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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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ROUNDTABLE ON MERGER REMEDIES

-- Note by Lithuania --

This note is submitted by the Lithuanian Delegation FOR DISCUSSION at the forthcoming meeting of the Competition Committee (15, 16 and 17 October 2003). This specific item will be discussed on Friday 17 October (morning).

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CONTRIBUTION FROM LITHUANIA

1. Merger review is supposed to tell how to eliminate a threat to competition posed by a merger. Lithuanian Competition Council fully agrees with the four general principles contained in a recent speech by Deborah Majoras and cited in the Merger Remedies Roundtable Issues paper. However, the idea of supplementing the aforementioned principles with the principle of relying on post-merger remedies to take care of competition problems if and when they actually arise seems to be controversial. It is true that quite often competition authority does have discretion concerning the choice of remedies including an alternative not to impose any *ex ante* remedy. The Competition Council in Lithuania is no exception. The Lithuanian Competition Law can be interpreted as allowing such possibility. However, if such approach were used systematically then competition authority would de facto abandon merger control and it should be hard to find reasonable justification for doing so. It seems that only under very unusual and exceptional circumstances it might be reasonable to restrain from *ex ante* remedies. Furthermore, there might be dangerous to attempt to formulate explicit rules stipulating when such approach could be used. It could be tempting to test the limits of such rules by allowing some mergers to proceed and making it much more costly to deal with *ex post*. The expected costs would most likely outweigh the expected benefits.

2. Concerning another focal problems raised in the Roundtable Issues paper, that is the choice between a structural and behavioural approach and implementation of remedies, the Competition Council considers a structural approach to be superior choice in most of the cases. This belief is based mostly on a relatively short experience (only a decade) of a merger review. To illustrate it the rest of this contribution will be devoted to two actual merger cases that the Competition Council of the Republic of Lithuania had to deal with several years ago and one complicated merger case that the Competition Council prepared to investigate but did not have to since the merger was abandoned. All of those mergers were horizontal and after considering various alternatives the Competition Council had little doubt that structural approach should be used in selection of adequate remedies.

A merger of business undertakings involved in scrap metal purchasing and processing

3. In 2000 closed stock company *Vitoma* notified the Competition Council about its intent to acquire shares of four companies offered for privatisation, that is 70.09 percent of shares of stock company *Antrimeta*, 70 percent of shares of the closed stock company *Ikrova*, 70 percent of shares of the closed stock company *Metalo lauzas*, and 70 percent of shares of the closed stock company *Antriniai metalai*. All of those companies were involved in purchasing and processing of scrap metal, the relevant market defined as purchasing of scrap metal in the territory of Lithuania. The sum of the pre-merger market shares of all involved companies was close to 48 percent and the sum of the pre-merger market shares of the target companies made up approximately 22.5 percent. The Competition Council came to the conclusion that the proposed merger would have established a dominant position and thus would have resulted in a substantial restriction of competition in the relevant market. Upon making the final decision the Competition Council took into account the evidence concerning significant economies of scale, presence of buyer power, relative weakness of the sellers, difficulty of a large-scale entry, and long-term export contracts with a large foreign buyer. All these circumstances were conducive to the ability to depress prices post-merger in the relevant upstream market. *Vitoma* did not propose any remedies at that time and the Competition Council refused to grant a permission to implement the concentration on the basis of the submitted notification.

4. After some time *Vitoma* submitted a new notification to the Competition Council concerning the same acquisition, however, simultaneously proposing to sell some of its physical assets. Even though they did not constitute stand-alone ongoing business such divestiture would have resulted in a significant reduction of *Vitoma's* productive capacity. The new investigation also showed recent changes in the distribution of market shares. *Vitoma's* market share decreased because of a new entry. This was related among other factors to the substantial decrease of the licence fee set by the government. The Competition Council accepted the proposed remedies and permitted concentration under certain matching conditions and obligations.

5. In our view this case can be characterized by the following features:

- Horizontal merger;
- Structural remedy: divestiture of business related assets;
- Effectiveness: eliminated threat to competition;
- Administrability: clean sweep divestiture, upfront buyers.

A merger of breweries

6. In 2000 *Carlsberg* A/S and *Orkla* ASA announced their plans to create *Carlsberg Breweries* A/S. The new company was supposed to be owned 60 percent by *Carlsberg* A/S and 40 percent by *Orkla* ASA. Despite the fact that foreign companies were involved in this merger it did threaten competition in Lithuania. All three largest Lithuanian breweries, that is stock company *Kalnapilis*, closed stock company *Utenos alus*, and stock company *Svyturys*, were directly or indirectly controlled by the merging foreign companies. The sum of pre-merger market shares of the aforementioned Lithuanian breweries was approximately 60 percent, however, they had more than 90 percent in the premium beer segment. The Competition Council came to the conclusion that intended concentration would have strengthened a dominant position in the relevant market (*Kalnapilis* and *Utenos alus* were already controlled by the same parent company) and therefore would have significantly restricted competition. The Competition Council informed representatives of the merging parties and started negotiations concerning adequate remedies. Since all three Lithuanian breweries directly affected by the merger were approximately of equal size the Competition Council insisted that the only adequate remedy was to sell one of the breweries in a time period prescribed by the Competition Council. Thus the final decision contained the following conditions and obligations. First of all, *Carlsberg* A/S (parent company of *Svyturys*) and/or BBH (parent company of *Utenos alus* and *Kalnapilis*) were obligated to sell an unspecified brewery (either *Svyturys* or *Kalnapilis* or *Utenos alus*) within the prescribed time limit. Secondly, until the divestiture *Carlsberg* A/S was obligated to maintain viability of the aforementioned breweries. Later the Competition Council agreed to extend imposed time limit for divestiture for a reasonably short period of time and finally one of the breweries (*Kalnapilis*) was divested.

7. In our view this case can be characterized by the following features:

- Horizontal merger;
- Structural remedy: divestiture of stand-alone ongoing business;
- Effectiveness: eliminated threat to competition;

- Administrability: clean sweep divestiture completed in a short period of time, however, some monitoring was required to ensure compliance with obligations.

Intended merger of banks

8. In 2001 the Competition Council received a request from the Estonian bank AS *Hansapank* to permit the acquisition of more than 90 percent of the shares of the stock company *Lietuvos taupomasis bankas* (Lithuanian Savings Bank) which was owned by the state and offered for privatisation. This was a horizontal concentration in the market of financial services but by itself it did not threaten to create a dominant position. However, almost at the same time when the Competition Council was reviewing the merger the announcement was made by *Forenings Sparbanken* AS (*Swedbank*) and *Skandinaviska Enskilda Banken* AB (SEB) about their intention to merge. *Swedbank* was a strategic shareholder of AS *Hansapank* and SEB was a strategic shareholder of *Vilniaus Bankas*. The sum of market shares of the two largest Lithuanian banks, that is *Vilniaus Bankas* and *Lietuvos taupomasis bankas* exceeded 40 percent threshold for several key financial services. Thus it was very likely that the latter merger would have created a dominant position in Lithuania. Nevertheless, the intended merger of Swedish banks was not even notified to the EU Commission at that time. Therefore the Competition Council only communicated its view to the relevant parties and governmental institutions in Lithuania that the only possible solution if both mergers took place would have been divestiture of one of the banks in Lithuania but before the beginning of implementation of the merger of Swedish banks there was no ground to block the acquisition of *Lietuvos taupomasis bankas* by AS *Hansapank*. The Competition Council also contacted the European Commission and Swedish competition authority.

9. Later the Competition Council received a letter from the SEB and *Swedbank* confirming that the merging parties agreed with the divesture of one of the banks in Lithuania in case their merger was allowed to proceed. However, having received the statement of objections from the European Commission the SEB and *Swedbank* abandoned their intentions to merge.

10. In our opinion this case can be characterized by the following features:

- Two separate horizontal mergers;
- Structural remedy: divestiture of stand-alone ongoing business if the second merger takes place;
- Effectiveness: eliminated threat to competition;
- Administrability: clean sweep divestiture but unlikely in a short period of time, extended monitoring would have been needed ensure compliance.