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NEWSLETTER

BUILDING BRIDGES

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Foreign M&A Transactions ||
Merger clearance in Belarus

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→ Overview

Merger clearance for transactions abroad

In the course of M&A transactions with respect to Belarusian targets, many foreign businesses tend to perform them within more “familiar” jurisdictions. From our practical perspective, some of such transactions are structured in the way, when the purchaser, seller and the company to be acquired (Hold Co) reside outside of Belarus.

In the meantime, an “outside” deal structuring does not indemnify the parties from the need to obtain the merger clearance in Belarus. Such merger clearance is issued by the authority in charge of competition matters in Belarus – the Ministry of antimonopoly regulation and trade (“MART”).

The primary issue which shall be noted by the businesses is that the Belarusian Law dated December 12, 2013 No. 94-Z (“Competition law”) directly stipulates its extraterritorial applicability. Thus, in virtue of Article 3 of the Competition law it covers the actions performed outside of Belarus, if the competition at Belarusian market is affected by such actions.

For the avoidance of eventual controversies connected with application of the said rule, the MART has recently published the guidelines and additionally confirmed, that even completely “foreign” transactions may fall under the supervision of MART.

Primary preconditions

It shall be noted, that the “share deals” requiring merger clearance in Belarus depend on **joint** availability of a **substantial criterion** and a **financial threshold**.

A brief overview of key types of share deals, which normally require merger clearance in Belarus, is presented below.

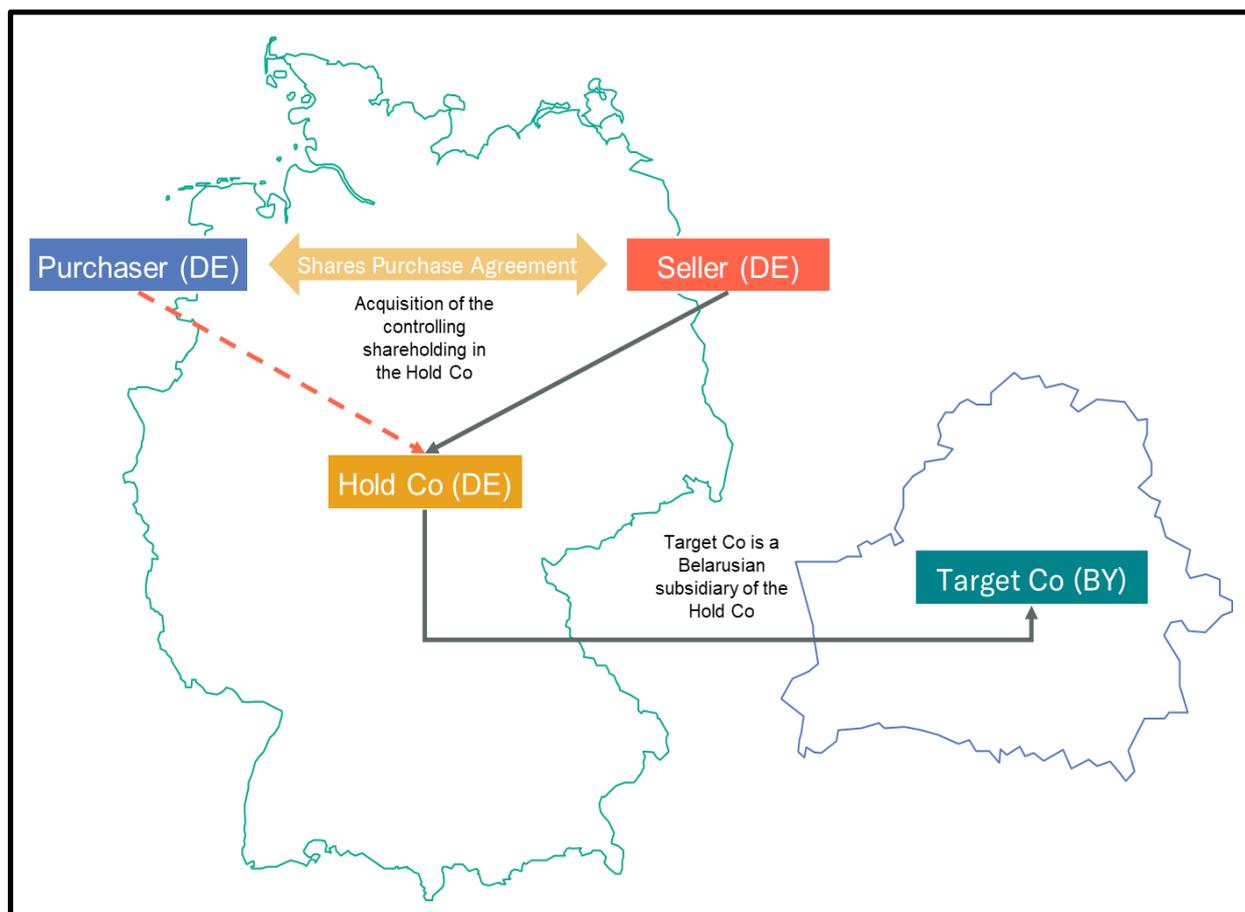
Substantial criteria	Financial thresholds
Acquisition of more than 25 % shareholding in total (provided that the purchaser/its group held 25 % or less/no shares in such company prior to acquisition)	Assets book value of the purchaser or the company to be acquired exceeds 200 000 basic units (ca. EUR 1,8 Mio) or Annual revenue of the purchaser or the company to be acquired for the previous year exceeds 400 000 basic units (ca. EUR 3,6 Mio) or The purchaser or the company to be acquired is included into the Register of dominant businesses or the Register of natural (state) monopolies
Acquisition of more than 50 % shareholding in total (provided that the purchaser/its group held at least 25 % and no more than 50 % of shares in such company prior to acquisition)	
Acquisition of more than 25 % shareholding in total by a dominant business*/its group (provided that the company to be acquired operates at the same market)	
Acquisition of 25 % and more shareholding in a dominant business* in total	
Transactions which lead to control over a dominant business / control over business activities of other company	

*Dominant business – usually a business which occupies 35 % of a commodity market or more (in some instances other thresholds are applied). The businesses found to be the dominant ones are included into the Register of dominant businesses

→ Recent guidelines of MART

As mentioned above, recently MART has published its guidelines over the extraterritorial applicability of the Competition law.

The primary issue highlighted in the said guidelines can be shown in the example below:



In the example shown as a result of the transaction the Purchaser will be entitled to exercise control over business activity of a Belarusian company. In this respect, such **transaction between two German companies** with respect to the shares in a **German company** may require the **merger clearance in Belarus**. Moreover, there is no difference, if the core business is performed in Belarus or elsewhere.

A single fact of availability of a Belarusian subsidiary may trigger the need for merger clearance in Belarus.

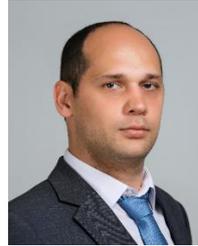
Moreover, besides the aforesaid guidelines from our practical perspective the need for a Belarusian merger clearance shall be assessed in each of the acquisition cases (substantial criteria) referred to above in the section “primary preconditions”.

→ What shall I do?

It shall be noted, that the M&A transaction not approved by MART where required stands of chance to be held void by a court. Moreover, the Competition law does not envisage the possibility of “post factum” merger clearance; in any case it shall be obtained prior to the closing of such transaction. Thus, even if an M&A deal does not imply direct acquisition of Belarusian companies, the eventual transactional structure shall be diligently reviewed and assessed in advance.

In case of whatever doubts, it is expedient to verify the need for a merger clearance thus to ensure a smooth expansion of your businesses. Failing to comply with the duty of a merger clearance may significantly impede the business of a purchaser in Belarus.

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