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Global Forum on Competition

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from Estonia

-- Session II --

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. In Estonia both horizontal and vertical anticompetitive cooperation (agreements between undertakings, concerted practices and decisions by associations of undertakings) are prohibited under the Competition Law. The Competition Law neither define nor even mention hard core cartels – all forms of anticompetitive co-operation are treated alike.
2. According to Penal Code these two types of collusion are regarded as criminal offences and the Penal Code does not differentiate between the two either. Therefore, any kind of anticompetitive co-operation is criminally punishable. Both undertakings (legal person) and members of the management or of the supervisory board of a legal person will be liable and may be punished for the committed crime.
3. As referred to above, Estonian legislation does not provide any definition of the hard-core cartels but in practice the distinction is drawn between hard core cartels, other cartel activities and vertical anticompetitive activities. In Estonian Competition Law the above-mentioned restrictive anticompetitive cooperation is seen exactly the same way as in the European Union competition law (Article 81 of the EC Treaty).
4. As any kind of anticompetitive cooperation is prohibited, there is no requirement to prove an explicit agreement between the parties. Prohibited cooperation may manifest itself in any form, even tacit collusion. Still, it is highly unlikely that tacit collusion could actually be criminally punished because of the high standard of proof which comes with criminal procedure.
5. In order to impose criminal sanctions it is not important to show the actual effect of the restrictive practices – it is presumed that the anticompetitive co-operation will produce negative effects on competition. Sanctions for competition related crimes are not higher than in cases of other crimes – the rules are uniform throughout all of the Penal Code. The actual punishment depends on the circumstances of the case (including mitigating and aggravating circumstances). Of course, if the restrictive practice actually causes negative effects it could influence the sanctions depending on the effects.
6. Although it is possible to prove anticompetitive co-operation without different evidence in the administrative proceedings where part of the burden of proof is vested on the person whose activities are under investigation, the standard of proof in criminal cases is somewhat higher. Although in certain circumstances the indirect evidence could theoretically be sufficient enough to prosecute a person, for now there is no case-law to actually confirm it.
7. The hard core cartels are especially harmful to competition, so, in our view they have to be prosecuted as strictly as possible. In Estonia there is no need for the existence of explicit agreement between the parties to prove a cartel but in case of collusion not involving an agreement it is harder to find clear direct evidence and therefore we will proceed more carefully in order not to impose unjust sanctions on persons. This does not weaken the fight against cartels but enables stability and legal certainty.
8. We find the leniency programs very helpful in discovering the cartels, especially the secret cartels. We already have the necessary legal framework for leniency in the Criminal Procedure Code and we are currently working on the detailed conditions for the application of leniency. As soon as the detailed conditions are ready they will be enforced by the Chief Public Prosecutor.