

Reply to the Attention of A. Neil Campbell
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VIA FAX to +380.44.520.03.25 and EMAIL to terentyev@amcu.gov.ua; pg@amcu.gov.ua

Yuriy Terentyev
Chairman
Antimonopoly Committee of Ukraine
45, Lypkivskoho Vasylia
Mytropolita, str.
MSP-03680, Kyiv, 03035
Ukraine

Dear Chairman Terentyev:

Re: Draft Guidelines On The Assessment Of Horizontal Mergers

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 a 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, Russia, Brazil, India, China, Japan, Korea, Spain, Italy and Portugal) to promote reforms consistent with the *Recommended Practices*, including submissions to your predecessor at the AMC in 2008, and to the Minister of Economic Development and Trade of Ukraine in 2015.

¹ The current members of the Group include Accenture, 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 recently-announced public consultation on its Draft Horizontal Merger Guidelines (the "Draft Guidelines"), which we understand were prepared in consultation with the Competition Council of the Republic of Lithuania, the German Bundeskartellamt and the US Federal Trade Commission, and are modelled after the EU Horizontal Merger Guidelines.

We applaud the AMC for its efforts in consulting with these other competition law agencies, and in conducting this public consultation. We have reviewed several English-language summaries of the Draft Guidelines prepared by private law firms active in Ukraine, as we understand that an official translation of the Draft Guidelines is not available in English.

The summaries we have reviewed suggest that the Draft Guidelines will make a meaningful and positive contribution to Ukrainian merger control law and practice. However, as the AMC is presently conducting a public consultation regarding its merger control laws, we wished to write and provide feedback to you respecting two other aspects of those laws which we believe, based on our members' substantial experience with multinational merger transactions, could be clarified to the benefit of both the AMC and the business community: (1) calculation of the target's Ukrainian assets/turnover for purposes of Ukraine's mandatory merger notification thresholds; and (2) the application of those thresholds to joint venture transactions. Each of these issues is addressed in greater detail below.

I. Calculation Of Target's Ukrainian Assets And Turnover

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 concentration may be implemented only if a prior approval of the Antimonopoly Committee of Ukraine [...] has been received [...] if:

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, in particular the phrase (which we have highlighted) “*taking into account relations of control*”, unfortunately leaves open to interpretation the question of whether the particular assets or businesses being acquired, as opposed to the entirety of the seller’s corporate group, are to be used in determining whether a transaction crosses the thresholds for mandatory pre-notification in Ukraine.

This is a very important distinction, and one that has been specifically targeted for treatment in the ICN’s *Recommended Practices*. Those guidelines clearly 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 reportable in Ukraine, the seller-side analysis should focus only on the particular assets or businesses being acquired and not the entirety of the seller’s corporate group.

The Group therefore respectfully recommends that the AMC issue a notice or guidelines, perhaps in connection with any report to be issued following the current public consultation around the Draft Guidelines, clarifying that the notification thresholds in Article 24(1) are not intended to capture the asset value/turnover of the seller’s entire corporate group within Ukraine, but rather only the Ukrainian asset value of, or Ukrainian turnover generated by, the particular assets or businesses being acquired in the transaction.

Such a notice would provide important clarity and predictability to the business community, while at the same time minimizing burdens on the AMC by avoiding a large number of 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.”⁵

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

⁴ *Ibid.* (emphasis added).

⁵ See *Recommended Practice I.B*, Comment 1 (emphasis added).

II. Application Of Notification Thresholds To Joint Venture Transactions

The Group also seeks clarification from the AMC on a narrow question regarding the treatment of joint ventures. We understand, from remarks that you have previously made in public fora, that only full-function (sometimes referred to as “concentrative”) joint ventures⁶ are subject to the mandatory pre-notification regime set out in the *Law of Ukraine on Protection of Economic Competition*. (This is presumably because only such joint ventures qualify as “concentrations” under that law.) This interpretation follows the approach taken under the EC Merger Regulation, much as the current Draft Guidelines are modelled after the EU Horizontal Merger Guidelines.

However, as our understanding is based on informal, rather than formal, sources, the Group would encourage the AMC to issue guidelines or some other form of public notice to confirm that only full-function joint ventures (which otherwise meet the asset value/turnover thresholds in the *Law of Ukraine on Protection of Economic Competition*) are subject to mandatory pre-notification in Ukraine.

* * *

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. 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
J. Chad, McMillan LLP

⁶ Full function joint ventures are generally characterized as joint ventures that perform, on a lasting basis, all of the functions of an autonomous economic entity, and which thereby bring about a lasting change in the structure of the undertakings concerned. See, e.g., European Commission, Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, (98/C 66/01) at para 11.