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ROUNDTABLE ON INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER COMPETITION LAW

-- Note by the Delegation of Lithuania --

This note is submitted by the delegation of Lithuania to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2010.

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ROUNDTABLE ON INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER COMPETITION LAW

-- Note by Lithuania --

1. General effects of enhanced price transparency

1. As far as this part according to its title considers general effects of enhanced price transparency, in this 1st part of written contribution issues related to price transparency will be discussed. As for enhanced transparency through other kind of information, these issues will be more detailed discussed in the 2nd part of this written contribution.

1. Please describe one or more actual situations in which transparency played a role in the degree of competition in the market. Are there cases in your jurisdiction where changes in the degree of transparency clearly resulted in changes in the existing degree of competition?

2. First of all, it must be noted, that following provisions of the Lithuanian Law on Competition, relevant EU legislation (in this case Article 101 of the Treaty on Functioning of the European Union (TFEU), which the Lithuanian Competition Council is also entitled to apply directly), national and EU case-law, any agreements between competitors concerning prices of relevant goods or services are prohibited and constitute *per se* infringement of the competition rules. Thus any agreed actions of the competitors towards prices of their goods or services may be caught by this prohibition as cartel agreement (concerted practice). It is presumed that these agreements have detrimental anti-competitive effects without need to prove them as they restrict competition by object. For this reason, as far as such price agreements (concerted practices) can be considered to be agreements artificially enhancing price transparency between certain competitors, it can be concluded that this kind of price transparency always has a negative influence on the degree of competition.

3. There is number of cases in practice of the Lithuanian Competition Council, where price transparency was enhanced collusively (e. g. by bid rigging, setting minimum or fixed prices, determining methods of setting prices, etc.) both between individual undertakings and within associations of undertakings. For instance, the price fixing agreements were established between providers of taxi, photography services. Decisions concerning minimal prices and the method of calculating prices for certain services were established within associations of Lithuanian architects and auditors. Associations of event organisers and advertisers have also agreed on the fixed fees of the participation of their members in bids.

4. On the other hand, different approach must be taken into account considering price transparency in cases of abuse of dominant position. As it is stated in the Lithuanian Law on Competition and in Article 102 of the TFEU, price discrimination is one of the forms of the abuse of dominant position and states an infringement of the competition rules. Thus the Competition Council holds the view that pricing policy (official price lists, transparent discount system, etc.) of a dominant undertaking should be transparent in order to prevent possible price discrimination and consequences related to it (e. g. restriction of competition in downstream markets, etc.).

5. Taking into account more general approach to the price transparency, excluding above mentioned infringements of the competition rules, price transparency may be enhanced also by other public or private means.

6. For instance, probably the biggest transparency exists in fuel retail sector, where end customers sometimes even without moving from one place are able to compare prices of different fuel retailers that all (2 or even 3) are situated virtually in the same location. That kind of transparency cannot be dogmatically judged as pro- or anti-competitive. This transparency allows competitors immediately to react to price changes in the market. In case of price decrease this reaction benefits end customers as they get lower prices from all undertakings. However price increases are also immediately followed by competitors, thus disadvantaging customers. In general the same effect could appear and in other fields, where prices of different undertakings may be compared without significant efforts (e. g. in e-commerce sector), especially when there are relevantly not many major participants in the market.

7. Apart from this direct price transparency, there exist other forms and methods of price transparency, which also may result in pro- or anti-competitive outcome on certain markets. Although the Lithuanian Competition Council cannot provide information about certain factual situations that show direct or indirect price transparency influence on the degree of competition, in Lithuania there are some examples of enhanced price transparency, which in different situations may be described as lessening or increasing competition level.

8. First of all *ex ante* regulation of certain industries (telecommunications, gas, electricity, heating energy and other various services of public interest) plays an important role in enhancing price transparency. For instance provisions of sector specific state regulation determine requirements for price regulation (e. g. requirement that certain prices (for electricity, water, heating supply) must be approved by sector regulator. In other fields state regulation obliges undertakings that have market power to base their prices on costs, to charge non-discriminatory prices for customers belonging to the same group or to announce their prices publicly. There might be also other kind of restrictions or obligations regarding prices of undertakings operating in regulated sectors. Usually state regulation measures related to pricing of certain goods or services are applied in sectors where undertakings that in certain relevant markets hold significant market power or monopoly position. Thus *ex ante* price regulation is established in order to prevent misuse of market power and to encourage competition in related relevant markets. For this reason it can be sufficiently reasonable concluded that this kind of enhanced price transparency directly promote competition.

9. On the other hand the Lithuanian Competition Council is aware of other kind of state practice, when government institutions through their legislation enhance price transparency in different relevant markets. For instance despite the fact, that prices of raw milk are not regulated in general by any laws of the Republic of Lithuania the Ministry of Agriculture was used to recommend size of deductions and increments of the basic price depending on the quality of raw milk. Thus elements of the raw milk price were made transparent and all buyers could presume that all of them calculate prices for raw milk similarly. The Competition Council was of opinion that these recommendations restrict price competition in the raw milk market. After suggestion of the Competition Council in 2008 these recommendations were abolished.

10. Furthermore it is common practice of the Ministry of Agriculture to constantly update and publish aggregated recent and historical price information concerning different agricultural products and raw materials. The Department of Statistics also publishes various statistical information including information regarding prices. It must be mentioned that the Lithuanian Competition Council is concerned about publicly available details of statistical information regarding business activities and its possible harm to competition in relevant markets, but while public information does not indicate data of individual

undertakings it may be assumed that general (average) price information by itself does not have direct influence on the degree of competition, especially in non-concentrated markets with large number of competitors.

11. Of course there are also other systems enhancing price transparency, which are created following private initiatives of undertakings in order to simplify their operations in the market. For instance individually or within associations analysing factors that influence price increases or decreases (state tax policy, patterns of trade in different geographical markets, innovations, etc.), publishing results of market surveys, of means for better communication with customers (specialised internet portals or information systems that are dedicated to customers in order they could make a better choice of goods or services, etc.). Pro- or anti-competitive effects of these initiatives, as it is already mentioned above, if there are no evidence of collusive behaviour of competitors, depend on the structure of the market.

2. Besides the possibility for consumers to better compare products and services and for the sellers to engage in anti-competitive co-operation, what other pro- or anti-competitive effects might be associated to higher levels of transparency in the market? Please illustrate your remarks with actual situations.

12. Besides general pro- and anti-competitive effects of the price transparency mentioned in the question, few more aspects may be discussed. First of all it must be noticed that price transparency when it can be enjoyed by customers usually promotes competition or has other positive effects like over all better knowledge about pricing policies and factors influencing prices, thus lessening information asymmetry between suppliers and their customers.

13. Meanwhile considering price transparency from the players' in the relevant market point of view, other pro- and anti-competitive effects may be named. Price transparency as part of general market information would benefit potential entrants into the market. Ability to know and to evaluate general information about actual price levels, price structure and other related factors may give valuable knowledge to undertakings that are contemplating on the decision whether to enter the market or not. Moreover in case of new entry this knowledge would help certain undertaking to decide on market entry strategy in order to make entry successful. For instance new entrant may present its new goods or services at lower than actual average market prices, thus it can attract customers from competitors, gain certain market share and instigate competitive response that again would benefit customers.

14. On the other hand adverse effect may appear if intensives to compete are not very apparent, for instance, because the structure of the market. In this case price transparency may have anti-competitive affect by lessening degree of competition comparing to degree that would have been in absence of price transparency. It can be illustrated by example when one competitor is following other competitor's actions concerning prices. For instance one competitor increases its price from 10 € to 15 €. Following this another competitor increases its prices to similar level, e. g. from 10 € up to 14 €, taking into account competitor's price and hoping that with still lower than competitor's price it will retain its customers but will receive more profit. If there were no enhanced price transparency, situation probably would be different, taking into account the fact that the other competitor would not be able to instantly react to competitor's price increase. Thus it would not raise its prices at all or at least it would do it not instantly giving more time for costumers to benefit from lower prices. Furthermore if it would increase its prices, probably this increase would not be identical or similar to competitors increase and in general its prices remain more lower that competitor's, i. e. increase from 10 € to 12 € (not 14 €) for the good of customers. From this simple example it is apparent that in the absence of enhanced price transparency when undertakings compete without precise knowledge about competitors' prices and their changes competition would be more active and giving more benefits to their customers, because at least competitors would not be interested in price increases.

3. What factors and market characteristics do you take into consideration when assessing if transparency is a competition enhancing factor or not? Please illustrate your remarks with actual situations.

15. As it mentioned in the 2nd answer of this Part, usually it is considered that transparency, which is dedicated to improve customers' information, is a competition enhancing factor. This is the most important in cases of a dominant undertaking operating on the market. Meanwhile the same cannot be said about transparency that improves competing undertakings' information. That kind of transparency needs closer attention in order to assess its influence on competition conditions in the market.

16. As factor to be assessed first of all must be mentioned nature of information that is available, i. e. is it aggregated statistical information or is it individualised information indicating operation of certain individual undertaking. This objective indication may serve as a first phase in assessing possible competition concerns regarding transparency. If information represents information of individual undertakings it easier to monitor its behaviour in the relevant market, so it is easier to notice deviations from agreed or concerted behaviour in case of collusion. For this reason transparency of individual information is more suspicious regarding competition concerns than aggregated statistical information that gives general basic information about relevant market.

17. Another important factor is content of available information. Usually information about prices and production (trade) quantities is essential in monitoring behaviour of individual undertaking. It by itself is sufficient to demonstrate undertaking's operation in the market and even enables to convey other important information concerning costs and demand. Thus transparency regarding information on prices and quantities of individual undertaking is a factor that raises anti-competitive concerns as it can serve as means for monitoring collusive behaviour and noticing deviations from it.

18. Next factor in assessing transparency is also of objective nature – information relevance in time. This means that depending on the time period, which is covered by certain information, this information may be treated as enhancing anti-competitive effects. Usually historical information (even concerning prices and quantities) does not raise competition concerns because it is simply too old and thus does not reflect current situation of certain undertaking nor lets predict its future behaviour. However information about recent past, actual or future activity gives valuable material evaluating and predicting behaviour in the market of certain undertaking. For instance if actual and recent past information shows undertaking's price decrease and increase of its market share, it is apparent that it started aggressive competition policy. This may serve as a sign to other competitors also to undertake certain actions regarding this change in the market in order to eliminate benefits that were sought by the former undertaking before it succeeds gaining them. Thus initiatives of fierce competition are lessening. This may also serve as monitoring system to prevent from and punish for deviations from collusive behaviour. Meanwhile transparency about future prices or quantities by itself may fall under *per se* prohibition to engage into price fixing agreements or concerted practices.

19. Furthermore, if transparency of price or other business information is available only to a limited group of undertakings while other participants of the same market cannot access it or are deliberately excluded from this group, suspicion about anti-competitive influence of this limited transparency to the market only strengthens. This is because individual pricing and quantity information exchanges between competitors are likely to be explained only by intention to collude their behaviour on the market. That kind of transparency, especially when only private group of undertakings are able to benefit from it, usually cannot be explained or reasoned by any pro-competitive objective as this transparency is not equally available to all market participants and potential entrants.

20. If it is established that undertakings enhanced transparency in the market important factor to assess is its ability to distort competition in all relevant market. For this purpose structure of the market must be analysed. It is considered that in the market where exists large number of competitors so the supply of certain goods or services is of atomised, non-concentrated nature, transparency (excluding information about future plans) usually will not have distorting effect and even may promote competition. However in oligopolistic or other concentrated markets where operate relatively small number of major competitors, transparency may have an anti-competitive effect. In this latter case transparency enables them to be aware and with sufficient precision predict competitors' positions and strategies in the market, thus reducing important element of competition – uncertainty about competitors' foreseeable behaviour on the market. Without uncertainty competitors are discouraged from active competition because they are also aware that their competitive actions may be almost instantly noticed and eliminated by other competitors before achieving any goals or benefits that were supposed to be reached by initiating certain competitive actions on the market. Moreover transparency in concentrated market may facilitate coordination as it enables competitors to monitor each other's preventing deviations from collusive behaviour.

21. In the light of above mentioned factors it can be summarized that the more information lets indicate, monitor and predict individual competitors' operations on the market, the more competition concerns transparency raises. However in each case assessment of the transparency depends on a complex of different factors. Common universal rules, when transparency enhances competition and when it does not and has an adverse effect, cannot be formulated apart from certain factual situation. For sure it can only be emphasised that artificially enhanced transparency through collusive agreements or concerted practices regarding prices, quantities, capacities or other conditions of operation on the market is prohibited and constitutes infringement of competition rules. In all other cases more detailed assessment must be carried out.

2. Information exchanges between competitors

22. First of all it must be emphasised that the Lithuanian Law on Competition expressly prohibit any agreements, concerted practices and decisions of associations of undertakings concerning direct and indirect price fixing, market sharing, production limiting and other "black-listed" collusions, as it is presumed that they have detrimental effects on competition. Therefore, if any information exchange indicates or by itself constitutes (for instance, exchange of future price lists) that kind of collusion, it is treated not as information exchange as such, but as price fixing, market sharing or other above mentioned agreement, concerted practices or decision of association. This issue must be kept in mind while discussing further questions, because according to Lithuanian competition law other kind of information exchanges (for instance exchange of recent past data about volumes of sales) does not constitute *per se* infringements and different approach must be taken into account as their anti-competitive object or effect needs to be assessed.

1. When are information exchanges amongst competitors permissible in your country? In what circumstances an exchange of information between competitors can be pro-competitive?

23. In Lithuanian legislation there are no provisions in general prohibiting information exchanges amongst competitors. However there is established general prohibition to enter into agreements or concerted practices that prevent, restrict or distort competition within relevant market. So it can be concluded, that information exchanges among competitors in general are permissible unless they reduce, restrict or distort competition. Main factors taken into account while considering possible anti-competitive effects, as it is mentioned in the answer to the 3rd question of Part 1, include nature and content of information exchanged, time period that it covers, availability of such information to other undertakings, structure of the market. From this it also follows that if there is no restriction of competition there is no need to make additional assessment of exchange influence on competition (whether it has pro-competitive effect or has no effect at all), because anyway certain information exchange is permissible.

24. On the other hand it must be noted that even in cases when it is considered that certain information exchange restricts competition, there as a possibility for certain undertakings, which are engaged in this exchange, to argue by pleading pro-competitive effects of certain information exchange (efficiencies defence). Thus certain information exchange may be individually exempted from general prohibition of anti-competitive agreements. This possibility is provided by the Article 6 of the Lithuanian Law on Competition and Article 101(3) of the TFEU, stating that prohibition of anti-competitive agreements is not applied to agreements that promote technical or economic progress or improve the production or distribution of goods, and thus create conditions for consumers to receive additional benefit (additional conditions must be also applied). That means that if undertakings concerned prove that pro-competitive effect of certain exchange of information outweighs anti-competitive effects, it will not constitute infringement of competition rules.

25. As an example of pro-competitive information exchanges must be mentioned information exchanges that are permissible by block exemption regulations. For instance the European Commission Regulation (EU) No 276/2010 concerning certain agreements, decisions and concerted practices in insurance sector allows joint compilation and distribution of information necessary for the calculation of the average cost of covering a specified risk in the past between undertakings in insurance sector. Of course there are additional conditions in order certain agreement could fall under this exemption rule, for example – from the information exchanged insurance undertakings cannot be identified, this information is available on reasonable and non-discriminatory terms, etc. Nevertheless it can be concluded that this information exchange generally could be treated as pro-competitive if all conditions are met. Thus undertakings that enter into information exchange agreements that are covered by block exemption regulations rules may feel secure from suspicions of anti-competitive behaviour, because conditions set in these regulations establish presumption of legality of certain information exchange.

2. If information exchanges restrict competition, will they restrict competition by "effect"? Or will they restrict competition by "object" or constitute a per se infringement?

26. Following provisions of the Lithuanian Law on Competition information exchange does not constitute a *per se* infringement, as *per se* infringements that in all cases are considered as restricting competition are expressly listed in the Law on Competition and these are agreements: 1) to directly or indirectly fix prices or other conditions of purchase or sale; 2) to share the product market on a territorial basis, according to groups of buyers or suppliers or in any other way; 3) to fix production or sale volumes for certain goods as well as to restrict technical development or investment; and 4) to apply dissimilar (discriminating) conditions to equivalent transactions with individual undertakings, thereby placing them at a competitive disadvantage. So it is clear, that in general information exchange by itself is not prohibited, unless it forms a part of other *per se* infringements, for instance, it serves as instrument for monitoring, how undertakings follow price fixing, market sharing agreements or other above mentioned collusive practices.

27. For this reason in other cases for there to be an infringement of competition rules, it is always important to establish that information exchange restricts competition by its object or bay its effect. It must be mentioned that this alternative between "object" and "effect" follows from general prohibition of anti-competitive agreements. So as far as information exchange is not separately regulated general rules for its evaluation are applied and its objects or effects must be analysed like in cases of any other anti-competitive agreement. There are no provisions that information exchange should be treated as restricting competition by its object or only by its effect – this evaluation depends from every certain case. Thus if there are evidence which shows competitors intentions to restrict competition, there are no reasons why this information exchange should not be treated as restricting competition by its object. Furthermore, if there is such evidence, further assessment of effects of this exchange (like evaluation of market structure, etc.) may be not necessary.

28. However, it must be mentioned, that in the absence of evidence of anti-competitive object of certain information exchange, while evaluating, whether certain information exchange restricts competition by its effect, according to relevant factors, such as nature and content of information, structure of the market, etc., usually potential (not factual) anti-competitive effects are taken into account. This is because actual effects of certain information exchange are practically almost impossible to demonstrate, calculate, show and compare degree of competition in the market where information exchange is implemented with the degree that would have been in the absence of exchange. Thus anti-competitive effect of information exchange usually is based on the conclusion, that if information exchange satisfies certain criteria (for instance, in the oligopolistic market information concerning recent and actual data about quantities of certain goods sold by individual undertakings is exchanged periodically), it has appreciable potential anti-competitive effect – it is likely to restrict competition and competition would have been more intensive in the absence of such exchange.

29. For reason mentioned above in some cases it may appear that evaluation of potential anti-competitive effects of certain information exchange becomes more formal and is limited only to the verifying, whether in certain situation necessary factors exist (such as concentrated market, individualized recent or actual data, etc.). If these factors are established, anti-competitive effect of information exchange generally is "presumed", thus making an impression that information exchanges are considered to restrict competition by object or even constitute *per se* infringements. Nevertheless this question is rather of theoretical nature than practical as in practice competition rules prohibit all anti-competitive agreements – restricting competition by object, by effect and *per se*.

3. In order to establish an infringement, is it necessary to prove that firms agreed to share information? Or can the mere fact that they exchanged information be sufficient to establish a competition law violation? Does your competition law apply to mere concerted practice of exchanging information among competitors?

30. In Lithuanian law there are no general prohibitions of exchange, publishing or other ways making available certain information, the influence of each exchange on competition must be assessed in the context of general prohibition of anti-competitive agreements or concerted practice. It must be noted that under the Lithuanian Law on Competition all forms of collusion are prohibited, that means that in qualifying infringement of competition rules there is no difference between agreements, concerted practices or decisions by associations of undertakings as far as they all similarly are able to determine collusive behaviour of undertakings. Thus in the case of information exchange same principles of establishing and proving of collusive behaviour must be applied. From this it follows that even if information exchange is implemented only by mere concerted practice but (as it is explained above) this information exchange has anti-competitive object or effect, the Law on Competition is applied to it. For the same reason, the mere fact that undertakings exchanged information is not sufficient to constitute the violation of competition law as the anti-competitive object or effect (actual or potential) of certain exchange must be also proved.

4. What factors can be used to distinguish in these cases between unilateral actions by firms and coordinated actions that could potentially be subject to a prohibition against unlawful agreements? Is reciprocity required to find that information exchanges are unlawful? Conversely, could it be unlawful if one firm unilaterally makes information available to competitors or the market place, for example information about intended price increases or other future competitive conduct?

31. As it explained above, in order to constitute, that information exchange is prohibited by the Lithuanian Law on Competition, first of all the element of collusion must be established. Therefore reciprocity is necessary for there to be relationship between competitors that could be regarded as

agreement or concerted practice. If there is no evidence of reciprocity, there is no agreement and thus there is no violation of competition rules by anti-competitive agreement. So if one undertaking unilaterally makes available its commercial information (by making public announcements or even directly sending this information to its competitors) it is not sufficient for there to be an infringement as far as other competitor does not "respond" to this invitation to collude. Thus in general competitors are not responsible for unilateral actions of one undertaking; otherwise it would be very easy to deal with competitors that do not want to collude simply just by sending them certain information. However competition rules should not interpret and used in that way, as their main purpose to protect competition but not to provide means for unfair competition.

32. On the other hand it must be noted that, if there is no collusion, there are no other objective reasons why one undertaking should be encouraged to act this way unilaterally and thus take risk of possible negative consequences of disclosing to its competitors information that is usually treated as commercial secret. For this reason, presuming that undertakings are cautious enough and are aware of possible harm of unilateral disclosure of their information, unilateral (at least at first sight) disclosure of information by one undertaking gives a signal and raises suspicion of possible anti-competitive collusion. For instance one undertaking periodically in a newspaper or on its website announces its quarterly activity results (volumes of sales, costs, prices, market share, etc.). By itself this publicity may look unusual but it not enough for there to be a violation of competition rules. However, it gives a signal that this available information is part of "market talk" between competitors and their corresponding answers are also available somewhere, for instance on their websites. Situation like this could be treated as possible violation of competition rules, because it raises doubts whether this "market talk" is just coincidence of unilateral behaviour of several competitors, especially when the nature and content of information is quite similar. Nevertheless absence of adequate respond from competitors does not exclude possibility of collusion, because there might be other mechanisms for agreed proper respond, for instance simply by adopting certain factual behaviour in the market (rising or decreasing own prices). But in this case still the evidence of reciprocal behaviour must be established in order to qualify violation of competition rules.

5. In your practice, have you developed "safe harbours" that can help the industry to structure information exchanges in a way which does not infringe competition law? Have you published guidelines in this area?

33. The Lithuanian Competition Council has not prepared any guidelines or recommendations in respect of permissible information exchanges yet. This is due to the fact that the Competition Council at this time had only few cases where information exchange as such had been qualified as violation of competition rules and only recently after appeal procedures Lithuanian Supreme Administrative Court adopted its decisions, in which different approaches of the Court to the information exchanges are reflected. However the Competition Council always gives its opinion on certain questions regarding information exchanges that are received from undertakings in order to prevent infringements of competition rules. Meanwhile the Competition Council in cases of information exchange always follows legislation and practice of the European Commission and EU case-law in order to ensure that information exchanges amongst competitors are treated similarly at EU and national level.

6. Under what circumstances, if at all, would your competition authority prohibit information exchanges? If information sharing is not prohibited per se, what factors should be used to decide whether an information sharing practice was unlawful? Would it always be necessary to show that information sharing had anticompetitive effects?

34. As it is explained in the answer to the 3rd question of Part 1, anti-competitive assessment of information exchanges includes number of factors starting from content of information to market structure. Usually it is considered that anti-competitive effect of information exchange may arise when undertakings

exchange information of confidential nature that lets indicate results of undertaking's operation in the market and with sufficient accuracy predict its future behaviour, for instance, information concerning their recent past or actual volumes of sales, costs, market share, future plans. The more detailed information is, the more anti-competitive concerns its exchange raises. Furthermore, if information exchanged is individual, the exchange of it is more likely to restrict competition, than the exchange of aggregated statistical covering all market in general information. Finally the structure of the market also is one of the key factors deciding whether information exchange is capable to restrict competition in the market. The information exchange in the concentrated market is more likely to restrict competition, that in the market which can be characterised by a large number of competitors where supply of certain goods or services is atomised. It cannot be rejected that the nature of certain goods or services would also be important in assessing information exchange as infringement of competition rules, while it is obvious that the more homogeneous goods the easier it is to monitor and predict operation of the competitor, because there is no need to take into evaluation such competitive element like quality differences between goods of different suppliers.

35. In general it can be concluded that information exchange restricts competition by removing important element of competition – uncertainty of competitor's actions and therefore prevents or reduces hidden competition. For this reason if certain information exchange is of that kind that it enables competitors to follow each other activities and operation in the market and the structure of the market is such that enables competitors (if needed) to take proper actions in order to eliminate unfavourable changes in the market, this information exchange is liable for restriction of competition.

36. On the other hand, as it is discussed in the answer to the 2nd question of Part 1, if there is clear evidence that information exchange has as its object restriction of competition, the above mentioned factors like market structure are not important and detailed analysis is not needed. However probably only in very rare cases anti-competitive object of the information exchange can be clearly demonstrated, thus assessment of its anti-competitive effects usually is necessary.

7. More specifically, what role would the following factors play in decisions to prohibit such practices?

a) Evidence of pro- or anti-competitive intent and/or effects.

37. Evidence of pro- or anti- competitive intent or effect is always important. If there is evidence of anti-competitive intentions what in general can be treated as anti-competitive object of the information exchange, there would be no need for very detailed assessment of other factual circumstances related to information exchange (like analysis of market structure, etc.). In case there is no evidence of anti-competitive object, the determining the anti-competitive effect is necessary for constituting infringement of competition rules. However it must be noted that effect may be either actual or potential. An actual effect is more difficult to prove, because information exchange by its nature does not absolutely eliminate competition but reduces it. Meanwhile potential anti-competitive effect depends on the number of different circumstances and factors, that must be evaluated (structure of the market, nature of the information, specification of goods, etc.) in order to conclude that certain information exchange must be prohibited. If after all anti-competitive effect is established there is still possibility that because of pro-competitive intentions and effects information exchange will not be prohibited as it may be proved that efficiencies resulting from the exchange counterweights anti-competitive effects. However if there is no evidence of efficiency only mere pro-competitive intentions of undertakings concerned do not exempt anti-competitive information exchange from prohibition.

b) General market structure and conditions affecting the probability of successful co-ordination (e. g. degree of concentration; height of barriers to entry/expansion/exit; degree of product differentiation; lumpiness in order volumes; etc.).

38. Factors related to the nature and structure of the market are very important when anti-competitive effect of information exchange is examined, since restriction of competition is more likely in concentrated oligopolistic markets. Although it must be noted, that not in all cases all mentioned factors must be analysed, because depending on the certain market there may quite obvious that the supply of certain goods or services is concentrated only by few participants on the market and naturally exist relatively high barriers to entry and expand in the market. Thus the most important indicator of possible anti-competitive exchange of information is related to the number and size of major competitors. The more concentrated market is, the more exchange of information is likely to restrict competition. In other cases more detail analysis should be done in order to determine, whether there exist proper conditions for co-ordination, including barriers to entry, product differentiation and other relevant factors.

c) Degree to which such practices are widespread in the market.

39. The importance of this factor is closely related to the structure of the market. If information exchange practice is widespread in oligopolistic concentrated market what means that it is wide spread among major competitors, this does not deny possible anti-competitive effect of this practice. However if in more fragmented market there are several or many parallel information exchange systems this may indicate that there is no information asymmetry among competitors and still competition between undertakings participating in different exchanges remain. But still to eliminate possibility of anti-competitive effect of this widespread practice overall analysis of it must be done, since instead of eliminating anti-competitive effect it by its extent may eliminate competition.

d) Evidence that information exchanges were adopted by agreement of competitors, versus being unilaterally deployed.

40. As it is explained in the answer to the 4th question of Part 2, the element of reciprocity is necessary to prohibit information exchange as unlawful anti-competitive practice. Therefore unilateral disclosure of information cannot be treated as violation of competition rules, unless it is the result or episode of other anti-competitive agreement or practice.

e) Evidence that one or more transparency enhancers are being used to support an anticompetitive agreement.

41. If it is established that information exchanged is anti-competitive, evidence of other subject's participation, promotion or other kind of support or assistance to this exchange may be important in considering whether it is also responsible for violation of competition rules.

f) Characteristics of the information exchanged, such as its subject matter, level of detail, age and frequency.

42. Characteristics of the information exchanged are the key issue that needs to be assessed while deciding whether exchange of certain information is anti-competitive. As it is already mentioned above, if certain information exchange is of that kind that it enables competitors to follow each other activities and operation in the market, the exchange of it is likely to restrict competition. For instance, information that contains sensitive business information usually treated like commercial secrets, other data related to operation and activities in the market (market shares, volumes of sales, costs, etc.) should not be exchanged. Moreover this information should not be exchanged if it represents data that is of recent past or even actual data (one year old, half year old, quarterly, monthly information – depending on the market

different time periods may be described as recent) because it is still important and gives valuable material for assessing and predicting current and future behaviour. It must be also mentioned that continuous periodical and frequent exchange of certain information also gives indications that exchange is anti-competitive as it shows that undertakings concerned are constantly engaged into co-ordination and for a long time, thus more and more losing independence of decisions on their behaviour on the market – one of the key elements of normal competition. However it cannot be excluded that even sole exchange of certain information could also restrict competition, because it could be sufficient to predict competitor's course of conduct for a rather long period of time. Finally, as it is apparent from above, one of the most important characteristics of the information exchanged is its level of aggregation – there would be no competition concerns, if from this information would not be possible to indicate data of individual undertaking.

g) The public or private nature of the information exchanged.

43. Public or private information makes difference in determining whether undertakings concerned should be liable for competition restriction resulting from the made available information. This means that if certain information is or became publicly or even privately (by individual requests) available not by certain actions or decisions of undertakings, but because of the actions or decision of third parties (for instance statistics, market research agencies, government institutions), it cannot be treated as anti-competitive agreement between undertakings concerned. And on the contrary, if this information became available to competitors as a result of their agreement (concerted practise or decision of their association) and it cannot be received from other sources, this may constitute infringement of competition rules.

44. On the other hand comparing information exchange, where certain information is available to unlimited number of undertakings or other subjects, with exchange which is limited only to the closed group of undertakings participating in the exchange, the latter situation may indicate not only anti-competitive effect of the exchange but also anti-competitive object and intentions of the competitors concerned.

8. Do you distinguish between the following types of information exchanges? If you do, how do you assess of these different types of information exchanges?

a) "Direct" exchanges between competitors and "indirect" exchanges, i. e. exchanges which take place with the intermediation of a third party (e. g. a consultant or trade association)?

45. As far as under Lithuanian legislation it is not prohibited to receive information, but there is prohibition to enter into anti-competitive agreements, in case of such agreement there is no difference, whether information "technically" is received directly from competitors or indirectly through a third party. Attendance of the intermediary does not change the fact that competitors have agreed to exchange information. On the other hand the question of intermediary's responsibility for taking part in anti-competitive agreement may arise.

b) "Horizontal" information exchanges (i. e. between companies on the same level of trade) and "vertical" information exchanges (i. e. between companies on different levels of trade)?

46. The Lithuanian Competition Council does not have any practice concerning anti-competitive "vertical" information exchange. Nevertheless it may be assumed that general principles of evaluation of anti-competitive objectives or effects of that kind of agreement should be applied. However in cases like that there would be other factors than in cases of "horizontal" exchanges that would be of major importance while making anti-competitive assessment.

47. For instance, probably in some cases there would be a question of possible abuse of dominance rather than vertical agreement as such, e. g. if dominant supplier enters into an information exchange

agreement with only one buyer, thus placing in disadvantage other buyers that do not receive and are not able to receive certain information. On the other hand, if supplier discloses its information to its buyers instead of competitors, the question of efficiency and customers' welfare effect arises, which may counterweight any possible anti-competitive effects in the supply market.

c) Information exchanges which are set up by companies and information exchanges which are favoured or required by the government or by other public entities?

48. In case of information exchanges, which are favoured or required by government or other public entities, it is important to notice that there may be no evidence of undertakings' common will to act together in certain way – in this case to exchange information. For this reason the agreement (concerted practice, decision of association) as such may be absent, thus making impossible the qualification of the exchange of information as an anti-competitive agreement. However if there are no strictly binding rules to exchange certain type of information, the fact that anti-competitive information exchange is favoured or even recommended by government or other public entities does not remove liability from the undertakings involved, but following provisions of the Lithuanian Law on Competition this fact can be assessed as a mitigating circumstance.

d) "Private" information exchanges (i. e. among suppliers only) and "public" information exchanges (i. e. among suppliers and buyers)?

49. There is no general difference whether the information exchanged among suppliers is also available to buyers, as it does not change the fact that it may restrict competition between suppliers. However this factor may be important deciding whether agreement can be exempted from the prohibition because it creates conditions for consumers to receive additional benefit.

9. In your jurisdiction, to what degree and under what particular circumstances information exchanges taken as circumstantial evidence of anti-competitive agreement?

50. The Lithuanian Law on Competition does not expressly list evidence that can be used to prove anti-competitive agreements, therefore any evidence is considered to be appropriate if it is lawfully collected and it confirms circumstances, on which anti-competitive agreement is assessed is based. For this reason if it is established that between competitors information exchanges were exercised formally there are no obstacles or other additional requirements in order to use this fact as evidence proving anti-competitive agreements either as direct evidence or as additional circumstantial evidence of certain agreement.

10. How do you assess possible countervailing efficiencies? For example, the parties may argue that information exchanges can bring about productive efficiencies and increase welfare. If the conduct has plausible efficiencies, would that be sufficient to undermine an infringement case or would it be necessary to engage in a broader balancing exercise of restrictive effects and efficiencies?

51. General principles of the assessment of possible countervailing efficiencies of certain anti-competitive agreement and conditions to exempt this agreement from prohibition are stated in the Article 6 of the Lithuanian Law on Competition. It stipulates that prohibition of anti-competitive agreements is not applied where the agreement promotes technical or economical progress or improves the production or distribution of goods, and thus creates conditions for consumers to receive additional benefit, also where: 1) the agreement does not impose restrictions on the activity of the parties to the agreement, which are not necessary for the attainment of these objectives; 2) the agreement does not afford the contracting parties the possibility to restrict competition in a large share of the relevant market. In the event of a dispute concerning the compliance of the agreement with these provisions, the burden of proof falls upon the party to the agreement benefiting from this exemption.

52. Following these provisions assessment of the efficiencies of any agreement is carried out in the same way, i. e. undertakings concerned must submit their evidence that efficiencies effects outweigh anti-competitive effects of certain agreement and meets other conditions set in the provisions of the Law on Competition. It must be noted that these conditions are strict enough, as they require not only proving that agreement is capable to produce efficiencies, but also proving that these efficiencies cannot be produced in the absence of the agreement. If the undertaking succeeds in complying with and proving of the existence of these conditions investigation of the agreement is terminated concluding that this agreement is exempted from general prohibition of anti-competitive agreements. Additionally it must be noted that, as it is mentioned above, for certain groups of agreements more general rules concerning efficiencies there are set in block exemption regulations. It is held that all agreements that satisfy conditions set in the block exemption regulations are considered to satisfy efficiency criteria and additional individual assessment of the agreement according to the general exemption criteria usually is not needed, unless there are grounds to revoke application of the block exemption.

3. Cases

53. The Lithuanian Competition Council in its practice had two cases where anti-competitive agreements were established as mere information exchanges among competitors. Despite the fact that Competition Council treated these information exchanges following the same principles of assessment, there are now two Court's decisions regarding them, which however represent two different approaches towards information exchanges as anti-competitive agreements.

54. In 2006 the Competition Council adopted decision constituting that during period from 1999 to 2004 six major paper wholesalers in Lithuania by exchanging information about their individual market shares and volume of sales of the separate types of paper on the quarterly basis infringed competition rules that prohibit anti-competitive agreements. This conclusion was made following the analysis of the market structure, nature of the information exchanged and the behaviour of undertakings concerned. It was concluded, that relevant markets in which undertakings operated and concerning which information was exchanged were oligopolistic relatively concentrated markets. It was determined, that during investigation period, there were approximately up to 20-40 undertakings operating in relevant markets, meanwhile six biggest undertakings engaged in the information exchange together held total markets' share of up to 94-97 %. Furthermore it was established that these undertakings after each quarter of the year constantly exchanged (directly or through intermediary market research company) individual data about volumes of sales and market share of the accounting periods. Moreover this information was kept privately and was not available to any other competitor (even if it was asking to admit it to the exchange) or buyers. After considering all these circumstances the Competition Council finally concluded that these information exchanges restricted competition in relevant markets, since they reduced hidden competition thus lessening intensives to compete and thus creating barriers to enter relevant market. After appeal procedure in 2009 the Lithuanian Supreme Administrative Court adopted its decision approving the Competition Council's decision constituting that this information exchange agreement restricted competition and violated competition rules as it had potential anti-competitive effect.

55. Another case is related to the information exchange in the diary sector where seven producers of dairy products were exercising exchange of individual information concerning their volumes of purchased raw milk, volumes of produced and sold different types of dairy products. This information also involved even more details, for instance volumes of purchased raw milk according to its quality, volumes of dairy products' sales in Lithuania and foreign countries (EU, third countries), etc. This information was disseminated through their association every month during all period from 2001 until 2007. It must be mentioned that information exchange was based on the reciprocal basis, as even member of the association could receive competitors' data only if it agreed to disclose its own individual data to them. During the information exchange period relevant markets were characterised as concentrated markets as there were

four biggest producers together held markets' share of up to 73-85 %, while the remaining share of the markets concerned was divided by a number of other smaller competitors. In the information exchange took part all major participants of relevant markets, except one undertaking which was not a member of the association. After assessing these findings the Competition Council concluded that these information exchanges restricted competition in relevant markets, since they lessened competition by increasing transparency of their actions in the markets thus deterring from active competition that would have been in the absence of such information exchanges. However after two of the undertakings concerned made an appeal to the court and after in 2009 the Lithuanian Supreme Administrative Court adopted its decision this assessment of anti-competitive information exchange on the part to of appellants was annulled and on this part it was returned to the Competition Council for additional investigation. Main criticism from the Court regarding this Competition Council's decision was related to the absence of evidence of factual restriction of competition, while assessment of potential anti-competitive effect of these exchanges provided in the Competition Council's decision did not convince the Court.