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Yuriy Terentyev
Chairman
Antimonopoly Committee of Ukraine
45, Vasilya Lypkivskogo Str.
03035 Kyiv
Ukraine

Dear Chairman Terentyev:

Re: Proposed Amendments to Regulation on Concentration

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, as you know, the Antimonopoly Committee of Ukraine (the "AMC") is an active member.

The Group was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in over twenty other jurisdictions (*e.g.*, the United Kingdom, Canada, Poland, Russia, Brazil, India, China, Japan, Korea, Spain, Italy and Portugal) to promote reforms consistent with the *Recommended Practices*, including submissions to the AMC in 2008 and 2016, and a submission to the Minister of Economic Development and Trade of Ukraine in 2015.

[1] The current members of the Group include Accenture, Bosch, BHP Billiton, Chevron, Cisco, Danaher, GE, Novartis, Oracle, Procter & Gamble, 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 writes in connection with the AMC's public consultation on proposed amendments to Ukraine's Regulation on Concentration, which we understand was announced on December 13, 2018 (the "Proposed Amendments"). We applaud the AMC for its ongoing efforts to review and bring Ukrainian merger control laws into greater conformity with international best practices. We understand that the primary thrust of the Proposed Amendments is to remove the activities of the vendor(s) in a transaction from the notification threshold analysis in Ukraine. As explained in greater detail below, such an amendment would promote consistency with the bedrock "local nexus" principle of international merger control. It would also allow both merging parties and the AMC itself to devote their time and resources to the review of transactions more likely to have competitive effects in Ukraine.

We hope that this submission, which draws upon the MSG members' very substantial experience with multinational merger transactions, will prove useful to the AMC as it proceeds with the Proposed Amendments.

I. Analysis of the Proposed Amendments

We understand, based on English-language translations we have reviewed, that Article 24(1) of the *Law of Ukraine on Protection of Economic Competition* provides that a proposed transaction must be notified to the AMC where:

- the combined value of assets worldwide or combined worldwide turnover of the participants to a concentration, **taking into account relations of control**, exceeded the equivalent (calculated at the official foreign exchange rate established by the National Bank of Ukraine on the last day of the financial year) of EUR 30 million in the preceding financial year; while the value (combined value) of Ukrainian assets or Ukrainian turnover (combined turnover) of each of at least two participants to a concentration, **taking into account relations of control**, exceeded the equivalent (calculated at the official foreign exchange rate established by the National Bank of Ukraine on the last day of the financial year) of EUR 4 million in the preceding financial year; or

- the combined value of Ukrainian assets or combined Ukrainian turnover of the undertaking control over which is acquired or of the undertaking-owner of the assets, share (shares, participation interests) being acquired or received into management and use or of at least one of the founders of a new undertaking, **taking into account relations of control**, exceeded the equivalent (calculated at the official foreign exchange rate established by the National Bank of Ukraine on the last day of the financial year) of EUR 8 million in the preceding financial year; while the worldwide turnover of at least one other participant to a concentration, **taking into account relations of control,** exceeded the equivalent (calculated at the official foreign exchange rate established by the National Bank of Ukraine on the last day of the financial year) of EUR 150 million in the preceding financial year. (**emphasis added**)

The language cited above, and in particular the phrase "*taking into account relations of control*" (which we have highlighted), unfortunately creates uncertainty as to whether it is the particular assets or businesses being acquired, or the entirety of the vendor's corporate group, that is to be used in analysing whether a transaction exceeds the thresholds for mandatory pre-notification in Ukraine. We understand that, historically, it has been the operational practice of AMC to assess the notification thresholds based on the entirety of the vendor's corporate group, and the Proposed Amendments are intended to clarify that, going forward, only the particular businesses or entities being acquired would be counted in the notification analysis.

This is a very important issue, and one that has been explicitly addressed in the ICN's *Recommended Practices*. They specifically state that notification thresholds should "*be confined to the relevant entities or businesses that will be combined in the proposed transaction*".[3] They further elaborate that "*the relevant sales and/or assets of the acquired party should generally be limited to the sales and/or assets of the business(es) being acquired.*"[4] As these recommendations make clear, when assessing whether a transaction is notifiable in Ukraine, the vendor-side analysis should focus only on the particular or entities being acquired and not the entirety of the vendor's corporate group. For purposes of the substantive competitive effects analysis, those resources of the vendor that are not part of the transaction cannot, *per se*, have an effect on competition. They are thus irrelevant for the assessment. Consequently, they should not be considered when determining whether or not a transaction should be subject to merger review.

The Group therefore strongly supports the adoption of the Proposed Amendments.[5] Indeed, in the Group's view this is one of the key issues in Ukrainian merger control that remains to be addressed following the significant amendments adopted in 2016. Focusing only on the businesses being acquired will provide important clarity and predictability to the business community, while at the same time minimizing burdens on the AMC by avoiding notifications (each requiring substantive review by AMC staff) for transactions lacking a material local nexus with Ukraine. As the *Recommended Practices* have noted in this respect, "*requiring merger notification in respect of transactions that do not have a material local nexus "imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit*."[6]

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[3] See *Recommended Practice* I.B, Comment 3 (emphasis added).

[4] *Ibid.* (emphasis added).

[5] We understand that the Proposed Amendments will update Ukraine's Regulation on Concentration, but that there are also references to control relations in the *Law of Ukraine on Protection of Economic Competition*. It will be important to identify and make any changes to the Law that may be required to ensure that the Proposed Amendments will be effective and enforceable.

[6] See *Recommended Practice* I.B, Comment 1 (emphasis added).

II. Suggested Revision to Scope of the Proposed Amendments

We understand, based on English-language reference materials that we have consulted, that the Proposed Amendments are currently limited to excluding only the **turnover** of the entirety of the vendor's corporate group from the notification analysis, and do not address the issue of the **assets** of the vendor's corporate group. We assume this to be an inadvertent oversight in the drafting of the Proposed Amendments. As mandatory notification may be required in Ukraine on the basis of **either** turnover levels or asset values, the Group strongly encourages the AMC to revise the Proposed Amendments to address assets in addition to turnover. In the absence of such a revision, the Proposed Amendments will not fully achieve the operational and policy benefits set out above.

* * *

Thank you very much for considering the Group's views. We believe that the Proposed Amendments represent an important further step towards bringing 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.

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: Members of the Merger Streamlining Group
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