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**ROUNDTABLE ON POTENTIAL PRO-COMPETITIVE AND ANTI-COMPETITIVE ASPECTS OF  
TRADE/BUSINESS ASSOCIATIONS**

**-- Lithuania --**

**16 October 2007**

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## **EXPERIENCE OF THE COMPETITION COUNCIL OF LITHUANIA INVESTIGATING INFLUENCE OF ASSOCIATIONS ON COMPETITION ENVIRONMENT ON THE RELEVANT MARKETS**

### **1. Association as structure uniting enterprises**

1. As usual associations execute various functions depending on the aims of companies establishing the association as well as the relevant market where they carry out its activity. Often associations indicate that join entities, help them to act in the relevant market, supply information on the same foreign market etc. Also associations can organise various kind of economic or other kind of activity even issue certificates and licenses, also can organise seminars etc. Usual associations indicate that the main function is to represent interests of enterprises especially drafting or amending laws that can make influence on the relevant markets. Also very often associations do the lobby work in order to promote or protect interest of entities on the relevant markets. Some associations have their own code of honour or even disciplinary instruments if their members do not follow the regulation of association, do not pay membership fees or do not participate in the events of association.

### **2. Possible influence of associations on enterprises and markets**

2. Scope of activity of associations very often depends on how many and especially how many big enterprises – participants of the relevant market – are the members of such association. Conditionally there are several kinds of associations depending on a size of enterprises big, medium or small associations of various size of enterprises.

3. When association is very big, comprises of almost all participants of the relevant markets or consists only of large enterprises - leaders of the relevant market - it might be cases when all decisions, declarations, information, views or official opinions expressed by such associations might influence the rest participants of the relevant markets.

4. When association consists only of large enterprises - leaders of the relevant market – very high membership fee can be an obstacle to become a member of such association. In that case very often few alternative associations comprising small and medium enterprises or regional enterprises can appear on the relevant market.

### **3. Possible negative activity of association**

5. Association can become not only place for enterprises to meet each other and to discuss problems but also can become a place for coordination of their activity on the relevant markets and even to make prohibited agreements. Article 3 part 10 of the Law on Competition of the Republic of Lithuania says that “agreement means contracts concluded in any form (written or verbal) between two or more undertakings or concerted actions of undertakings, including decision made by any combination (association, amalgamation, consortium, etc.) of undertakings or by representatives of such a combination”<sup>1</sup>.

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<sup>1</sup> <http://www.konkuren.lt/english/antitrust/legislation.htm>;

6. Experience showed that it should be clearly distinguished cases of direct negotiations on forbidden agreements from process during which the association tries to analyse situation on the relevant markets and wants to express its opinion on market processes, what is going on the markets, what influence changes will cause in the longterm perspective. When fast and unpredictable changes are going on the relevant markets it is natural that enterprises members of association pay attention and try to discuss such changes. Sometimes there is very narrow borderline between discussion and possible wish to coordinate activity in favour of enterprises of association and thus to make prohibited agreement.

7. Very often publicly expressed opinion of associations - that in case if prices will grow up on stock exchanges - the enterprises of associations subsequently will be forced to raise prices on the relevant markets (e.g. on the relevant fuel markets) are unlikely to be evidences of cartel activity. From the other hand – such declaration is very good illustration that discussions on market prices are going on actively between members of association.

8. Also often such discussions on various market changes can lead to arrangement of various recommendations for enterprises and can raise a wish to coordinate their strategies. In such cases activity of association can overgrow simple discussion and exchange of opinions, and can lead to active drafting of recommendations and even prescriptions how to operate on the relevant markets, and at last can become very strong instrument in case if all decisions of the association are obligatory for its members.

9. Thus very active discussions can run inside the association until such activity transforms into actions that are prohibited by the competition rules when association starts to coordinate activity of its members or starts to recommend measures to built obstacles for other competitors to enter the markets, or initiates the exchange of confidential information that can create more favourable situation for members of association comparing to other market participants, or arranges recommendations to keep minimal prices or to split the relevant geographic market, or to undertake other activity which can make influence on economic decisions of members of association and other economic entities on entire market.

#### **4. Position of association and its members during investigation**

10. Investigations showed that where are few kinds of behaviour of associations and their members in case of investigation of cartels where associations were under suspicion to be involved in a cartel activity. If members of association played active role in cartel it is always possible to identify enterprises-initiators of prohibited agreement. Such initiators, having their own interests, actively agitate other members to follow certain recommendations or models of certain behaviour on the relevant markets.

11. Other case when association tries to take collective responsibility of a cartel activity. In that case enterprises members of association indicate that administration of association or even leader of association initiated active preparation of recommendations and relying upon the data transmitted by the members calculated minimal recommended prices, and after that spread information between members of association. As usual in such cases interrogations always show that recommendations of associations are not obligatory. But as usual there are always a part of members of association who always follow the recommendations because of reputation and standing of the association.

12. Thus experience showed that as usual members of association are tended to follow the recommendation of association even in case if it is not obligatory because the membership means the acceptance and sharing of opinion and standpoint of association<sup>2</sup>. In such cases it is necessary during

<sup>2</sup>

European Cartels. Student Reports 2000. Editors: Nils Sigfrid, Clara Wrangel, Martin Levinson, Ginger Olson. Printed in Reprocentralen in Lund, Sweden, ISBN 91-630-9832-6, p. 33-34;

investigation to determine how widely members of association have followed the recommendations and how it could have influenced the competition environment on the relevant markets.

## **5. Experience of the Competition Council of Lithuania investigating activities of associations**

13. Experience showed that associations could become not only a place for enterprises to meet each other but also a place for making prohibited cartel agreements. It should be said that there were some cases when associations directly applied to the competition authority asking to explain whether one or another activity of association can infringe the competition rules (e.g. Association of truckers in case of fast increasing of prices of petrol and insurance of vehicles). But such cases do not guarantee that later will not be any intentions of enterprises or association to initiate prohibited agreement.

14. Experience showed that there is a very big possibility of coordination of activities between members of association when the association is composed of big enterprises market leaders. Such companies dominating on various segments of the relevant markets can pursue to control entire market (oligopolic effect) and consequently to coordinate their activities. Often as consequence of such coordination is simple non-intervention in some parts of the relevant geographic market or various segments of the relevant product markets.

## **6. Case of exchange of confidential information in association**

15. Competition Council of Lithuania investigated activity of paper trading merchants on the relevant paper markets of Lithuania and the Baltic States according to Article 5 of Law on Competition of the Republic of Lithuania and Article 81 of the Treaty<sup>3</sup>. In this case the Association of paper trading merchants organised longterm exchange of confidential information (e.g. total sales and value, market shares, confidential information on competitors etc.) and facilitated that members of association - the biggest paper trading companies in the Baltic States – could obtain such information. Investigation showed that information could have great influence on economic decisions of members of association on various relevant paper markets and consequently made influence on other market players and entire market.

16. When during investigation is hard to find proper facts of direct fixation of prices another important sphere of investigative activity should be a possibility to identify the subdivision of the relevant product and geographic markets on territorial basis. Exchange of data of total sales and of market shares on the relevant product markets indicate position of each company in every segment of the said markets. This could become an indication for other companies-competitors not to intervene into such spheres of activity of each company. As a consequent final result of such prohibited agreement – was longterm stability of market shares of members of the association on various relevant markets. In such cases very important to investigate longterm changes of market shares of members of association on various relevant markets. This analysis is necessary and very informative and can show possible longterm tendency and extent of coordination of activity between competitors.

17. In this case the Competition Council of Lithuania relied upon few similar cases investigated by other competition authorities of the member states. For example on the case No 05-D-65<sup>4</sup> of competition authority of France where it was determined that few companies having big part of the relevant market exchanged information and maintained market shares stable for a long period and thus blocked possibilities

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<sup>3</sup> Case No 2S-13, <http://www.konkuren.lt/ataskaitos/ataskaitos.htm>, 2006 Annual report of the Competition Council of Lithuania, ECN case no 296;

<sup>4</sup> <http://www.conseil-concurrence.fr/pdf/avis/05d65.pdf>. Décision n° 05-D-65 du 30 Novembre 2005 relative à des pratiques constatées dans le secteur de la téléphonie mobile;

of other competitors to enter the relevant market. Also it was relied on the case No 05-D-38<sup>5</sup> of competition authority of France. It was determined in the said case that associations of transport having 60 % of the relevant market tried to stabilise market shares.

18. Also while investigating paper merchants case the Competition Council of Lithuania relied upon the EU case of Agricultural Tractors Registration Exchange<sup>6</sup> where exchange of confidential information has been examined.

19. It is necessary to analyse further cases of exchange of information through associations and to determine what kind of information and in what extent could be allowed that such exchange process do not influence the economic decisions of members of association and should not be treated as concerted practice or prohibited agreement. Each case is different depending on what kind of information have been exchanged and what consequences this exchange could cause on the relevant market.

## **7. Cases of cartel agreements in association**

20. When one or few big enterprises are being dominated in association often they can wish to lead the activity of association and to enforce their own opinion or even initiate some activity that is prohibited by the competition rules.

21. Competition Council of Lithuania investigated activity of the Association of enterprises giving taxi services in Vilnius city<sup>7</sup>. During investigation the initiators of cartel who actively agitated other members of association to raise tariffs and to make cartel agreement were identified. Analysis of minutes of meetings of association showed that members of the said association constantly discussed possibilities to raise and fix tariffs of taxi services at the same time on the relevant market. Moreover leaders of cartel agreement constantly encouraged other entities non-members of the association also to raise tariffs of taxi service.

22. In another case the Competition Council investigated activity of the Association of drivers teaching and qualification raising schools<sup>8</sup>. Investigation showed that members of association many times have had meetings and discussion on prices and at last the final decision was to raise minimal prices and to establish the range of tariffs – “from...to”. The said association was headed by a director of big enterprise which was one of the initiators of cartel agreement. In such cases very important to determine the input of each enterprise participated in cartel agreement.

## **8. Cases of investigation of impact of recommendations taken by associations**

23. Competition Council of Lithuania investigated activity of the Association of architects<sup>9</sup>. Investigation showed that the code of professional ethics of this association has provisions obligating

<sup>5</sup> <http://www.conseil-concurrence.fr/pdf/avis/05d38.pdf>. *Décision n° 05-D-38 du 5 Juillet 2005 relative à des pratiques mises en oeuvre sur le marché du transport public urbain de voyageurs*;

<sup>6</sup> EEC 14.02.1992, Decision 95/157/EEC (UK Agricultural Tractor Registration Exchange; Official Journal L68-13/03/1992 Page: 19; Celex No: [392D01\\_57](#) and Judgment of Court of First instance and European Court of Justice related to this case; 27.10.94 CELEX 61992A0034; 29.05.1998; CELEX 61995J0008;

<sup>7</sup> Case No 2S-3, <http://www.konkuren.lt/archyvas/archyvas.htm>, 2005 Annual report of the Competition Council of Lithuania;

<sup>8</sup> Case No 2S-12, <http://www.konkuren.lt/archyvas/archyvas.htm>; 2004 Annual report of the Competition Council of Lithuania;

<sup>9</sup> Case No 13/b, <http://www.konkuren.lt/archyvas/archyvas.htm>; 2000 Annual report of the Competition Council of Lithuania;

members of association not to compete with other members of association and to follow the recommendations on setting up prices of projecting works. Competition Council obligated the said association to abolish such provisions and to harmonise the said code with competition rules.

24. In 2006 the Competition Council of Lithuania started investigation of activity of the Association of auditors (Chamber of auditors) in the relevant market of audit services<sup>10</sup>. Investigation showed that administration of association initiated discussions on prices and collected information on prices applied by the members of association. Relying upon collected information the administration prepared the recommendation on fixed audit prices on the relevant market and spread the recommendations between members of association. Moreover the administration of association initiated few cases in order to investigate why some members of association do not rely upon the said recommendation and finally punished two of members.

25. In this case the Competition Council of Lithuania relied upon a few similar cases of other competition authorities of the member states. For example, on the case No 98-D-07<sup>11</sup> of the competition authority of France. Investigation showed that the council of advocates prepared indicative pricelist of services on the relevant market and thus infringed competition rules. Also on the case No 00-D-52<sup>12</sup> of competition authority of France where it was determined that issuing the recommendations on fees for services of advocates the council of advocates set up minimal service prices and eliminated free competition of prices on the relevant market.

26. In 2007 the Competition Council of Lithuania has started investigation of activity of Association of processing of recyclable garbage (PEATA)<sup>13</sup>. Investigation showed that the said association calculated, analysed and forecasted a growth of recyclable garbage prices on the relevant markets. During this activity the association drafted the recommendations with fixed minimal prices for recyclable garbage collection and spread the said recommendations not only between members of association but also agitated other garbage collecting companies to follow the recommendations. The case is still under investigation.

27. It is necessary to analyse further such cases in which associations try to act on behalf of members of association and to dictate its members, to prepare recommendations and to spread between members of association, and thus become an initiation, organiser and the main player in cartel agreement. Such cases are different from direct cartel agreements when companies simply agreed to make cartel agreements in association.

## 9. Conclusions

28. When there are few alternative associations on the relevant market established according to a size of enterprises it shows that there is some level of confrontation and tension between enterprises that might lead to splitting of market and fixing of spheres of influence on such relevant market. Associations made up exclusively of big enterprises, the leaders of the relevant market, give occasion to look thoroughly on competition environment on the relevant markets and possibly to analyse the activity of such association.

29. Experience shows that there are few possible models of cartel activity in case of participation of associations in cartels. It is necessary to separate cartel cases from attempts of associations to analyse and

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<sup>10</sup> Case No 1S-142, <http://www.konkuren.lt/archyvas/archyvas.htm>; 2006 Annual report of the Competition Council of Lithuania, case still under investigation;

<sup>11</sup> Décision n° 98-D-07 du 14 Janvier 1998, <http://www.conseil-concurrence.fr/pdf/avis/98d07.pdf>;

<sup>12</sup> Décision n° 00-D-52 du 15 Janvier 2001, <http://www.conseil-concurrence.fr/pdf/avis/00d52.pdf>;

<sup>13</sup> Case No 1S-38, <http://www.konkuren.lt/archyvas/archyvas.htm>; 2007 Annual report of the Competition Council of Lithuania.

explain changes going on the relevant markets, express its thinking and opinion on market processes and to express position of association. In that case there is a need to do preventive work in order to eliminate possibilities that activity of association could overgrow into prohibited agreements on the relevant markets.

30. In case of investigation of recommendations prepared by the association it is necessary to determine who was initiator of drafting and has led the process of implementation of recommendations, how widely and how many enterprises have followed the recommendations and what final impact the recommendations had on the economic decisions of the members of association and other competitors as well as final influence on the relevant market.

31. In case of investigation of cases of exchange of confidential information between enterprises through association it is necessary to determine whether such information gave advantage to members of association comparing to nonmembers, what possible influence such information could have on the economic decisions of the members of association and other competitors as well as final influence on the relevant market. Special attention should be paid to the longterm changes of market shares of members of association on the relevant markets; longterm stability of market shares can show possible coordination of activity between enterprises.