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COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

-- Note by Ukraine --

14-15 June 2016

This document reproduces a written contribution from Ukraine submitted for Item 5 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm*

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UKRAINE

1. Introduction

1. The system of merger notification thresholds established in Ukraine in 2002, provides that a prior authorization for merger is required if the assets (total assets) or sales (total sales) of products in Ukraine only of at least one participant in the concentration exceed the sum equivalent to 1 mln. EUR or the same rate of at least two participants gained elsewhere in the world. However, a participant in the concentration for which the exceeding of the relevant thresholds in Ukraine was necessary could be the seller, who eliminated his assets (business) abroad. Therefore, the Antimonopoly Committee of Ukraine (hereinafter – the AMCU) has the experience of consideration the cases that didn't have fundamental impact on competition in product markets of Ukraine.

2. Background of the Revision

2. The revision of Ukrainian legal provisions related to merger thresholds was essential for establishing of the local jurisdictional nexus in order to use the resources of the competition authority more effectively and to reduce unreasonable government intervention in business processes.

3. Another reason to revise the Ukrainian legal provisions related to merger thresholds was the low thresholds which caused consideration by the AMCU a large number of small transactions that didn't substantially affect the competition.

3. Revision of Ukrainian Legal Provisions

4. A system of three indicators, particularly enshrined in Article 1 of Council Regulation EC 139/2004, is a common mechanism for establishing of jurisdictional nexus. These three indicators are:

1. the combined aggregate worldwide turnover of all the undertakings concerned;
2. the turnover of one undertaking concerned within the jurisdiction;
3. the turnover of at least one more undertaking concerned within the jurisdiction.

5. This system of three indicators is reasonable and effective if the concentration cases involving national and multinational companies are more or less equally distributed in the range from 0 to infinity. In this case, the relevant indicators (1), (2), (3) are chosen depending on the scale of the economy. As a result, the concentrations of the participants that are not sufficiently large in terms of absolute size (shown by indicator (1)) or do not operate in sufficiently scale within the jurisdiction (shown by indicators (2) and (3)), are derived from the sphere of control of concentrations.

6. However, the Committee conducted an analysis of nearly 1500 cases of real concentrations, considered in 2013-2014, and found that in fact cases of concentration are unevenly distributed in terms of turnover (value of assets) of their members:

- The biggest part of all concentration cases includes the cases in which the amount of the combined aggregate worldwide turnover exceeds 100 mln. EUR (75,6 % of all cases) including the cases in which this amount exceeds 150 mln. EUR (72,2 % of all cases);
- The second place in terms of quantity of concentration cases belongs to cases the turnover amounts of which range from 12 mln. EUR (13,6 % of all cases);

- Relatively significant group of all concentration cases (8,14 %) relates to those with the range of values of less than 12 mln. EUR. According to the current Ukrainian legislation, preliminary notification for such cases is not mandatory.
- The part of the concentration cases with the amount of combined aggregate worldwide turnover in the range 60-100 mln. EUR (2,6 % of all cases) and 100-150 mln. EUR (3,5 % of all cases) is not significant.
- There is the similar situation in analysis of concentration cases in which the indicator of aggregate worldwide assets:
 - Exceeds the amount of 150 mln. EUR (74,8 % of all cases);
 - Ranges from 12 mln. EUR to 70 mln. EUR (16,8 % of all cases);
 - Is less than 12 mln. EUR and the preliminary notification is not mandatory (4,9 % of all cases).

7. Taking into account the individual turnovers in Ukraine of participants of concentration there are two sub-groups among the group of concentration cases with the amount of aggregate worldwide turnover of 150 mln. EUR: 30,5 % of all cases with the amount of individual turnover in Ukraine less than 1 mln. EUR and 23,5 % of all cases with the amount of individual turnover in Ukraine more than 50 mln. EUR. The part of all concentration with the amount of individual turnover in Ukraine from 1 mln. EUR to 15 mln. EUR comes out at 17,5 %.

8. In the process of analysis of the aggregate worldwide turnover indicators all cases were divided into 21 groups in view of the markets. The analysis showed that 13 groups maintained the concentration cases (60 % of all cases) with the amount of aggregate worldwide turnover more than 50 mln. EUR.

9. At the same time, 4 groups (upstream industry, fuel and energy industry, consumer goods industry, advertisement and publishing industry) maintained about 40-44 % of the concentration cases with the amount of aggregate worldwide turnover less than 50 mln. EUR.

10. Another 4 groups in the range of aggregate worldwide turnover less than 50 mln. EUR maintained the 60% of all concentration cases:

- building industry 59 %;
- real estate 61 %;
- building materials 67 %;
- trade 73,7 %.

11. The analysis of the entities involved in each market showed the following. The Ukrainian entities prevailed in cases related to the range from 12 mln. EUR to 60 mln. EUR of the aggregate worldwide turnover (range A). At least one entity was multinational in the concentration cases with the amount of the aggregate worldwide turnover more than 100 mln. EUR (range B).

12. Under such circumstances the rising of the thresholds together with implementation of the system of three indicators wouldn't be quite effective. Or it could decrease the effectiveness of the system that prevents monopolization in the markets and the restriction of competition. It could be explained by following:

- in case of establishment of the aggregate worldwide turnover indicator at the highest level of the range A the position of concentration position (big multinational entities) wouldn't fundamentally change;
- increasing of thresholds in the form of aggregate worldwide turnover up to 100/150 mln. EUR could cause the withdrawing from the concentration control regime of some national

and local markets, particularly the markets of upstream industry, building and building materials industry and trade.

4. Outcome of the Revision

13. As the result of the abovementioned, a dual system of thresholds that includes two subsystems was submitted in the process of drafting the amendments to the Law of Ukraine “On Protection of Economic Competition” in the part of thresholds regime (draft of a bill was developed by members of parliament with the help of the members of the Antimonopoly Committee of Ukraine).

14. The first subsystem complies with classical system of three indicators.

15. In order to determine the absolute value of thresholds (worldwide turnover / value of assets and the amount of turnover / asset value of at least two members of concentration in jurisdiction), the identical indicators used in 24 European jurisdictions that implement the system of three indicators and their correlation to the size of GDP were analyzed. In the process of this analysis it was defined that the rate of mentioned correlation in terms of aggregate worldwide turnover ranged from $6 \cdot 10^{-5}$ (France, Romania) to $222 \cdot 10^{-5}$ (Poland). The rate of the mentioned correlation in terms of turnover of concentration participants in jurisdiction ranged from $0,15 \cdot 10^{-5}$ (Germany) to $18 \cdot 10^{-5}$ (Cyprus)^{1 2}. The average rate of correlation of aggregate worldwide turnover to GDP was $46,5 \cdot 10^{-5}$. The average rate of correlation of turnover of at least two concentration participants in jurisdiction to GDP was $6,45 \cdot 10^{-5}$. The appliance of these average rates to GDP of Ukraine (65 665 mln. EUR in 2014) results the following indicators:

- in terms of aggregate worldwide turnover of all participants:
 $65665 \cdot 46,5 \cdot 10^{-5} = 30,53$ mln. EUR;
- in terms of turnover of at least two concentration participants in Ukraine:
 $65665 \cdot 6,456 \cdot 10^{-5} = 4,23$ mln. EUR.

16. On this basis, the indicator of 30 mln. EUR was established as the threshold in terms of aggregate worldwide turnover (assets) of all participants. The indicator of 4 mln. EUR was established as the threshold in terms turnover (assets) of at least two concentration participants in Ukraine.

17. Another subsystem is used in the situation when both concentration participants have significant presence in the markets of Ukraine. This subsystem calls for mandatory significant presence (turnover / assets) in Ukraine only for the acquiree (target company). But this is also not enough for introduction of the obligation to obtain permission from the Antimonopoly Committee. This obligation appears only when another part of concentration (buyer) has very high worldwide indicators (value of turnover / assets is more than 150 mln. EUR). Thus, the scope of control includes only cases of acquisition of significant in terms of size Ukrainian businesses by very large foreign investors. Other multinational concentrations withdraw from control of the Antimonopoly Committee of Ukraine.

18. The new system of thresholds for notification of concentration is provided by amendments to the Law of Ukraine "On Protection of Economic Competition", which was introduced on 26 January, 2016 and came into force on 18 May, 2016.

¹ **Footnote by Turkey.** The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognizes the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of United Nations, Turkey shall preserve its position concerning the “Cyprus” issue.

² **Footnote by all the European Union Member States of the OECD and the European Union.** The Republic of Cyprus is recognized by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.”