Global Forum on Competition

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL:
CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from Ukraine

-- Session I --

This contribution is submitted by Ukraine under session I of the Global Forum on Competition to be held on 17 and 18 February 2011.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Ukraine --

1. General issues

1.1 Review of the merger control system in Ukraine

1. The Ukrainian legislation has a comprehensive control system for concentration of economic entities, represented by the Law of Ukraine «On Protection of Economic Competition» (hereinafter referred to as the Law) and the Provision on the Procedure of Filing Applications to the Antimonopoly Committee of Ukraine on Pre-Approval of Concentration of Economic Entities (Provision on concentration), approved by the order of the Antimonopoly Committee of Ukraine (hereinafter referred to as the Committee) dated 19.02.2002 No. 33-p (hereinafter referred to as Provision on concentration).

2. The Law specifies that the following shall be deemed concentration:

- the merger of economic entities or the affiliation of an economic entity to another entity;

- the acquisition of control directly or through other persons over one or several economic entities or over parts of economic entities by one or several economic entities, in particular by means of:
  - the direct or indirect purchase or acquisition (by other means) of assets in the form of an integrated property complex of or a structural subdivision of an economic entity; the receipt (for further management), lease (leasing), concession or acquisition (by other means) of the right to use assets in the form of an integrated property complex of or a structural subdivision of an economic entity, in particular the purchase of assets of a liquidated economic entity;
  - the appointment or election of a person — occupying one or several positions of the head, a deputy head of the supervisory board, the board of directors or the mentioned positions at other supervisory or executive boards of other economic entities — as the head, a deputy head of the supervisory board, the board of directors or of other supervisory or executive boards of the economic entity or the creation of a situation where there is the coincidence of more than half of the members of the supervisory board, the board of directors, of members of other supervisory or executive boards of two or more than two economic entities;

- the establishment of such an economic entity by two or more than two economic entities that will independently perform economic activities for a long period, whereas the mentioned formation does not result in the co-ordination of competition behavior between economic entities which established the economic entity or between them and the newly-established economic entity.

- such direct or indirect purchase, acquisition (by other means) or receipt (for management) of shares (stocks) that ensures attaining or exceeding 25 or 50% of the votes at the higher board of management of the relevant economic entity.
3. Besides, the Law specifies threshold values; should such values be exceeded. Concentration may be carried out only on condition that prior authorization for it is granted by the Antimonopoly Committee of Ukraine or an administrative board of the Committee. Such threshold values are:

- the total cost of assets or the total product sales of the participants in the concentration, with relations of control being taken into account, in the last financial year, including those abroad, exceed the sum equivalent to 12,000,000 euros, while:
  - the assets (total assets) or the sales (total sales) of products, including those abroad, of at least two participants in the concentration, with relations of control being taken into account, exceed the sum equivalent to 1,000,000 euros, and
  - the assets (total assets) or the sales (total sales) of products, in Ukraine only, of at least one participant in the concentration, with relations of control being taken into account, exceed the sum equivalent to 1,000,000 euros;

- regardless of total assets or total sales of the participants in the concentration, when:
  - a product share in a certain market of any one participant in the concentration, or the total share of the participants in the concentration, with relations of control being taken into account, exceeds 35%, and the concentration is to take place in this or related commodity market.

4. The Merger notification system is based on the principle of obligatoriness, as economic entities are obliged to receive an authorization for concentration, if the threshold values are exceeded.

5. Payment shall be charged for granting an authorization for concentration in amounts envisaged by the Law.

6. The procedure of submitting applications for authorizing concentration, requirements to the application and documents attached thereto, and the procedure of considering applications and cases for authorizing concentration are determined by the Law and the Provision on concentration.

7. Article 26 of the Law stipulates that participants in concentration shall submit an application for authorizing concentration to the Committee.

8. According to the legislation, the Committee or an administrative board of the Committee shall consider the applications for authorizing concentration within 30 days of its submission for consideration.

9. The following shall be performed in considering applications on concentration:

- determination of the participants in the concentration with relations of control being taken into account;
- determination of affected markets;
- significance analysis of concentration effect on commodity markets, total share of participants in the concentration in the affected market, evaluation of market shares of main competitors, presence and significance of obstacles for market entry, presence of potential competitors;
- analysis of presence and significance of anticompetitive effects of concentration.

10. The laws of Ukraine on protection of economic competition do not envisage any exceptions or special provisions for cases of international merger.
2. Special issues

2.1 Cooperation between competition institutions (international, regional and bilateral)

11. There were no conflicts between the Committee and foreign jurisdictions regarding the regulation of international mergers. However there were cases when a foreign department would authorize concentration, while the Committee, due to certain circumstances, would delay in taking the relevant decision. This can be exemplified with a situation of authorizing SCOR S.A. (Paris, France) to purchase shares of Converium Holding AG (Zug, Switzerland), providing the buyer with exceedance of 50 percent of votes in the company’s supreme management body. Then, due to non-amicable takeover, the applicant failed to provide information on the company being object of takeover according to the legislation in effect, resulting in a necessity for the Committee to send requests to the company being object of takeover to submit information. The application was suspended until receipt of the relevant information. Before the Committee made a decision on the said concentration, SCOR S.A. had taken over Converium Holding AG, due to which the Committee initiated a case on breach of legislation on protection of economic competition and imposed a fine on SCOR S.A. The concentration was authorized.

12. The Committee’s international cooperation in the field of competition protection based on bilateral agreements with competition institutions of EU and CIS member countries, specifically, Slovakia, Hungary, Bulgaria, Latvia, Poland, Austria, Russian Federation, Armenia, Georgia and Azerbaijan. Currently, these agreements were not applied in cases of international merger.

13. The Committee takes into account that decisions made for authorizing concentration in any case affect the interests of its participants, and regarding international merger – other countries’ interests as represented by their residents.

14. However in considering applications for authorizing concentration the priority is always non-admission of monopolization or substantial limitation of competition in Ukrainian markets.

15. The Committee is an active participant in events held by international organizations in the field of competition policy, including in the field of merger control, inter alia: United Nations Conference on Trade and Development (UNCTAD), Organization for Economic Cooperation and Development (OECD), International Competition Network (ICN) and the Interstate council for Antimonopoly Policy (ICAP or the Antimonopoly Council) of CIS member countries. The Committee studies and uses in practice the recommendations and principles developed by international organizations.

16. On 16 January 2003 the Verkhovna Rada of Ukraine ratified the Agreement on harmonized antimonopoly policy, signed at the council meeting of government executives of CIS member countries on 25 January 2000 in Moscow. The main purpose of the Agreement is to discover and terminate transnational limitations of competition.

17. Taking into consideration the positive international experience in the said field, the Agreement is currently a qualitatively new document ensuring competition protection by means of cooperation, effected solely on voluntary basis and under no circumstances, it is viewed as a tool to influence sovereign positions of partner states. Besides, the Agreement does not envisage application of any regional rules in the territory of signatory countries.

18. Developed on a modern concept base, the Agreement determines an interaction procedure for competition bodies, grounded on the principles of harmonized application of the parties’ national legislation and taking into consideration the relevant recommendations of the Organization for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), as well as the experience and cooperation principles of countries with stable market traditions. It should be mentioned that the Agreement may be acceded by other non-CIS member countries.
2.2 **Legal issues**

19. The Law determines threshold values, under which economic entities should obtain the Committee’s authorization for concentration. Information regarding threshold values is provided in item 1.2 of section I.

20. Certainly, the Committee attempted to receive information from non-resident economic entities, being members of international mergers.

21. However, it may be difficult to get responses to various requests of the Committee, so it should obtain support and interact with the Ministry of Foreign Affairs as well as other countries’ competition institutions in order to receive assistance in getting the necessary information.

22. The Committee takes into account decisions made by foreign competition institutions. At the same time, the Committee performs compulsory independent research of the concentration effect on commodity markets of Ukraine.

23. The Law of Ukraine on « the Antimonopoly Committee of Ukraine» stipulates that in considering applications and cases on concentration, effecting other powers in the field of control of observing legislation on protection of economic competition, control of concentration, bodies and officials of the Antimonopoly Committee of Ukraine shall exercise its powers, observing the laws on protection of economic competition irrespective of bodies of power, bodies of administrative and economic government and control, bodies of local self-government, their officials, economic entities, associations of private citizens or their bodies.

24. The interference of central and local bodies of state executive power, bodies of local self-government, their officials, associations of private citizens and their representatives in activities of the Antimonopoly Committee of Ukraine and its territorial offices shall be prohibited, except in cases stipulated by the laws of Ukraine.

25. The Law stipulates that the Cabinet of Ministers of Ukraine may allow a concentration, prohibited by the Antimonopoly Committee of Ukraine as causing monopolization or substantial limitation of competition in the market in general or its major part, if a positive effect on social interests due to such concentration exceeds adverse effects of competition limitation. No such cases occurred lately. No such difficulties arose in practice.

2.3 **Additional issues**

26. The legislation envisages that a decision of the Antimonopoly Committee of Ukraine and the Cabinet of Ministers of Ukraine for authorizing concentration may be stipulated by fulfillment of certain requirements and obligations by participants in concentration, eliminating or alleviating the adverse effect of concentration on competition. Such requirements and obligations may concern, specifically, restrictions of management, use or disposal of property, as well as an economic entity’s obligation to alienate the property.

27. Example: in September 2009 the Committee decided to authorize a concentration comprising companies located in Great Britain and Cyprus. The said concentration occurred at the condoms market. The relevant decision was stipulated by additional terms fulfilled by participants in concentration in order to alleviate the effect of concentration on competition. Specifically, the Committee imposed obligations on the participants in the concentration regarding price policy, goods sale and purchase terms etc.

28. It should be mentioned that imposition of such additional terms is not sign of special treatment of international mergers.
29. The Committee may adopt additional terms both as certain actions and as attitude adjustment. Specifically, the aforementioned additional terms relate to attitude adjustment (see clause 1 of this section).

30. In the example presented in clause 1 of this section participants in concentration undertook to fulfill the additional terms without any objections, though imposition of additional terms to authorize concentration usually requires lengthy negotiations with the applicant, explanation of the Committee’s position and review of alternative options.

31. In order to control fulfillment of the additional terms imposed by the decision for authorizing concentration, in the example presented in clause 1 of this section, the Committee obligated the participant in concentration being resident of Ukraine, connected by control relations with economic entities, to provide the Committee (for 3 years annually in the 1st quarter) with information regarding volumes and prices for condoms for the preceding accounting period.

32. The national legislation does not envisage the Committee’s duty to reconcile additional terms with other competition institutions. At the same time, international agreements made in the field of competition (acceded to by Ukraine or the Antimonopoly Committee of Ukraine) stipulate the parties’ right for various consultations. These provisions were not applied in practice in considering applications for authorizing concentration.

33. Applications for authorizing concentration recently reviewed by the Committee, where international companies were members:

- In September 2010 the Committee received an application for authorizing Hewlett Packard Company (Palo Alto, USA) to purchase shares of ArcSite Inc. (Cupertino, USA), providing the buyer with exceedance of 50 percent of votes in the company’s supreme management body. Concentration occurred at the services market of complex problem solution, business securing, loss and risk prevention of companies and state agencies. The Committee permitted the said concentration.

- In May 2010 the Committee received an application for authorizing:
  - Zhejiang Geely Holding Group Co., Ltd (Hangzhou, China) and Daqing State Owner Assets Operating Co. Ltd (Daqing, China) to found company Beijing Geely Wanyuan Investment Co., Ltd (hereinafter referred to as Beijing HoldCo) (Beijing, China);
  - Beijing HoldCo and Shanghai GearAirWar Investment Co., Ltd (Shanghai, China) to found company Shanghai Geely ZhaoYuan International Investment Co., Ltd (Shanghai, China);
  - Geely Sweden AB (Stockholm, Sweden) to purchase shares of Volvo Personwagnar Aktiebolag (Goteborg, Sweden), providing the buyer with exceedance of 50 percent of votes in the company’s supreme management body;
  - Meantime North America LLC (Wilmington, USA) to purchase shares of Volvo Cars of North America LLC (Rockly, USA), providing exceedance of 50 percent of votes in the company’s supreme management body.

Concentration occurred at the vehicles market. The Committee permitted the said concentration.

- In May 2010 the Committee received an application for authorizing L’ORÉAL S.A. (Paris, France) to acquire control over a part of ESSIE COSMETICS, LTD. (New York, USA), namely its assets related to activity in development, production, marketing and sale of body and hand care, cosmetic and SPA products (nail polishes, nail care, nail accessories, lip glosses). Concentration occurred at the cosmetic products market. The Committee permitted the said concentration.