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LEGAL ALERT

## AMCU CLARIFIES THE IMPACT SANCTIONS MAY HAVE ON MERGER CLEARANCE IN UKRAINE

1. The Antimonopoly Committee of Ukraine (**AMCU**) has recently issued the Explanatory Note on Improvement of Control over Mergers of Undertakings with Participation of Sanctioned Individuals (**Explanatory Note**) as to the application of the Law of Ukraine “On Amending Certain Laws of Ukraine on Protection of Economic Competition and on Improvement of Control over Mergers” (**Law**), which came into force on November 10, 2017.
2. The Law amended the Law of Ukraine “On Protection of Economic Competition” (**Competition Law**) and the Law of Ukraine “On Sanctions” (**Sanctions Law**) and is aimed at ensuring that no individuals or undertakings, placed under sanctions, benefit from mergers.
3. Before the Law was adopted, the AMCU had no legal ground to prohibit the merger unless it resulted in the monopolization of the whole market or its significant part or in the substantial restriction of competition on the whole market or its significant part, as provided by the Competition Law. The Law added new ground for such a prohibition, namely, non-compliance with the Sanctions Law.
4. This novelty has been reflected in the following amendments to the Sanctions Law and to the Competition Law:
  - the Sanctions Law now clearly prescribes that the AMCU shall prohibit any merger which includes the actions falling under the listed sanctions;
  - under the Competition Law, the AMCU has been granted the right to ban the merger non-compliant with the Sanctions Law at various stages of consideration. Particularly, the AMCU shall now send back the applications for the merger or leave them unconsidered, close the ongoing cases without issuing a decision on merits, or annul the already issued decision, depending on the moment when it became aware of the fact that the merger participant(s) had been placed on the sanctions list.
5. Still, the Law left some important issues unclear. For instance, one could not easily infer whether the ban would apply by mere fact of the undertaking or individual being sanctioned, or whether it came into play only when some actions, specifically included into the sanctions list, were performed in the course of the merger.

These and other issues have been clarified by the AMCU's Explanatory Note.

6. Most importantly, the Explanatory Note provided a non-exhaustive list of sanctions preventing the merger clearance:
  - freeze of assets, *i.e.* temporary suspension of the individual's right to use and to dispose his/her possessions;
  - prohibition of the participation in privatization, rent of state property by foreign residents and by individuals being under direct or indirect control of foreign residents or acting in their interest;
  - total or partial prohibition of transactions concerning securities emitted by the sanctioned entities.
7. Important is the fact that the AMCU will discreetly take into account the provisions of the Competition Law regarding the merger of entities (including their ultimate beneficiary owners) that are linked by relations of control.
8. Procedurally, the AMCU is now in a position to review its previous clearance of any merger if the latter would have been prohibited under the Sanctions Law, within the period of 5 years since such a clearance was granted.
9. Besides, the mergers non-compliant with the Sanctions Law have been exempted from the "default approval" under the Competition Law, when the AMCU is presumed to tacitly approve the merger in absence of its decision during the consideration period.
10. The AMCU has already applied the Law in its few merger cases refusing to render decisions on merits. Namely, JSC "NIPigazpererabotka" along with "Technip France SA" and "Linde AG" have been denied a right to establish a joint venture. The reason for AMCU's refusal was the fact that a citizen of the Russian Federation, Gennady Tymchenko, sanctioned by Ukraine, was among the ultimate beneficiary owners of one of the undertakings exercising control over the merger participant.

Moreover, the AMCU specified that it established the relations of control based on the nature of the relations, but not just on the legal form of relations.

11. It is, thus, apparent that the AMCU adopted a broad approach as to the scope of the Law, applying it not only to the merger participants, but also to the sanctioned individuals linked with them by relations of control.
12. With the Law taking effect at the end of 2017, the AMCU now specifically requires that merger clearance applications include information as to the presence or

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absence of sanctioned individuals among the participants or among those exercising control over them.

13. Although the AMCU's practice is yet to fully crystallize, progressive effects of the Law are definitely expected in relation to the Ukrainian business environment since mergers of sanctioned undertakings are now outlawed in Ukraine.

If you have any questions, please contact:

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