable to public takeover bids.

14 What is the level of detail required in the preparation of a filing?

There is no official questionnaire to be completed by the interested party or parties. Detailed requirements with regard to information needed in the preparation of a filing are set by the Law on Antimonopoly Activity, Resolution on Administrative Procedures and Instruction on Receiving Antimonopoly Approval.

As a rule the following information is to be indicated on the notification filed to the antimonopoly authority:

- information on the financial and economic aspects of the contemplated transaction;
- information regarding types and amounts of goods (produced or sold in Belarus and for export) in numbers and value (if applicable); the form in which such information is to be provided is set by the Instruction on Receiving Antimonopoly Approval;
- information on legal entities controlling property of other legal entities (legal entities that can directly or indirectly determine decisions of other legal entities or impact decision-making process by way of possessing more than 20 per cent share of the statutory fund of a legal entity); the form in which such information is to be provided is set by the Instruction on Receiving Antimonopoly Approval;
- information on the interested party and the target company, including name, place of residence, postal address, banking details, amount of statutory fund and balance sheet assets; and
- the purpose of the contemplated transaction.

15 What is the timetable for clearance and can it be speeded up?

The question is not relevant as no special timetable for clearance is available. The general waiting period within which the antimonopoly authority is to issue a response is 30 days upon filing all the documents. The legislation does not provide for a possibility to speed up the clearance. However, in practice the review process may be shortened to two weeks, but no less.

16 What are the typical steps and different phases of the investigation?

Belarusian merger clearance regulation does not provide for a mandatory investigation as part of merger clearance. The Instruction on Receiving Antimonopoly Approval envisages that the antimonopoly authority is entitled to send inquiries to state authorities and other organisations that are competent to provide documents or information that can be necessary to perform clearance. In addition, the Law on Antimonopoly Activity allows officials of antimonopoly authorities to have access to state authorities and commercial entities for the purposes of familiarisation within their competence with all the documents that may be necessary for them to perform their functions.

Substantive assessment

17 What is the substantive test for clearance?

The substantive test as such is not set by Belarusian legislation. Within clearance, the antimonopoly authority evaluates the effect of the contemplated transaction: whether it may result in the emergence or strengthening of a dominant position of a legal entity on the relevant market or the restriction of competition. The approval can be granted if there is no such effect, or there are certain measures that can be undertaken by the legal entity in order to secure competition. In the case of the latter the antimonopoly authority will include the requirements under which the transaction can be performed and will set the term for fulfilling them.

18 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures.

19 What are the 'theories of harm' that the authorities will investigate?

The main concerns within merger assessment are abuse of market dominance, limitation of competition, unfair competition and standard contract provisions.

20 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

In principle, within merger clearance procedures the antimonopoly authority may take into consideration any issue relevant in the contemplated transaction under review. There may be indirect assessment of non-competition issues, which are addressed mostly in situations where a party to the transaction seeks clearance for a merger that formally results in hindering competition on the market. According to the Law on Antimonopoly Activity, the antimonopoly authority may disregard threats to competition caused by the activity to be undertaken by a newly formed legal entity if:

- such activity is necessary for the purposes of fulfilling legislative acts within the boundaries of such acts and restriction of competition is inevitable; or
- the positive effect will greatly exceed the negative consequences on the relevant commodity market.

21 To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies may be taken into account by the antimonopoly authority for the purposes of justifying a transaction that is likely to hinder competition on a relevant commodity market. According to the Law on Antimonopoly Activity, the antimonopoly authority or a court can take into account positive effects (including economic effects) of the company's activity if they significantly exceed the negative consequences of such activity.

Remedies and ancillary restraints

22 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

According to the Law on Antimonopoly Activity, antimonopoly authorities are vested with the power to:

- by way of judicial proceedings claim invalidity of transactions made without the approval of the antimonopoly authority and resulting in the emergence or strengthening of dominant position or restriction of competition;
- prescribe to stop illegal activity (not meeting the requirements of antimonopoly legislation of Belarus) and to eliminate harmful repercussions resulting from such activity; and
- issue a decision on the forced reorganisation or liquidation of a legal entity that has a dominant position on a relevant market.

Update and trends

Decisions of the Department of Pricing Policy and decisions of departments of pricing policy under committees of the economy of local executive committees are not published. Court practice with regard to appealing such decisions is very scarce. No key judgments were delivered within the past year.

Major changes in the merger control legislation were introduced by the Edict of the president of the Republic of Belarus No. 499, which came into force on 14 January 2010. The Edict limited the cases when approval of the antimonopoly body for merger clearance is required. The rationale for adoption of the Edict was that the antimonopoly authorities were overloaded with applications for approval of transactions, the majority of which did not and could not threaten competition on the internal market.

Furthermore, at the beginning of 2010 a new Instruction on Receiving Antimonopoly Approval was adopted. The whole procedure of receiving the approval of the Department of Pricing Policy now complies with the Resolution on Administrative Procedures. Similar instructions on receiving antimonopoly approvals are expected to be adopted by local executive committees in the near future.

Within the first quarter of 2010, the Department of Pricing Policy, jointly with the Ministry of Justice, has developed a draft Law of the Republic of Belarus 'On Introducing Changes and Amendments to Certain Codes of the Republic of Belarus with regard to Criminal and Administrative Liability for Breaching Antimonopoly Legislation'. The draft law provides for more serious administrative liability, introduction of economic liability and development of criminal liability for breaching antimonopoly legislation.

23 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible to remedy competition issues. For the purpose of restoring the balance on the market, the antimonopoly authority may impose or suggest certain measures on or to legal entities. According to the Law on Antimonopoly Activity, the antimonopoly authority in exceptional cases may decide to reorganise or liquidate the legal entity that has a dominant position and restricts competition and issue suggestions to legal entities regarding the development of commodity markets and competition. No specific guidelines on giving divestment undertakings or behavioural remedies are set by law.

24 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The legislation provides neither for the procedure of giving divestment undertakings nor for any other remedy. The conditions and timing thereof are set by the antimonopoly authority.

25 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There is no relevant track record available regarding requiring remedies in foreign-to-foreign mergers.

26 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Belarusian legislation does not address the issue of arrangements relating to a transaction. It is entirely at the discretion of the antimonopoly authority to cover related arrangements.

Involvement of other parties or authorities

27 Are customers and competitors involved in the review process and what rights do complainants have?

In general, there is no obligation on the antimonopoly authority to involve customers and competitors in the review process. The Law on Antimonopoly Activity, however, envisages that the antimonopoly authority within the review process has the right to request information from all individuals and legal entities, as well as from state and local government agencies. Therefore, at the discretion of the antimonopoly authority information required for the purposes of clearance may be received from customers and competitors. Complainants are vested with the right to appeal against either actions of legal entities or individuals to the antimonopoly authority or to the court, or decisions of the antimonopoly authority and officials thereof. Moreover, public associations for protecting consumer interests are entitled to exercise control in the sphere of antimonopoly law by means of filing complaints to the antimonopoly authority or to the court.

28 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

According to the Law on Antimonopoly Activity, the antimonopoly authorities are obligated to keep confidential all the information that appears to be a state, commercial or official secret. Therefore, in practice no publicity is given to the review process as such. Belarusian legislation does not provide for any specific measures on protecting commercial information, including business secrets, from disclosure within merger clearance. There is also no specific liability for state officials for disclosing such information. General principles for protection of information are set by the Law of the Republic of Belarus of 10 November 2008 No. 455-Z 'On Information, Informatisation and Protection of Information'. General liability for disclosure of commercial secrets or other secrets is set by article 22.13 of the Code on Administrative Offences of the Republic of Belarus as a fine within the range of 140,000 to 700,000 Belarusian rubles.

29 Do the authorities cooperate with antitrust authorities in other jurisdictions?

By virtue of the law, the antimonopoly authorities are entitled to cooperate with antitrust authorities in other jurisdictions. In practice, most of the cooperation exists with Russian antimonopoly authorities and is most effective in the sphere of harmonisation of legislation between the Belarus and Russia.

30 Are there also rules on foreign investment, special sectors or other relevant approvals?

There is no specific regulation addressing certain types of activities.

Judicial review

31 What are the opportunities for appeal or judicial review?

Any decision of the antimonopoly authority can be appealed within one year from the date of decision, first to the antimonopoly authority itself (obligatory prejudicial procedure) and subsequently to the commercial court. Within the judicial review the decision of the first instance court can be appealed to the appellate instance and subsequently to the cassational instance.

32 What is the usual time frame for appeal or judicial review?

As set by article 31 of the Law of the Republic of Belarus of 28 October 2008 No. 422-Z 'On the Basics of Administrative Procedures' the appeal is to be submitted within a year from the date of the decision. The time frame for the appeal to be considered by the state authority is one month. The court of first instance has to consider the claim within no longer than one month. The appeal against the first

instance court decision is to be filed with the appellate instance court within 15 days from the date of decision. The appellate instance will then have 15 days to decide on the appeal. A cassational appeal is to be filed within one month from the first instance court decision date and will be considered within one month from the date the appeal was received by the cassational instance.

Enforcement practice and future developments

33 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

During 2009 Belarusian the antimonopoly authorities approved four reorganisations in the form of a company takeover, establishment of six associations and one economic group. With regard to accomplishing reorganisations of economic entities enjoying a dominant position on a relevant commodity market, the antimonopoly authorities have issued eight opinions on conditions of the reorganisation of an economic entity into an OJSC within the process of state property privatisation. The Department of Pricing Policy has considered and satisfied two applications for antimonopoly approval of a transaction envisaging purchasing shares by natural persons and provided clarifications for transactions with shares to 16 economic entities.

No statistics on foreign-to-foreign mergers are available.

34 What are the current enforcement concerns of the authorities?

No statistics on the reviewing process are available. However, judging by the merger transactions that took place recently, there have been merger clearances related to the banking and insurance sectors.

35 Are there current proposals to change the legislation?

We are not aware of such proposals.

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