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ANTITRUST ISSUES INVOLVING MINORITY SHAREHOLDING AND INTERLOCKING DIRECTORATES

-- Lithuania --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 19 February 2008.

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ANTITRUST ISSUES INVOLVING MINORITY SHAREHOLDING AND INTERLOCKING DIRECTORATES:

1. How are minority shareholdings handled in your merger control regime? In which cases does the acquisition of a minority shareholding trigger the requirements for a merger notification and review under your merger rules?

1. The Law on Competition of the Republic of Lithuania defines concentration as[1]:

    1. merger when one or more undertakings which terminate their activity as independent undertakings are joined to the undertaking which continues its operations or when a new undertaking is established out of two ore more undertakings which terminate their activity as independent undertakings

    2. acquisition of control, when one and the same natural person or persons already controlling one or more undertakings, or one or more undertakings, acting by contract, jointly set up a new undertaking or gain control over another undertaking by acquiring an enterprise or a part thereof, all or part of the assets of the undertaking, shares or other securities, voting rights, by contract or by any other means.

2. Control[2] is defined as any rights arising from laws or contracts that entitle a legal or natural person to exert a decisive influence on the activity of the undertaking, including:

    1. ownership or the right to use all or part of the assets of the undertaking;

    2. other rights which confer decisive influence on the decisions or the composition of the undertaking's managing bodies.

3. Decisive influence[3] means the situation when the controlling person implements or is in the position to implement its decisions regarding the economic activity or the decisions or composition of the management bodies of the controlled undertaking

4. Controlling person[4] means a legal or natural person having or acquiring control over an undertaking. A controlling person may be a citizen of the Republic of Lithuania, a foreign national or a stateless person, or any other undertaking, as well as public and local authorities. Spouses and their underage (adopted) children shall be considered as one controlling person. When two or more legal or natural persons, acting under contract, exercise control over an undertaking which is subjected to concentration, each of the legal or natural persons shall be considered a controlling person

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1 Article 3(14) of the Law on Competition of the Republic of Lithuania.

2 Article 3(15) of the Law on Competition of the Republic of Lithuania.

3 Article 3(17) of the Law on Competition of the Republic of Lithuania

4 Article 3(16) of the Law on Competition of the Republic of Lithuania

5. The intended concentration must be notified[5] to the Competition Council (CC) when:

- one undertaking acquires all or a part of the assets of the undertaking or a part of its shares which, including all previous acquisitions, constitute 1/4 or more of the authorised capital, or confer 1/4 or more of all the voting rights.

- the undertakings operating on the basis of an agreement, jointly set up a new undertaking, or establish a common management body or any administrative subdivision, also of those which, due to the decisions taken, will have a half or more of the same members in supervisory board, administrative board or other management body, or of those which commit themselves to co-ordinate among themselves decisions concerning their economic activity or to transfer to each other the whole or a certain part of profit, or of those which confer to each other the right to dispose of all or a part of their assets, or one or several undertakings of which by contract or otherwise acquire control of another undertaking.

- the long-term lease of the assets is tantamount to acquisition;

- an acquisition of less than ¼ of the assets shall be deemed concentration where the joint control is acquired (a shareholders‘ agreement concerning the joint decision on certain issues, appointment of a member of the Board, etc. is concluded).

6. A concentration shall not be deemed to arise[6] where commercial banks, other credit institutions, intermediaries of public trading in securities, investment companies and insurance companies acquire more than 1/4 of shares in another enterprise or insurance company with a view to transferring them, provided that they do not exercise voting rights in respect of those shares and that any such disposal takes place within one year of the date of acquisition. In the opposite case the concentration is considered to arise and be subject to the requirement of the concentration notification.

7. A concentration shall not be deemed to arise[7], where the composition of the existing shareholders and the existing control do not change. This provision states that such internal reorganisation (restructuring) or the creation of a new company within the group of associated undertakings is not deemed to constitute a concentration.

8. It shall be considered that no concentration is performed where only an insignificantly larger part of shares is acquired that does not entitle the shareholder to any additional rights including the right to appoint more members of the bodies of management and therefore the existing control is not changed (or strengthened).

9. The ¼ share of shares or votes has been selected with a view to ensuring the compliance with the *veto* rights of the shareholders established in other Laws (negative control). Under the current Lithuanian legislation the veto right corresponds to the holding of 1/3 of all votes, although in individual cases the corporate management agreements may provide for a share of ¼. Therefore in practice notifications on concentration are most often submitted by persons who acquire 33.4 percent or more of the shares. A smaller acquisition of shares is normally related with additional rights that are incorporated in certain agreements (e.g., the shareholders agreement, management agreement, etc.). Such agreements would

5 Article 10 of the Law on Competition of the Republic of Lithuania

6 Article 10(5) of the Law on Competition of the Republic of Lithuania.

7 Resolution No. 45 of 27 April 2000 of the Competition Council of the RL on the procedure for the submission and examination of notification on concentration and of calculation of aggregate turnover

normally define the elements of joint control. In each individual case upon receipt of a concentration notification the Competition Council shall examine the acquisitions also from the point of view of the control to be acquired.

2. In your enforcement practise, do you distinguish between minority shareholdings representing a passive financial investment (i.e., no active participation or representation in the board) from minority shareholdings that allow some form of control (joint, sole or negative) on the target? If yes, how do you deal with these different situations?

10. Except for the above cases defined in the Law on Competition when acquisitions are effected by financial investors, all other cases are deemed to constitute concentration that is subject to the notification requirement involving the obligation to obtain a concentration authorisation.

11. In practice there occur cases where the undertaking (other than financial investors) submit notifications on concentration, and for the purpose of obtaining an authorisation for the acquisition of a block of shares treats such acquisition only as financial investment with the purpose to sell the shares acquired at the same time seeking to acquire all other management rights granted by the shares.

12. Further we are presenting an example of a concentration deal. In 2003, the Competition Council was investigating a case of concentration in the dairy sector where *Rokiškio sūris* acquired a 35.3 percent block of shares of *Panevėžio pienas*. This case under investigation was also important for the purpose of determining the nature of control and defining the markets.

2.1 Acquisition of 33.5% of shares by Rokiškio sūris in Panevėžio pienas

13. The concentration notification was submitted on four occasions, while it was three times withdrawn each time indicating a different size of the block of shares intended to be acquired and emphasizing that the principal purpose of the concentration implemented by *Rokiškio sūris* – acquire an influence in *Panevėžio pienas* enabling the acquirer to make influence on the strategic commercial decisions of the company, and at the time ensuring that the value of the shares will not decrease. In the assessing of this concentration it was taken into account the other important fact, that the another principal shareholder of *Panevėžio pienas* was *Pieno žvaigždės* which owned 50.2 percent of shares and votes.

2.2 Assessment of the acquisition of control

14. The most important assessment of control was performed in the case of the submission of a notification concerning the acquisition of 33 percent of the above company while claiming that the control will not be acquired since the *veto* rights will not be acquired.

15. Attention should be drawn to the fact that the concepts of control and the decisive influence as defined in the Law on Competition includes the acquisition of rights, where in this case irrespective of whether or not the person acquiring the control actually exercises the rights. The important aspect hence is the fact of acquisition and the possibility to exercise such rights.

16. In this case it was defined that sole control changed into joint control. It is to be noted that undertaking is jointly controlled where two or more undertakings or persons have a possibility to exercise the decisive influence upon the company, i.e., a possibility to veto actions determining strategy of the economic activity of the undertaking. Such shareholders must arrive at an agreement concerning the common business strategy of the target undertaking, as otherwise there is a possibility to enter a deadlock arising from the situation where the controlling undertakings reject the proposed strategic commercial decisions.

17. In this case it was defined that minority shareholding has rights for blocking the decisive decisions for the strategy of business policy of the target undertaking, such as the decisions concerning the budget, significant investment, business plan.

18. In general, it is considering that the decisions concerned with the protection of the rights of minority shareholders are related to the decisions such as amendment of the Articles of Association (statute of company), increase or reduction of capital or liquidation of the company**.**

19. Since *Rokiškio sūris* withdrew the notification concerning the acquisition of 48.3% of shares (and accordingly the votes), the issue to be assessed is the acquisition of 33% of shares. The acquisition of 33% of shares of *Panevėžio pienas* by itself would not mean the acquisition of control, i.e., the acquisition of decisive influence. However, in this particular case even the acquisition of 33% of shares is relevant, since there is a possibility, that when voting at the General Meeting of Shareholders *Rokiškio sūris* will acquires more than 1/3 of all votes and will be able to exercise the *veto* rights. Another possibility arises of a possible limiting of the part of the voting rights of another shareholder of *Pieno žvaigždės* (i.e., according to the ruling of the court or in cases provided by laws of the Republic of Lithuania[8]). The probability of the use of this possibility is assessed as an additional argument allowing a conclusion on the existence of control. Furthermore, it has been established that when voting at the General meeting of shareholders the votes of minority shareholders count to the benefit of *Pieno žvaigždės* and *Rokiškio sūris*, i.e., making it highly probable that *Rokiškio sūris* will acquire 1/3 of votes.

20. As an additional argument is the actions performed by *Rokiškio sūris* seeking to acquire an additional part of shares (which is also testified by the repeated submission of the notification on the intended concentration). It follows, that the acquisition of 33 % of the block of shares is assessed as the acquisition of the joint control.

2.3 Decision

21. All three companies mentioned above operate in the same markets, i.e., milk purchase and the dairy products markets. The concentration being implemented was assessed as a horizontal concentration significantly changing the degree of concentration in the relevant markets of milk purchase and the unskimmed dairy products markets. Since in these markets *Rokiškio sūris* and *Pieno žvaigždės* (associated with *Panevėžio pienas*) would hold, respectively, about 61 % and about 60 % of the market, the only strong competitor in the market being *Žemaitijos pienas*, and other market participants quite small, thus the concentration would result in a creation of a dominant position and a significant weakening of competition in the markets concerned. Since all three companies operate in the same markets, i.e., milk purchase and the dairy products markets, there is an increased probability that all of them will start exerting a common strategy or otherwise coordinate their actions in the markets, that may include agreements concerning the payment for the milk purchased, sharing of the zones of milk purchase, dairy products realisation prices and trade discounts application.

22. The Competition Council passed the decision whereby *Rokiškio sūris* was authorised to acquire up to 35.3 % of *Panevėžio pienas* subject to certain conditions and obligations:

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8 For example, Article 15(8) of the Law on Securities Market of the Republic of Lithuania stipulates: The person who fails in the time limit established in par. 1 of this Article shall for the period of two years have no right to hold in the General meeting of shareholders more votes than the last threshold of which he had provided a correct information. Besides, the decision of the court may revoke all decisions taken from the moment of the acquisition of the block of shares until the submission of correct information where such decisions concerned the changing of the managers of the company or infringed the property or non-property rights of shareholders".

1. *Rokiškio sūris* obligated to cancel the voting by all votes of the previously acquired and the additional shares of *Panevėžio pienas* in the general meeting of shareholders on the following issues: decisions on profit allocation; to form, reduce or cancel the reserves of retained earnings; to sell, put in pledge or mortgage the certain specified assets and etc.

2. When effecting the additional acquisition of the shares of *Panevėžio pienas* and (or) performing other actions of concentration (e.g., coordinating the decisions concerning the activity between the shareholders of *Panevėžio pienas* and the associated undertakings), the company is obligated to apply to the Competition Council and obtain permissions for such activities.

23. *Rokiškio sūris* acknowledged the "*veto*" rights as the fact of the acquisition of joint control. The Competition Council duly considered the expressively hostile position of *Pieno žvaigždės* – another principal shareholder of *Panevėžio pienas* in respect of actions of *Rokiškio sūris* and the possible difficulties of the company being acquired in the face in the confrontation of the interests. The company was authorised to perform the concentration transaction assessing the acquisition of the block of shares as investment (financial) seeking to sell all shares of *Panevėžio pienas*.

3. In your enforcement practise, do you have experience with minority shareholdings raising unilateral and/or coordinated effects? Do you have experience with minority shareholdings investigated under your domestic competition rules on restrictive agreements between competitors? Have you investigated dominant firms for holding shares in competing firms? Can you prove examples?

24. The process of minority shares acquisition (until 24.99 percent and without any additional rights) is not cover by the Competition Law. It should be noted, that such acquisitions may have significant impediment on competition in the certain markets. By obtaining the interest in rival's company, undertakings may loss incentives for effective competition by the reasons of more possibilities for getting information about competitor's predictable commercial strategy, pricing and other important for business information, and also for possibilities for getting some part of earnings in the same market, which supposedly (perhaps) would not get by enforcing theirs company activity. So opportunities formed for lessening common leverage of competition in certain markets (especially where is a little amount of market participants).

25. For instance, it would be considered cases when financial investor (investment fund, bank, insurance company and etc.) acquire minority shares stake (with adequate management rights) in the same and/ or related markets. In that case, jeopardy arises that those investors would be interested to obtain as more as possible investment returns avoiding competition between companies. In the following way such investor even can fill a role of coordinator/ initiator for coordinated interactions in the market.

26. In general, assessing the notified concentrations the Competition Council applies a presumptive test of the dominant position as 40 percent share of the relevant market. The concept of joint dominance may be also applied.

3.1 Collective dominance

27. Several undertakings hold a collective dominance where the undertakings may exercise a unilateral decisive influence in the relevant market effectively restricting competition. This possibility occurs, first, if there is not efficient competition between the group concerned and the remaining

undertakings in the market, and, second, in case the members of the group do not compete efficiently among themselves[9].

28. Where 2 or 3 (or more) undertakings hold the largest shares of the relevant market and jointly account for more than 70 percent of the market and the shares of the remaining competitors are significantly smaller, there is a significant possibility that such undertakings, taken as an entirety, may operate sufficiently independently in the market in respect of other undertakings, and therefore, not compete among themselves.

29. When assessing whether the members of a group efficiently compete among themselves the Competition Council seeks to establish whether the members of the group act in a parallel manner, i.e., whether they follow one another acting in the same manner and avoiding mutual competition, and in particular – performing similar or identical restrictive actions in respect of other undertakings.

30. The Competition Council, acting in accordance with Article 14(1) of the Law on Competition refuses to issue the concentration authorisation and obligates the undertakings participating in the concentration or controlling persons to perform actions specified in the law, where the concentration may result in a creation or strengthening of a dominant position or a significant restriction of competition in the relevant market. The dominant position of one undertaking created or strengthened as a result of the concentration is one of the reasons the presence of which allows a reasoned conclusion that the concentration may substantially restrict competition in the relevant market. The concept of the dominant position includes the case of joint dominance therefore very often the assessment of the consequences of concentration is based on the determination of the presence of the dominant position.

31. When establishing whether the restriction of competition is significant the Competition Council will consider the market shares of the undertakings participating in the concentration, also whether they are close competitors, whether the buyers have limited possibilities to substitute the supplier, whether the merged undertaking may obstruct the development of the competitors, whether the concentration concerned removes from the market any important competitor, etc.

4. Does your jurisdiction have specific legal provisions dealing with interlocking directorates?

32. A standard concentration notification form [10] shall include the data on the undertakings participating in the concentration including the data on the affiliated undertakings[11] and the natural persons controlling them:

1) the list of the shareholders of the undertakings participating in the concentration including the undertakings affiliated to them that hold not less than 10 percent of voting rights, issued shares or other securities specifying the share of each of them in percent;

2) the list of all other undertakings engaged in economic activity in each market affected by the concentration and in which all persons (specified above) individually or jointly have not less than 10 percent of voting rights, issued shares and other securities specifying the share of each of them in percent;

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9 The following actions are analyzed– group symmetry, market transparency, links between undertakings, etc.

10 Resolution No. 45 of 27 April 2000 of the Competition Council of the RL on the procedure for the submission and examination of notification on concentration and of calculation of aggregate turnover

11 Definition is provided in Art.3(12) of the Law on Competition

3) the list of the members of supervisory boards, boards and other bodies of management of all undertakings participating in the concentration that are at the same time the members of supervisory boards, boards and other bodies of management engaged in economic activity in each market affected by the concentration specifying the names of the undertakings and the positions of the members.

5. In your enforcement practise, do you have experience in devising remedies for anticompetetive effects arising from minority shareholdings or interlocking directorates? Can you provide examples? Does your merger control regime have a preference for structural remedies or conduct remedies for these issues?

33. When assessing the concentrations and the possible arising competition concerns, for the purpose of resolving the anticompetitive effects the Competition Council imposes both structural and/or behavioral remedies.

34. It is worth mentioning that the competition concerns may arise from horizontal concentration effects on market and vertical concentration, and both together. For instance, the interesting merger case in alcoholic beverages market the Competition Council investigated in 2003. Another important case was in telecommunications sector in 1998.

5.1 Alcoholic beverages market

5.1.1 Stumbras / Mineraliniai vandenys (2003)

35. In 2002, when analysing the compliance of the actions of *Stumbras* in granting the discounts and effecting the settlement for the advertising services with the provisions of the Law on Competition the Competition Council established that *Stumbras* was holding the dominant position in the markets of strong alcoholic beverages. *Mineraliniai vandenys* had become the winner of the public privatization tender held by the State Property Fund. *Mineraliniai vandenys* was operating in the wholesale market for trade in alcoholic beverages (imported as well as locally produced). Furthermore, the competition authority established a possible concerting of actions of competitors in the relevant markets concerning the 12.5 percent block of shares of *Artrio-2* owned by *Stumbras* and the respective participation in the management of the company. The principal activity of *Artrio-2* is the wholesale trade in alcoholic beverages. 12.5 percent of the holding in *Artrio-2* was also owned by *Alita* equally involved in the management of *Artrio-2*. *Alita* is the second largest strong alcoholic drinks producer in Lithuania and the leading producer of sparkling wines. *Artrio-2* was participating and declared a successful tenderer in the tender for the privatization of *Anykščių vynas* held by the State Property Fund. *Anykščių vynas* is another producer of strong alcoholic beverages and selected kinds of vines. The provisions of the Law on Alcohol Control of the RL established the State monopoly of the production of strong alcoholic drinks effective until 1 January 2004. Therefore it is only after the market of strong alcoholic beverages was properly liberalised that the competition in these markets could be triggered, since part of the producers of alcoholic and non-alcoholic beverages could start producing strong alcoholic beverages without any relatively large investment. The substitutability of the supply of imported strong alcoholic drinks was relatively limited on account of the price that considerably differed from the average prices of the domestic strong alcoholic beverages and the quality standards, in addition to the priority assigned by the Lithuanian consumer to the domestic production. However, following the joining by Lithuania of the EU and the elimination of all trade restrictions, *Stumbras* is expected to enter into competition with the production of not only EU but also the neighboring States upon which the EU applies a zero rate customs duty.

36. On the basis of conducted analysis, it was concluded that the notified transaction could become a significant impediment to competition at two different levels of supply chain, that is between producers and distributors respectively.

37. Having considered the circumstances as above described the Competition Council resolved to authorise *Mineraliniai vandenys* to implement the concentration deal by acquiring up to 100 percent of shares of *Stumbras* in accordance with the submitted concentration notification subject to the following conditions for the implementation of the concentration and the obligations:

1. *Mineraliniai vandenys* obligated to sell all shares of *Artrio-2* held by it upon the acquisition by *Mineraliniai vandenys* the control of *Stumbras* and the taking over of the management of the company;

2. *Mineraliniai vandenys* obligated to recall the representative delegated by *Stumbras* from the Board of *Artrio-2* upon the acquisition by *Mineraliniai vandenys* the control of *Stumbras* and the taking over of the management of the company;

3. To sell the shares of *Artrio-2* to an undertaking not related, in terms of the Law on Competition, with *Mineraliniai vandenys*.

38. Furthermore, *Stumbras* was obligated in the agreements with other undertakings to establish the prices and the conditions comparable to those established in the agreements with *Mineraliniai vandenys* in order to avoid discrimination and prevent the appearance of the possibilities to discriminate.

5.2 Telecommunications sector

5.2.1 Omnitel/ Telia&Sonera (1998)

39. Before the supposed transaction of acquiring 100 percent of *Omnitel* shares, *Telia AB* and *Sonera Corporation* (via *Amber Teleholding JV*) were jointly controlling *Lietuvos Telekomas* which was the fixed telecommunications incumbent in Lithuania holding the monopoly position. The mobile services in the market were provided by 2 operators: *Omnitel* (about 60 percent of the market) and *Bite GSM* (accordingly about 40 percent of the market). *Lietuvos Telekomas* had intention to entry into mobile telephone services market and for this purpose obtained 2 licences (and appropriate frequences): GSM 900 and DSC 1800, besides it owned minority (28 percent) of shares of mobile operator *Bite GSM*.

40. The transaction was cleared only after *Telia* and *Sonera* agreed to sell 28 percent of shares of *Bite GSM* owned by *Lietuvos Telekomas* and to waive the licences and the appropriate frequencies held by *Lietuvos Telekomas* for the provision of the mobile telecommunications services.

41. Upon the discharge of these obligations (1999), the possibility was opened for the third operator *Tele 2* to enter the market following which and the selling of the *Bite GSM* shares by *Lietuvos telekomas* and in that relation the waiving of the right of the participation in the management (in the view of joint control) the competition in the market was largely strengthened. As clear indications of that were the significant lowering tariffs, improved service quality and the increased service diversity. The increased number of the participants in the market reduced the possibility to enter for the companies into various agreements able to distort the market relations and at the same time inflict damage to the consumers.