

# Ukrainian merger control laws to become more sophisticated in 2014?

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## Historical background

Over the past two decades the formation of Ukrainian merger control laws has been inspired by the EU merger regime. However, many observers contend that Ukraine applies low financial thresholds that trigger notification of transactions with no possible competitive effect on Ukraine's economy. In essence, in a foreign-to-foreign transaction that is completely unrelated to Ukraine, it is sufficient for one of the parties (either the buyer or the seller) to have assets or sales in Ukraine in excess of EUR 1 million in order to trigger the notification requirement.

This issue was raised on numerous occasions in the recommendations of the United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD) and the International Competition Network (ICN). To respond to these concerns and to avoid the control of economically and competitively less important transactions, in 2008 the Antimonopoly Committee of Ukraine (the AMC) prepared amendments to the Law of Ukraine "On Protection of Economic Competition" (the Competition Law) that were submitted to the Ukraine Parliament and even successfully passed the first reading, but little progress was made since then.

The problem became more urgent in 2012 and in 2013, when the AMC became more powerful and began changing its past practices by enforcing competition laws more rigorously. The implementation of the electronic database that tracks control links between undertakings and monitoring of press releases and websites of other competition agencies by the AMC has increased the detection risk dramatically. In order to increase public awareness, the AMC started sending letters to the transaction parties (usually big multinational corporations) after its monitoring department has discovered public information about a transaction that involved a multinational corporation with some presence in Ukraine.

## Proposed legislative changes

The most recent version of the proposed amendments to the Competition Law that should increase the notification thresholds states that the deal will require Ukrainian merger clearance, in particular, if:

- (1) aggregate worldwide asset value or sales turnover for all parties to the deal exceeds EUR 30 million, while aggregate Ukrainian asset value or sales turnover for each of at least two parties exceeds EUR 2.5 million; or



- (2) aggregate Ukrainian asset value or sales turnover for one of the parties to the deal exceeds EUR 30 million, while aggregate worldwide asset value or sales turnover of any other party exceeds EUR 30 million.

The increase of the existing thresholds 2.5 times and, most importantly, the fact that two parties should meet this threshold, is supposed to exclude a number of deals having no significant impact on competition in Ukraine from the need to seek merger clearance in Ukraine.

These amendments were scheduled for adoption in November – December 2013. The unstable political situation in Ukraine has shifted the priorities of the Ukrainian Parliament. However, we hope that in 2014 the lawmakers will return to the original agenda and the expectations of the business community will be finally rewarded by adoption of the respective amendments to the Competition Law.

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## Regulator's Practice Forecast

As a result of the expected increase of financial thresholds, the number of transactions subject to clearance in Ukraine, especially foreign-to-foreign ones, is likely to fall down dramatically. This should free up the resources that the AMC may use to monitor ongoing transactions and review historical transactions in an attempt to find past violations within the five-year limitation period that could still be prosecuted. Violations can also be easily dis-

covered when the AMC compares different notifications, including in the electronic database that easily tracks corporate history of an undertaking.

### **Trusts in the Loop**

As Ukrainian competition regulator becomes more sophisticated and as its resources free up from numerous routine notifications, the use of trusts in corporate restructurings is likely to attract increased attention from the AMC. The problem with trusts arises from the common practice where the owner of the business wants to create a trust managed by a trustee, which is often a reputable licensed trust company that acts as a trustee for many other trusts. Although a lot depends on the wording of the trust deed/declaration and other details, the acquisition of legal title to the assets held in the trust in many cases will be treated as concentration for Ukrainian competition law purposes. The only issue then would be to calculate the financial thresholds for each undertaking held by the trustee for different beneficiaries, including all the affiliates.

Similarly, a concentration that is potentially subject to merger clearance may arise from the appointment of the protector of the trust, whose specific rights may lead to the establishment of negative

control over the target, due to, for example, the right to block certain decisions, etc., or from the appointment of director in the company held in trust, who already occupies a similar position in another company. An attempt to comply with Ukrainian competition law requirements will create a lot of practical problems for the trustee who may not have sufficient members of staff to keep a separate director for every company.

The treatment of trusts by the Ukrainian competition regulator remains largely a grey area, untested in practice. Issues may arise not only when a trust is created, but also in the context of any notification by a party that has a trust for the benefit of its shareholders, especially by a party that had already applied to the AMC for a clearance in the past. In the latter case, the AMC will easily notice that the corporate structure of the party submitted within the previous merger clearance procedure differs from the one, which now includes a trustee. Failure of the applicant to provide an exhaustive list of "undertakings connected by a control relationship", including those managed by the same trustee, may also stall merger clearance process for an important transaction. The analysis of this risk should be made at the early stage before the notification is submitted to the AMC in order to ensure smooth merger clearance process.