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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

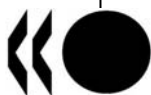
Contribution from Lithuania

-- Session II --

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-- Lithuania --

1. Existing tools for international co-operation

1.1 Formal mechanisms

1. The primary legal basis for the co-operation between the European Commission, national competition authorities of the Member States (known as the European Competition Network, “ECN”) and the Competition Council of the Republic of Lithuania (“the Competition Council”) is established in 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 (“Regulation No 1/2003”). The Regulation No 1/2003 gives grounds for the assistance on carrying out particular investigative actions, such as exchange of information, exercise an inspection in the undertaking concerned and other actions necessary for the investigations of infringements of Articles 101 (prohibition of anti-competitive agreements) and 102 (prohibition of the abuse of dominance) of the Treaty on the Functioning of the European Union (“TFEU”). The Competition Council is a member of the ECN. It is also necessary to mention that the Regulation No 1/2003 establishes such clauses on co-operation that give power the Commission and the competition authorities of the Member States to consult and to provide one another with and use evidence any matter of fact or of law, including confidential information. Additionally, the requested agency may conduct dawn raid on behalf of the requesting national competition authority or the European Commission.

2. As to the international co-operation, the Law on Competition of the Republic of Lithuania indirectly foresees a right of other specialists and experts to participate in the investigations. Under Article 26 (1)(9), “The authorized officers of the Competition Council, carrying out investigations, shall have the right to enlist the assistance of specialists and experts”. Having regard to this article, it might be deemed that officials, experts and specialists from other countries, whose names are enlisted in the court authorization (the Law on Competition requires a court authorization in order to carry out the inspection) could take part in the inspection.

3. Moreover, the Competition Council has two bilateral agreements with the agency of the Republic of Kazakhstan for Competition Protection (Antimonopoly Agency) and Antimonopoly Committee of Ukraine.

4. The agreement with the agency of the Republic of Kazakhstan for Competition Protection was signed in 2010 and concerns mainly cooperation in the area of competition policy and law, such as sharing non-confidential information related to competition policy and law development. It also establishes internship possibilities, trainings and consultancy for the personnel of the Agency in the area of competition law and policy development. It is worth noting that the agreement with the Antimonopoly Agency is drawn in a rather general manner that does not establish any clear basis for co-operation on investigations in cartel cases.

5. The agreement on co-operation between the Competition Council of the Republic of Lithuania and Antimonopoly Committee of Ukraine is more detailed and contains clauses on both co-operation in the

area of competition law and policy, trainings on sharing of experience, and assistance in carrying out investigations of anti-competitive behaviour. The clause on information exchange includes the ability to exchange information necessary for a successful co-operation in cartel investigations. Information being exchanged includes documents of entities or their approved copies, references, explanations, reports, communications and other written documents needed for investigations to be properly carried out.

6. None of these bilateral co-operation agreements have so far been used in practice.

1.2 *Informal mechanisms*

7. The Competition Council has not yet extensively used informal mechanisms of co-operation, particularly in carrying international dawn-raids. The reason for this is that the co-operation in cartel investigation cases is rather formal by its very nature, in particular due to many legal formalities and other procedural issues. For example, during investigations many questions, regarding the protection of confidential and other collected information, its disposal, transmission and sharing, also many procedural questions on the mechanism of co-operation itself, on legitimacy of actions carried out in one country by the specialists of another country, etc. arise, which usually cannot be solved informally. Despite of this, the Competition Council has some experience of informal co-operation too. It should be stressed, however, that any informal cooperation is carried out in compliance with the obligation to protect confidential information and other procedural rules, ensuring legitimacy of the investigations.

8. Participation of experts of the Competition Council in various working groups and workshops is one of the informal mechanisms for co-operation in cartel investigation cases. For example, experts of the Anti-competitive Agreements Division of the Competition Council regularly attend discussions of the ICN Cartel Working Group and European Competition Network (the “ECN”). While the nature of the discussions varies a lot, some of the most relevant ones include bid rigging, its detection, prevention, etc. Specialists of the Competition Council have also participated in other similar ECN and international projects which substantially contributed to the quality of the investigation of cartel cases, i.e. participation in Forensic IT project which deals with forensic IT tools used in investigations and dawn-raids. Participation in the ECN meetings, trainings, communication with its members might be deemed as other informal means of co-operation in investigating cartel cases.

9. Moreover, sometimes investigations of anti-competitive behaviour could be initiated due to an informal co-operation as well. For instance, the Competition Council initiated its investigation after receiving some specific non-formal information regarding particular industry sector and problems occurring therein, from another competition authority from a Member State. Similarly, the Competition Council itself is also spotlighting some issues that could be interesting to other competition authorities.

10. Finally, although it was mentioned, that due to the nature of cartel investigations, most of procedures related with it are formal, it also must be pointed that a lot of preparatory work of the co-operation with another institution in cartel investigations is carried out in an informal manner. For example, the time and date, or other circumstantial details of international dawn-raid are usually arranged through informal inter-institutional communication.

1.3 *The use of OECD instruments*

11. The following OECD instruments have been applied by the Competition Council in the year 2010.

- Policy Roundtables – Cartel Sanctions, Direct Settlements, Prosecuting Cartels;

- Reports on Hard-Core Cartels;
- Best Practices on Information Sharing in Cartel Investigations;
- Policy Briefs – Prosecuting Cartels without Direct Evidence, Fighting Cartels in Public Procurement, Using Leniency to Fight Hard Core Cartels;

12. These documents were used to focus cartel investigations. It should be noted that the number of complex cartel cases with indirect evidence has been rising in Lithuania recently, thus, the Competition Council applied OECD instruments which played an essential guiding role and were applied to support some investigations. Secondly, the amount of investigations regarding cartels in public procurement has also increased, therefore, the OECD instruments, opinions, discussions and experience provided by other countries concerning investigations of cartels in public procurement are considered to be very useful when carrying out investigations.

- Policy Roundtables on Market Studies and sector overview were used with the aim to better understand relevant markets and industries. It was, particularly, helpful in handling cases and conducting market researches.

2. Types of co-operation

13. During its experience with cartel investigations the Competition Council has requested for and received various types of co-operation from other competition agencies, grounding such co-operation on the provisions of the abovementioned Regulation No. 1/2003, as well as co-operating and communicating informally.

14. The Competition Council assisted in the dawn-raids that were carried out in the Republic of Lithuania on behalf of the Latvian Competition Authority and by the European Commission in their cartel cases investigations. Moreover, experts of the Latvian Competition Authority have assisted the Lithuanian Competition Council by carrying out dawn-raids in Latvia in a case where the undertakings were suspected of behaving anti-competitively both in Lithuania and in Latvia. Although this case concerned abuse of dominant position, co-operation with the Latvian Competition Authority was nevertheless successful and efficient and contributed to the strengthening of mutual institutional collaboration. In another case, Lithuanian Competition Authority experts were assisted by Latvian colleagues in a dawn-raid carried out in Latvia with experts of both institutions participating.

15. Besides co-operation in dawn-raids, the Competition Council also requested (and was requested itself) for advisory co-operation, especially through the use of requests for information (the “RFI”) of the ECN. RFIs are very useful in many different aspects of cartel investigations, this network enables all the EU competition authorities and the European Commission to share and discuss their experience, give advice and ideas on various topics and problematic issues. There is no limitation on the diversity of topics that can be discussed though the ECN by the RFIs, therefore both substantive issues (like market definition or theory of harm) and procedural aspects (like imposition of fines or disclosure of information, etc.) of the cases can be shared. However, it also must be stressed that the ECN and, more precisely, the RFIs are not intended to be used for exchanging data of particular cases, it is virtually designated to share opinions and/or information of a rather general nature. For information on sharing the data of particular cases, please see Section 5 below.

16. Usually the co-operation of the Competition Council with other competition authorities takes place in writing in paper or by e-mails. However, sometimes telephone calls can also be made or various issues can be discussed during regional or international meetings.

3. International vs. regional co-operation

17. The Competition Council principally collaborates with all ECN members (particularly in cases of RFI). In the view of co-operation with specific national competition authority, taking into account the fact that until now the Competition Council has carried out cross-border investigations only with the Latvian Competition Authority and having regard to the frequency of other types of assistance with this agency; it should be deemed that the Competition Council collaborates with Latvian competition authority the most. This phenomenon could be explained by the fact that undertakings which engage in cross-border economic activity usually do it in the region of the Baltic States (typically in Lithuania and Latvia).

18. As to the cooperation with other authorities, the Competition Council co-operates more with authorities of the adjacent countries compared to countries further away from Lithuania. However, the frequency of co-operation with other countries is hard to define since the Competition Council collaborates every time when it is necessary or receives a request from other national competition authority.

3.1 Regional co-operation

19. As it was already mentioned above, since the Competition Council is a part of the ECN, the co-operation with the members of this regional network includes various types of assistance necessary to properly exercise the investigations relating to cross-border infringements. It is worth noting that the Competition Council has assisted not only the national competition authorities but also the European Commission: there were two dawn raids exercised in the Republic of Lithuania jointly with the European Commission.

20. Moreover, in the context of regional co-operation, there are annual conferences organized by the neighbouring countries in the region of the Baltic Sea. The aim of these meetings is to share information and experiences obtained in practice of each of the authorities. The participant states are usually Lithuania, Poland, Latvia, Estonia, Sweden and Finland, with other authorities participating as guests of the conference at times.

3.2 Co-operation with newer agencies

21. In order to answer if the Competition Council is a mature or newer agency, the facts that Lithuania is a part of the EU and the existence of compliance of Lithuanian competition rules with the EU competition legal order, also the practice of the Court of Justice of the European Union is being applied by Lithuanian institutions and the national courts should be taken into account. Besides, since the Competition Council shares its experience with other agencies from third countries, it might be deemed to be a mature agency.

22. It is necessary to note that the Competition Council jointly with the German Federal Ministry of Economics and Technology is currently implementing the EU Twinning Project “Strengthening the Enforcement of Competition and State Aid Legislation in Armenia”. Under the auspices of this program, the Competition Council analyses Armenian competition cases and legislation. Additionally, in the beginning of November 2011, the Competition Council organised training sessions for the delegation from the State Commission for the Protection of Economic Competition of the Republic of Armenia. During the training week, the staff of the Lithuanian Competition Council presented the national legislations and its application, as well the peculiarities of the co-operation inside the Competition Council between separate divisions.

23. Furthermore, there were internships and trainings arranged for the employees of national competition authorities from Ukraine and Kazakhstan.

4. Identifying gaps and improving the current frameworks

24. As mentioned above, the Competition Council has not yet had much practice in international or regional co-operation regarding investigation of particular cartel cases, so it is difficult to point what are the main challenges we are facing. Until now, there have been no procedural issues during co-operation in dawn-raids. However, one of the substantial issue arising during co-operation of cartel investigations is the insufficient amount of relevant information on a particular case. The situation might have resulted from the fact that the Competition Council was only an assisting authority and did not carry out the investigation itself, therefore, it had only the key information and facts of the particular case and, consequently, any specific knowledge on the details of the case was lacking. Therefore, during the dawn-raids carried out by the Competition Council in Lithuania on behalf of another national competition authority, some details and/or circumstantial evidence might be overlooked. In order to avoid this problem, an expert of the initiating competition authority could be designated in more international dawn-raids who could settle such situations, when questions about the relevance of evidence arise.

25. Due to the same reason low number of instances of practical application of international co-operation in cartel investigation cases, the Competition Council has not so far had any experience concerning different types of liability in competition cases involved.

26. As to the co-operation with experts of the European Commission, it should be noted that no problems arose during the dawn-raids, carried together with the Commission in Lithuania. First of all, the reason for this was that all dawn-raids of the Commission were carried out according to the provision of Regulation No. 1/2003, so naturally there were no contradictions with national proceedings. Secondly, national proceedings in competition cases in Lithuania are basically in conformity with the Regulation No. 1/2003, This is due to the fact that prior to the accession of Lithuania to the EU Lithuania had to ensure that its legislation was in compliance with the EU Regulations and laws, and, particularly, to ensure that the practice of application of national laws in this field shall be consistent with the application of the EU law.

5. Information Sharing

27. In all cases of co-operation in cartel investigations, the Competition Council has only collaborated with competition authorities that apply European Union rules on information sharing in competition law cases, i.e. the European Commission and Latvian Competition Authority. Therefore, all the questions that arose or could have arisen as regards the sharing and use of information, gathered during international co-operation, were handled in conformity with Regulation No. 1/2003 Article 12, which reflects the principle of mutual recognition of Member States.

28. This article provides that for the purpose of applying Articles 101 (prohibits anti-competitive agreements) and 102 (prohibits abuse of dominant position) of the TFEU the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. According to the rules, information exchanged shall only be used in evidence for the purpose of applying Article 101 or Article 102 of the TFEU and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to EU competition law and does not lead to a different outcome, information exchanged under this article may also be used for the application of national competition law. It should also be mentioned that in some circumstances information, shared in conformity with the requirements of this article, can be used against natural persons.

29. Talking about practical enforcement of the information sharing issue, it should be mentioned that in the case when the Competition Council carried out a dawn-raid in Lithuania on behalf of the Latvian Competition Authority, the Lithuanian Competition Council was responsible to ensure safe and confidential transportation of the collected data to the Latvian Competition authority. This duty is derived from the Regulation No. 1/2003. However, if the information shared does not fall within the scope of application of the Regulation No. 1/2003, then, according to the Law on Competition of the Republic of Lithuania, article 22, the Competition Council would not have any other legal basis for disclosing of and sharing confidential information.

30. As to the sharing of information that has been received as a leniency application, the Law on Competition of the Republic of Lithuania does not have a direct provision regulating this issue. Moreover, the practice of all Member States of the EU is also divergent and not harmonized.

6. International co-operation within other policy areas

31. Considering international co-operation within other policy areas and taking into account the fact that the Competition Council has modest experience in international investigations, the Competition Council is, however, not aware if other law enforcement areas face any specific challenges or problems in international co-operation as those faced by competition authorities in cross-border cartel cases.

32. Additionally, until now the Competition Council has not had yet any special discussions with other regulatory authorities on common problems that the institutions are facing in international co-operation.