

Belarus merger control (2018)

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A conversation with Maksim Salahub, partner, and Viktoriya Mikhnevich, senior associate in the Minsk office of regional law firm Sorainen, on the key issues on merger control in Belarus.

NOTE—to see whether notification thresholds in Belarus and throughout the world are met, see *Where to Notify*.

Note—in some languages, Belarus can be known as 'White Russia'. For example, Belarus can be known as 'Weißrussland' in German, although officially it is known as Belarus. Likewise, Belarus is known as 'Wit-Rusland' in Dutch

1. Have there been any recent developments regarding the Belarusian merger control regime and are any updates/developments expected in the coming year? Are there any other 'hot' merger control issues in Belarus?

In the beginning of 2018 a new version of the Law on Countering Monopolistic Activity and Development of Competition (the 'Law') was adopted. Starting from 3 August 2018 it will replace the current law, which entered into force on 1 July 2014. The new version retained the essential provisions of the current law and introduced new details based on the recent practice, including changes to the grounds and threshold for merger clearance procedure. The Law further harmonises the national legislation with the regulations and practices of the Eurasian Economic Union (Armenia, Belarus, Kazakhstan, Kyrgyzstan, and Russia).

In addition to the Law, the Ministry of Antimonopoly Regulation and Trade (MART) has already developed and adopted a set of by-laws regulating the merger control procedures. The new by-laws clarify some of the procedural steps and requirements to the provided documents.

We expect that the antimonopoly authorities will continue to actively monitor the market for transactions and proactively review a variety of information sources (national and foreign). The authorities will further develop cooperation closely with their colleagues in Russia and other countries within the Eurasian Economic Union.

2. Under Belarusian merger control law, is the control test the same as the EU concept of 'decisive influence'? If not, how does it differ and what is the position in relation to 'minority shareholdings'?

There is no concept of 'decisive influence' in the Belarusian law. According to the Belarusian merger control law the following requirements are to be met simultaneously:

- at least one of the grounds for merger control stipulated in the law is present, and
- the financial thresholds set forth in the law are reached.

Under current version of the law the main ground for merger control is share acquisition as a result of the respective transaction. In most cases the minimum amount of shares acquired, which triggers merger clearance, is 25% of all shares issued by the target company (but not only voting shares). Where the company holds a dominant position in the market, there is no such threshold—the acquisition of any amount of shares in such a company triggers the requirement to obtain merger clearance.

Note—the most material decisions (liquidation, reorganisation) are adopted by all shareholders unanimously, other significant decisions by two-thirds or three quarters of all votes of shareholders, remaining decisions by a 50% + 1 vote. In some cases different amount of votes may be provided by the company's articles of association. Moreover, the amount of votes of shareholders may be distributed disproportionately to their shareholding in limited liability companies.

Taking into account the above mentioned, the acquisition of minority shareholdings may be subject to merger clearance.

At the same time the new Law will introduce new grounds for merger control related to acquisition of fixed and intangible assets or the right to influence decisions of an individual entrepreneur or a business entity. This influence will exist if orders of a person or an entity are mandatory for such individual entrepreneur or business entity due to agreement or any other ground (eg appointment as an executive body of a business entity).

The Law will also dismiss the requirement to meet the financial thresholds in case at least one of the parties to a transaction is listed in a special register either as holding a dominant position in the market, or as a natural monopoly.

3. Are joint ventures caught by the national merger control provisions (including non-structural, cooperative joint ventures)?

Currently joint ventures are not specifically caught by the national merger control provisions. They may fall within the given provisions along with other entities in case one of the grounds present and general thresholds are reached.

The situation will change as the new Law enters into force. Non-structural joint ventures operating under co-operation (simple partnership) agreement will be subject to merger control in case this agreement is concluded between competitors with respect to the Belarusian market. Further, the merger control may be held due to acquisition of influence over decisions of an individual entrepreneur or a business entity (being either partner, or the joint venture itself) as described in question 2 above.

4. What are the merger control thresholds and would a purely foreign-to-foreign transaction be caught (commenting on any 'effects' doctrine/policy if relevant)?

The acquirer should apply to the antimonopoly authority for approval of the intended transaction with the shares in case the book value of the direct target's worldwide assets as of the latest reporting date exceeded 100,000 basic units (approximately €1,010,000), or the worldwide revenue from sales in the previous financial year that exceeded 200,000 basic units (approximately €2,020,000) in the following cases:

- acquisition of shares of a target holding dominant position in certain commodity market by an acquirer which operates in the same market segment
- acquisition of at least 25% of shares of or the right to influence decisions of a target holding dominant position in certain market segment
- acquisition of the right to dispose of more than 25% of shares of a target or more than 50% of shares when the acquirer has the right to dispose of more than 25% but not more than 50% before the transaction, or
- acquisition of the right to participate in the executive bodies, supervisory board and other managing bodies of two or more targets (which operate in the market of interchangeable (similar) goods) by the same acquirer (which has opportunity to determine conditions for the target's business activities).

The Law will increase the thresholds up to 200,000 basic units (approximately €2,020,000) of assets and 400,000 basic units (approximately €4,040,000) of revenue. Moreover, the merger clearance will be necessary also in case when these thresholds are met by the acquirer. As mentioned in section 2 above the requirements to the thresholds will not apply to the companies listed in the state register of the entities holding a dominant position in the market or the state register of natural monopolies.

The Law will also introduce the following additional grounds for the merger clearance:

- acquisition of the right to give mandatory orders to an individual entrepreneur or a business entity or the right to perform functions of a company's executive body, including on the bases of a trust management agreement, a simple partnership agreement, or an agency agreement
- conclusion of a simple partnership agreement on the territory of the Republic of Belarus between individual entrepreneurs and business entities being competitors to each other
- acquisition into ownership, use, or possession of the property, which is located on the territory of the Republic of Belarus and constitutes fixed or intangible assets of a business entity, provided that the value of this property exceeds 20% of the book value of the fixed and intangible assets of the business entity, which has its property disposed.

The competition law of Belarus is applicable to the foreign entities, as well as to the transactions made abroad. But it is a bit ambiguous and is not clear enough as to the necessity to obtain approval for a foreign-to-foreign transaction (ie where the acquirer, the seller, and the direct target are foreign entities; the transaction does not involve in any way transfer of shares or assets in the Belarusian company). This is quite a questionable issue and is subject to separate consideration in every specific case. Not every foreign-to-foreign transaction is subject to merger clearance even if all the thresholds are exceeded. Currently the general rule is that such transaction is subject to merger clearance in Belarus if it leads or may lead to prevention, restriction, or elimination of competition in the respective commodity markets of Belarus, eg due to indirect transfer of shares/participatory interests in a Belarusian entity, and/or other rights relating to a Belarusian entity, if the acquirer and the target operates on the Belarusian market.

5. Are there any specific issues parties should be aware of when compiling and calculating the relevant turnover for applying the jurisdictional thresholds?

The thresholds for notification are based on the total worldwide value of assets/turnover of the target. This includes only value of assets/turnover of this specific company, save for its subsidiaries or other group companies whether in Belarus or abroad.

6. Where the jurisdictional thresholds are met, is notification mandatory and must closing be suspended pending clearance?

The procedure of merger clearance requires obtainment of prior approval of the transaction by the antimonopoly authority, the MART or its local divisions. It means that transactions should not be put into effect prior to clearance by the MART. Post notification is possible in case where the seller holds more than 50% of votes in the acquirer or vice versa.

According to the new Law the post notification will be possible if more than 50% of votes in the acquirer and the target are held by the same parties.

7. Is there any discretion to review transactions that fall below the notification thresholds?

The MART reviews transactions according to the procedure for merger clearance only in case the statutory thresholds are met. In case a transaction falls under these thresholds, the merger clearance is not required, but the MART can check it within its powers to carry out control over the competition in the market.

8. Is it possible to close the deal globally prior to local clearance?

This depends on the terms and conditions of the global transaction. The MART approves only certain transaction which is subject to merger clearance in Belarus and normally does not become concerned with the global transaction. The mandatory rule is that the acquirer is to obtain antimonopoly approval prior to putting the transaction into effect (the Belarusian part of the transaction). If the particular Belarusian transaction may be separated from the global transaction and closing a transaction globally does not mean closing of the Belarusian transaction, it is possible to close a transaction globally prior to clearance in

Belarus (it implies the following steps: closing the transaction globally, then obtaining the antimonopoly approval of the Belarusian transaction, and then closing the Belarusian transaction).

9. Is there a deadline for filing a notifiable transaction and what is the timetable thereafter for review by the Ministry of Antimonopoly Regulation and Trade?

The acquirer should apply for obtainment of approval of the transaction with the MART before closing a transaction.

The MART should decide upon it within 30 calendar days of the date of filing of the application.

Note—usually the review timetable runs from the day of notification if it is submitted before 3 to 5pm (the usual time of registration of incoming correspondence), and it runs from the day after notification if it is submitted later. However, the Law does not specify this.

10. Who is responsible for filing a notifiable transaction (noting also whether there is a specific form/document used and an applicable filing fee)?

According to the new by-law adopted by the MART any of the acquirer, target, their shareholders, as well as persons holding the target's shares in trust management can apply for obtainment of approval of the transaction. Usually the acquirer is the party which deals with filing.

The person responsible for filing shall submit an application according to the form stipulated by the laws and attach the required set of documents.


There is no filing/state fee for consideration of the application.

11. Please confirm/comment on the penalties for failing to notify or suspend transactions pending clearance and the Ministry of Antimonopoly Regulation and Trade's record/stance in terms of pursuing parties for failing to notify relevant transactions (commenting, if relevant, on any statute of limitations regarding sanctions for infringements of the applicable law).

Failure to obtain the antimonopoly approval from the MART can result in the imposition of penalty on the responsible officer of the acquirer in the amount of 20 to 100 basic units (approximately €200 to €1,000). Moreover in a case of failure to obtain the antimonopoly approval from the MART, the transaction may be recognised judicially as invalid provided that it leads to an occupying or strengthening a dominant position and/or to obstructing competition.

12. Are there any other 'stakeholders' other than the Ministry of Antimonopoly Regulation and Trade (for example, any 'sector regulators' who might have concurrent powers)?

The MART is the only regulator with the power to file a suit in order to recognise the transaction as invalid

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