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Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Lithuania --

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This note is submitted by Lithuania to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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1 Pre-merger notification regime

1. The Law on Competition (hereinafter – the Law) states that the intended merger must be notified to the Competition Council (hereinafter – the Council) and its permission must be obtained where the combined aggregate income of the economic entities concerned in the business year preceding the merger is more than LTL 50 million (approx. 14,5 mln. euros) and the aggregate income of each of at least two economic entities concerned in the business year preceding the merger is more than LTL 5 million (approx. 1,5 mln. euros).

2. The Law does not specify any mandatory period following the notification during which the parties are prohibited from consummating the merger. However, the parties are prohibited to merge until the Council merger clears the merger. The Council shall adopt the resolutions no later than within four months after receiving a notification of merger submitted in accordance with the established requirements. If the Council does not adopt the resolution regarding the notified merger within four months, economic entities or controlling persons have the right to consummate merger in accordance with the conditions formulated in the notification of merger.

2. Review of mergers falling below notification thresholds

3. The Council has authority to review the merger under the merger review provisions on its own initiative if notification thresholds prescribed by the Law are not met, with the conditions: firstly, not more than 12 months have passed from the implementation of the merger in question; secondly, it is likely that merger will result in the creation or strengthening of a dominant position or a substantial restriction of competition in a relevant market.

4. For the purpose of reviewing mergers on the Council's initiative the ordinary merger control procedure provided in the Law may be applied *mutatis mutandis*, meaning that the available remedies do not differ from remedies available for the notifiable mergers.

5. Upon completing the examination of the notification of merger, the Council shall adopt one of the following decisions:

1. to permit merger in accordance with the submitted notification;

2. to permit the implementation of merger in accordance with the conditions and obligations established by the Council for the economic entities concerned or controlling persons necessary to prevent the creation or strengthening of a dominant position or a substantial restriction of competition in a relevant market;

3. to refuse merger and impose an obligation on the economic entities or controlling persons concerned to perform actions restoring the previous condition, or to eliminate the consequences of merger, including the obligations to sell the enterprise or part thereof, the assets of the economic entity or part thereof, the shares or part thereof, to cancel or amend contracts, as well as to establish the terms and conditions for the fulfilment of the above obligations, where the merger will result in creation or strengthening of a dominant position or substantial restriction of competition in a relevant market.

6. In 2011 the Council imposed an obligation on economic entity to submit a notification on consummated merger when the aggregate income indicators established in the Law did not meet the

notification thresholds. After the examination of the notification the Council gave a permit for implementation of merger in accordance with the submitted notification.

7. August 2013, the Council imposed another obligation on economic entity to submit a notification on merger on the Council's initiative. The process is not finished so far as the Council's decision was appealed to the court.

3. Review of mergers that should have been notified but were not

8. If the parties fail to notify a merger that was subject to mandatory notification provisions, they are subject to penalties. A fine of up to 10 per cent of the gross annual income in the preceding business year can be imposed on economic entities for implementation of a notifiable merger without permission of the Council. Nevertheless, the Council retains the power to review the merger that should have been notified but was not under merger review. In this case the parties can notify themselves or the Council can impose an obligation to do so. There is no time limit on when the agency can review the merger.

9. The Council is entitled to start investigation for the implementation of merger without a prior notification or consent. Upon establishing that economic entities have failed to notify, the Council, following the principles of impartiality and proportionality, shall have the right to:

1. to obligate the economic entities to discontinue illegal activity, to perform actions restoring the previous situation or eliminating the consequences of the violation, including the obligation to terminate, amend or conclude contracts, also to set the time limits and conditions for meeting the above obligations; to impose an obligation to notify the merger;

2. to obligate the economic entities or controlling persons who have implemented merger resulting in the establishment or strengthening of a dominant position or a substantial restriction of competition in a relevant market without notifying the Council or getting its permission to perform actions restoring the previous situation or eliminating the consequences of merger, including obligations to sell the enterprise or part thereof, the assets of the economic entity or part thereof, shares or part thereof, to reorganize the enterprise, to terminate or amend contracts, also to set the time limits and conditions for meeting the above obligations;

3. to impose fines on economic entities set by the Law.

10. The Council retains the power to review the merger under provisions of merger review only if the merger was notified and can adopt one of the decisions mentioned in Answer 2.-3.

4. Example of success with remedies

11. In 2008 Maxima LT, UAB had notified the Council regarding the consummated merger by acquiring commercial premises in various cities in Lithuania. During the examination of notification of merger, the Council concluded that negative consequences on competition could have resulted in Vilnius, Klaipėda and Marijampolė geographic markets. Thus, the Council obligated UAB Maxima LT to remove the consequences of merger in Klaipėda and Vilnius and Marijampolė municipalities – either to cancel/terminate the commercial premises and warehouses lease contracts, or to transfer the ownership rights in respect of such premises.

5. Subsequent review of previously cleared and consummated mergers

12. The Council may not challenge a merger that it has previously approved except for the cases, where such a resolution was adopted based on incorrect or incomplete information submitted by the economic entities participating in merger or by the controlling persons and that had a decisive influence when adopting the resolution, or where the economic entities or controlling persons have violated the conditions and obligations of the implementation of merger. In case of any circumstance stated above the Council shall start a new investigation. If economic entities fail to comply with or breach the Law, the Council shall have the same rights as mentioned in Answer 5. There is no time limit to start a post-merger review.