

Ukrainian Competition Authority Suggested New Merger Control Thresholds

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On 28 October 2020, the Antimonopoly Committee of Ukraine (the "AMC") submitted to the Ukrainian Parliament the proposed amendments to the draft law introducing new merger filing thresholds in Ukraine. The amendments have been developed by the AMC in co-operation with competition law experts from the EU and the USA.

According to the public statements of Olga Pishchanska, Head of the AMC, and certain members of Parliament, the draft law is expected to be voted upon by Parliament later this year, meaning that under an optimistic scenario it may be adopted by the end of the year or early in 2021.

The major changes in the merger control regime proposed by the AMC are as follows:

Re thresholds:

1. The turnover/assets value of a controlling seller would be excluded when calculating the target's notification thresholds if control relations between a target and a seller cease to exist after a concentration (currently, the turnover/assets of a controlling seller are taken into account when calculating the merger thresholds of a target even if the seller loses control as a result of the transaction, and the filing may be technically triggered based on a seller only);

2. The new notifiability thresholds for transactions structured as:

- the acquisition of shares which results in reaching or exceeding (directly or indirectly) of 25% or 50% of the votes in the highest governing body of an undertaking or in the acquisition of control over it;
- the acquisition of control over an undertaking through the purchase or lease of assets; and
- making contractual arrangements resulting in the acquisition of control over an undertaking,

namely, the above-mentioned concentrations would require a prior clearance if either Test A or Test B below are triggered for the preceding financial year:

A. Ukrainian turnover or assets of a target exceed EUR 2 million, and combined Ukrainian turnover or assets of all parties exceed EUR 30 million; OR

B. Ukrainian turnover or assets of a target exceed EUR 2 million, and worldwide turnover of at least one other party exceeds EUR 150 million;

3. Meanwhile, the thresholds for the following transactions structured as:

- the merger of undertakings, or the takeover of one undertaking by another;
- the establishment of a newly formed full-function joint venture performing on a lasting basis the functions of an autonomous economic entity; and
- the acquisition of control by way of appointment to certain management positions of persons who already occupy similar position(s) at other undertakings,

would remain unchanged (please see two alternative notifiability tests set out below):

A. Ukrainian turnover or assets for each of at least two parties exceed EUR 4 million, and combined worldwide turnover or assets of all parties exceed EUR 30 million; OR

B. Ukrainian turnover or assets of at least one party exceed EUR 8 million, and worldwide turnover of at least one other party exceeds EUR 150 million.

Re other important changes:

1. For the purposes of calculation of thresholds, different steps within one transaction consummated between the same undertakings on the same relevant (including adjacent) market(s) within a two-year period would be treated as one and the same concentration arising on the date of the last transaction step. This, however, does not apply to transactions structured as mergers, takeovers or the establishment of full-function JVs;
2. Introduction of the full-functionality criteria for JVs notifiability into the law – this would remove legal uncertainty since so far such criterion was provided for in only the AMC's non-binding guidelines; in the meantime, non-full-function JVs may still require concerted practices clearance;
3. The merger filing fee would more than double (i.e., from approximately EUR 600 to EUR 1,300).