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COMPETITION COMMITTEE

### Working Party No. 3 on Co-operation and Enforcement

#### ROUNDTABLE ON CARTELS INVOLVING INTERMEDIATE GOODS

-- Lithuania --

27 October 2015

*This document reproduces a written contribution from Lithuania submitted for Item 3 of the 122nd meeting of the Working Party No. 3 on Co-operation and Enforcement on 27 October 2015.*

*More documents related to this discussion can be found at:  
[www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm](http://www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm)*

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**-- Lithuania --**

For the purposes of assessment of the hypothetical scenarios, we list below the national legislation relevant for the analysis that will be further applied to the scenarios of Countries A, B and C.

**1. Relevant national legislation**

**1.1 *The purpose and the scope of the Law on Competition***

1. Article 1 part 1 of the Law on Competition of the Republic of Lithuania (the Law on Competition) states that the purpose of this Law is to protect freedom of fair competition in the Republic of Lithuania. The Law on Competition regulates, inter alia, activities of undertakings which restrict or may restrict competition. Undertaking means an enterprise, a combination of enterprises (associations, amalgamations, consortiums, etc.), an institution or an organisation, or other legal or natural persons which **perform or may perform economic activities in the Republic of Lithuania or whose actions affect or whose intentions, if realised, could affect economic activity in the Republic of Lithuania** (Article 1 part 2, Article 3 part 17 of the Law on Competition).

2. The Law on Competition is applied to activities of **undertakings registered outside** the territory of the Republic of Lithuania **if the said activities restrict competition on the domestic market of the Republic of Lithuania**. This Law is not applicable to activities of undertakings which restrict competition on foreign markets, unless international agreements to which the Republic of Lithuania is a party state otherwise (Article 2, parts 2 and 3 of the Law on Competition).

**1.2 *Sanctions for the infringements of the Law on Competition***

3. Under Article 35 of the Law on Competition, upon establishing that undertakings have concluded an anti-competitive agreement, the Competition Council of the Republic of Lithuania (the CC) has a right to obligate the undertakings to discontinue illegal activity, to perform actions restoring previous situation or eliminating the consequences of the violation and to impose fines on undertakings set by the Law. Amount of the fines is determined according to the Rules concerning the setting of the amount of a fine imposed for the infringement of the law on competition of the Republic of Lithuania, approved by the resolution No. 1591 of 6 December 2004 of the Government of the Republic of Lithuania (the Fining Rules).

**2. Answers on the hypothetical scenarios<sup>1</sup>**

**2.1 *Country A***

4. According to the abovementioned national legislation on the scope of the Law on Competition, the Law would apply to all undertakings, if their activities restrict or may restrict competition in Lithuania (Country A). As a result, if the evidence available to the CC suggests that the agreement to fix prices restricts or may restrict competition in Country A, the Law on Competition will be applicable to Alpha and Beta. However, if the undertakings only agreed to charge a specified “export price” in Country B (i.e., formed an export cartel), it could not be stated that the acts of undertakings restrict competition in Country A and the CC could not, therefore, assert jurisdiction over the undertakings concerned.

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<sup>1</sup> Answers of the CC do not address jurisdictional relationship and cooperation between the of European Commission, the CC and other national competition authorities of the EU Member States, as such cooperation is regulated by the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

## 2.2 Country B

5. As previously mentioned, the Law on Competition **applies** to activities of undertakings **registered outside the territory** of the Republic of Lithuania **if the said activities restrict competition on the domestic market** of the Republic of Lithuania (Article 2, part 3 of the Law on Competition). Accordingly, the CC would consider whether economic activities of Alpha and Beta which are registered outside the territory of Lithuania have restricted competition on the Lithuanian market.

6. An agreement between Alpha and Beta to charge higher selling prices for the Component X sold to the integrators in Country B might raise suspicions that these activities restrict competition in Country B as only some of the anti-competitive overcharge on Component X might have been passed on to Country C. Lithuania (Country B) may wish to assert jurisdiction over foreign undertakings and consequently bring an enforcement action on the basis that foreign undertakings produce direct commercial effects within its territory restricting competition, even though they are not registered there.

7. In this case it is to be noted that competition restriction in Country B might be a consequence of the agreement concluded by the undertakings which are organised and located in Country A where the Component X is being manufactured. Therefore, it could be considered that evidence might be located in Country A at the offices of Alpha and Beta. In order to conduct an inspection and gather evidence relevant to an investigation, the CC would seek cooperation of the NCA of Country A (different rules depending on whether Country A is an EU Member State, or not).

8. The CC has in its practice opened investigations against foreign undertakings incorporated in other countries than Lithuania, whose activities were suspected to restrict competition in Lithuania. However, the cases discussed further in more detail are not related to sales of intermediate goods.

- In 2011, the CC launched an investigation against *Air Baltic Corporation AS*, an undertaking incorporated in Latvia, for possible abuse of dominant position; in 2012 the CC opened an investigation against companies representing trade mark of *United Colours of Benetton*, incorporated in Italy for possible anti-competitive resale price maintenance agreement. The CC had primary suspicions that certain activities of foreign undertakings might have restricted competition in Lithuania, however, the said investigations were closed without finding an infringement.
- On 10 June 2014, the CC found that *Gazprom*, undertaking incorporated in Russia, infringed the Law on Competition. The CC established that *Gazprom's* refusal to negotiate the natural gas swap agreement with Lithuanian company *Lietuvos energijos gamyba*, amounted to a failure to comply with merger conditions imposed by the CC on *Gazprom* in 2004. Since such actions could have negatively affected competition on the Lithuanian market, the CC conducted an investigation against foreign undertaking and subsequently imposed a fine.

9. When applying the Law on Competition, jurisdictional rules require the CC to assess whether the actions of undertakings could affect economic activities in the Republic of Lithuania. Therefore, the place of the meetings itself would not be a decisive element when bringing an enforcement action. The place of the meetings on price-fixing could, however, indicate the location of evidence and indicate the need of cooperation for evidence-gathering purposes.

10. The Law on Competition provides the CC with several options of sanctions, including an obligation on the undertakings to discontinue illegal actions and imposing a fine (Article 35 of the Law on Competition). The CC uses its discretion to use one or some of the above sanctions depending on the circumstances of the case.

11. If it is established that Alpha and Beta came into agreement to fix prices of Component X which restricts competition in Country B, the CC would normally impose a fine which can be up to 10 percent of the gross annual income in the preceding business year (Article 36 part 1 of the Law on Competition).

12. When calculating a possible fine, the CC takes into account sales both directly and indirectly related to the infringement, because under the Fining Rules it is expressly provided that both types of sales are relevant (Article 5 of the Fining rules). Sales achieved on the domestic market of the NCA are taken into account to assess the relevant value of sales. In the case concerned, the CC would consider sales of Component X in Lithuania as directly related to the infringement. Other kind of sales, namely, sales of similar products, could be regarded as indirectly related to the infringement.

13. The CC's practice on imposition of fines in relevant cases is provided below.

- On 11 February 2015, the CC found that Lukrida and Manfula sought to restrict competition in the market of combined heat and power plant construction. The companies used a third-party company Envija to fix a part of the price (the minimum margin of 10 per cent) for internal combustion engines purchased from Envija. Hence, the 3 companies breached Article 5, part 1<sup>2</sup> of the Law on Competition and Article 101, part 1 of the TFEU. When calculating the fine, the CC did take into account only national sales of internal combustion engines. The sales achieved outside the domestic market were not taken into account, since it was considered that in this case this might amount to sanctioning effects outside of NCA's national jurisdiction<sup>3</sup>.
- On 7 December 2014, the CC found that food retail chain Maxima and bakery and other frozen food producer Mantinga came into a vertical price fixing agreement which breached Article 5 part 1 of the Law on Competition and Article 101, part 1 of the TFEU. Since the established infringement was related to the sales activities between Lithuanian undertakings and took place in the Lithuanian market, only sales in Lithuania were calculated into the relevant value of sales when determining the fine (in case of Mantinga, the income from sales of all of its products to the retailers in Lithuania, and in case of the retailer Maxima, the income from sales of Mantinga's products in Lithuania).

14. Even if other jurisdictions have already imposed sanctions for the conduct concerned, the CC would not be automatically deprived from bringing an enforcement action, since the CC is entitled to establish competition law infringements in the territory of Lithuania (Article 1, part 1, Article 18, part 1(1) of the Law on Competition).

15. However, if the same practice committed by the same undertakings was already investigated and sanctioned in another jurisdiction, the CC will consider if such an investigation falls within its enforcement priorities. A Notice on the CC's Enforcement Priorities approved by the resolution No 1S-89 of 12 July 2012 of the CC states that in order to decide whether a matter falls within the enforcement priority, the CC will assess the following principles:

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<sup>2</sup> Article 5 part 1 of the Law on Competition is national equivalent of the Article 101 of TFEU and provides prohibition of agreements restricting competition, i.e. that all agreements which have the purpose of restricting competition or which restrict or may restrict competition shall be prohibited and shall be void from the moment of conclusion thereof.

<sup>3</sup> At the moment of submission, the Case is still being challenged before the courts.

- the potential impact of an investigation on effective competition and consumer welfare;
- the strategic importance of such an investigation; and
- the rational use of resources.

16. Therefore, considering the potential impact of an investigation and the rational use of resources, the CC could in theory avoid parallel action in its own country and not assert jurisdiction on the same basis. For instance, the CC, in practice, has previously refused to open investigations in situations when the same matters were being contested before national courts.

17. In case the CC decides to open an investigation and to impose a fine subsequently, the CC would seek to determine whether other jurisdictions have already imposed sanctions based on the same facts, even though there's no legal obligation to do so under national competition law. The CC would consider if another jurisdiction has already obligated undertakings to terminate illegal activity as well as what kind of sales and factors of financial activities of the undertaking were considered and included into the relevant value of sales when determining the fines, so that risk double sanctioning is minimised.

### 2.3 *Country C*

18. As in the case of Country B, the CC acting as a competent authority of Country C would consider if the economic activities of foreign undertakings, i.e. Alpha and Beta, restricted competition on the Country's C market. If there is solid evidence showing that Alpha and Beta have agreed on export price of Component X which has been incorporated into finished products for purchasers in Country C, it can be assumed that these acts of undertakings (potentially) affected economic activities in Country C. The given hypothetical facts suggest that there could be harm in Country C resulting from the price-fixing agreement made abroad (e.g. export cartel formed in Country A) as a result, it would be possible to bring an enforcement action against Alpha and Beta.

19. In the opinion of the CC, awareness of Alpha and Beta that finished products are sold in Country C, is not significant in itself for bringing the enforcement action or finding of infringement. It is important to have a ground to suspect or establish that Alpha and Beta affected the sales of cartelised products in Country C through their anti-competitive activities and such actions restricted competition in this country.

20. The general rules on fining would not be different from those described under the scenario of Country B. As to the relationship between the companies for fining purposes, as long as the finished product integrators in Country B and purchasers of the finished product in Country C were not in any way additionally restricting competition, e. g. did not take part in either horizontal, or vertical agreements with Alpha and Beta, the mere fact that integrators and purchasers form a single economic unit would not be relevant when bringing an enforcement action.