

Azerbaijan merger control

Produced in partnership with GRATA Law Firm

A conversation with Ummi Jalilova, executive director of the Azerbaijan practice of regional law firm GRATA Law Firm, on key issues on merger control in Azerbaijan.

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

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

The existing Law on Antimonopoly Activity (the Law) was adopted in Azerbaijan in 1993 and has undergone four packages of amendments since then (in 1997, 2002, 2015, 2016 and 2018 accordingly). This Law, although being updated regularly has various gaps in practical areas. The Law sets out the requirements for and procedure for merger control in the Republic of Azerbaijan.

Currently, the State Service for Antimonopoly Policy and Protection of Consumers of The Ministry of Economy of the Republic of Azerbaijan (the Antimonopoly Agency) is the merger control authority in the Republic of Azerbaijan.

The Antimonopoly Agency has an exclusive right to implement the State control on prevention of market players on their key positions or actions and restricting competence on the market in the purposes of restricting the monopoly.

In terms of 'hot' issues, the Law on Antimonopoly Activity in Azerbaijan has a lack of instructions in the field of mergers and, therefore, it is hard to expect a well-established practice on merger control issues. The Law sets out a period of 15 days to consider an application, but in practice it may take more time to obtain the prior written consent of the Antimonopoly Agency compared to other countries.

2. Under the Azerbaijan 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'?

The Law neither clearly regulates the concept of 'decisive influence', nor the rights of minority shareholders. It only regulates obtaining the written consent of the respective executive body in some cases which are shown in question 4 below. A 'dominant' market position is presumed to be a market share of more than 35% (statutory presumption) or other determinative figure specified by the legislation.

The Antimonopoly Agency in accordance with their internal rules implements the simple formula to find out the percentage of coverage of the company's shares in the respective market. The mentioned formula draws the comparison between the shares of the company and other market player in the relevant market, based on statistic data.

Some provisions in relation to the protection of the rights of minority shareholders exist in the Civil Code of AR. According to it, in a Joint Stock Company shareholder can complain to the court on the resolution of the General Meeting of shareholders. The decision of the Constitutional Court of AR on the interpretation of some articles of the Civil Code of AR dated 16 December 2011 clarifies that in such cases as 'squeeze out' and 'dilution' the rights of minority shareholders can be recognized as violated.

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

According to the Law, in certain cases when the establishment, reorganisation or liquidation of a market entity occurs, obtaining the prior consent of the Antimonopoly Agency may be required. Moreover, the definition of a market entity includes enterprises and administrative bodies that are participants are directly and indirectly represented on the Azerbaijan market. Thus, should a joint venture (including non-structural, cooperative joint ventures) be established or become active in Azerbaijan, then, subject to the thresholds and other factors indicated below, it could be caught by the provisions of the Law on Antimonopoly Activity.

Indirectly represented participants of the Azerbaijan market are the entities that have any influence to the Azerbaijan market through their activity outside the Republic of Azerbaijan.

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)?

Pursuant to the Law, the prior written consent of the Antimonopoly Agency is required in the following cases:

- amalgamation and association of market entities if it will result in the establishment of a market entity, whose respective commercial market share will exceed 35%
- association and amalgamation of market entities, if the total value of assets in Azerbaijan exceeds an amount equivalent to seventy five thousand (75,000) times the size of the minimum wage (€10,214,087)
- liquidation (except for cases of liquidation of enterprises according to the court's judgment) and division of the enterprises, whose total value of assets in Azerbaijan exceed an amount equivalent to fifty thousand (50,000) times the size of the minimum wage (€6,809,391), and also national and municipal enterprises (if it will result in the establishment of market entities, whose respective commercial market share will exceed 35%)
- acquisition by a market entity (association of market entities or group of persons exercising control over each other's property) of more than 20% of voting shares in another market entity (this does not apply to the founders of the legal entity)
- if when transferring fixed assets or intangible assets of a market entity in the ownership or use of another market entity (or an association of market entities or group of persons exercising control over each other's property) the carrying value of property which is the subject of the transaction exceeds 10% of the amount of fixed assets of production and intangible assets of an economic entity alienating the property, or
- acquisition of another market entity (association of market entities or group of persons exercising control over each other's property) rights of a single market entity, determining the business environment or giving an opportunity to exercise the functions of its top governing body.

The consent of the Antimonopoly Agency for carrying out transactions, specified in the fourth, fifth and sixth bullet points is required only in the following cases:

- if the total balance value of assets of a market entity in Azerbaijan exceeds an amount equivalent to seventy five thousand (75,000) times the size of the minimum wage (€10,214,087)
- if the share of one of the market entities on the respective commercial market exceeds 35%, or
- if the entity acquiring the shares controls the activity of an economic entity, alienating the shares.

The Law has an extra-territorial effect in its provisions, however this is mostly in regarding cross-border matters. Thus, the extra-territorial provisions of the Law apply in cases when agreements and contracts, entered into by and between enterprises, executive power and/or administrative bodies (executive power and administrative bodies of the Republic of Azerbaijan, its cities, regions and constituent administrative-territorial units are concerned. All unions, associations, concerns, consortia and other unions of enterprises whenever they exercise administrative functions (placement of state orders, establishment of limits for material resources, etc) are also regarded as administrative bodies on the one side and foreign natural persons and legal entities of foreign jurisdictions on the other side, may lead to the restriction of competition in the national market of Azerbaijan.

Based on existing practice and experience, purely foreign-to-foreign transactions should not fall under merger control in Azerbaijan unless the result of such foreign-to-foreign transactions has an influence on the market in Azerbaijan (ie an increase or decrease of the market entity affiliated with one or both parties to the foreign-to-foreign transaction).

To see whether thresholds in Azerbaijan are met, see *Where to Notify*.

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

There are no specific issues in relation to the calculation of turnover.

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

The notification and obtaining of prior written consent of the Antimonopoly Agency is mandatory to the extent that a transaction meets the thresholds and other factors set out under the Law.

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

No, there is no discretion to do so.

The thresholds are stipulated by the Law and may change only by the legislative acts, it is not within the discretion of the Antimonopoly Agency.

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

No, failure to obtain consent prior to closing can result in a fine and potential invalidation.

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

Filing should be done at any time before a transaction takes place. Filing should be done by way of submitting to the Antimonopoly Agency the application along with the respective agreement and/or resolution on establishment, reorganisation or liquidation of the market entities and information about volumes of sales of the main products (services) on the relevant market.

The Antimonopoly Agency has 15 days from the date of filing of an application and submission of the full package of required documents to decide whether to grant or refuse its consent for the transaction. The deadline runs from the day following notification.

While the Law states that it is not allowed to demand from an enterprise any other documents for the purposes of obtaining of an antimonopoly consent for establishment, reorganisation and liquidation of the market entity, as stipulated above, but due to very broad definition of the required documents it is recommended to clarify the list of such documents with the Antimonopoly Agency for each transaction. Thus, according to practice, this process may take up to one year.

The list of minimum required documents to be submitted with the application is:

- corporate documents of the companies

- activity statements for the last two years
- statements on assets
- corporate documents of the founders
- excerpt of the general meeting protocol, and
- information on the shares of the relevant market in Azerbaijan.

Please note that all mentioned above documents are required for each company involved into specific transaction. However, the provided list is basic one and it is strongly recommended that the documents required for each transaction is clarified separately.

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

Filing should be done by way of submitting to the Antimonopoly Agency the application along with the respective agreement and/or resolution on the establishment, reorganisation or liquidation of the market entities and information about volumes of sales of the main products (services) on the relevant market.

There is no filing fee.

11. Please confirm/comment on the penalties for failing to notify or suspend transactions pending clearance and the Antimonopoly Agency'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 merger consent as well as the submission of incorrect information to the Antimonopoly Agency is punishable by a fine up to AZN 5,500. Further, the establishment, reorganisation or liquidation of a market entity without the consent of the Antimonopoly Agency may be invalidated by a court, pursuant to an action initiated by the Antimonopoly Agency.

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

Depending on the type of business activity, obtaining consent from 'sector regulators' may be required as well. Such requirements mostly apply to financial services (banking, insurance and reinsurance, investment funds, etc) and the security services.

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