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**13 December 2017****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Cancels & replaces the same document of 23 November 2017**

**Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note  
by Ukraine****5 December 2017**

This document reproduces a written contribution by Ukraine submitted for Item 5 of the 128th OECD Competition committee meeting on 5-6 December 2017.

More documents related to this discussion can be found at

[www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm](http://www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm)

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## *Ukraine*

1. Ukrainian legislation and practice widely applies the concept of the "Safe Harbors" in controlling the concentrations. For example, while controlling concentrations, in cases where the volumes of sales or the value of the assets of participants in the relevant transactions do not exceed the statutory indicators.

2. In accordance with part 1 of Article 24 of the Law of Ukraine on "Protection of Economic Competition", there is a need for the prior approval by the Antimonopoly Committee in cases stipulated by part 2 of Article 22 of this Law and other normative-legal acts, when:

- the aggregate value of assets or the aggregate volume of sales of goods of the concentration's participants for the previous fiscal year, including sales abroad, exceeds the sum equivalent to 30 million EUR subject to the official currency exchange rate established by the National Bank of Ukraine, effective on the last day of the fiscal year, while the value (aggregate value) of the assets or volume (aggregate volume) of the sale of goods in Ukraine of at least two of the concentration's participants, taking into account relations of control, exceeds the equivalent of 4 million EUR subject to the official currency exchange rate established by the National Bank of Ukraine, effective on the last day of the fiscal year for each of them, or
- the value (aggregate value) of the assets or the volume (aggregate volume) of sales of goods in Ukraine for the last previous year of a business entity of which control is being taken over or a business entity assets, shares (stocks) of which are taken into ownership, use or management or at least one of the founders of the newly established business entity, taking into account relations of control, exceeds the sum equivalent to 8 million EUR subject to the official currency exchange rate established by the National Bank of Ukraine, effective on the last day of the fiscal year, while the value (aggregate value) of the volume (aggregate volume) of the sale of goods, including sales abroad, of at least one of the participant of the concentration, taking into account relations of control, exceeds the equivalent of 150 million EUR subject to the official currency exchange rate established by the National Bank of Ukraine, effective on the last day of the fiscal year.

3. The concept of "Safe Harbors" is also used in the system of control over concerted actions of business entities. They are set out in the standard requirements for the concerted actions of business entities for the general exemption from the prior obtaining of the permission of the bodies of the Antimonopoly Committee of Ukraine for the concerted actions of the subjects of management (dated February 12, 2002 No. 27-p)

4. In accordance with the above requirements, in the absence of strict restrictions in cases where concerted actions, whose players are competitors, and their aggregate market share does not reach 15%, and the concerted actions of participants are not rivals and the aggregate market share does not reach 20%. Hard restrictions include: fixing prices, market distributions or sources of supply, limiting or stopping the development, sale or purchase of goods

5. In the Law of Ukraine "The Protection of Economic Competition" there is a sufficiently developed system of material presumptions, in particular Articles 6, 13, 15.

6. Article 6 provides general definitions of anticompetitive concerted actions, according to which, concerted actions, which have led or may lead to the prevention, elimination or restriction of competition, are anticompetitive. At the same time, the second part of this article contains a list of presumptions according to which certain concerted actions of business entities are determined by anticompetitive:

- setting prices or other conditions for the purchase or sale of goods;
- distribution of markets or sources of supply by territorial principle, range of goods, volume of their sale or purchase, by the circle of sellers, buyers or consumers or by other features;
- distortion of the results of auctions, tenders;
- use of different conditions for equivalent transactions with other economic entities, which places the latter in a disadvantage in competition;
- conclusion of agreements on condition of acceptance by other economic entities of additional obligations, which in their content or in accordance with trade and other honest practices in business activities are not related to the subject of these agreements;

7. Article 13 (2) defines the presumption of abuse of a monopoly dominant position on the market. It is believed that the abuse of a monopoly position is, in particular, the actions of economic entities that hold such positions as:

- the establishment of such prices or other conditions for the acquisition or sale of goods, which could not be established under conditions of significant competition in the market;
- the application of different prices or different other conditions to equivalent transactions with business entities, sellers or buyers without objective justification for those reasons;
- the condition for the conclusion of transactions by the acceptance by the entity of additional obligations, which by their nature or in accordance with trade and other honest practices in business activities are not related to the subject of the contract;
- the creation of barriers to market access (exit from the market) or removal from the market of sellers, buyers, and other business entities.

8. Article 15 (2) defines the presumptions of anticompetitive actions of the authorities, local governments, bodies of administrative and economic management and control:

- direct or indirect compulsion of business entities to join the association, concern, inter-branch, regional or other forms of associations or concerted actions, concentration of business entities in other forms;
- any action aimed at the centralized distribution of goods, as well as the distribution of markets between economic entities by territorial principle, range of goods, volume of their implementation or procurement, or among consumers or sellers;
- establishing a ban on the sale of certain goods from one region of the country in another or granting permission to sell goods from one region to another to a certain extent or under certain conditions;

- an act which imposes prohibitions and restrictions on the independence of enterprises not provided for by the laws of Ukraine, including the purchase or sale of goods, pricing, the formation of programs of activity and development, and the management of profits.
9. The aforementioned forms of conduct of business entities or state bodies were chosen by AMCU as a presumption, based primarily on the practice of applying the Law of Ukraine "On the Protection of Economic Competition", which revealed that these forms of behavior on the one hand entail negative consequences for competition, on the other hand, these are the most common types of behavior that can be identified by concerted action, abuse of market power, anti-competitive actions of state bodies.
10. The legislation of Ukraine applies a legal presumption regarding the connection between the structure of the market and the presence of a dominant position. According to the second part of Article 12 of the Law of Ukraine "On protection of economic competition" the position of economic entities, the market share of which exceeds 35%, as well as the position of each of several economic entities, if the aggregate market share is not more than three exceeds 50%, and the aggregate share no more than five exceeds 70%.
11. Unlike other presumptions of Ukrainian competition law, these presumptions are controversial. They do not apply if the business proves that there is significant competition.
12. Article 56 contains procedural presumptions. It is assumed that in the event that a decision that can not be handed down is prompted to publicize the decision, it is deemed to have been deposited in the official printed matter within 10 days.
13. The advantage of these accusations is that they allow you to save time and reserves of the competition authority, dismiss it from the need to in each case prove the presence or absence of negative consequences for competition.
14. The disadvantages of this approach are that there may be problems of identifying non-standard or new behaviors that may have negative effects on competition.
15. The presumption, in accordance with the Law of Ukraine "On the Protection of Economic Competition" and "Safe Harbors", as far as they are defined in normative legal acts, are absolute. The law does not provide for certain conditions and circumstances in which they may not be applicable. An exception is the aforementioned presumption regarding the structural features of domination.
16. Presumptions according to which certain actions or inaction are determined by violations of the Law of Ukraine "On the Protection of Economic Competition" and entailing appropriate consequences are determined by the Law of Ukraine "On the Protection of Economic Competition".
17. At the same time, the correct application of the appropriate presumptions of competition protection can be verified by the courts.
18. As for Safe Harbors, they are defined by the Law of Ukraine "On the Protection of Economic Competition" in relation to control over the concentration of business entities.
19. Concerning the concerted actions of business entities, the possibility of identifying such "Safe Harbors" is also established by the Law of Ukraine "On the Protection of Economic Competition".

20. At the same time, the right to determine the specific detailed circumstances under which those or other concerted actions of economic entities are permitted and do not entail responsibility provided by the legislator of the Antimonopoly Committee.

21. In accordance with Article 11 of the Law of Ukraine "On the Protection of Economic Competition", the Antimonopoly Committee may determine typical requirements for certain types of concerted actions. Agreed practices that meet the standard requirements for certain types of concerted actions set by the Antimonopoly Committee of Ukraine are allowed and do not require the approval of the Antimonopoly Committee of Ukraine.

22. At present, the Antimonopoly Committee has adopted Typical requirements for concerted actions of business entities for the general exemption from the prior approval of the bodies of the Antimonopoly Committee of Ukraine for concerted actions of business entities and typical requirements for the establishment of economic associations, as well as typical requirements for concerted actions of the sub-objects of management in relation to joint research and development or research.

23. Until 2016, other, significantly lower threshold values of value indicators operated in Ukraine, for exceeding them, it was necessary to obtain the permission of the Antimonopoly Committee to conduct concentration:

24. In cases stipulated by part two of Article 22 of this Law and other normative-legal acts, when the aggregate value of assets or the aggregate volume of sales of goods of participants of concentration, taking into account the control relations, for the last fiscal year, including abroad, exceeds the sum equivalent to 12 millions of euros, determined at the official exchange rate established by the National Bank of Ukraine, acting on the last day of the fiscal year, while: (Paragraph two of part one of Article 24 in the edition of the law N 2596-IV (2596-15) of 31.05.2005) the value (aggregate value) of the assets or volume (aggregate volume) of the sale of goods, including abroad, of at least two participants in the concentration, taking into account the control relationship, exceeds the equivalent of 1 million euro, determined at the rate of the National Bank of Ukraine acted on the last day of the fiscal year for each, and the value (aggregate value) of the assets or the volume (aggregate volume) of sales of goods in Ukraine of at least one participant in the concentration, taking into account the control relationship, exceeds the amount equivalent to 1 a million Euros, determined at the rate of the National Bank of Ukraine, acting on the last day of the fiscal year;

25. The system of thresholds that existed in Ukraine caused criticism from business and experts, as they resulted from the necessary request for permission in the cases of concentration between comparatively not large entities of transactions, which did not significantly affect the state of concentration in commodity markets of Ukraine.

26. Taking into account the recommendations of the OECD and UNCTAD in view of the best practices summarized by ICN, in 2016 Ukraine has been reforming the thresholds for concentration control. This reform envisaged a significant increase in the value of turnover indicators, as well as the refusal of the threshold figure in the form of a market share.

27. At this time, the Committee is working on the development and adoption of standard requirements for vertical coordinated actions, as well as concerted actions in relation to technology transfer.

28. The project of both documents is basically the concept of "Safe Harbors" according to the criteria of market share of concerted actions in accordance with the approaches adopted in the EU. During the development of documents, discussions were held with representatives of lawyers specializing in competition law and business.