Mergers and Acquisitions Control in European Union Antitrust Regulation System

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Abstract: The article analyzes antitrust control over mergers and acquisitions in the European Union. The correlation of competences of the European Union and member states in the field of mergers and acquisitions regulation was analyzed. Using the examples of Germany, France and Great Britain the antitrust control of the EU member states is discussed.

Keywords: mergers and acquisitions, economic concentration, antitrust control, Council Directive.

Introduction. Currently, mergers and acquisitions are a universal mechanism for the development of world trade turnover. Liberalization of trade and foreign direct investment regimes, economic integration of states lead to an increase in the number of mergers, including cross-border ones, which requires more control by states. In the European Union, there are two ways to merge, as set out in Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011: by acquisition (merger by acquisition) and merging by creating a new company (merger by formation of a new company).

Discussion. In a merger by takeover, the assets and liabilities of the companies involved in the transaction are transferred to the acquiring company in exchange for shares of the acquiring company and monetary compensation of of the value of the issued shares, while the companies themselves cease operations without the need for liquidation. In a merger by creation of a new company, all companies involved in the transaction cease operations without liquidation, their assets and liabilities are transferred to the newly formed company in exchange for its shares and monetary compensation in an amount not exceeding 10% of the value of the issued shares.

A takeover in the Western literature is commonly understood as the establishment of control through the acquisition of shares belonging to shareholders of the company being taken over. In the European Parliament and Council Directive №2004/25/EC of April 21, 2004 "On takeover of companies" takeover is understood as a public offer of company shares in the form of compulsory or voluntary offer for the purpose of gaining control of a company. Each of the Mergers and Acquisitions Directives provides for the existence of bodies each Mergers and Acquisitions Directive stipulates the existence of bodies supervising such transactions and describes their principal functions in more detail which are set forth in the national laws of each country. Laid down in national legislation

In addition to the control over the legality of mergers and acquisitions carried out by the competent authorities of the member states, EU antitrust regulation is important in this area, since competition is an important element for the functioning and integration of the market. The main provisions governing competition are contained in the EU Treaty. Defining competition in the market, horizontal, vertical and conglomerate mergers, the determining factor of such classification is the degree of influence on specific market of goods and

services.

Horizontal mergers are mergers of companies in the same industry that perform the same stages of production or produce the same product. **Vertical mergers** are mergers of companies from different industries, but related to the production of the same product, usually in this way the expansion of production up to the full cycle.

Conglomerate mergers are the merger of companies from different industries which do not have a common production.

In its anti-trust activities, the EU Commission uses this type of classification, paying particular attention to the control of horizontal mergers. It defines horizontal mergers as mergers involving companies that are competitors in the same industry. The aim of such transactions is to increase their market share, increase the efficiency of their activities and eliminate competitors [2]. Under vertical mergers the EU Commission understands transactions involving companies of different stages of production, but related to the same technological chain [1].

Initially, European law was characterized by soft regulation of monopolistic activities and was aimed at regulating anti-competitive agreements, but not at controlling the structure of the market and the shares of companies on it. This focus of the competition law may be related to the fact that most of the major mergers and acquisitions in the 80-90s were carried out in the United States and Britain. Despite the absence of direct mentioning of mergers and acquisitions in the provisions of the EU Treaty dedicated to the competition regulation, they are applied by the European court to such transactions.

A similar rule of the Treaty of Rome was first applied to mergers and acquisitions in the 1973 Continental Can case, in which the court argued that the rule prohibited a dominant company from acquiring the stock of a competitor if it would reduce competition. Since 1989, the EU Commission has been given broad powers of antitrust control by Council Regulation No. 4064/89 on the control of enterprise competition. This Regulation is considered to be the beginning of the reform of the EU antitrust law.

In the field of competition law, the EU Commission is the body responsible for the development of competition in the pan-European space. Important is the possibility to appeal against the Commission's decision in court, as well as a real possibility to recover compensation from the antimonopoly authority, which allows limiting the abuse of the Commission and taking into account the interests of companies. A number of cases in the early 2000s pointed to the inadequacy of the method applied by the Commission in reviewing mergers and acquisitions. In 2004, Regulation No. 139/2004 changed the method: previously the Commission was checking whether a company could create a dominant position as a result of a merger, now it is checking whether the transaction could interfere with competition on the EU market. Therefore, this approach is considered more economically justified.

The Commission has developed a number of other regulations that improve competition law in the 60 years since the signing of the Treaty of Rome, European anti-corruption law has been in a state of constant improvement and at the moment it is recognized as one of the most developed in this field. Mergers and acquisitions control has now become one of the main areas of protection against unfair competition. Council Regulation (EC) No. 139/2004 on the control of concentrations is the main document regulating antitrust activities in mergers and acquisitions. Regulation No. 802/2004/EEC on the application of the Regulation on Merger Control Regulation governs the control procedure.

Results. In accordance with the Regulations, concentration is manifested when there is a

change in control as a result of merger of previously independent companies, acquisition of control of a company already controlling one or more companies. Thus, the main criteria is redistribution of control by any means. According to the Regulation, mergers and acquisitions may be a form of concentration, concentration is allowed as long as it does not harm the increase of competitiveness, improvement of conditions of living standards. The Regulation establishes the criteria for classifying a concentration as pan-European, in such cases the transaction automatically falls within the competence of the European Commission. Thus, major cross-border mergers and acquisitions are regulated at the pan-European level. In doing so, the Commission must take into account all interrelated transactions that are not of interest to antitrust regulation separately, but in the aggregate leading to the establishment of concentration. This position was upheld by the Court in Handel case[4].

The peculiarity of the European competition law is its systemic application with the norms of the peculiarity of the European competition law is its systematic application by the norms of national legislation. In this regard, the question of applicable law may arise. In 1969, in the Walt Wilhelm case, the Court of Justice of the EU found that the application of national law at the same time as the European law is acceptable, as long as it is not in conflict with it[5]. In addition, the EU Commission has established competition agencies from member states to harmonize the enforcement of competition law. These agencies form, together with the Commission, the European Competition Network, but are directly part of the system of local authorities.

In the EU states the control is mainly carried out by several agencies, distributed by industry or on the principle of self-regulation with control by the state.

In Germany, the Competition Authority of the Federal Republic of Germany has competence over competition. The current Punitive Law of 1958 contains three basic principles: prohibition of horizontal mergers; regulation of vertical mergers that restrict competition; supervision of dominant enterprises in the market. Regulation of mergers and acquisitions was included in the code only in 1973. According to the Punitive Law of the Federal Republic of Germany, a merger of the participants, the turnover of which in the world market is more than 500 million euros, and the turnover of at least one of the participants in the market of the Federal Republic of Germany is not less than 25 million euros, can be considered as a concentration. However, if it is proved that the merger will lead to improvement of competition conditions, exceeding the negative consequences of dominance, the merger may be allowed.

In France, there is a Competition Council which regulates merger and acquisition process. Mergers of companies with large shares of the domestic market are prohibited, but, as in Germany, may be allowed due to the positive impact on social welfare. Statutory mergers (*fusions*) of two French companies are generally used in intra-group transactions but can also be implemented on the back of a public offer to obtain 100% of the shares and voting rights of the target company.

In the UK, which recently decided to leave the EU, the main body overseeing the legality of mergers and acquisitions is the Committee on Takeovers and Mergers. Government departments and ministries are also involved in controlling mergers in banking, financial services, media, for example, the Prudential Regulation Authority is involved in controlling mergers in the banking and insurance sectors. Investigations in mergers and acquisitions are carried out if the share of the company formed as a result of the transaction is at least 25% and if the assets of one of the companies involved in the transaction amount to more than 70 million pounds sterling. The legislation of UK establishes other grounds for investigation for companies of different spheres of activity. The UK antitrust regulation is recognized as one

of the most developed among the EU countries.

Despite the existence of peculiarities and differences in national legislation in the field of merger control, the legislation of EU member states is harmoniously included in the system of EU antimonopoly regulation, implementing regulation where there is regulated by EU directives. At the same time, in case of inconsistency of national law with the common European law, the EU law prevails.

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