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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from Lithuania

-- Session II --

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Information on the Cartel agreement on prices concluded by undertakings providing taxi services in the local market of the city of Vilnius

1.1 Problem in brief

1. On 3 February 2005, the Competition Council of the Republic of Lithuania (further – the Competition Council) passed Resolution No. 2S-3 whereby the authority sanctioned the group of taxi companies for the conclusion of the anti-competitive cartel agreement.

2. The present case of the establishment of the cartel agreement should be attributed to the category of investigations where the cartel was proven (which, as could be noted in advance, has also been confirmed by the First instance court) virtually in the absence of any direct evidence.

3. The cartel under consideration has the following characteristics:

- First, the scope of the cartel agreement is not extensive, covering only the local market of the city of Vilnius. Therefore, it falls outside the scope of Art. 81(1) of the Treaty establishing the European Community and was assessed under the national competition law.
- Second, the prohibited agreement was involving over 10 market participants who were lead by the Association uniting the taxi companies and one of the taxi company, – a market participant was at the same time the founder of the Association.

1.2 The relevant market

2. The market of the product concerned is the market for the passenger carriage by call taxis

4. One of several undertakings cannot have a significant impact on the prevailing conditions of sale, such as prices if the customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. The product under consideration does not have a substitute in the public transportation area as a taxi passenger may easily reach any destination as opposed to the services provided by other public transportation means that run in accordance with the predefined route and schedule. Furthermore, the price of this service is significantly higher than the rates of other public transportation services.

5. The geographical market is the area defined by the Municipality of Vilnius as the administrative boundaries of the city of Vilnius, wherein the companies providing taxi services are obligated to charge identical rates of the service effective within the municipal territory of Vilnius.

1.3 The origin of the cartel agreement

6. Within the period under consideration (2H of 2004) there were 43 taxi companies legally operating in the city of Vilnius (population about 600.000) being holders of over 1400 license cards. In view of fierce competition in the market the rates of the call taxi services in Vilnius have remained unchanged for some 4-5 years already and were fixed at one of the lowest levels among capitals of the

European Union Member States (on the average 0,23 - 0,29 EUR, plus the boarding fee up to 0,38 EUR). No separate charge was placed for the call by telephone. Despite the surging fuel prices during the year 2004, until October of the year the prices remained stable. Such low price level was maintained due to the minimum wages paid to the taxi drivers, the outworn taxi fleet (quite a number of taxi companies operating in the city were hiring drivers with their own vehicles), as well as quite fierce competition in the service market concerned.

7. Over the several recent years the taxi company UAB“Martono taksi“ (further – MARTONAS) operating over 100 vehicles was the most solid taxi company in the city with its vehicles servicing the approaches of the airport, prestigious hotels and other sites. But it was not able to dictate the price levels to other taxi companies, as the number of vehicles operated thereby accounted for as little as 8 percent within the total in the city. In late June 2004 the Taxi service providers Association was founded at the initiative of MARTONAS.

8. Approximately a month following the founding of the Association, the business news section of a major Lithuanian TV channels released a commentary in which the President of the Association (as discovered during the investigation –MARTONAS’s major shareholder) and the executive director of the company publicly announced that the taxi service rates in Vilnius are unreasonably low and needed to be increased. Several days later the appendix to of the major national dailies was quoting the statements of the same persons to the effect that the taxi companies representing the major share of the Vilnius city taxi services market *intended to make an agreement* before the year end concerning the increase of the prices by one third. Responding to the statements the Competition Council warned the companies referred to in the articles that such agreement would constitute a violation of the requirements of the Law on Competition of the Republic of Lithuania (further – the Law on Competition).

9. Nevertheless, members of the Association increased the service rates simultaneously to be in effect as of 1 October 2005. The Competition Council, suspecting an infringement of the Law immediately initiated an investigation. Having obtained the judicial warrant inspections were conducted in the premises of the undertaking suspected of the infringement. Over 80 percent of the market participants (total 39 natural persons) were interviewed during the investigation. Some market participants explained that they had been instigated to join the Association and increase the service prices.

10. The investigation established that the undertakings providing taxi services in the city of Vilnius had concluded the agreement prohibited by the Law on Competition in the form of concerted actions. The rates were also discussed at the Association meeting held a week preceding the price increase. This implies that the taxi companies had not merely come into contact, but that it was a restrictive contact eventually resulting in the pricing changes, – the price jump as of 1 October 2004. The causality between the preceding contact and the resulting price increase is absolutely obvious. In accordance with Art. 5(1)(1) of the Law on Competition agreements to directly or indirectly fix prices of certain goods or other conditions of sale or purchase are prohibited. Such agreement concluded by competitors in all cases shall be considered restrictive in respect of competition (Art. 5(2) of the Law on Competition).

11. Although no direct evidence has been established (most taxi companies do not use PCs), except a note in the calendar of the manager of one of the competing companies with the date of the meeting of the Association and the effective date of the new price, the contents of the minutes of the Association’s meeting and the course of the further developments showed the consistent preparations for the simultaneous rate. Besides, in their explanations several Association members claimed that the service rates were discussed at the meetings of the Association. Representatives of some non-member companies indicated that they had been instigated to follow the Association and the fix of the minimum price as proposed by the Association.

12. Also the investigation concluded that some participants of the cartel agreement (8 Association members) virtually simultaneously (end of September) applied to the company adjusting and installing the taximeters with a request to enter the modified rates in the taximeters (prior to establishing any new service rates taxi companies need to adjust their taximeters).

13. At the proceedings of the first instance court, representatives of the companies involved in the infringement attempted to prove that their behaviour in the market was caused by the leader regime and the growth of operating costs. The investigation, however, arrived at an opposite conclusion, - the costs incurred by individual taxi companies are different depending on quite a range of factors, – some are using drivers' own cars, others run the leased vehicles, wages of the employees come in different ranges too, as well as the vehicle repair costs and types of fuels; furthermore the fuel prices were increasing on a gradual basis, and in the course of the action coordination between the companies prices of some types of fuels had been even alleviating, etc.

14. Although orders issued by some companies concerning the increase had been signed in the course of September, i.e., on different dates, according to the opinion of the first instance court this fact cannot be regarded as a proof of the absence of agreement. The Court concluded that the undertakings had been coordinating the rates (comparison and discussions about the rates), and orders of virtually all companies were enforced simultaneously, on 1 October 2004, or a couple of days earlier.

15. The Court also noted that the provisions of Art. 5 of the Law on Competition are equivalent to those of Art. 81 of the Treaty prohibiting agreements between undertakings and concerted actions, however, the Treaty establishes the rules governing trade between Member States. Although the scope of the object of the present case is limited to the local market, for the purpose of the interpretation of the said Article of the Law on Competition account was taken of the explanations of the concepts and the rules in the cases of application of Art. 81 of the Treaty (Art. 1(3) of the Law on Competition). The European Court of Justice had defined the concept of concerted actions (concerted practice) as any cooperation leading to anticompetitive behaviour without concluding an agreement or an action plan (Cimenteries case No. 8/66; Gerhard Zuchner/Bayerische Verrensbank AG case C-172/80). In conclusion, for the purpose of application of Art. 5(1)(1) it is important to prove that the concerted practice by the undertakings has taken place, which requires the establishment of the bilateral contact and the following concerted practice.

16. In the course of the judicial proceedings, the taxi companies did not deny the fact of contacts, although claiming that the subject matter of their discussion was not the rates but rather the fair calculation of costs. The Court concluded this to constitute the agreement to indirectly fix the price of the product since the calculation of costs should normally be the internal issue of each individual company. Whether or not the costs (revenues) are being calculated fairly or correctly is established by appropriate public authorities rather than the Association of the undertakings. There, as was the case, the meeting of the Association involved contacts and instructions on the correct procedure for cost calculation which eventually results in nearly all companies increasing their rates almost at the same time. The Court had noted that the evidence collected by the Competition Council provides the proof that the issue of the rates had been discussed, and part of the taxi companies acknowledged that a company could not increase the rates on an individual basis as this would result in its bankruptcy or severely impede position of the company in the market. In the opinion of the Court, this shows that competition in the market is heavy and testifies to the fact that such agreement was necessary to the companies in order to be able to maintain in the market, and of special value and benefit this agreement was to MARTONAS, since the company is using good condition vehicles and more expensive fuels, therefore it is forced to maintain higher rates which makes competing difficult.

17. It is obvious that fixing of the service rate and the increase in the price affects adversely the customer who is forced to pay the same (fixed) price regardless of whether he is riding a new and

comfortable or an old vehicle. The undertakings concerned submitted the information on the new and coordinated rates to the administration of the Municipality which shows that the companies had assumed an obligation to adhere to the fixed rates, since in the opposite case a company deviating from the agreement could be appealed to the municipality by its competitors. Such concerted actions of the taxi companies deprive the customer of a possibility to choose the quality of the service. Thus damage is incurred to the customer not only due to the higher rates but also through depriving him of the possibility to choose a better quality service for a higher rate. This is exactly what constitutes the negative consequence of the restriction of competition that is subject to the provisions of the Law prohibiting to restrict competition even by concerted actions. Having regard to the above considerations the Court concluded there to be no grounds to annul Resolution No. 2S-3 of 3 February 2005 of the Competition Council as unlawful.

18. The Competition Council imposed pecuniary sanctions to the companies concerned for the infringement of Art. 5 of the Law on Competition. Having regard to the economic status of the infringing companies, they were subjected to the lower rate of LTL 5 000 (with an exception of the initiator of the violation that was subjected to a pecuniary fine in the amount of LTL 50 000). The undertakings appealed to court the decision also in respect of the amounts of the fines claiming them to be excessive. Having investigated the case the first instance court reduced the amount of the fines.

2. Principal evidence of the agreement prohibited by the Law on Competition concluded by undertakings providing taxi services

- The evidence of the coordination of the rates of taxi services have been recorded in the protocols of explanation of the undertakings concerned:
 - UAB „Kablasta“, one of the founders of the Association, - a representative claims that in the meetings of the Association of 2004-09-24 opinions of carriers concerning the taxi service rates were different, - some said that 70 cnt/km is sufficient, and another participant said that the rate should be 90 cnt/km, another one said that it should be as high as LTL 5, etc.“;
 - UAB „Litvega“, - a representative claims that at the meeting of 2004-09-24, R.Brazys, President of the Association and R.Kriukovas, Director of UAB „Martono taksi“ suggested that the „rates are adjusted“ and indicated the notes on the board: 1 km rate – not less than LTL 1, boarding fee – not less than LTL 2. Also indicated that on 2004-10-14, R.Brazys called <...> concerning the submission of information about rates. He wanted some information about the rates and inquired why the rates were lower than they should be“;
 - UAB „Kabrioletas“, - a representative claimed that the rates needed to be increased by 1 October up to LTL 1, and the boarding fee– up to LTL 2 <...>“. He also mentioned that UAB „Martono taksi“ „had invited several firms, that had not increased their rates „on the carpet““;
 - UAB „Ritaksa“- a representative indicated that „R.Brazys on the phone was inviting others to support the Association concerning raising of the rates up to 1LTL/km and the boarding fee up to LTL“;
 - UAB „Kobla“, one of the founders of the Association, - a representative claims that in the meeting of 2004-09-24 the participants were discussing the need to „<...> increase the rates because of the increase in the fuel prices <...>“;

- UAB „Ekipažas“, - representative indicated that he had been invited to participate in the meeting of the Association and that the Association invited him to join the Association and proposed to „<...> restructure the rates“;
 - UAB „Taksodromas“, - a representative indicated that in the meeting of the Association R.Kriukovas, the General Manager of UAB „Martono taksi“ said he would like to see the rates increased;
 - UAB „Merselita“, – a representative indicated that in the meeting of the Association of September 2004 the participants acknowledged that one of the objectives of the Association is to readjust the tariffs, and that in other States the rates are equivalent to the price of one liter of the gasoline;
 - UAB „Greitvila“, one of the founders of the Association, - representative indicated that the meeting of the Association discussed the issue of raising the taxi services rates. He also indicated that the Association proposed to calculate the costs of 1 km ride;
 - UAB „Aimagrė“, – a representative indicated that the meeting of the Association of September 2004 had indicated that the „rates are too low“ <...>“;
 - R.Brazys, the President of the Taxi services providers Association indicated that the companies providing taxi services had calculated the cost of carriage of passengers and that the data had been discussed during the meeting.
- Statements of R. Kriukovas, the General Manager of UAB “Martono taksi” and managers of some other entities in the press and in interviews to news agencies on the forthcoming increase in the rates;
 - Public statements in the press and to the news agencies of R.Brazys, the President of the Taxi services providers Association (a shareholder of UAB “Martono taksi“) on the planned increase of rates of the taxi services and the prognosticated prices;
 - It has been established that some of the entities involved in the coordination of taxi services rates (in the second half of 2004) had appealed to the company adjusting the taximeters with a request to adjust the taximeters to the modifies rates.
 - Following the coordination of taxi services rates significant changes took places in the pricing of the companies providing such services – starting from 1 October the rate per 1 km was increased from - 60-90 cnt. to LTL 1, and in some companies – up to LTL 1,30, the boarding fee – from LTL 1,30 to LTL 2.
 - Order of the companies concerning the increase of the rates:
 - indicated the same date for the increase of the rates – starting from 2004-10-01;
 - established virtually identical rates for the boarding and a ride of one kilometer (such rates have been coordinated in the course of bilateral contacts).
 - It has been established that the increase of the service rates could not have been caused by economic conditions them being very different:

- some entities are using new vehicles acquired on leasing terms, and others drive old vehicles, or rent the vehicles from their drivers;
- entities providing taxi services use fuels of different types, – part of the vehicles use gasoline and gas, others use diesel fuels;
- entities providing taxi services employ different numbers of employees and the salaries paid to such employees is also different;
- costs incurred by undertakings are of different level, they report different revenues and profits, etc.