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# DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE

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Working Party No. 3 on Co-operation and Enforcement

### INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Ukraine --

**25 February 2014** 

This note is submitted by Ukraine to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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## - Ukraine -

# 1. Pre-merger notification regime

- 1. Economic entities must obtain preliminary authorization of the Antimonopoly Committee of Ukraine for the concentration if the activities (value indicators and share of applied or adjacent product market) of the participants of the concentrations exceed the threshold amount defined by Part 1 of Article 24 of the Law of Ukraine "On Protection of Economic Competition".
- 2. In cases requiring the authorization for the concentration the participants of the concentrations shall appeal to the AMCU with the relevant application. In 15 days from the date of receipt of the application, the application shall be considered as accepted for consideration, if the application and other documents met the requirements defined by the Law on protection of economic competition. The Antimonopoly Committee of Ukraine or an administrative board of the Antimonopoly Committee of Ukraine shall consider an application for authorising concentration within a period of 30 days from the date when the application was accepted by the relevant body of the Antimonopoly Committee of Ukraine (Article 26 and Article 27 of the Law of Ukraine "On Protection of Economic Competition").
- 3. In other words, the participants are prohibited to complete the mergers until receiving authorization for the concentration.

## 2. Review of mergers falling below notification thresholds

- 4. If the authorization for the concentration is not required, the Antimonopoly Committee of Ukraine has no authority to review the merger.
- 5. However, even in cases when the authorization for the concentration is not required, economic entities may appeal to the Antimonopoly Committee of Ukraine with the application for concentration (in accordance with Articles 22 and 24 of the Law of Ukraine "On Protection of Economic Competition") or preliminary findings on the necessity of authorising concentration or lack of that sort of necessity (Article 29 of the Law of Ukraine "On Protection of Economic Competition").
- 6. In case of violation of the legislation on economic competition protection in the form of implementation of concentrations without the preliminary authorization of the Antimonopoly Committee of Ukraine, whose presence is necessary, the Antimonopoly Committee of Ukraine shall initiate the proceedings on the violation.
- 7. According to Article 48 of the Law of Ukraine "On Protection of Economic Competition", bodies of the Antimonopoly Committee of Ukraine, proceeding from the results of the consideration of cases on violations of the laws on protection of economic competition, shall take decisions, including those on:
  - imposition of a fine;
  - elimination of consequences of violations of the laws on protection of economic competition; in particular, to eliminate or mitigate the negative effect produced by economic entities' concerted practices and/or concentration on competition.
- 8. Thus, the Antimonopoly Committee of Ukraine considered a case of violation of legislation on the protection of economic competition, committed by Enterprise A, in the form of the implementation of the concentration by taking on lease of integral property complexes 17 petrol stations owned by

Enterprise B, without obtaining authorization of the Antimonopoly Committee of Ukraine, whose presence is necessary.

- 9. During the research, it was found that the above concentration led to monopolization in some markets of retail sale of light oil products in Zaporizhia Oblast.
- 10. To eliminate the negative effects on competition, the Committee obliged the defendant to terminate lease agreements concluded with Enterprise B and return the rental items, specifically, two gas stations, to the owner Enterprise B.
- 11. The defendant recognized the fact of the violation, contributed to the proceedings and committed to fulfill the obligation to return to its initial condition. Enterprise A was fined for the violation.
- 12. If the concentration does not require the authorization of the Antimonopoly Committee of Ukraine for its implementation, the Antimonopoly Committee of Ukraine has no legal grounds to appeal against the merger.
- 13. Economic entities, which apply to the AMCU for the preliminary authorization for concentration and if the concentration does not result in the monopolisation or in the substantial restriction of competition on the commodity markets of Ukraine, shall obtain the authorization within a period of 30 days from the date when the application was accepted.
- 14. If the concentration is implemented without the authorization of the Antimonopoly Committee of Ukraine, whose presence is necessary, investigations shall be conducted as the case of violation of the legislation on protection of economic competition.

## 3. Review of mergers that should have been notified but were not

- 15. Concentration which requires authorisation in accordance with Part 1 of Article 24 shall be prohibited until it has been authorised.
- 16. According to Point 12 of Article 50 of the Law of Ukraine "On Protection of Economic Competition", the concentration of economic entities without the relevant authorisation to be granted by bodies of the Antimonopoly Committee of Ukraine if that sort of authorisation is necessary is considered as a violation of the legislation on protection of economic competition.
- 17. According to Paragraph 3 of Part 2 of Article 52 of the Law of Ukraine "On Protection of Economic Competition", for the violations provided for by Point 12 of Article 50 of the present Law fines shall be imposed in amounts not exceeding 5% of the income (proceeds) got by an economic entity from the sale of products (goods, work, services) in the accounting year directly preceding the year in which the fine is imposed.
- 18. However, the legislation provides the prescription period of bringing to responsibility for a violation of the laws on protection of economic competition (Article 42):
- 19. An economic entity shall not be brought to responsibility for a violation of the laws on the protection of economic competition after the expiration of a prescription period.
- 20. The prescription period of bringing to responsibility for the violation of the laws on protection of economic competition shall be a period of five years from the date when the violation was committed.

- 21. Furthermore, according to Article 53 of the Law it is provided that if an entity abuses of monopoly (dominant) position, the Antimonopoly Committee of Ukraine shall have the right to accept a decision on compulsory split-up of the entity that holds the monopoly (dominant) position.
- 22. For example, the Committee considered the case on violation of legislation on protection of economic competition by Enterprise A in the form of implementation of concentrations without obtaining authorization of the Antimonopoly Committee of Ukraine, in particular:
  - acquisition of assets in the form of the integral property complex of the Enterprise B that provides economic activities in shipbuilding;
  - acquisition of assets in the form of the integral property complex of the Enterprise C that provides economic activities in shipbuilding;
- 23. Simultaneously, the AMCU has provided authorization for the specified concentrations, because the defendant appealed to the Committee with the relevant statements and was fined for the violation of the legislation on protection of economic competition.

# 4. Subsequent review of previously cleared and consummated mergers

- 24. According to Article 58 of the Law of Ukraine "On Protection of Economic Competition", bodies of the Antimonopoly Committee of Ukraine on their initiative or on the basis of applications submitted by persons may review decisions taken by them on cases on violations of the laws on protection of economic competition and on applications and cases on concerted practices and concentration:
  - if substantial circumstances were unknown and might not be known to the bodies of the Antimonopoly Committee of Ukraine, which resulted in taking the unlawful or groundless decision (within a period of five years from the date when the relevant decision was taken);
  - if the decision was taken on the basis of unreliable information, which resulted in taking the unlawful or groundless decision (within a period of five years from the date when the relevant decision was taken);
  - if participants in the concerted practices or the concentration do not fulfil such requirements and obligations that were the stipulation made with respect to the decision taken by the bodies of the Antimonopoly Committee of Ukraine on the concerted practices or the concentration in accordance with Part 2 Article 31 of the present Law (within the period of the decision validity);
  - if there are no circumstances on whose basis the decision on authorising the concerted practices or the concentration was taken (within the period of the decision validity);
  - if there are other grounds provided for by laws of Ukraine (within a period of three years from the date when the decision was taken unless laws provide for otherwise).
- 25. Bodies of the Antimonopoly Committee of Ukraine which took a decision may suspend its fulfilment until its review has been completed and persons participating in the case shall be notified of the fact in writing.

- 26. Bodies of the Antimonopoly Committee of Ukraine, proceeding from the results of the decision review, may:
  - retain the decision;
  - change the decision;
  - repeal the decision;
  - take such a new decision that is provided for by Articles 31 and 48 of the present Law, by Part 1 of Article 30 of the Law of Ukraine "On protection Against Unfair Competition".
- 27. If the Antimonopoly Committee of Ukraine, proceeding from the results of the decision review, takes a decision to prohibit the concentration, the state registration of the economic entity established as a result of the concentration shall be annulled in legal form on the basis of a claim to be lodged by the Antimonopoly Committee of Ukraine.