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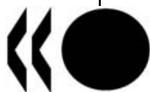

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ROUNDTABLE ON CROSS-BORDER MERGER CONTROL:
CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from Lithuania

-- Session I --

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CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Lithuania --

1. General points

1. The first legislation establishing merger control in Lithuania was the 1992 Law on Competition. By the amendment of 15 of April 2004, which entered into force on 1 May 2004, the Law on Competition has brought the merger regime, found in section III (Articles 10 to 15), closer to the EC model. A more detailed regulation of concentrations is provided in Resolution No.45 of 27 April 2000 of the Competition Council on the approval of the procedure for submission and examination of notification on concentration and of calculation of aggregate turnover (the Merger Regulation).

2. The authority responsible both for implementing the Law on Competition and for overall competition policy is the Competition Council (the Council). The Council undertakes control of concentrations, conducts investigations into concentration cases and can prohibit or permit concentrations. The Council's resolutions in merger cases may be challenged before the Vilnius Regional Administrative Court.

3. Under the provisions of the Law on Competition, the Council must be informed of the intended market concentration and its permission must be obtained when the combined aggregate turnover of the undertakings concerned is more than 30 million litas in the last financial year prior to concentration, and the aggregate turnover of each of at least two undertakings concerned is more than 5 million litas in the last financial year prior to concentration.

4. The Council has the right control concentrations that fall below the above – indicated turnover thresholds. The Council may, within 12 months after implementation of a concentration, request merging parties to file a notification if it is likely that a concentration falling below the jurisdictional thresholds will create or strengthen a dominant position, or result in a significant impediment to competition in the relevant market. This alternative was designed to address competition concerns in 'small markets', where turnover figures of firms with significant market power are below the level that would allow the competition authority to claim control over concentrations under the thresholds mentioned above. The Council uses this right on average for one to two cases per year.

5. Article 2(2) of the Law on Competition expressly states that the Law on Competition shall also apply to the activities of undertakings registered beyond the territory of Lithuania if such activities restrict competition in the internal market of Lithuania. Accordingly, Lithuanian merger control rules apply to all concentrations that fall within the turnover criteria described above, irrespective of where a concentration takes place and whether the parties concerned have any subsidiaries or activities in Lithuania. Notably, however, if a party to a concentration is an undertaking of a foreign country, its aggregate turnover is calculated as the sum of income received from the sale of its products in the Lithuanian market.

6. All concentrations of undertakings exceeding the turnover thresholds defined above must be notified to and receive approval from the Council. The law on Competition requires that concentrations

falling within the turnover thresholds be notified to the Council prior to their implementation and following the presentation of an offer to conclude an agreement or acquire shares or assets; authorization to conclude an agreement; conclusion of an agreement; or the acquisition of ownership rights or to dispose of certain assets.

7. A concentration subject to notification cannot be implemented before it is cleared by the Council. Any implementing transactions and actions performed by the undertakings and controlling persons that are constituted as implementing the concentration are considered to be invalid with no legal force and effect. At the request of the undertakings participating in concentration or of the controlling person, the Council may permit individual actions of concentration until the adoption of a final decision, taking into account the consequences of suspension of concentration to the persons concerned, as well as a foreseeable influence on competition. Such permission may be subject to certain conditions and obligations.

8. The Council has four months in total to examine the notification of concentration submitted in accordance with the established requirements. If the commitments are offered the examination period may be extended for one month at the request of the notifying parties. The time limit begins on the next day after receipt of a notification that complies with these requirements. Article 11 of the Law on Competition provides general filing requirements, while the Merger Regulation establishes detailed rules for filing according to a standard notification form. Besides the formal requirements set down in the law (such as registration information of the undertakings participating in the concentration; a description of the method of concentration and a description of transaction; an information about associated undertakings; a description of activities of each of the undertakings participating in the concentration and evaluation of their market share in a relevant market), the standard notification form requires more detailed and sophisticated analysis of the relevant markets that might be affected as a result of concentrations performed. On the other hand, by agreement with the Council, it is possible to reduce the scope of the notification in most transactions that create no significant competition issues. Although the Law on Competition establishes two phases of examination of the concentration, which may take up four month (or five month on the request of merging parties), the Council usually clears most mergers within one month.

9. The Law on Competition requires payment of a filing fee. The Government has set the filing fee at 4,600 litas.

10. Having completed its examination of a notification, the Council will make one of the following decisions:

- to permit the concentration as indicated in the notification;
- to permit the concentration by establishing conditions and obligations regarding the concentration on the undertakings or controlling persons participating in the concentration to prevent the creation or strengthening of a dominant position; or
- to refuse to grant permission to effect the concentration by imposing obligations for the undertakings or controlling persons concerned to undertake actions to restore the previous situation or remove the consequences of the concentration.

11. The Lithuanian substantive test for clearance prohibits any concentrations that create or strengthen a dominant position; or result in a significant impediment of competition in the relevant market. As to the dominant criterion, Lithuanian competition rules define ‘dominant position’ as a position of one or more undertakings in the relevant market in which the undertaking does not directly face competition, or that enables the undertaking to exercise a unilateral decisive influence in the relevant market by effectively restricting competition. The Law on Competition contains a presumption of market domination based upon high market share. Thus, unless proved otherwise, an undertaking with a market share of not less than 40 per cent (for retail trade market - 30 per cent) shall be considered to have a dominant position in the

relevant market. Moreover, unless proved otherwise, each of a group of three, or a smaller number of undertakings with largest share of the relevant market, jointly holding 70 per cent or more of the relevant market (for retail trade market – 55 per cent), shall be considered to enjoy a (collective) dominant position. The Guidelines on the Establishment of a Dominant Position provide an open-ended list of concerns that may be addressed by the competition authority. Pursuant to Guidelines, the Council is supposed to assess sole and collective market dominance (the later implies assessment of coordinated effects) and unilateral effects. Analysis of these competition-related concerns is described in greater detail. Besides, the Guidelines contain a general statement allowing the Council to take into account any other factor that may be relevant in assessing the probability of a significant impediment to competition, such as the possibility to invoke conglomerate effects or vertical foreclosure. In practice, the Council usually invokes the market dominance test. Thus, this test might be regarded as the centre of gravity of the Council's analysis. In cases of vertical concentrations, the Council also used to assess possible foreclosure of upstream or downstream markets.

2. Specific questions

2.1 Co-operation among competition authorities (international, regional and bilateral)

12. There are two bilateral agreements:

- Agreement between the Competition Council of the Republic of Lithuania and the Agency of the Republic of Kazakhstan for Competition Protection (Antimonopoly Agency) concerning cooperation in the area of competition policy and law (dated 02-08-2010);
- Agreement on co-operation between State Competition and Consumer Protection Office of the Lithuanian Republic and Antimonopoly Committee of Ukraine (dated 18-02-1997).

13. It should be noted that these agreements haven't been used in practice in any cross-border merger case.

14. There are no specific statutory provisions on the cooperation of the Council with other competition authorities. Outside the remit of national competition rules, the Council's cooperation with other competition authorities is defined by EC law, including the EC Merger regulation and the Commission Notice on case referral in respect of concentration. Besides, the Council is involved in participating in EU Ad Hoc Merger Working Group. The basic document for enforcing cooperation among the national competition authorities of the EU and the EEA in the review of mergers which are notified to more than one authority ('Draft/ Best practices on cooperation in merger review') is now under consideration.

15. The Council most intensively cooperates with the European Commission and national competition authorities within the European Competition Network and ECA (European Competition Authorities). The Council participates in cross-border mergers information exchange process. This information is very useful for possibility to use provided information to contact the case-handlers directly responsible for the case. All participants of ECA are provided with key information: the date of received notification and provisional deadline for decision; the parties involved in anticipated transaction; the relevant economic sectors/ markets; the other member States concerned.

16. The Council also actively participates in developing competition policy in international forums, such as OECD and ICN (International Competition Network). The Council participates in OECD Competition Committee, Working Party No.2 'Competition and Regulation' and Working Party No. 3 'Co-operation and Enforcement' as an observer since 2001. The Council participates in the activity of ICN since 2002 and respectively in ICN Merger Working Group. The main activities in this area are participation in Merger Workshops, and submission of responses to the ICN Questionnaires and ICN Merger Templates& Related Materials.

17. A number of significant changes to better align the Concentration control with the best practices are implemented:

- Increased flexibility in timing of notification by removing the former deadline for notification of one week after the conclusion of a binding agreement and by introducing the possibility of notification before conclusion of a binding agreement;
- Increased flexibility of investigatory timeframe by providing, at the parties request, an additional month triggered on the submission of a remedy offer;
- Enhancement of the substantive test of dominance by the application of test of significant impediment of competition;
- Inclusion of the consideration of efficiencies in merger review analysis;
- Publication of the Procedure for the Submission and Examination of Notification on Concentration and of Calculation of Aggregate Turnover;
- Publication of The Guidelines on the Establishment of a Dominant position with the latest amendments on the notion of joint dominance and significant impediment of competition in concentration cases.

2.2 Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

18. As mentioned above, the Law on Competition shall also apply to the activities of undertakings registered beyond the territory of Lithuania if such activities restrict competition in the internal market of Lithuania. Accordingly, Lithuanian merger control rules apply to all concentrations that fall within the turnover criteria described above, irrespective of where a concentration takes place and whether the parties concerned have any subsidiaries or activities in Lithuania. Notably, however, if a party to a concentration is an undertaking of a foreign country, its aggregate turnover is calculated as the sum of income received from the sale of its products in the Lithuanian market.

19. It was one case in banks merger in question which could possibly in some extent rely on the actions and decisions taken by foreign competition authorities.

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

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

2.3 Remedies (types, monitoring and enforcement)

22. The Council may permit concentration by establishing conditions and obligations relating to the concentration for the undertakings or controlling persons participating in the concentration to prevent the creation or strengthening of a dominant position. Such conditions and obligations may be both of a behavioural and structural nature. The most common structural remedy imposed by the Council is the divestiture of an undertaking. However, in practice, the Council has also imposed behavioural remedies such as, a requirement of transparent pricing and arm's length dealing with related undertakings, a prohibition on applying discriminatory prices and imposing exclusive purchase obligations, as well as requirement to provide the possibility of unilateral termination of a contract.

23. The Council applied both structural and behavioural remedies to resolve competition-related concerns resulting from foreign-to-foreign mergers. However, the remedies were imposed only in situations where merging non-Lithuanian companies had significant presence on Lithuanian markets through their local subsidiaries or related companies. In practice, under the common legal power to use obligations and conditions the Council can use the trustee institution (both divestiture and monitoring) in more complicated cases where it is required to ensure compliance with obligations. As a rule, the parties involved in concentration are obliged to provide regular information on adequate compliance with obligations and conditions.

24. As practice shows, the risk of a foreign-to-foreign merger being blocked is rather low, but it can be expected that if question of dominance or significant restrict of competition arose, the Council might make clearance subject to either behavioural or structural remedies, including a 'hold separate arrangement'. There are provided below two instances of foreign-to- foreign mergers with applied structural and behavioural remedies.

2.3.1 A merger of breweries

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

aforementioned, the final decision contained described procedure of providing regular trustee's reports and information to Council on compliance with obligations. And finally, *Kalnapilis* was sold and a buyer *Danish Brewery Group* was approved.

2.3.2 A merger in telecommunications and information technologies services

26. In 2005, the Council examined the notification of acquiring a 100 per cent shareholding of *Microlink AS* by one of the largest Estonian telecommunications and information technologies service provider *Elion Ettevõtted AS*. *Microlink AS* was Internet and data transmission services provider in Lithuania, Latvia and Estonia. Upon the implementation of the transaction in Lithuania *AB Lietuvos telekomas* was supposed to acquire subsidiaries of *Microlink AS* operating in Lithuania. *AB Lietuvos telekomas* and *Elion Ettevõtted AS* were controlled by the *TeliaSonera AB*. The Council assessed the concentration deal under consideration as vertical and horizontal in the retail Lithuanian market of broadband access. At that time *AB Lietuvos telekomas* was a sole wholesale broadband access provider in Lithuania, operating a well-developed fixed telecommunications line network and the infrastructure; furthermore, the company held a dominant position in the leased lines market, and, in additional to quite a number of other advantages was in the process developing alternative internet access and data transmission technologies. The Council concluded that following the concentration through the acquisition of its competitor *AB Lietuvos telekomas* would strengthen its market position. Although *UAB MicroLink Lietuva's* market share was insignificant, it was nevertheless one of the major Internet and data transmission services provider in Lithuania. Due to the concentration transaction *AB Lietuvos telekomas* would strengthen its position in the market and in connection with other related undertakings could restrict competition in the relevant Lithuanian retail market for broadband access. Meanwhile its competitors managing networks of much lower penetration rate had less possibility to increase their market shares. Thus, the Council authorized *Elion Ettevõtted AS* to implement concentration with following conditions and obligations. First at all, *AB Lietuvos telekomas* was obliged to sell *UAB MicroLink Lietuva* within an established time limit. Secondly, until the divestiture *AB Lietuvos telekomas* was obliged to maintain viability of the acquired entity, accordingly maintain its competitiveness, trade marks and other acquired rights related with the image of the entity. Besides aforementioned, the Council imposed an obligation to ensure the continuity of the contracts concluded with the business partners and customers, *AB Lietuvos telekomas* was obliged to ensure non-discriminating terms in the provision of the broadband access to all recipients of the service. The decision also contained prescribed procedure for providing regular information of *AB Lietuvos telekomas* to the Council on compliance with obligations. The latter company was disposed of prior to the established term and later in 2006 *UAB Microlink Lietuva* offered to the market a fixed telecommunications service 'Metro Tel' thus entering into competition with *TEO LT, AB* (former *AB Lietuvos telekomas*).

27. During the investigation procedure, the Council communicated to the Latvian Competition Council and the Estonian Competition Authority. As Internet and broadband access markets were defined as national markets, so it wasn't the possible referral case to the European Commission. The situation in Lithuanian market slightly differed from the certain situation in Latvia and Estonia, as *UAB Microlink Lietuva* didn't own the network for providing Internet and data transmission services. It used network based on leased lines from *AB Lietuvos telekomas,* besides the leasehold time was coming to an end. However, *Microlink AS* entities in Latvia and Estonia owned networks for providing aforementioned services. Therefore, the Latvian Competition Council and the Estonian Competition Authority adopted decisions contained the obligation to divestiture the part of business asset (network). Notably, that the first decision was made by the Latvian Competition Council, the second – by the Lithuanian Competition Council, and the latest – by the Estonian Competition Authority.