

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON CARTEL JURISDICTION ISSUES, INCLUDING THE EFFECTS DOCTRINE

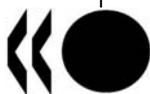
-- Lithuania --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item V of the agenda at its forthcoming meeting on 21 October 2008.

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1. Fact Scenario and Assumptions

1. The factual assumptions from which the issues for discussion will flow are as follows:

- Foreign-based manufacturers of an input product agree to fix prices on that product, all of which is produced outside your jurisdiction.
- Foreign-based entities purchase the input from the cartel participants or their agents and incorporate the cartelized input into a finished good.
- Supply chain intermediaries subsequently sell the finished good into your jurisdiction.
- The sales of the finished good into your jurisdiction may be to end-users or to other levels in the distribution chain (*e.g.*, wholesalers and retailers).

1.1 Consider how the following factors would affect your analysis

1.1.1 Some or all of the anti-competitive overcharge is passed through the supply chain resulting in artificially higher prices for your jurisdiction's purchasers of the finished good.

2. In case of cartel agreement made between foreign-based manufacturers of the input product, when the overcharge is passed to the purchasers of the finished goods in Lithuania, it would be considered that there is an effect of the cartel agreement on the Lithuanian domestic market. If it is established that the purchasers of the finished goods must pay artificially higher price for the finished good because one of its element's price is increased by the cartel agreement, it is apparent that final purchasers suffer consequences of the cartel agreement.

1.1.2 Some, but not all, cartel members make sales of the finished good

- directly into your jurisdiction, or
- to foreign subsidiaries or affiliates that manufacture or assemble the finished good for parent corporations that are headquartered (or have offices) and sell the finished good in your jurisdiction.

3. The fact that some conspirators sell finished good directly into jurisdiction, would strengthen the conclusion that cartel agreement restricts competition in Lithuanian domestic market and would prove the direct effect on the competition on it. On the other hand it would show that there is a direct implementation of the price-fixing agreement and would cause a suspicion whether there might be an agreement concerning not only prices of the input product, but also prices of the finished goods.

4. While assessing the situation with subsidiaries and parent corporations, there would be necessary to determine whether they can be considered as single economic entity, which is active in Lithuanian domestic market. On the other hand there for the establishment of the infringement of the activities of the cartel members there would not be any significant difference whether the finished goods are sold directly into the Lithuanian domestic market or whether they are sold through intermediaries which are headquartered in Lithuania and sell finished goods there.

1.1.3 Conspirators know that the cartel activity affects – and intend that it affect – your jurisdiction’s import or domestic commerce

5. For example,

- cartel members regularly discuss and take into account market conditions in your jurisdiction, or
- cartel members regularly track or monitor pricing and sales of finished goods in your jurisdiction, or
- cartel members know that a substantial percentage of finished goods containing cartelized inputs are sold in your jurisdiction.

6. If there would be evidence that could prove conspirators’ intention to affect imports or domestic commerce in Lithuania, this conclusion would cause suspicions that there might be a cartel agreement not only regarding prices of the input product, but also regarding other anticompetitive objective, for instance, object could be the exclusion of the undertakings which sell in Lithuania finished goods that consist input product of the other manufacturers – competitors of the conspirators. On the other hand, if conspirators also sell finished products in which price of the price-fixed product is incorporated, they would be interested in maintaining their market share of the finished goods in Lithuania by monitoring pricing of these goods and, when needed, they could take certain actions in order to regulate prices on the market or prevent other sellers of the finished goods from penetrating the market.

7. Conversely, suppose that the conspirators do not know or do not discuss whether the cartel activity will affect your jurisdiction.

8. If the conspirators don’t know that the cartel activity affects Lithuanian jurisdiction, in any event this circumstance won’t exempt them from the fact that they are infringing competition rules, which results in harm of the consumers in Lithuania.

1.1.4 There is evidence of direct contacts between the conspirators and companies in your jurisdiction

9. For example,

- negotiations that result in agreements, oral or written, directly between cartel members and purchasers in your jurisdiction, or
- sales by cartel members to direct purchasers of cartelized inputs outside your jurisdiction, which include terms that can be tied to negotiations between cartel members and customers in your jurisdiction or subsidiaries of customers in your jurisdiction, or
- some, but not all, cartel participants have direct contact with firms from your jurisdiction, and such contacts are known or foreseeable to other cartel participants.

10. The fact that cartel participants negotiate with the direct purchasers could show that the cartel in its self is likely to be not very reliable, because purchasers are able to negotiate the price. Thus there might be a lot of deviations from the cartelised price of the product which could show that the anticompetitive agreement is not fully implemented.

1.1.5 Evidence shows a direct correlation between prices of the cartelized input product and finished goods in your jurisdiction

- Pricing of the price-fixed product accounts for a large percentage of the price of the finished good.
- Evidence shows that the component's price is directly incorporated into the price of the finished good.

11. Evidence on direct correlation between prices would affect the analysis in that way that it would allow determining more precisely the influence of the price-fixing agreement to the general price level of the finished goods in Lithuania. From the purchasers' perspective, these evidences could show that the price increase of the finished goods is caused not by the actions of the sellers of the finished goods.

1.1.6 The conspirators attended price-fixing meetings in your jurisdiction

12. Alternatively, none of the conspirators' price-fixing meetings took place in your jurisdiction.

13. If it is known that the price-fixing meetings were held in Lithuania, this would affect the fact-finding procedure. There wouldn't be any necessity to ask for cooperation other competition authorities, because there would be all possibilities to take all required investigative measures on its own.

2. Key Issues and Questions for Discussion

2.1 Enforcement Actions/Prosecutions

2.1.1 What are your jurisdictional requirements before enforcement action can be taken? Are these jurisdictional requirements consistent with other general criminal law principles of transnational enforcement employed in your jurisdiction?

14. The Law on Competition of the Republic of Lithuania (hereinafter – the Law on Competition) states that this law shall also be applicable to the activity of the undertakings registered beyond the territory of the Republic of Lithuania if said activity restricts competition in the domestic market of the Republic of Lithuania.

15. According to this provision it is clear that the Competition Council of the Republic of Lithuania (hereinafter – the Competition Council), which supervises compliance with the Law on Competition, is authorized to take law enforcement actions, if Competition Council receives or collects enough data or documents that allow to reasonably suspect that anticompetitive activities of the foreign-based undertakings restrict or are able to restrict competition in Lithuania. So the conclusion can be made that the main requirement that must be fulfilled before enforcement actions can be taken is to have reasonable suspicion about the restrictive effect on competition in the domestic market.

16. It must be also mentioned that from 1 May 2004, when Lithuania became a member of the European Union, the Competition Council also has a right to apply Article 81 of the EC Treaty when anticompetitive agreements affect trade between Member States. So when there is a suspicion that foreign-based undertakings have agreed to set prices and that this agreement is able to affect trade between Member States, the Competition Council is also authorized to initiate enforcement actions against undertakings concerned and apply Article 81 of the EC Treaty vis-à-vis them. In this case the Competition Council, following the requirements set in the European 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) (hereinafter – Regulation 1/2003), must inform the European Commission before or without delay

after commencing first formal investigative measure. This information must be also available to the competition authorities of other Member States.

17. In Lithuania participation in cartel agreements is not a criminal offence. For this reason in case of application of the competition rules jurisdictional issues are not consistent with the criminal law principles of transnational enforcement.

2.1.2 *Which of the factors listed above are relevant, and which are not relevant, to your agency's decision whether to take enforcement action against an international cartel?*

18. While deciding whether to take action against an international cartel the Competition Council must take into account various factors. The most important factors would be those which could verify that cartel agreement between foreign-based undertakings has an effect of restriction of competition in Lithuania.

19. From the factors listed above the most relevant factors in this case could be the factors that anti-competitive overcharge is passed to the purchasers of the finished goods artificially increasing the price of the finished goods. An important factor could be the fact that conspirators intend to affect Lithuanian imports or domestic commerce which could be evident from the conspirators discussions about market conditions, monitoring of pricing and sales in Lithuania and from the fact that substantial percentage of the finished goods containing cartelized inputs are sold in Lithuania. A relevant factor in making a decision whether to take enforcement actions could be evidence of the direct contacts between conspirators and companies in Lithuania. Evidence of the direct correlation between prices of the cartelized input product and finished goods that are sold in Lithuania also could influence decision of the Competition Council to take enforcement actions. Suspicion of competition restriction in Lithuania could be also evident from the fact that conspirators attend price-fixing meetings in Lithuania.

20. Other factors from the list above could be taken into account during the investigation of the anticompetitive agreement – after the decision to take enforcement action against foreign-based undertakings concerned was made. These factors would be relevant in making a final decision whether the cartel in truth restricts competition in Lithuania.

2.1.3 *In considering whether to take enforcement action, do you consider whether other jurisdictions have imposed penalties for the same conduct?*

21. Considerations whether other jurisdictions have imposed penalties for the same conduct on conspirators in principle depends on the preliminary evaluation, whether the cartel effect trade between Member States, in other words – whether suspected anticompetitive agreement infringes only the Lithuanian Law on Competition or whether it could also infringe Article 81 of the EC Treaty.

22. This distinction is based on the consideration, that if agreement has effect on competition conditions only in Lithuania and it has no effect on trade between Member States, other jurisdictions could not impose penalties on the undertakings concerned for the same conduct, because no other jurisdiction has any rights to apply its competition laws in Lithuania – only Lithuanian Law on Competition could be applied in these cases and only Lithuanian Competition Council is authorized to apply it. That means that in any event there won't be any "same conduct" for which other jurisdictions could have imposed penalties.

23. But the different approach must be taken in cases when there is a suspicion that anticompetitive price-fixing agreement concluded between foreign-based undertakings has effects not only in Lithuania but also effects trade between Member States and thus infringes not only Lithuanian Law on Competition but also infringes Article 81 of the EC Treaty. It is important to mention, that in the Regulation 1/2003 it is stated that not only European Commission is authorized to apply Article 81 of the EC Treaty, but this right

also have national competition authorities of the Member States. This provision leads to the situation that it is theoretically possible that several different jurisdictions can take Article 81 of the EC Treaty enforcement actions. In cases like that it is important to consider whether other jurisdictions have imposed penalties on the undertakings concerned for the same conduct because it is important to avoid breach of principle *ne bis in idem*.

24. In order to avoid imposition of double penalties for the same conduct Regulation 1/2003 provides that where competition authorities of two or more Member States are taking enforcement actions under Article 81 of the EC Treaty against the same anticompetitive agreement, the fact that one authority is dealing with the case is sufficient ground for the others to suspend the proceedings before them or to reject the complaint. The European Commission may also reject to take actions on the ground that a competition authority of a Member State is dealing with the case. Where a competition authority of a Member State or the European Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

25. In order to verify whether the same conduct of the undertakings concerned was or is dealt by the other competition authority in other jurisdiction, European Competition Network (hereinafter – ECN) was created. Following the instructions laid down in the European Commission Notice on cooperation within the Network of Competition Authorities (hereinafter – the Notice on cooperation) competition authorities must decide which one or several of them will deal with the suspected anticompetitive agreement under Article 81 of the EC Treaty. Other competition authorities must suspend or withdraw their actions against the same conduct on the ground that another authority is dealing or has dealt with that case.

2.1.4 How do principles of international comity affect the decision to take enforcement action?

26. How principles of international comity affect Competition Council decision to take enforcement actions clearly shows the provisions laid down in the Law on Competition which states that this law seeks for the harmonization of the Lithuanian and the European Union law regulating competition relations. This provision is supported by the Regulation 1/2003 which states that the European Commission and the competition authorities of the Member States apply Community competition rules in close cooperation and that the competition authorities of the Member States may consult the European Commission on any case involving the application of the Community law. It is even forbidden for competition authorities of the Member States to take decisions which would run counter to the decision adopted by the European Commission.

27. Following these provisions the Competition Council in any event respects the principles of the international comity and makes decisions according to the established practice and recent developments in the competition policy of the international community.

2.1.5 Do you have jurisdiction over organizations and individuals that reside in other jurisdictions (through use of, for example, summonses, arrest warrants, and extradition measures)?

28. As it is mentioned above, Competition Council is entitled to investigate anticompetitive agreements or other practices exercised by the foreign-based undertakings if they affect on competition conditions in Lithuania. In order to adopt a final decision Competition Council needs certain information and other evidence to examine and evaluate all factual and legal circumstances in which practices under investigation were exercised. For this purpose the Competition Council can apply a set of different investigative measures, including inspection of the premises of the undertaking, request to give explanations and other information, etc.

29. In case when evidences, which are needed for the investigation of a case under Article 81 of the EC Treaty, are in another state, the Competition Council is entitled to ask for help through the ECN. This network enables all competition authorities to exchange and use information which has been collected by them for the purposes of applying Article 81 of the EC Treaty. Regulation 1/2003 also provides that competition authority of the Member State may ask another competition authority of another Member State for assistance in order to collect information on its behalf. It can also ask another authority to carry out fact-finding measures on its behalf. Where competition authority acts on behalf of another authority, it acts pursuant to its own rules of procedure and under its own powers of investigation.

30. In case when evidence, which are relevant for the investigation of a case only under the Law on Competition, the above mentioned cooperation through the ECN cannot be invoked. In that case general principles of international cooperation between authorities in different states should be applied. The Law on Competition does not have any special provisions for that.

2.1.6 How do the kinds of factors described above affect your determination of appropriate fines/penalties? Is this approach consistent with how effects are taken into account when determining fines/penalties in purely domestic cartel cases?

31. Basic principles of the determination of the appropriate fines are laid down in the Law on Competition. It states that in setting the amount of fine imposed on undertakings, the account must be taken to the gravity of the infringement, duration of the infringement, circumstances extenuating or aggravating the liability of an undertaking and influence of each undertaking in the commission of the infringement, if the infringement has been committed by several undertakings. Voluntarily putting an end to the effect of detrimental consequences of infringement after the commission thereof, rendering of assistance to the Competition Council in the course of investigation, compensation for the losses or elimination of damage are considered as extenuating circumstances. Obstruction of investigation, concealment of the committed infringement, failure to put an end to infringement notwithstanding the obligation by the Competition Council to discontinue illegal actions or repeated commission of the infringement for which the undertakings have been subjected to penalties provided for in this Law are considered as aggravating circumstances.

32. Most of the factors listed above would affect the determination of the fines imposed on the price-fixing cartel participants. The most important thing in any event would be the fact that is a hard core cartel, because price-fixing necessarily restricts competition in the relevant market and passing of the overcharge to final consumers harms their interest to get certain quality goods for reasonable price. Cartel participants' intention to affect the Lithuanian domestic market and direct contacts with the companies in Lithuania would confirm the purpose to restrict competition. These circumstances would affect the evaluation of the gravity of the infringement.

33. None of the factors would affect the evaluation of the duration of the infringement because they don't give any reference to the period of time when this cartel agreement was implemented. Also none of these factors would be considered to be extenuating or aggravating liability circumstances.

2.1.7 Do fines imposed in other jurisdictions affect the imposition and calculation of fines in your jurisdiction? If so, in what manner?

34. Sanctions for the breach of competition rules including fines are imposed and calculated exclusively following the provisions of the Lithuanian Law on Competition. For this reason imposition or no imposition of fines in other jurisdictions does not affect the decision of the Council of Competition to sanction undertakings involved in the cartel agreement and the calculation of fines imposed on them.

2.1.8 How important is consistency among different jurisdictions in determining your enforcement policy?

35. As it is explained above, the Competition Council in decision making process under competition rules set in the Law on Competition and the EC Treaty has a duty to ensure that there won't be any deviations from the common practice of the explanation and application of the competition rules. Thus the consistency among different jurisdictions plays very important role in determining Competition Council enforcement policy in respect of the uniformity of laws regulating competition relations.

2.1.9 If your jurisdiction has any cases that fit the described fact scenario, please describe

36. In Lithuania there were no cases that fit the described fact scenario.

2.2 Private Damages Claims

2.2.1 Does your law permit indirect purchasers to seek recovery of cartel damages?

37. In the Law on Competition there is a general provision that person whose legitimate interests have been violated by actions performed in contravention of competition rules laid down in the EC Treaty or in the Law on Competition is entitled to appeal to the court with a claim concerning the termination of illegal actions and/or compensation of damage incurred. In the Civil Code of the Republic of Lithuania there is also general provision that any person has a right to claim for compensation of damages that were suffered because of unlawful actions (including breach of Law on Competition) of the other person (including undertakings).

38. From these provisions it follows that even indirect purchasers are entitled to seek recovery of damages that were caused by the cartel participants, even if these participants are foreign-based undertakings. It must be kept in mind that in civil actions for recovery of damages the claimant has a duty to prove that certain damages is the result of the defendant's unlawful actions.

2.2.2 Have any indirect purchasers been successful in recovering damages? Why or why not?

39. Competition Council is not aware of any successful claims for recovery of damages of the indirect purchasers of the cartelized products.

2.2.3 What methodologies have been used to assess damages to these purchasers in civil actions related to cartels? Which ones have been successful? Why?

40. Since the Competition Council is not aware of any indirect purchaser's civil actions, it is impossible to describe methodologies of the damages assessment.

2.2.4 Does enforcement action by the antitrust agency concerning these types of cartel effects have any impact on civil actions and vice versa?

41. Competition Council decisions do not bind the courts in case of civil action if they are not approved by administrative court. However the Competition Council acting on its own initiative or by ruling of the court can be involved in the civil proceeding and give its conclusions on the evaluation of facts or other circumstances. Its decisions and conclusions are considered to be evidence in civil action cases and only the court after evaluating all evidences is entitled to adopt final decision.

42. Final decisions of the court in civil and administrative cases have binding effect on the Competition Council and it cannot dispute facts and assessment established in them.