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**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

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CONTRIBUTION FROM ESTONIA

This note is submitted by Estonia as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

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EXPERIENCES OF AND NEEDS FOR CAPACITY BUILDING

Mrs. Aini Proos
Deputy Director General, Estonian Competition Board

Activities conflicting with good trade practices and customs were prohibited by a law on fighting against unfair competition in Estonia in 1931. However, the application of the law ended together with the disappearance of the State of Estonia as a result of World War II.

In 1988, after the will to restore the independence of Estonia had been declared, restoration of market economy started. A new Price Act, passed already in 1989, became a basis for liberalisation of prices. In 1990 a Price Board was established. The main task of the new Board was to analyse and coordinate the price setting, set the prices and to supervise that the undertakings conformed to those. Thus the work performed was more of a character of consumer protection. At the same time, the Board was engaged, together with relevant ministries, lawyers and economists, in drafting legislative acts necessary for liberalisation of prices.

In 1991 the first draft of Competition Act was drawn up, that included provisions on prohibition of restriction of competition by means of agreements, abuse of dominant position and unfair competition. However, as this draft was not approved and as, at that time, we did not have well educated specialists in the field, knowledgeable of basic principles of market economy, the subsequent drafts of legal acts relating to prices and competition issues were drawn up by officials exercising the supervision of the Price Act together with ministerial officials, all of them possessing a degree in law or economics that was obtained at so called Soviet time.

To create something so totally new for the country, in such conditions - it was a job involving great responsibility, but a very interesting one. I was fortunate enough to work in both working groups, in the one that drafted the Competition Act, as well as, in the other that drafted the Consumer Protection Act.

In 1993 the Competition Act and in 1994 the Consumer Protection Act entered into force in Estonia. In 1993 the Price Board was renamed to Estonian Competition Board (ECB) and a duty of supervising the compliance with the Competition Act, as well as, a duty of supervising the prices were imposed on the new agency. There were 47 working places at the ECB at that time.

After the process of liberalisation of prices came to an end, there was no more need for monitoring the price setting in Estonia. Therefore, in 1995 the relevant agencies were reorganised so that Consumer Protection Board employed the officials exercising supervision in respect of prices and there remained 29 officials in ECB.

Since 1999 we have working places for 47 officials again and this time for exercising supervision in respect of competition matters only, in order to be able to carry out more efficient supervision.

In 2001 our scope of work broadened, as the supervision in respect of credit institutions, securities brokers and insurance companies, as well as, total merger control were added to our duties. At the same time we ceased to exercise supervision in respect of unfair competition matters.

Besides the ECB, separate agencies-regulators were established for exercising supervision over activities of natural monopolies, in such sectors as energy, railway transport and communications, namely

Energy Market Inspectorate, Railway Administration and Communications Board. In matters concerning state aid, the Ministry of Finance exercises the supervision. All Boards belong to an administrative field of a Minister: the ECB - Minister of Finance, Energy Market Inspectorate - Minister of Economic Affairs, Railway Administration and Communications Board - Minister of Roads and Communications. It is arranged so that the budgetary questions and appointment of the Director General fall into the scope of activities of the relevant Minister, but the supervision in respect of compliance with the laws is carried out independently by the agencies.

During the past years, all the mentioned agencies, including the ECB, have been engaged in training new and absolutely new employees in the process of actual supervision, as there are no specialists available that have special education obtained at some educational institution. In case some employees leave, we must start training new people again. We have been fortunate to receive assistance in the form of training from those countries, where the supervision in respect of competition matters has been exercised for many decades already. However, I would like to mention here, that it is not enough to train only the officials, as it has appeared, also to be necessary to train the judges as well, as they also lack preliminary knowledge of market economy and free competition that enables market economy to function properly. We have used every available possibility to offer to the judges interesting lectures and seminars, co-operating with specialists in the respective fields from other countries.

For many years, most of the employees of the ECB have been economists; fewer people have had a degree in law or in other fields. From this have arisen problems concerned with legal correctness of proceeding of cases and of decision making, as well as, with defending the cases in court.

However, we do not have any reason to believe that this situation will change, as the top lawyers' - advocates' offices charge for 3 hours the same amount of money that a medium employee will receive as salary in one month. Thus the top lawyers are not interested to work in a government agency, but prefer to defend those who are in position to buy their services. The government agencies are not likely to use their services too often. In 2001 the budget of the ECB was not enough even for handling one case in a court. We were forced to ask for additional financing from the Ministry, and we were fortunate to receive it this time. In all other cases we had to manage with the lawyers employed by the ECB itself.

At present, the ECB does not have the authority to prosecute; therefore, the probability of discovering cartels is small. For taking measures in order to prohibit the cartels, it would be necessary to obtain evidence. For obtaining evidence, it would be necessary for the officials to have the authority to confiscate all documentation immediately, to have immediate access to all rooms, to listen (secretly) to all meetings. At the same time, the fines must be sufficiently high in order to force the undertakings to act fairly and the supervision procedure together with court hearings should not take years. Such extension of the process is very beneficial to the offender, as it will be possible for such an undertaking, during the whole proceeding period, to force unfair conditions on the customers, as well as, on competitors in the goods market, the results of which cannot be remedied later, regardless of the amount of a fine imposed on the undertaking.

Understanding the necessity of such measures, that would restrict the activities of undertakings, takes some time on all levels in a young country. So shortly after a fall of a totalitarian regime nobody wishes to impose strict measures. As a result, the undertakings in dominant position in the market or those entering into cartel agreements, take use of the general liberalisation of economy in their own interests and become more and more fearless.

Considering the above-mentioned, we can draw a single conclusion here, that possessing only those resources that we do today, it is not possible to exercise efficient competition supervision, i.e. to prevent the ruling of cartels and monopolies.

I would like to suggest some measures that might change the situation:

- For using legal assistance in proceeding of cases and in courts, for that is necessary to rearrange the budget of the Board this way that by reducing the number of employees, we shall have resources for retaining legal assistance. At the same time, it is important that those resources should not be reducible as the so-called "household expenses" are, but that the relation between the salary fund and legal assistance remains unchanged.
- Allocation of competition cases for proceeding to private entrepreneurs - the advocates' offices, via public calls for tender, payment for their services at a court's decision from the sums payable by the offender or in proportion with a fine imposed by a court. At the same time, minimal use of resources of state budget must be foreseen, in case an offence is not established.
- Amending legislation thus as to give authorisation for prosecution for the purpose of exercising supervision in respect compliance with the Competition Act, for which every time a decision made by a judge would be necessary.
- To provide that a claim for damages caused to the competitors or customers be made after the court's decision takes effect, regardless of the length of time that has passed since the offence was committed.
- To provide a possibility to agree upon an arbitrator, in order to quicken the decision making, or formation of a special court (competition or market court), the decisions of which may be appealed further only to the Supreme Court, instead of the present three court levels.

To conclude, let me say that building up of a competition authority does not involve only creation of working places, but also continuous training of the competition officials, as well as, of the judges. The laws must be continuously amended, too, in order to ensure that there are no gaps in legislation and to prevent, thus, from making use of them. This way it would be possible to ensure the existence of legal and economic facilities for exercising efficient supervision in a country.

ANNEX A

Questionnaire to invitees on international co-operation in cartel and merger investigations

CARTELS

The questionnaire covers the period from 1 January 2000 to the present.

The ECB has had assistance within the following projects:

- Assistance to the Estonian Competition Board (ES 9803.03.02.003) – Mr. Eugene Stuart
- Strengthening of the Estonian Competition Board (ES/98/IB/FI/01) – Mr. Philippe Riou
- Co-operation project between the Finnish Competition Authority and the Estonian Competition Board – Ms. Leena Eerola

Within these projects the ECB has asked for assistance in the following cartel cases:

- Case 25/99 Agreement between milk producers
- Case 5/00 Milk processors and wholesalers
- Case 22/99 Hawaii Express (resale price maintaining)
- Case 22/00 The agreement between the members of Viljandi County Tradesmen Union
- Case 13/99 Agreement between the taxi drivers of Pärnu city
- Case 32/99 Agreement between the taxi drivers of Tartu city

We have had meetings and discussions about abovementioned cases. The assistance has always been very useful and practical and has helped to solve the cases.

The ECB has made formal requests to foreign competition agencies in a case started in 1998 concerning a boycott in the Port of Helsinki of vessels operated by the Estonian Shipping Company (ESCO). The ECB sent out 3 requests to Finnish, Swedish and Danish Competition Authorities. Their answer was that the issue of boycott of Estonian ships in the ports of these countries does not belong to the competence of competition authorities for reason that according to their competition laws, they are not dealing with the questions related to the labour market. ESCO submitted an application to the European Commission in the same matter against Finnish company Finlines. ESCO complained that Finlines had abused its dominant position in the port of Helsinki and that the rules of the Federation of Finnish Master Stevedores, to which Finlines belongs, provide that a member must seek permission from the Board when it wishes to establish itself in a new port, which, in ESCO's view, constitutes a market-sharing agreement in breach of Article 81 of the EC Treaty. The ECB offered assistance to the European Commission DG IV in the process of investigation in this case. The European Commission founded in its decision of 17

January 2001 that the Finnish Competition Authority is the best placed to investigate and decide upon ESCO's complaint.

CONTROL OF CONCENTRATIONS

1. On October 1st, 2001 a new Competition Act was put into effect, where important amendments were made in the chapter of control of concentrations:
 - Possibility to prohibit the concentration which creates or strengthens a dominant position as a result of which the competition would be significantly impeded in market for goods;
 - The definition of control was amended;
 - Acquisition of joint control and acquisition of control over one part of another undertaking were added;
 - Market share threshold was abandoned. Turnover thresholds were enhanced. Additional threshold was added, requiring that business activities of at least one of the merging undertakings or of the undertaking of which control is acquired, are carried out in Estonia;
 - Amendments in submission and proceeding of notifications.

In order to clarify the issues of control of concentrations the ECB prepared the drafts and the Minister of Finance established the guidelines for submission of notices of concentration and for calculation of turnover of parties to concentration.

2. Since October 1, 2001 to December 31, 2001 ten concentrations were notified to the ECB. Two of them did not fall within the scope of the Competition Act. One did not reach the turnover thresholds and the other fell within the exemption for credit institutions.
 - In seven cases one undertaking acquired control over the whole of another undertaking and in one case the control was acquired over a part of another undertaking;
 - In four cases the control was acquired over a foreign undertaking that carried out business activities in Estonia. In four cases the control was acquired over whole or part of Estonian undertakings. In one case where the control was acquired over a part of an Estonian undertaking, the acquirer of control was an Estonian undertaking.
 - The notified concentrations involved information services, telecommunications, forest industry, district heat supply, soft drinks and insurance markets.
3. Some problems have appeared during the proceedings of notified concentrations.
 - 3.1 Notification threshold concerning business activities in Estonia capture some insignificant concentration. The ECB considers that in the case of a foreign undertaking the fact that the business activities are carried out in Estonia means, that the undertaking has a subsidiary or branch in Estonia. Sometimes the subsidiary or branch of foreign undertaking has very little importance in Estonian markets and if there is no horizontal overlaps and vertical connection, the

concentration does not raise competition concerns. It may be necessary to establish a turnover threshold for business activities carried out in Estonia in future.

- 3.2 According to the Competition Act the concentration shall be notified to the ECB within one week as of acquisition of control or joint control. Such a wording has caused some problems in defining the moment for notification. Especially in case of acquisition of control based on written agreement, which conclusion and enforcement dates are different. If the notification date is the second one, it is not pre-concentration notification anymore. Therefore the ECB has strongly suggested obliged parties to submit the notification within one week from conclusion of agreement, but not later than one week after it is put into effect.
- 3.3 According to the Competition Act the parties to concentration shall not perform any acts directed at giving effect to the concentration before adoption of a decision by the ECB. No exemptions are allowed from this rule. It has appeared that in some cases under certain conditions the exemptions from this rule are necessary.
4. Cooperation with competition authorities from other states

In the process of preparing the amendments to the Competition Act, the ECB was supported by experts from Swedish and French competition authorities. Also the officials of the ECB had a possibility to study the proceeding of concentrations in the Finnish Competition Authority.

Another aspect of co-operation is that several cases are notified to the ECB and to the competition authorities in other states. As the proceedings and decisions of competition authorities may be different, it may cause problems to parties to the concentration.

According to the knowledge of the ECB at least four transactions were notified to the ECB and to the Finnish Competition Authority on the same time.

In one case the ECB had co-operated with Finnish Competition Authority in the form of exchanging information in order to clarify the actual acquirer and relevant market issues. Because of the confidentiality restraints it was possible to exchange the public information only.