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Aivaras Abromavicius
Minister of Economic Development and Trade
Grushevskogo Street 12/2
01008, Ukraine, Kiev

Dear Minister Abromavicius:

Re: Competition Law Reforms

We write on behalf of the Merger Streamlining Group (the "**Group**"), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] The cornerstone of the Group's activity has been to work with competition agencies and governments to help implement international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* ("**Recommended Practices**") of the International Competition Network ("**ICN**"),[2] of which the Antimonopoly Committee of Ukraine (the "**AMC**") is a member.

The Group's work projects to date have included two major surveys on compliance with the *Recommended Practices*, as well as submissions to the European Commission, the U.S. Antitrust Modernization Commission, and to competition agencies in over twenty other jurisdictions (including the European Union, the United Kingdom, Poland, Bulgaria, Austria, Portugal, Spain, China, Japan, India, Korea, Brazil and Chile). In November 2008, the Group also made a submission to the AMC regarding Ukraine's merger notification thresholds and the absence of a material local nexus requirement.

[1] The current members of the MSG include BHP Billiton, Chevron, Cisco, Danaher, GE, Novartis, Oracle, Procter & Gamble, SAB Miller, Siemens, and United Technologies.

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <http://www.internationalcompetitionnetwork.org/ uploads/library/doc588.pdf> [*Recommended Practices*].

The Group understands that the Government of Ukraine is in the process of making structural changes to the AMC and to Ukrainian competition laws, including the recent appointment of Mr. Yuriy Terentyev as Chairman of the AMC. The Group respectfully encourages the Government to take this opportunity to address some aspects of Ukrainian merger control laws that are clearly inconsistent with international best practices. In particular, the current pre-merger notification thresholds are very low and can apply to transactions that have no material nexus to Ukraine, resulting in notifications being required for transactions that are unlikely to present any competitive concerns in Ukraine. In addition, the use of market shares in pre-notification thresholds creates uncertainty for parties and the AMC. Both these outcomes can be aggravated by disproportionately severe penalties for failures to file. Finally, in the spirit of constructive engagement, based on our members' very substantial experience with multinational merger transactions, the Group offers some observations about current AMC procedures which could be improved.

1. Material Local Nexus

The absence of a meaningful local nexus imposes costs and burdens on merging parties; it also causes the AMC to expend its scarce time and resources on transactions that are unlikely to have substantive anti-competitive effects within Ukraine. This has two fundamental components: local sales or assets of two merging parties, and the magnitude of the threshold.

a) Notification Thresholds Should Have A Local Nexus Requirement

While lack of nexus historically was a somewhat common defect in the design of merger review regimes, over the past decade many jurisdictions have made changes in response to the ICN's *Recommended Practices* with the result that Ukraine is now somewhat of an outlier in its approach to filing thresholds.

In the European Union ("**EU**"), the notification thresholds are triggered where at least two parties to a transaction have material turnover in the EU.[3] Most individual countries within Europe have also designed their notification thresholds with the principle of local nexus in mind, as discussed further below.

We understand that Ukraine presently requires that a proposed transaction be notified to the AMC where:

(i) the undertakings' worldwide total asset value or aggregate turnover for the prior financial year exceeds the equivalent of €12 million;

[3] There are two alternative thresholds for the EU. The first threshold is met where the merging parties have a combined worldwide turnover in excess of €5,000 million and at least two parties have EU-wide turnover in excess of €250 million. The second threshold is met where the merging parties have a combined worldwide turnover in excess of €2,500 million, the combined turnover of all merging parties exceeds €100 million in each of at least three Member States, each of at least two parties have turnover in excess of €25 million in each of the three Member States; and at least two parties have an EU-wide turnover in excess of €100 million.

(ii) the worldwide asset value or turnover of at least two participants to the transaction exceeds the equivalent of €1 million each; and

(iii) the asset value or aggregate turnover in Ukraine of at least one participant to the transaction exceeds the equivalent of €1 million.

Collectively, these tests do not impose a meaningful local nexus requirement within Ukraine. For example, if an acquiror with global sales of €12 million — itself an extremely low threshold — and €1 million of Ukrainian turnover acquires a South American company with *no* Ukrainian turnover, a filing would be required. This is notwithstanding the fact that the acquired company has no economic activity within Ukraine.

The ICN *Recommended Practices* clearly state that notification thresholds should incorporate a material local nexus, based on sales or asset levels within the jurisdiction concerned.[4] Moreover, local nexus should be based on at least two parties to a transaction having activities in the jurisdiction (or alternatively, the target business alone if it has a significant local presence):

> *Determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory.*[5]

The Group therefore respectfully submits that it would be appropriate to amend the third branch of the current notification threshold to require that at least two parties to the transaction have material Ukrainian turnover and/or assets.

b) Notification Thresholds Should Be Material

The Group believes that the current turnover or asset threshold of only €1 million in Ukraine is inconsistent with the *Recommended Practices*, as this level of activity is too low to constitute a "material" local nexus. Many other European countries — including some countries whose economies are smaller than Ukraine's — have adopted substantially higher turnover thresholds than Ukraine. For example:

- *Belgium* — requires notification where each of two parties to the transaction has turnover in Belgium in excess of €40 million.

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[4] *See Recommended Practice* I-C, Comment 1.

[5] *See Recommended Practice* I-C (emphasis added); see also Comment 1.

- *Czech Republic* — requires notification where each of two parties to the merger has turnover in the Czech Republic in excess of approximately €9 million.[6]

- *Finland* — requires notification where each of two parties to the transaction has turnover in Finland in excess of €20 million.

- *Greece* — requires notification where each of two parties to the transaction has turnover in Greece in excess of €15 million.

- *Netherlands* — requires notification where each of two parties to the transaction has turnover in The Netherlands in excess of €30 million.

- *Sweden* — requires notification where each of two parties to the transaction has turnover in Sweden in excess of approximately €21 million.

Similarly, the Group believes that the €12 million aggregate worldwide turnover or assets threshold (for all parties to the transaction on a combined basis) is immaterial and ineffective at "*screen[ing] out transactions that are unlikely to result in appreciable competitive effects*" within Ukraine.[7] The requirement that each of at least two parties to the transaction separately have €1 million of worldwide turnover or assets is also *de minimis* and is unlikely to screen out transactions that would not be expected to have anti-competitive effects in Ukraine.

Each of the countries noted above employs a substantially higher aggregate turnover threshold. Three of them use a threshold based on aggregate worldwide turnover, which is much higher than Ukraine's thresholds:

- *Finland* — requires an aggregate worldwide turnover in excess of €350 million.

- *Greece* — requires an aggregate worldwide turnover in excess of €150 million.

- *Netherlands* — requires an aggregate worldwide turnover in excess of €150 million.

The other three use a more targeted approach which focuses on the aggregate turnover of the parties within the particular jurisdiction. Again, in all cases, the levels are substantially higher than Ukraine's thresholds:

- *Belgium* — requires an aggregate Belgian turnover in excess of €100 million.

- *Czech Republic* — requires an aggregate turnover in Czech Republic in excess of approximately €54 million.

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[6] All currency conversations are based on the European Central Bank's exchange rate at December 31, 2014.

[7] *See Recommended Practice* I-B, Comment 1.

- *Sweden* — requires an aggregate turnover in Sweden in excess of approximately €106 million.

In order to achieve a "material" local nexus standard, the Group respectfully recommends that Ukraine consider:

(i) adopting a local turnover and/or asset threshold of at least €10-20 million, for at least two parties to the transaction (which would still be well below many other European countries); and

(ii) increasing its aggregate turnover and/or asset threshold substantially (*e.g.*, to turnover within Ukraine of €50-100 million, or worldwide turnover of at least €150 million).

2. Market Share-Based Thresholds

The Group notes that the use of market share-based thresholds in the Ukrainian merger notification regime is inconsistent with the *Recommended Practices*. We understand that where a transaction falls below the turnover/asset filing thresholds discussed above, a filing is required whenever the market share of the parties, either individually or combined, exceeds 35% of the affected, or an adjacent, market.

Market share thresholds generate considerable uncertainty because the process of defining relevant markets and estimating shares is necessarily time-consuming, subjective, and fact- and economics-intensive. Accurate market share estimates are often difficult — if not impossible — for merging parties to obtain. This also presents challenges for the AMC: making a proper determination of whether market share thresholds have been exceeded may be difficult and resource-intensive.

The ICN's *Recommended Practices* explicitly state that market share-based notification thresholds are not objective and should not be employed. For example, Recommended Practice II-B states that "*notification thresholds should be based on objectively quantifiable criteria*". The commentary to this *Recommended Practice* explains that "*[e]xamples of criteria that are not objectively quantifiable are market share and potential transaction-related effects*" and that market share-based tests "*are not appropriate for use in making the initial determination as to whether a transaction is notifiable.*"[8]

Accordingly, the Group encourages the Government to eliminate the market share-based branch of the Ukrainian notification thresholds.

3. Penalties

The concerns expressed above regarding the lack of local nexus and the market share threshold uncertainty in Ukraine's merger notification criteria are exacerbated by the

[8] *See Recommended Practice II-B*, Comment 1 (emphasis added).

AMC's ability to impose a maximum fine of up to 5% of an entity's global turnover for failing to notify transactions that trigger these notification criteria. The Group understands that the AMC has imposed fines for failures to file in various cases, including in foreign-to-foreign transactions.

The combination of the current non-ICN-compliant thresholds with such potentially severe and disproportionate penalties could subject companies to significant financial liability on the purely technical basis that they did not pre-notify a transaction even though it could not be expected to have any material impact on the Ukrainian economy. For example, parties to a transaction may believe that a filing is not required based on the subjective market definition or market share thresholds; however, if the AMC disagrees with this analysis, the parties could be subject to a fine of up to 5% of their total turnover.

If the reforms described at Parts 1 and 2 above are implemented, the unpredictability and fairness concerns raised by the current combination of non-ICN-compliant notification thresholds and harsh failure-to-file penalties would be materially reduced. However, in the interim, it may be appropriate for the AMC to consider refraining from imposing failure-to-file penalties in respect of transactions that do not have a material local nexus with Ukraine.

The Group also understands that the AMC has the ability to ask the Minister of the Economy to suspend input licenses if a transaction is found to be anti-competitive. This is a remedy that only exists in a few other jurisdictions and is rarely used. It is a counterproductive remedy because it would result in the complete removal of a competitor that would otherwise be available to provide some price, product choice, service and other benefits of competition for customers in Ukraine. As noted by the ICN *Recommended Practices*, "*[t]he object of a remedy should be to restore or maintain competition.*"[9] The international norm is to focus on full or partial divestiture, prohibition, or other remedial orders that are tailored to address the specific anti-competitive effects that would be expected to result from a merger.

4. Merger Review Processes

We note in passing four additional considerations that would be useful for the Government to consider if it proceeds with merger reforms:

- The three-month phase II review period should be fixed so that parties (and the AMC) have certainty regarding timing. Currently, the waiting period appears to reset every time the AMC sends an RFI, such that parties could technically remain in limbo for an indefinite time period. "Stop-the-clock RFIs" should be the exception (*e.g.*, where parties are non-responsive to an AMC RFI).

- The necessity for all the state commissioners to be physically present in Ukraine at a meeting in order to have quorum to make a decision is difficult. It can create delays arising from the Commissioners' travel schedules. A more flexible procedure

[9] *See Recommended Practice XI-A, Comment 1.*

whereby state commissioners are able to achieve a quorum through a conference call would benefit both AMC and merging parties with faster decision-making.

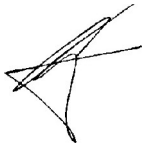
- Our understanding is that parties do not necessarily have a named contact within the AMC staff with whom to discuss the progress of the case and how they can assist the authority. This hampers parties' efforts to engage with the AMC and undermines the productivity of the agency. It also puts the more senior AMC personnel under pressure as legal counsel do know who they are.

- A simplified or fast track merger notification process for transactions that are unlikely to create competition concerns would reduce the burdens on both merging parties and the AMC. Internationally, a number of jurisdictions have introduced such simplified processes in recent years, including the European Commission, China, and Brazil. Such processes are consistent with the ICN's general recognition that, since most notified transactions do not raise competition concerns, "*merger review systems should be designed to permit such transactions to proceed expeditiously*"[10] and refrain from imposing unnecessarily burdensome initial notification requirements for such transactions.[11]

* * *

Thank you very much for considering the Group's views. We believe that the recommendations set out above would bring Ukraine's merger control regime into greater compliance with international best practices, while at the same time allowing the AMC to focus its resources on those transactions most likely to have significant domestic effects. The Group encourages the Government to use the *Recommended Practices* as a touchstone throughout any modernisation of the Ukrainian merger control regime. We would welcome the opportunity to respond to any questions or discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,



A. Neil Campbell Casey W. Halladay

Copy to: Yuriy Terentyev, Chairman, Antimonopoly Committee of Ukraine
Members of the Merger Streamlining Group
Jun Chao Meng, McMillan LLP

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[10] *See Recommended Practice IV-B*, Comment 1.

[11] *See Recommended Practice V.*