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## Working Party No. 3 on Co-operation and Enforcement

**REMEDIES IN MERGER CASES**

**-- Lithuania --**

**28 June 2011**

*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 the 28 June 2011.*

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**1. What is your process for considering possible remedies for mergers that present competitive problems? Are parties responsible for proposing remedies, and are they required to follow particular procedures or time lines in order to do so? If your merger review system involves a 2-phase process, are there different procedures and standards for reviewing proposed remedies in the 2 phases?**

1. Article 14(1)(2) of the Law on Competition of the Republic of Lithuania (Law on Competition) entitles Competition Council (CC) to clear mergers by imposing "*conditions and obligations <…> in order to prevent the creation or strengthening of a dominant position or the significant impediment of competition*".

2. The Law on Competition provides for a two-phase procedure. Phase 1 and Phase 2 can last up to one and three months respectively. In case of commitments, the examination period may be extended by one month at the request of the notifying parties. The CC, however, encourages parties to a notifiable merger that may raise competition concerns to contact the CC at an early stage in order to discuss these concerns and craft possible solutions.

3. The remedies, both structural and behavioral, may be proposed by the notifying parties or offered by the CC itself. There are, however, no rules published as to the timelines or a particular procedure to be followed when proposing remedies. The key requirement is that the proposed remedies address the competition concerns identified by the CC.

**2. When crafting merger remedies, does your agency employ structural remedies? Do you employ behavioral remedies or hybrid remedies? How do you decide what remedy or combination of remedies best cures the competitive harm of concern? Is the approach different in horizontal and vertical mergers?**

4. The CC has employed both structural and behavioral remedies to address the competition concerns that have arisen during the assessment of merger notifications.

5. The most common structural remedy imposed by the CC is the divestment of an undertaking or a part of an undertaking constituting a stand-alone ongoing business.

6. The behavioral remedies include requirement of price transparency and arm's length dealing with related undertakings, a prohibition to apply discriminatory pricing and to impose exclusive purchasing obligations, as well as requirement to guarantee the right to terminate a contractual relationship unilaterally at any time subject to a three months notice period. Behavioral remedies have been imposed both independently and as a package with the structural ones.

7. As to the difference in approach towards choosing a remedy in horizontal and vertical merger cases, it should be noted that experience of the CC in vertical merger cases is rather scarce. Therefore no conclusive approach could be described.

**3. When seeking structural relief, under what circumstances do you require the divestiture of a stand-alone business? Do you ever require the divestiture of intellectual property in lieu of the divestiture of a stand-alone business or a collection of physical assets? When do you use each type of divestiture remedy?**

8. The CC considers the divestiture of a stand-alone business to be the preferred type of a structural remedy due to its viability and potential to exercise competitive constraint on the post-merger undertaking. Hybrid remedies are, however, often imposed to ensure the viability of the divested business.

9. The CC has, however, also imposed a divestment of a non-stand alone business in 2000 ***Vitoma / Antrimeta et al II***[1] case, where the notifying party, active on the market for procurement and processing of scrap metal, proposed to sell some of its physical assets that did not constitute a stand-alone business. Such divestiture had resulted in a significant reduction of *Vitoma's* productive capacity and, consequently, in the reduction of its market share.

10. Divestiture of intellectual property has so far never been imposed as an independent remedy in lieu of the divestiture of a stand-alone business or a collection of physical assets. The transfer of intellectual property rights has only been an explicit part of a stand-alone business divestiture remedies in e.g. ***Carlsberg AS / Orkla*** case[2], where the parties were obliged to sell a brewery, and ***Elion Ettevõtted / MicroLink AS*** case[3], where the parties were obliged to divest a retail broadband service provider.

**4. What types of behavioral remedies does your agency use? In what circumstances have you used firewalls, fair dealing clauses, transparency requirement, anti-retaliation provisions or prohibition on anticompetitive contracting practices?**

11. During the last 12 years since the coming into force of the current Law on Competition the CC has employed a variety of behavioral remedies ranging from the obligation not to discriminate (primarily used in the earlier cases) to access obligations and account separation (imposed more recently). Below are some example cases that best describe the wide range of behavioral remedies recently imposed by the CC.

12. In ***Rautakirja / Lietuvos spauda***[4] the Finnish company Rautakirja Oy acquired control of UAB Lietuvos spauda Vilniaus agentūra ("Lietuvos spauda"), a former State enterprise operating on the wholesale and retail markets for distribution of publications (newspapers and magazines). Rautakirja Oy was active on the same markets through its joint venture UAB Impress Teva („Impress Teva").

13. The concern in the present case was the creation of a dominant position at the wholesale level of the market for distribution of publications, where the combined share of the merging firms would have reached 45-50% and in some regions the merged entity would have become the only distributor. While the overlap of the parties' retail operations and their overall market share on this level was found to be insignificant, it was concluded that the vertical integration would allow the merged firm to cross-subsidise its operations and gain a competitive advantage against even the most efficient competitors. The merger was cleared subject to commitments including the obligation on the acquiring company to retain two separate channels of distribution at the retail level, not to engage in a preferential treatment of its retail operations and not to include exclusive distribution or exclusive purchase provisions in contracts with publishers and retailers. In addition, Rautakirja Oy was required to allow all publishers access to its wholesale distribution system on non-discriminatory terms. The commitments also included the right for publishers to terminate their contractual relationships with the merged entity at any time subject to a three months notice period.

14. A year after the above-described case Rautakirja Oy notified its intended acquisition of a full control of Impress Teva[5]. Even though some of the remedies imposed were similar to the ones employed in

1 Competition Council Decision No. 101, September 18, 2000.

2 Competition Council Decision No. 123, November 9, 2000.

3 Competition Council Decision No. 1S-122, October 27, 2005.

4 Competition Council Decision No. 1S-121, October 27, 2005.

5 Competition Council Decision No. 1S-190, December 29, 2007.

the earlier case, the CC has emphasized the transparency requirement as to how the commission for the distribution services should be determined. This was aimed at ensuring transparency in the system of commission and precluding instances of discrimination of publishers or publishing houses.

15. In ***Rokiškio sūris / Panevėžio pienas***[6] the merger in question affected the market of milk procurement and dairy products. One of the largest producers of milk products, AB Rokiškio sūris, intended to acquire a 35.3% shareholding in AB Panevėžio pienas that was solely controlled by AB Pieno žvaigždės, another major producer of milk products. The concentration would have changed the level of control from sole to joint. After the merger, the combined market share of the merging parties would have been 60% in the milk procurement market and 61% in the dairy product market with one major third-party competitor remaining in both markets. The concern was that creation of relations between three leading competitors might lead to fixing of prices and market sharing. The merger was, nevertheless, authorised subject to a commitment by AB Rokiškio sūris to refrain from voting in the general meeting of shareholders of AB Panevėžio pienas on issues of distribution of profits, establishment of reserves and disposition of permanent assets.

16. In ***TeliaSonera / Omnitel***[7] the merger concerned the increase of the shareholding of up to 90% in UAB Omnitel, the leading mobile telephone network operator in Lithuania, by AB TeliaSonera. At the time, AB TeliaSonera already had 60% shareholding in AB Lietuvos telekomas, the operator of the largest fixed-line telephone network, and 55% in UAB Omnitel. The CC was concerned that AB TeliaSonera would be able to ensure a full coordination between AB Lietuvos telekomas and UAB Omnitel that would allow the achievement of economies of scale and the investment in research and development, as well as horizontal and vertical integration of existing and future networks on the basis of technology and simultaneous restructure of management systems. It was thought that such coordination could lead to a reduction of competition on the relevant markets. The merger was allowed subject to commitments of the parties to refrain from reorganising or merging UAB Omnitel with AB Lietuvos Telekomas as well as to ensure that no business (customer contracts) will be transferred from AB Lietuvos Telekomas to UAB Omnitel without prior clearance by the CC.

17. The behavioral remedies imposed by the CC have not been limited in time in the earlier cases, however, this practice is changing and where appropriate the behavioral remedies have fixed time frames, e.g. in *Rautakirja Oy/ Impress Teva* the term for behavioral remedies was limited to 2 years with a possibility to extend if the market participants were to complain.

**5. Do you have experience protecting the to-be-divested assets or businesses prior to divestiture? Have you required that assets or businesses be held separate or otherwise preserved? Have you employed monitoring trustees?**

18. In cases where remedies include a divestment of assets or business, in addition to this structural remedy the CC includes ancillary measures to protect against the risk that a divestiture remedy may ultimately fail due to depreciation of the value of assets or business. The measures include an obligation on the acquiring party to maintain viability of the business to be sold, including maintaining the reputation of the business, trademarks and other acquired rights.

19. Moreover, the time limit for the sale of business is considered to be confidential in order not to undermine the value of the assets. This time limit can also be postponed to ensure that the viability of the assets is preserved.

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6 Competition Council Decision No. 1S-29, April 3, 2003.

7 Competition Council Decision No. 1S-140, December 11, 2003.

20. The CC has in three cases appointed a monitoring trustee to ensure the effectiveness of the remedy and the compliance of the parties with such a remedy (*Rautakirja Oy / Lietuvos Spauda, Rautakirja Oy / Impress Teva, Carlsberg AS/ Orkla*). In *Rautakirja Oy / Impress Teva* the monitoring trustee was also entitled to mediate the disputes as to the proper implementation of the imposed remedies.

**6. How do you ensure an expeditious and successful divestiture? Do you require divestitures be finalized before a merger closes? If not, how quickly do you require divestiture? What happens if the divestiture has not timely occurred? Do you use sales trustees? Do you insists on enhanced asset packages when sales are not timely? How do you ensure that a sale to a proposed divestiture buyer and the terms of the divestiture will accomplish your remedial goals?**

21. Given the limited four (plus one) month time frame for adopting a decision in merger assessment cases, the divestitures do not have to be finalized before a merger. The CC, however, sets a term for a divestiture, which is normally kept confidential in order to ensure the value of the assets is not undermined.

22. Since the practice of the appointment of any kind of trustee is limited, there has only been one instance where the merging parties appointed a specific sales trustee – *Carlsberg AS/ Orkla* case. Therefore, at this stage the CC would not be in a position to describe any trends or rules of the appointment of such a trustee.

23. There are no statutory provisions on how purchasers of divested assets should be approved. In practice, the obligation of the merging parties to get prior approval of the prospective buyer by the CC is clearly stated in every conditional clearance decision that establishes structural remedies.

**7. How do you ensure that parties comply with your remedy order? Do you include reporting requirements or inspection clauses in your orders? Do you have staff dedicated to enforcement of remedies?**

24. Pursuant to Article 41(1) of the Law on Competition the notifying parties may be fined up to 10% of the annual income in the preceding financial year for failure to comply with the imposed merger remedies. Article 41(4) of the Law on Competition also provides the CC with the option of imposing a periodical penalty of up to 5% of the average daily turnover in the preceding business year of the undertakings concerned for each day of continuation of infringement.

25. In addition to the statutory provisions ensuring compliance, the CC merger decisions with remedies also provide for a reporting requirement allowing the CC to ensure effective and timely implementation of the imposed remedies.

26. The only case where the parties failed to comply with the imposed remedies was *Rautakirja Oy / Impress Teva*, where the parties failed to appoint a monitoring trustee which resulted in a monetary fine.

27. In is noteworthy, that given the very small number of the members within the merger assessment division, there are no staff members specifically dedicated to enforcement of remedies.

**8. Is your experience in enforcing remedies reflected in documents describing your best practices or in other guidelines documents? If not, are you planning to issue guidance in the near future?**

28. There are currently no guidelines or other type of explanatory document on the enforcement of remedies by the CC. Taking into account that no remedies have been imposed during the last two and a half years and the limited resources of the CC there are no plans to issue guidance on the matter in the near future.

**9. What role do third parties and the public have in commenting on the proposed remedies? How have your courts assessed the agencies' remedies and effort to enforce them?**

29. There are no specific rules on market testing of remedies, but general procedural provisions ensure that third parties are able to present their views on the matter prior to adoption of the final commitment decision. As a general requirement, pursuant to Article 13(1) of the Law on Competition all notified mergers must be publicly announced in the *Official Gazette* with details as to the nature of the merger and the parties involved. Within two weeks of this publication, any person whose interests could be affected by the concentration may submit their written objections. Such third parties must then be informed of the envisaged decision before it is adopted and are entitled to submit their comments. Moreover, they are granted access to the file (except for commercial secrets of other persons) and may request participation and the right to be heard at the procedural meeting of the CC/

30. Third parties additionally have formal rights to be directly involved in the merger review process even where they are not directly approached by the CC. In cases of mergers raising competition concerns, the officers of the CC are entitled to, and normally do, contact major competitors and customers of the merging firms in order to get their views on the effects of the transaction in question on the markets concerned. Usually this is done by sending questionnaires, but other forms of contact, such as telephone calls or interviews, may sometimes be used.

31. The importance of third party involvement was particularly clear in *Rautakirja Oy / Lietuvos Spauda* and *Rautakirja Oy / Impress Teva* case, where the CC organised official meeting with the publishers, retailers and direct competitors of the parties. A large part of the publishers expressed support towards the notified merger subject to the proposed remedies. The major newspapers as well as confederation of business employers have also supported the imposed remedies.