

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

**ROUNDTABLE ON EX OFFICIO CARTEL INVESTIGATIONS AND THE USE OF SCREENS TO
DETECT CARTELS**

-- Note by Lithuania --

This note is submitted by Lithuania to the Competition Committee FOR DISCUSSION under Item X at its forthcoming meeting to be held on 30-31 October 2013.

JT03345735

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ROUNDTABLE ON EX OFFICIO CARTEL INVESTIGATIONS AND THE USE OF SCREENS TO DETECT CARTELS

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1. Introduction

1. The policy of the Competition Council of Lithuania (CC) towards detecting cartels covers a variety of techniques and methods, including a mix of both reactive and proactive methods. Since 2004 the CC launched 41 cartel investigation cases, 14 of which (35%) were opened under its own initiative and 27 (65%) were the outcome of external event to take place before the CC became aware of an issue.

2. The CC does not prioritize reactive over proactive methods of cartel detection or vice versa and tries to ensure a balanced portfolio approach. A combination of both reactive and proactive methods enhances the overall effectiveness and enforcement of our cartel detection program.

3. This contribution includes a brief overview of the methods used by the CC to detect cartels, including the attempts to implement screening methods, and discussion on collaboration with public procurement officials.

2. Reactive methods of detecting cartels

4. Article 24 of Law on Competition of the Republic of Lithuania (hereinafter – Law on competition) states that there are three main subjects that are entitled to request to launch an investigation of restrictive practices, namely:

1. undertakings whose interests have been violated due to restrictive practices;
2. entities of public administration;
3. associations or unions representing the interests of undertakings and consumers.

5. Additionally, consumers may submit a complaint regarding the violation of their interests suggesting the CC to initiate an investigation.

6. The CC has established a formal complaint system in place for receiving, handling and responding to complaints. The request to carry out an investigation must be submitted in a written application, specifying the facts and circumstances of restrictive practices of which the applicant is aware and must also be accompanied by the documents confirming the above mentioned facts and circumstances. The CC must examine applications submitted in relation to restrictive practices not later than within 30 days from submission of the application and documentation and take a decision to launch or refuse to launch the investigation.

7. In terms of the reactive measures, the complaints are still the predominant method of cartel detection. During the past 10 years, 27 cartel investigations were launched through a complaint, 19 of

which were submitted by local authorities or public administration bodies in cases of price fixing and bid rigging/ collusion in public procurement projects as opposed to 7 investigations launched after the complaints from undertakings or customers have been received.

8. Furthermore, in 2008, the CC instituted a leniency programme by adopting Rules on Immunity from Fines and Reduction of Fines ('the Leniency Rules') that were applicable solely to horizontal agreements among competitors. Since the day the leniency programme was launched, the CC has received 3 applications so far. In two cases, the leniency applicants were granted a total immunity, while in the third case, it was established that the applicant had not engaged in a prohibited cartel activity at all. The leniency notice was later broadened to include vertical RPM agreements, however, no immunity was granted based on this amendment so far.

9. In conclusion, 27 of the above mentioned investigations resulted in 17 (58%) cases where cartel conduct has been uncovered. It is interesting to note that 65% of the successful enquires concerned public tender proceedings.

3. Proactive methods of detecting cartels

10. Article 24 paragraph 2 of Law on Competition states that the CC is also entitled to have the right to start an investigation on its own initiative by adopting a reasoned decision. The CC employs various proactive methods to detect cartels, including media and Internet monitoring, use of economic analysis and collaboration with state agencies. Different methods of detecting cartels are expected to assist the CC to identify suspicious behaviour, initiate subsequent cartel investigations and to better uncover cartel conduct.

11. However, no specific framework or procedure for initiating *ex-officio* cartel investigations is in force, therefore, the CC follows the same procedure for launching investigations following either reactive or proactive methods. The CC opens an investigation if there are reasonable grounds and evidence to suspect that the anti-competitive behaviour might have occurred. Accordingly, since 2004 the CC has established cartel conduct in 6 out of 14 cartel investigation cases (42%) launched at its own initiative.

3.1 Media and other public resources

12. The CC has been regularly and consistently monitoring media and the Internet. Once the CC official becomes aware of information that might be significant for detecting cartels, the information is transmitted to the concerned division within the CC. Media monitoring remains the main proactive method to detect cartels, which has already resulted in 10 cartel case initiations so far, in 5 of which cartel conduct was detected.

13. While monitoring media reports, the CC had reviewed information, including interviews of companies providing comments on their behavior as well as speculations about trends and pricing or allegations that other market players are engaged in anti-competitive activities. As a result, the CC has successfully uncovered cartel agreements on common prices¹ and exchange of confidential information².

14. The CC has also used press releases to detect other alleged anti-competitive activities. Recently, the CC opened an investigation into the market of the retail sales of clothing, after the CC officials brought relevant information on resale price maintenance (RPM) to the attention of the Anti-competitive Agreements Division within the CC. The comments on RPM were provided by the executive officer of an

¹ For example, *Lithuanian shipbrokers and agents society case* (2S-25, resolution of 8/12/2011) http://www.kt.gov.lt/index.php?show=nut_view&nut_id=1330

² *Paper wholesalers case* (2S-13, resolution of 26/10/2006) http://kt.gov.lt/index.php?show=nut_view&nut_id=695

international chain of fashion department stores and published on a website of financial and business news. The investigation is still ongoing.

3.2 Liaison with other state agencies

15. Liaison with other domestic law enforcement agencies has also brought forth useful leads.

16. In 2009, the Police Department under the Ministry of Interior reported suspected cartels to the CC after it had encountered relevant evidence during the course of its own investigations. Accordingly, the CC has successfully uncovered a bid rigging cartel in the car rental market³. In another case, collaboration with National Audit Office of Lithuania and Lithuanian Road Administration under the Ministry of Transport and Communications also led to the CC opening an investigation into a possible bid rigging in the road building market which, however, was terminated due to the lack of evidence.

17. Additionally, collaboration with other state agencies has also been beneficial in investigating anti-competitive agreements. In 2007, the CC received information provided by the Ministry of Health of the Republic of Lithuania regarding the possible anticompetitive vertical agreements between producers / suppliers and wholesalers of pharmaceuticals with regard to their participation in public procurement tenders. In the given case, the CC closed an investigation, following commitments proposed by eight pharmaceutical companies⁴.

3.3 Analysis of previous cases

18. The CC once launched an investigation after important background information on bid rigging was gathered in market analysis undertaken in a non-cartel investigation. Even though the analysis of previous merger case has indicated possible cartel conduct and the CC opened investigation into the press service market, the existence of a cartel was not established.

19. The CC has also triggered investigations following analytical tools of cartel detection trying to identify allegedly cartelized markets.

3.4 Economic studies and systematic monitoring of industry activities

20. In 2009, the CC observed significant retail price fluctuations (increases) in the retail fuel market which, according to the information available to the CC at the time, could not have been reasonably justified by the changes in oil prices. Such preliminary analysis led to a launch of an investigation into potential anti-competitive agreements. However, the evidence gathered during the investigation led to a subsequent closure of an investigation, since the evidence did not prove existence of an anti-competitive agreement in the sector.

21. Later, in 2010, after having observed substantive price increases in August – September 2010 in the food retail sector and having received additional information from the Ministry of Agriculture, the Competition Council has conducted an assessment of the change in the key input prices as well as the wholesale and retail prices for dairy and grain products. The study showed that recent increase in the input prices alone did not fully account for the extent of the increase in the retail prices for dairy and grain products in the country. The analysis of the CC revealed that the prices for food products (milk and milk products, flour, bakery goods) had not increased exclusively for objective economic reasons and that the

³ *AB Autoūkis, UAB Autodina, UAB Moller Auto case* (2S-28, resolution of 11/11/2010)
http://kt.gov.lt/index.php?show=nut_view&nut_id=1189

⁴ *Pharmaceutical companies case* (1S-137, resolution of 21/07/2011)
http://kt.gov.lt/index.php?show=nut_view&nut_id=1286

fluctuations could have emerged due to a weakening of competition. Based on these findings, the CC has opened an investigation into possible anti-competitive behaviour in the groceries sector with regard to the substantive price increases. The high profile investigation, which is still ongoing, is aimed at assessing whether a number of undertakings engaged in the production and / or marketing of food products have participated in anti-competitive agreements or concerted practices that could have possibly led to the increase in retail prices of mentioned products.

3.5 Screening

22. In the CC practice, the methods of screening based on economic evidence have not been widely implemented since implementation of such screening mechanism requires extensive resources and does not necessarily provide precise results.

23. Nevertheless, it must be mentioned that the CC has recently obtained more comprehensive access to the database of the Public Procurement Office of Lithuania, so screening for alleged cartel conduct in public procurement became more efficient. While applying behavioural screens, the CC tries to detect the sequence of winning suppliers, the rotation among them or possible market allocations. The reliable empirical evidence gathered during analysis is useful in identifying suspicious bid rigging in public procurement tenders.

24. In terms of structural screens, the CC has applied them only once in the course of full investigation into the fuel market. Having data available for the application of screens, the structural screens were chosen as the most appropriate to indicate whether the market concerned may indicate potentially anti-competitive activity. However, the application of cartel screens has not provided reliable results since they varied significantly depending on the screen used. Therefore, the possibility of further development of screening would be considered if a more reliable methodology of screening and appropriate data for such screening were available to the CC.

4. The effectiveness of anti-cartel enforcement

25. As the analysis of cartel investigations has shown, 62% of reactive investigations resulted in finding a cartel conduct as opposed to 46% of the investigations launched by the initiative of the CC that had the same outcome. However, a slightly higher rate of successful investigations following reactive methods to detect cartels does not eliminate or lessen the employment of proactive tools in the CC's practice. Every time the CC evaluates the possible effects the investigation could bring on a case by case basis.

26. On 2 July, 2012, the CC adopted a Notice on Agency's Enforcement Priorities ('Notice') which makes it possible to prioritize between investigations more efficiently. The Notice outlines a single priority of the Competition Council, which is to ensure the highest consumer benefit. Notice also outlines three main principles to prioritize investigations:

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

27. Consequently, in the practice of the CC there is no actual prioritization over cases initiated *ex-officio* and initiated otherwise as long as the highest consumer benefit is ensured and sensitive markets are

approached. The CC identifies and promotes those market interventions that significantly contribute to the protection of effective competition with the purpose of maximizing consumer welfare.

28. In order to make the assessment of the potential impact more objective, the CC has analyzed methodologies for calculation of impact of conducted investigation applied by different competition authorities around the world, while using the methodology applied by the UK Office of Fair Trading (OFT) as the basis for its own assessment.

29. The general principles of impact assessment are the following: first, the annual impact on consumers of price-fixing is estimated by multiplying the turnover of the affected goods and services by the price increase caused by agreement; second, the annual impact is multiplied by the number of years the cartel may have remained operational. The value is adjusted by the social discount rate in order to estimate future consumer savings.

30. As a result, even though reactive methods still play dominant role in practice, the CC tries to be increasingly active in the fight against conspiracies using proactive methods as it also allows uncovering harmful cartels.

5. Collaboration with procurement officials

31. While it is the Public procurement office that implements the public procurement policy and supervises the procedure of public procurement, the CC tries to ensure effective cooperation with contracting authorities as far as ensuring competition in public procurement is concerned. The CC officials have run seminars for the contracting authorities on how to detect possible cases of collusion in public tenders. The training courses were mainly focused on identification of 'suspicious' bidding patterns unusual in competitive bidding markets. Furthermore, seeking to highlight the usual cartel conduct indicators, the CC publishes the guidelines for detecting bid rigging in public procurement on its website that is based on the OECD *'Guidelines for Fighting Bid Rigging in Public Procurement'*. Consequently, more external players are informed of possible threats regarding public procurement and become aware of the illegality and potential harm of cartels.

32. The above mentioned training for procurement officials has already triggered a couple of successful investigations, and it is strongly believed that increasing awareness among public procurement agencies and large private organizations of unlawful bidding patterns can help to uncover more cartel conduct in the future. As the data shows, 70% of all the complaints submitted concerned bid rigging practices, which might be an indicator that contracting authorities and state agencies become aware of the threat underpinning the public procurement and advocacy may be playing a role in this awareness.

6. Conclusion

33. As shown above, the CC recognizes both proactive and reactive measures of detecting cartels. In terms of reactive tools, the complaints remain the main method to identify cartel conduct, while media monitoring is prevailing among proactive tools of cartel detection. However, screening mechanisms have not been widely used by the CC so far. The CC would consider applying screens in case more reliable screening mechanism and sufficient internal resources are available to the CC.

34. Increasing general external education among public procurement officials has been acknowledged as beneficial and effective with regards to the fact that more contracting authorities become aware of threats of collusion and monitor the bids in public procurement procedure. Increasing number of complaints of contracting authorities or procurement offices regarding bid rigging is a major sign of increased awareness.