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Ukraine: Public Consultations on Draft Horizontal Merger Guidelines

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On 28 November 2016 the Antimonopoly Committee of Ukraine (AMC) launched public consultations on the draft Horizontal Merger Guidelines. The AMC invites to submit comments to the draft by 7 December 2016.

The draft Guidelines, prepared in cooperation with the Competition Council of the Republic of Lithuania, Bundeskartellamt and the US Federal Trade Commission, are modelled after the EU Horizontal Merger Guidelines.

The main points may be summarized as follows.

I. Summary:

Under the draft Guidelines, the AMC's assessment of mergers will involve:

- definition of the relevant product and geographic markets;
- competitive assessment of the merger.

In assessing the merger, the AMC will focus on:

1. market shares and HHI levels;
2. likelihood of anticompetitive effects in the relevant markets;
3. likelihood that buyer power, market entry or efficiencies would act as a countervailing factor to potential anticompetitive effects;
4. conditions for a failing firm defence.

Importantly, the AMC should not intervene if the market shares and/or HHI levels stay below certain thresholds.

II. How the Draft Guidelines will Impact AMC Analysis:

The developments brought about by the draft Guidelines that are likely to have the most

appreciable impact are: (i) wider range of evidence and considerations that carry weight for the AMC; (ii) adjustment of the evidentiary weight of market shares; (iii) introduction of unilateral and coordinated theories of harm; (iv) clarifications on the evidence supporting powerful buyers, market entry and efficiencies as countervailing factors influencing the AMC's analysis; and (v) introduction of the failing firm defence.

(i) Types of Evidence and Considerations

The key development is 'legalization' of many sources and types of data and assessment methods which the AMC previously used (or refused to use) circumstantially. The evidence will range from simple historical events like market entries and expansion to more sophisticated econometric analysis like estimation of HHI levels, cross-price elasticities of the products involved or diversion ratios. This will create a level playing field to both the AMC and filing parties and make the assessment more effective and credible.

(ii) Market Shares

The evidentiary weight of market shares is now considered but one important form of evidence for the AMC. This is certainly a shift in the weight given to, but not an abandonment of, the market shares remaining to be the analytical backbone of the AMC's analysis.

(iii) Unilateral & Coordinated Effects

In the context of unilateral effects, the draft Guidelines contain a discussion of how the AMC will analyze different types of unilateral effects on competition. The discussion is broken down into three parts concerning (1) capacity and output for homogeneous products; (2) pricing of differentiated products, and (3) potential exclusionary conduct of the merger undertaking post-transaction.

As to coordinated effects, the AMC will analyse whether (1) competitors on the relevant markets are able to reach terms of coordination, (2) the coordination is likely to be sustainable. In addition, the following conditions will be necessary for coordination to be sustainable: (3) ability to monitor whether the terms of coordination are being adhered to; (4) presence of credible deterrent mechanism that can be activated if deviation is detected; and (5) absence of disrupting strategies from non-coordinating competitors, including 'mavericks'.

The AMC emphasises that the overview of theories of harm in the draft Guidelines cannot be exhaustive and factors other than those discussed in the document may also be relevant.

(iv) Evidence on Powerful Buyers, Market Entry and Efficiencies

The draft Guidelines clarify the types of evidence that would influence the AMC in the context of buyer power, market entry and efficiencies.

In particular, the AMC will consider the countervailing buyer power to be able to counter anticompetitive effects if buyers can (1) immediately switch to other suppliers, (2) vertically integrate into the relevant market, or (3) foster market entry of potential suppliers by placing large orders with them.

The evidence of entry by other likely competitors can be significant evidence influencing the

AMC. An entry must be timely, likely and sufficient to deter or counter anticompetitive effects. Rapid entry is defined as within two years.

As to efficiencies, the parties will have to show that they are attributable to the merger and would be beneficial for consumers.

(v) Failing Firm Defence

The AMC may grant clearance for the concentration if one of the merging parties is a failing firm. The basic requirement is that the post-merger anticompetitive effect should not be caused by the merger.

Also, the AMC will consider that the following criteria are very important in the context of the failing firm defence: (1) absent the merger, failing firm will exit the market in the near future due to financial difficulties; (2) there is no feasible alternative transaction or reorganisation that is less anti-competitive than the proposed merger; (3) absent the merger, the assets of the failing firm would inevitably exit the market.

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