

COOPERATION WITH PUBLIC INSTITUTIONS

How to reduce the risks of competition law infringement?



The mere fact that restrictive agreements between competitors are concluded with public institutions knowing of or incentivising such behavior does not mean that such agreements are allowed and release the company from liability

It is expected that this memo will help companies and their associations to answer the questions arising when cooperating with public institutions, and help public institutions to evaluate whether their proposals or actions could create conditions for companies to violate competition rules.

What does the Law on Competition prohibit and what companies should pay attention to?

Article 5 of the Law on Competition prohibits all agreements which have the purpose of restricting competition or which restrict or may restrict competition.

A fine of up to 10 per cent of the total annual worldwide turnover in the preceding business year shall be imposed on undertakings for infringing the Law on Competition.

In addition, a manager may be disqualified from occupying any managerial position for a period of three to five years and a fine can be imposed if such manager is found to have contributed to the anti-competitive agreement.

Does it mean that market players are not allowed to cooperate?

The Law on Competition prohibits only those agreements which restrict or may restrict competition, e.g. agreements to set (fix) prices, share the product market or fix the production volumes of certain goods. Such agreements are considered to have as their object restricting competition, irrespective of whether they have been implemented or not.

Along with other market players we are planning to address/addressed a public institution regarding market problems and legal regulation which, in our opinion, is flawed or insufficient. Is such type of cooperation prohibited?

No, companies have the right to express their opinion and represent their interests in front of public institutions. However, cooperation between competitors may often result in an increased risk of competition law infringement. Therefore, in all cases it is important to carefully evaluate such cooperation, e. g. measures and decisions that are taken, as well as information and target to whom such information is disclosed (exchanged).

HIGH LIKELIHOOD OF INFRINGEMENT

Manufacturers of alcoholic beverages approach a public institution regarding new requirements for product packaging, which are going to be introduced. Manufacturers believe that the new requirements are too strict and will result in increased costs, which will in turn lead to higher prices of alcohol. During the meetings with competitors and the public institution, manufacturers disclose their individual pricing information and the percentage of price increase following the entry into force of the new requirement. The public institution states that the new fee is inevitable and suggests that manufacturers introduce a new "packaging" fee, which will compensate for the expense incurred. Manufacturers agree on the date when the new fee will be introduced.

LOW LIKELIHOOD OF INFRINGEMENT

In the same situation alcoholic beverage manufacturers express their concern regarding the new requirements for product packaging. During the meetings manufacturers are trying to convince the public institution that the new requirements seem inefficient and will negatively affect both the market and consumers. Manufacturers submit alternative proposals which would ensure analogous requirements of package quality, safety and eco-friendliness. Discussions do not involve a disclosure of commercially sensitive information. Following the adoption of the new requirements for product packaging, each manufacturer takes individual decisions regarding their future market behavior.

For companies: how to avoid competition law infringement while addressing public institutions?

- While addressing public institutions, you can feel free to express your concerns regarding the market problems and encourage public institutions to take certain actions which lie within their field of expertise, as well as to refrain from taking them, one should not aim to restrict competition.
- Do not share or disclose commercially sensitive information to your competitors, especially if such information is related to pricing, production volumes, customers or sales conditions.
- Do not take joint strategic decisions or discuss your future business plans with your competitors, do not disclose which actions you are going to take in the future in case there were any changes in market conditions, e. g. changes in the price or supply of raw materials, new market players, regulatory changes. The disclosure of such information, even if it has been encouraged or supervised by a public institution, may be considered a restriction of competition.
- Do not allow public institutions to disclose commercially sensitive information related to activities of other market players – let the authority know that you are not going to discuss such information.
- If during the meetings (even if a public institution is one of the participants) prices or other price-related topics are discussed, you should immediately express opposition to discuss such topics and, in case such discussions continue, you should leave the meeting and seek legal advice.
- Do not make joint strategic future plans with competitors, even if a public institution encourages you to do so. Decisions related to the strategic activities of a company shall generally be taken individually.
- Try to minimize all possible risks – discuss the agenda of the meeting in advance, take meeting minutes, keep them and preserve information recorded during the meetings. If you have any doubts about information which has been discussed during the meeting, seek legal advice.

Note! Even if public institutions encourage companies or their association to take actions which might breach competition law requirements, such behavior of public institutions does not eliminate your liability, unless you are acting in accordance with the absolutely binding instructions of the governmental institutions.



For public institutions: how to avoid creating conditions which would increase the risks for the companies to enter into anti-competitive agreements?

- Evaluate the possible impact of your offers or actions on competition¹. If necessary, seek legal advice.
- Do not disclose or encourage companies to exchange or discuss commercially sensitive information. Do not encourage companies to take joint decisions related to their strategic future plans – such decisions shall be taken individually.
- Note that the Law on Competition prohibits all agreements or concerted practices between companies which have the purpose of fixing prices (their part) or any other conditions of sale (including what, and to whom, you plan to sell and on what terms).
- Note that agreements may be found to restrict competition both when they are concluded directly between competitors or indirectly (including when the intermediary is a public institution or any other third party).
- Bear in mind that the likelihood of breaching competition rules is higher when a) meetings and cooperation occur between competitors; b) competitors exchange or are encouraged to exchange commercially sensitive information (future pricing plans, strategy, business plans) while cooperating or participating in meetings.

Note! It depends on a particular situation (market, issues discussed, the extent of cooperation, behavior of companies) whether or not the actions encouraged by public institutions will be considered as breaching the provisions of the Law on Competition, and in each case these will be evaluated separately.

¹. Guidelines on the Assessment of Impact of Decisions on Competition

HOW SHOULD PUBLIC INSTITUTIONS EVALUATE THEIR ACTIONS?

HIGH LIKELIHOOD OF INFRINGEMENT

Encourage companies to jointly introduce new fees or stop production of certain goods.

Encourage companies to agree on pricing – increase prices, set fixed or minimum prices.

Act as intermediary or coordinate the process of taking joint commercial/strategic decisions between individual companies.

Directly or indirectly encourage independent companies to adhere to a particular business model (related to the strategic policy of a company) or behave in a way, which results in a joint, rather than individual, decision making.

Directly or indirectly encourage companies to disclose commercially sensitive information (future pricing plans, strategy, business plans).

LOW LIKELIHOOD OF INFRINGEMENT

Establish requirements or new rules, within the limits of their competence, which are binding on all companies.

Inform companies about particular market problems (e. g. increasing sales volumes of strong alcoholic beverages which are harmful for health) and encourage them to take individual decisions in order to solve these problems.

Seek to find out the opinion of market players and problems they are facing, without encouraging them to disclose confidential information to other market participants.

Encourage cooperation or actions between companies which have no negative impact on competition.

Where can you get more information?

For more information please visit the Competition Council's website www.kt.gov.lt or contact the authority by phone (+370 5) 260 8879.

This memo shall not be considered a binding normative legal act.

