

# OECD-GVH RCC Newsletter

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## Foreword

### Dear Readers,

Welcome to the second edition of the RCC Newsletter. The feedback you gave us on the first edition was encouraging, and judging by your willingness to provide articles for this edition we hope that we will succeed in offering you a forum for learning and exchanging ideas.

A lot of changes are keeping many of you, our beneficiary countries, busy and this is reflected in the contributions you sent us for this edition. Serbia and Montenegro report on the changes they have experienced last year in terms of legislation and changes in organisational structure (Montenegro), in order to align their competition law with the EU legal framework. Ukraine has introduced amendments to its leniency programme, incorporating many of the lessons that competition authorities around the world have learnt on their way to establishing effective leniency regimes. Kosovo has undertaken a thorough study of its banking system and discusses its most important findings and recommendations.

You will find a new addition to the newsletter. We are trying to draw your attention to a couple of topics that are currently of interest to many competition authorities. Two of them – “screening as a tool for cartel detection” and “quality competition” – have been inspired by recent OECD roundtable discussions. The third, an article on pay-for-delay, picks up on a topic that is currently being hotly debated in the competition world. In the context of this newsletter these articles can only serve as appetisers. But if you find the topics interesting and/or have cases in these areas they will provide you with ideas, concepts and lots of sources for further reading. Bon appetit!

Let us know about other topics you would like to see summarised and discussed by competition experts – we also welcome feedback on the topics we have chosen – were they useful to you?

We would like to remind you not to forget to check the programme of the RCC for 2014 - save the dates for the seminars that are of interest to you.

The next edition of the newsletter is scheduled for July 2014 and we are looking forward to your comments, contributions and questions. Please contact Sabine Zigelski (OECD – [sabine.zigelski@oecd.org](mailto:sabine.zigelski@oecd.org)) and Andrea Dalmay (RCC - [dalmay.andrea@gvh.hu](mailto:dalmay.andrea@gvh.hu)).



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## Annual Programme of the RCC for 2014

Date	Event
<b>February 14 – 15</b>	<b>Seminar on European Competition Law for National Judges – Abuse of Dominance</b>
<b>March 11 – 13</b>	<p><b>Practice and Procedures in Merger Investigations</b></p> <p>The seminar will focus very specifically on investigation techniques in merger proceedings. We will have a close look at best practices for investigations. For more complex phase 2 investigations topics such as essential planning and investigation steps, questionnaires and market surveys, gathering of econometric data, conducting state of play meetings, market testing of remedy proposals and drafting of decisions will be addressed. Experienced practitioners from OECD countries will deliver presentations in which they will share their experiences. Participants will practise on a hypothetical merger case throughout the seminar.</p>
<b>April 10 – 11</b>	<p><b>GVH Staff Training</b></p> <p>The two day seminar hopes to achieve two things: to provide an update on developments in the enforcement of and case law on Art. 101/102 TFEU (day 1) and to provide specific training in merger/antitrust/UCP case investigation techniques (day 2).</p>
<b>May 9 – 10</b>	<b>Seminar on European Competition Law for National Judges - Cooperation with the European Commission &amp; Private claims for damages</b>
<b>June 3 – 5</b>	<p><b>External Seminar FYR Macedonia – Bid Rigging and Public Procurement</b></p> <p>The focus of the seminar will be on a special kind of cartels – bid rigging cartels. Characteristics of bid rigging cartels will be examined, as will their treatment as a criminal offence in many jurisdictions and the ways in which they can be detected. We will use OECD materials on bid rigging and also on screens for cartel detection. As public procurement is often the victim of bid rigging, we will also focus on ways to alert public procurement officials to illegal cartel activities and we will compare different approaches to competition advocacy and to co-operation between competition authorities and other government agencies in this area. Participants will share their experiences with experts from OECD countries in lectures and case studies. This will be complemented with a practical exercise on a hypothetical case.</p>
<b>September 16 – 18</b>	<p><b>Competition Topics in Retail Markets</b></p> <p>Retail markets, especially food retail, pose a lot of different challenges to competition authorities as they are frequently investigated and are always of high interest to the public. The seminar will provide a better understanding of market definition and methodology, topics in merger control (oligopolistic markets, buyer power), vertical restraints (exclusive dealing, RPM), special phenomena such as category management and will also provide insights into sector inquiries. The topics will be addressed and discussed in lectures by</p>

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competition experts from OECD countries and in case studies presented by the participants.

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**October**

**RCC – FAS Seminar in Kazan, Russia**

Market analysis – general aspects and with a focus on special sectors (TBD)

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**December 2 – 4**

**Evidentiary Issues in Establishing Abuse of Dominance**

Many evidentiary challenges arise in establishing abuses of dominance. In order to establish a finding of dominance, competition authorities usually rely on indirect evidence such as market shares and barriers to entry. There is typically no single factor that leads to a finding of dominance, so it can be difficult to determine how much and what type of evidence is sufficient. Equally, the establishment of an abuse raises evidential complexities. The types of conduct that constitute an abuse can be difficult to establish and competition authorities face the difficult task of weighing evidence in support of an abuse against evidence suggesting that the conduct was a legitimate practice. The seminar will explore these issues through presentations by competition officials from OECD countries, case studies presented by the participants and hypothetical case studies.

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## Competition Committee Meetings: 17 - 20 June 2013

### Roundtable on New Developments in Rail Transportation Services

This roundtable was a follow-up to the discussion held in 2005. At that time competition was considered to be the exception rather than the rule in rail services, and there was some scepticism as to whether competition would develop since the efforts that had been made with vertical separation and competitive tendering had generated little market entry. The discussion showed that in most countries competition in freight services has been increasing and that the market shares of the incumbents have declined everywhere, and that in some countries the decline has been substantial. However, competition in the market is much less common in passenger services, though some notable exceptions were highlighted, such as Italy where there has been entry in the market for high speed rail services. One of the reasons for the more limited degree of direct competition in the passenger market is the limited number of commercially viable routes, as a large number of passenger services are subsidised. Nevertheless, competition through tenders is developing in many countries and it is helping to reduce subsidies. Sweden was highlighted as an example of a country which is successfully running tenders for such services.

The roundtable also discussed a number of other issues including issues related to public investment, (which is very extensive in this sector), antitrust issues related to vertical integration and access conditions, and also the issue of limiting competition from other means of transportation.

Link to the Secretariat paper:

[http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WP2\(2013\)6&docLanguage=En](http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WP2(2013)6&docLanguage=En)

### Roundtable on the Definition of Transaction for Merger Control Review

This topic was a follow-up discussion to the Committee Report to the OECD Council on the experiences of member countries under the 2005 OECD Recommendation on Merger Review. While the 2005 Recommendation provides that a merger regime's jurisdictional thresholds should be based on clear and objective criteria, it does not provide any guidance as to the concept of a "merger transaction". Significant differences exist among jurisdictions in this regard. For example, in the case of share acquisitions, some jurisdictions use percentage thresholds to identify at what level the acquisition of shares in another corporation is a "merger transaction", some focus on the value of the transaction or size of the parties, and others apply an "acquisition of control/material influence" model. Despite these different approaches, most "middle of the road" transactions will clearly fall under any jurisdiction's definition of a merger transaction. The difficult questions tend to arise in what could be considered as "borderline cases", such as the acquisition of a relatively small percentage of shares in another corporation, joint ventures where it is less clear how permanent the changes are that the parties' collaboration will bring about, and acquisitions of a few assets which in themselves are not clearly an "independent business". In these borderline cases, one can

expect to see more differences among various approaches to the definition of a “merger transaction”, and the advantages and disadvantages of various approaches might become more apparent.

The roundtable focused on these difficult and more interesting questions and provided an opportunity to revisit some issues that were discussed during the 2008 roundtable on Minority Shareholdings, although in a different context and without getting into questions of substantive analysis and remedies.

Link to the Secretariat paper:

[http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WP3\(2013\)5&docLanguage=En](http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WP3(2013)5&docLanguage=En)

## Roundtable on the Role and Measurement of Quality in Competition Analysis

The roundtable focused on how courts and competition authorities can take quality effects into account in competition cases. Concerns about quality are frequently raised in competition agency guidelines and court decisions, but there is no widely-agreed framework for analysing it and the treatment is often superficial. The delegates discussed various approaches to defining and measuring quality, and to using decreases in quality as an alternative to increases in price for the purpose of defining markets. Theory is helpful in regulated markets where prices are fixed at a level above marginal costs (quality will increase), but not so helpful in other markets. Performing an empirical analysis of the effects that changes in competition have on quality is therefore useful in most cases.

Delegates generally viewed choice as a component of quality, and concerns about less choice / smaller product ranges were raised during the discussion of several matters. However, while there were many examples of stronger competition leading to higher quality, it was not clear that more competition always leads to higher quality, and some delegates characterised the relationship between quality and competition as “complex”.

Link to the Secretariat paper:

[http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2013\)8&docLanguage=En](http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2013)8&docLanguage=En)

## Roundtable on Competition in Road Fuel

As crude oil and gasoline prices have increased sharply over recent years, both the public and policy makers have become acutely interested in determining the reasons for these increases and often turn to competition authorities to establish whether they are a result of anticompetitive practices. This roundtable discussed the main determinants of gasoline prices, and focused particularly on benchmark prices and on how government intervention and the regulatory framework may influence gasoline prices. Price formation, the existence of price cycles and of asymmetric pricing (also known as the “rockets and feathers” phenomenon) are complex matters and are not yet fully understood.

Delegates discussed the structural conditions which may favour parallel behaviour and coordination in these markets and the role of exogenous factors on pricing behaviour. Some delegates shared their experiences on the analysis of price cycling patterns and the role of information exchange and information

sharing. The “rockets and feathers” phenomenon was also discussed and some techniques for identifying evidence of asymmetric pricing were presented, along with possible explanations and the policy measures which may be implemented to tackle this pricing pattern. Several competition authorities monitor the road fuel sector closely and delegates discussed the importance of monitoring in order to have readily available information at their disposal to inform authorities and the public, as well as to detect possible anomalous prices in comparison with historical data. Regulation and deregulation were also discussed, including the introduction of rules to enhance price transparency and rules to reduce price volatility. Delegates shared the experiences of their competition authorities in their

enforcement activities, the difficulties they faced when distinguishing lawful conduct from unlawful conduct, and the types of evidence they employed to prove the existence of anticompetitive behaviour. Finally, the roundtable also provided an opportunity to discuss the main results of the market studies that have been conducted by some competition authorities in the road fuel sector, as well as their key recommendations and advocacy efforts aimed at improving the competitive conditions in this sector.

Link to the Secretariat paper:

[http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2013\)9&docLanguage=En](http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2013)9&docLanguage=En)

## Competition Committee Meetings: 28 – 31 October 2013

### Hearing on Links between Competition and Productivity

The Secretariat presented a draft “factsheet” that outlined the recent evidence on the links between competition and productivity. The factsheet provided a two page “narrative” of statements about the effects of competition and competition policy on important macro-variables, such as productivity, employment, and inequality. It also presented evidence for each of the statements, based on existing economic literature on the topic. The aim of the factsheet is to provide competition authorities with an additional tool to use in advocating their role. A draft version was discussed during the meeting. In light of the suggestions and comments received, a final version will be produced and will be available

in 2014 as part of the [Best Practice Roundtables on Competition Policy](#) series.

### Roundtable on Waste Management Services

The roundtable discussed competition issues in the handling of waste, in particular waste from households. It explored the developments that have taken place in this sector since the roundtable discussion in 2000.

Three main areas were covered:

- Collection of waste - households generate a variety of waste that is collected to be reused, recycled, incinerated as fuel or buried in landfills. Waste collection is



often considered to be a natural monopoly because of the large economies of density that characterise it. The roundtable discussed to what extent this is true and if competition can play a role in making these services more efficient (e.g. services could be tendered to the most efficient provider).

- Waste treatment through landfills and incinerators - competition in the markets for incineration services, landfills and waste transfer stations operates within very tight boundaries because of the presence of extensive regulation. Landfills can often only accept waste that originates within their boundaries. Legislation can specify the percentages of various types of waste that must be recycled, or it may prohibit the creation of new landfills or incinerators. International trade rules can restrict the export or import of various kinds of waste. The roundtable examined the interaction between competition and regulation in this area.
- Producer responsibility schemes – these schemes are developed by producers of goods that generate specific types of waste (e.g. packaging, batteries, tyres) to comply with obligations to ensure that this waste is appropriately collected and recycled (the so-called extended producer responsibility obligations). These schemes have to organise or outsource the collection of this waste, its sorting and transformation into secondary raw materials, and its subsequent sale. The roundtable discussion explored the different forms these schemes can take and the competition problems they may give rise to.

Link to the Secretariat paper:

<http://www.oecd.org/daf/competition/competition-issues-in-waste-management.htm>

## Roundtable on Remedies in Cross-Border Merger Cases

The roundtable on cross-border remedies sought to build on the discussions that have taken place over the years on the same topic and to also provide an update. In particular it focused on the monitoring and implementation of cross-border remedies, and on the issues that arise when such remedies need to be revised. Some of the key issues included:

- Examples of important recent mergers that involved cross-border remedies.
- Experiences of authorities in coordinating or cooperating with other authorities in connection with these remedies.
- Challenges which have arisen in the design or implementation of cross-border remedies, and how the authorities have overcome them.
- Revision of cross-border remedies for unforeseen circumstances or subsequent developments and the cooperation of authorities in such cases.

The proceedings of this roundtable discussion will be published in 2014 as part of the [Best Practice Roundtables on Competition Policy](#) series.

## Roundtable on Ex Officio Cartel Investigations

Fighting cartels remains a top priority for competition authorities. Since cartels are secretive in nature and cartelists often go to extreme lengths to conceal their illegal activities, cartel enforcement can be



extremely challenging for competition authorities, which most of the time need to rely on reactive tools such as complaints by competitors and customers or applications by participants to a cartel for leniency.

Less frequently, competition authorities take proactive actions to identify firms which are potentially involved in a cartel conspiracy, or markets which may be affected by cartelisation. These proactive cartel detection tools involve the analysis of observable economic data and firm behaviour, systematic monitoring of media, tracking of firms and individuals etc. to detect behaviour which is inconsistent with a healthy competitive process. Discussing the balance between proactive and reactive detection and particular detection methods may benefit competition authorities when they are evaluating their anti-cartel detection and enforcement policies. The roundtable discussion focused on

- proactive and reactive cartel detection methods, and the proper balance between them to achieve an optimal level of cartel deterrence and detection; and
- the use of screens by competition authorities to detect likely cartels and initiate antitrust investigations.

The roundtable discussion provided an opportunity to discuss the various screening methods used by authorities and to present successful experiences of the implementation of such screens in case enforcement.

Link to the Secretariat paper:

<http://www.oecd.org/daf/competition/exofficio-cartel-investigations.htm>

## Roundtable on Food Chain Industry

Recent events on world commodity markets, coupled with high levels of food-price inflation, have raised concerns, including competition concerns, about the functioning of the food chain across many countries from upstream segments through to consumers. The aim of this roundtable was to address competition issues in the food chain, such as:

- market concentration at food processing and retailing stages associated with the consolidation resulting from mergers and acquisitions;
- the importance of market power and related buyer power;
- the effects of vertical restraints on efficiency and welfare at different levels of the food chain; and
- the increased penetration of private labels.

Link to the Secretariat paper:

<http://www.oecd.org/daf/competition/competition-issues-in-food-chain.htm>

**Papers from the meetings will be available at**

<http://www.oecd.org/daf/competition/roundtables.htm>.

## Some Thoughts on Competition and Quality



**Sabine Zigelski**  
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During the June 2013 meetings of the OECD Competition Committee a roundtable was held on the topic of “The Role and Measurement of Quality in Competition Analysis”, based on a note by the Secretariat (Ms Anna Pisarkiewicz and Mr Jeremy West).

(<http://www.oecd.org/daf/competition/workinprogress.htm#Quality>)<sup>1</sup>

The paper is highly recommended reading and the purpose of this article is to introduce some of its ideas and highlight their relevance for competition authorities.

It is very easy to agree that quality is of course a very important competition parameter and that competition effects on product quality can be at least as harmful or beneficial to consumers as price effects – and we routinely see product quality being mentioned in merger guidelines. At the same time it seems to be far more difficult to define what quality actually is, how it is influenced by market changes or competitive conduct that is subject to the scrutiny of competition authorities and how we can capture it in everyday competition analysis.

The first problem is of course one of definition – each of us has different notions of what quality is and values quality aspects of a product differently. To give just one example, while some consumers will only buy milk from happy biodynamic cows others could not care

<sup>1</sup> For all references and literature, please consult this roundtable secretariat note.

less about the state of mind of their milk producers. So to find out what the most relevant quality aspects of a product are and how they are valued by consumers is in itself a very difficult task. On the other hand, when defining markets, it might not be an insurmountable obstacle after all and we might be dealing with this problem quite well already: it is an enforcer’s daily bread to deal with product markets that are not homogenous, i.e. markets where products with different characteristics, features, performances – in short qualities – have to be considered and the closeness in terms of them belonging to the same relevant product market has to be decided. This is effectively what the SSNIP-test (Small but Significant Non-transitory Increase in Price) is all about. It asks which different products, i.e. usually products with more or less the same basic function but different specifications, should be included in a market. Will a price increase of 5 to 10 % of happy-cow-milk induce a sufficient number of consumers to buy industrial-style-cow-milk in order to render this price increase unprofitable? If so they should be considered to be in the same market. And what about soy-milk? So the SSNIP-test (which cannot always be performed but is always useful to conduct at least as a thought-experiment) helps us to put a rough value on different product features and qualities. Consumers will very rarely be able to say exactly how much a certain quality feature is worth to them, but they will normally be able to say if they would look for an alternative in case of a price increase and what the alternative would be. Experts have been arguing that it might be useful to use a SSNDQ-test (Small but Significant Decrease in Quality) instead, and this might be true for very dynamic and technology driven markets.

Microeconomic theory seems to be of little help when it comes to including quality aspects in the analysis of the effects that changes in the competitive landscape have. Theory usually focuses on price, keeping everything else equal and constant. Will more competition not only decrease prices but also increase quality? Or will a lot of competition in the end level out quality differences and so harm consumers who put a high value on certain quality aspects and choice? Theoretical predictions under “real life” conditions seem to be difficult and do not allow for unambiguous answers. Studies on an advertising ban by a professional association and the effect of competition on the quality of supermarket services show that an increase in competition led to marked increases in the quality of services, at the same or even lower prices. But this is rather anecdotal evidence, and other studies do not show clear results. As it is so often the case it all depends on the specific characteristics of the markets. A close look at economic reality and learning as much as possible about products and markets in the course of an investigation can and should not be replaced and will help to make predictions about the effects on quality of (anti-) competitive actions.

Theory as well as empirical evidence is much more straightforward though when it comes to markets with regulated prices above marginal costs: expenditures on marketing and quality will increase until the profits are competed away. This leads to more uniform quality offerings in price-regulated competitive industries than in unregulated ones and leaves customers with different quality needs worse off than without regulation. On the other hand they are still better off than they would be with a price regulated monopolist who does not need to compete away profits by improving quality but just sets the profit maximising price and

quality level – with less output and consumer benefit as well as deadweight losses. These general theoretical findings also generate some interesting insights into the potential effects of cartels and Resale Price Maintenance (RPM) on quality. If cartels “regulate”, i.e. fix a price level, a cheating strategy that might be harder to detect than price deviations might be to improve quality – in order to get a bigger share of the pie but at the cost of decreasing cartel related profits. And improving the quality of products and services is said to be one of the express aims of minimum RPM schemes – guaranteeing a price level that allows for higher quality offerings. However, this does not necessarily speak in favour of price cartels or RPM. Quality-wise, they lead to a more homogenous supply, leaving customers with less choice than there would be without price regulation and so possibly worse off than under competitive market conditions.

A striking real-life example of how regulated prices in a competitive industry may lead to too much quality can be found in the US airlines industry:

Airfares were regulated in the 1960s and early 1970s, at a level significantly above what a low-cost offering would have been. The profits allowed for extensive scheduling competition and a lot of additional services to passengers that many people still dream of. Customers who would have preferred less convenience and lower prices were neglected though. The counterfactual – a large range of prices and (costly) services to choose from – is what we know in the unregulated airline world of today, where everyone may choose a very individualised service. An additional finding was that under price regulation services and quality tended to decrease and airline profits increased the higher the concentration level on the market was.

Basically the same point was made in studies on price-regulated hospital markets. There higher concentration levels went along with higher mortality rates – thus patients being treated in a hospital that faced more competition had a greater chance of surviving heart attacks. Dealing with mortality rates as a quality indicator, it might not be advisable to go into detail about higher than economically optimal survival rates. The lesson to be learnt from both the airlines and the hospital studies is a rather simple one though for competition authorities: if a market is price-regulated it is still worthwhile to avoid higher concentration, otherwise the markets will suffer from overall reduced quality levels and a diversion of rents to the producers of the products and services, to the detriment of consumers. However, competitive price-regulated markets have a major drawback, too. Firms in those markets tend to raise quality to a homogeneous level that is too high for consumers who would prefer less service and lower prices.

Another type of investigation in which quality will be of interest concerns cartels that conspire to fix quality parameters – like banks agreeing to close on a certain day or cheese producers claiming that a quota system will safeguard quality. Many of these claims will need to be balanced against efficiency considerations and consumer benefits, so there can be no general advice other than being very careful in the analysis. In general, when competitors agree on very important competition parameters suspicions should be raised. Furthermore, producers tying goods or services will often invoke quality justifications that have to be considered critically. And quality may play an important role if vertically integrated firms provide services to

downstream competitors – abusive practices are not necessarily restricted to pricing and foreclosure.

To give a very brief summary, which does not do justice to either the paper that provided the basis for this article or to the theoretical studies and empirical work that have been conducted, would be that lower quality can be just as detrimental to consumer welfare as higher prices. Competition authorities cannot go wrong if they include quality aspects in their investigations and assessments, even if this will prove to be difficult in some cases. But even if the results may be inconclusive sometimes this will always improve the overall market and product knowledge and so inevitably improve the findings and decisions.

## Cartel Detection Methods in Hungary



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In the cartel investigation work of the Hungarian Competition Authority (GVH) acquiring information on usually concealed cartels is of utmost importance. In order to strengthen this work, the GVH founded a Cartel Detection Section which deals solely with the investigation and analysis of relevant economic data and market information related to cartels – in other words, with business intelligence in order to gather more information about the market. The GVH will only be able to initiate competition proceedings and detect a cartel if sufficient information is at its disposal.<sup>2</sup>

In our experience, it is only worth investing the huge amount of resources needed to prove a cartel if there is already some initial suspicion as to its existence. For this reason one of the tasks of the Cartel Detection Section is to identify suspicious behaviour, industries and conduct of undertakings which might deserve further analysis.

### I. \_\_\_\_\_

Information which contributes to the detection of cartels can originate from sources either outside or inside the GVH.

Outside sources of information can be *anonymous tip-offs*. During the investigation

<sup>2</sup> This article is a version of the Hungarian contribution to the OECD Roundtable on Cartel Detection, held on 30-31 October 2013 in Paris.

there are usually persons who (for revenge, jealousy, believed or real offences) are willing to – while keeping their identities a secret – provide information on presumed cartels.

The second source of outside information can come from *complaints and notifications*. Persons whose interests are damaged by the cartel activity often turn to the GVH in the form of official complaints or notifications. They can also ask for their identities to be kept a secret.

The third source of cartel information from outside sources stems from leniency applications. The leniency policy, which is a programme that operates under the conditions and rules set out in the competition act in force, so far does not have a large incentive effect in Hungary. Domestic undertakings usually only submit leniency applications if the GVH has already initiated a proceeding against them<sup>3</sup>.

The fourth, and quite new source of information, originates from *cooperating with and paying informants*. According to the introduced regulation, persons who provide indispensable information on hard-core cartels (hereinafter: informants) may be entitled to the payment of financial rewards if the conditions specified in the act apply. Since such cooperating parties are taking on financial risks due to the possible retaliation of the other parties involved in the cartel, the risks need to be offset in order to encourage informants to continue cooperating in the enforcement of the law. The other aim of

<sup>3</sup> See also the article about the Hungarian leniency policy in the previous edition of the [RCC Newsletter 1/2013, pp. 18.](#)

introducing financial rewards was to increase the pressure on undertakings, incidentally encouraging cartel members to apply for leniency, or at least make it more difficult to organise cartels or to hold them stable.

The GVH cooperates with anyone who is able to provide information. Such an individual may have had direct contact with the cartel (for example they may have been a party to the cartel) or may have acquired information of this unlawful act without having any direct involvement. The experience which has been gained since the introduction of the financial rewards for informants in 2010 suggests that, while the leniency programme does not have a big incentive effect, the GVH is receiving more data<sup>4</sup> from informants every year. As a result of this, the GVH has been able to initiate significant – on-going – cartel proceedings.

By cooperating with any kind of informant (whether anonymous, complainant or on a reward basis etc.) the GVH is able to take advantage of the fact that the undertakings' own employees are also their biggest risk. This is because employees have access to the sensitive data of undertakings in their daily work and may use this information against the undertakings if they discover illegal behaviour.

## II.

In order to ensure that it does not have to rely solely on outside information, the GVH also tries to obtain its own information on cartel activities from economic analyses. This is known as *cartel screening*. The use of economic tools and empirical data to detect cartel activity has been on the agenda of the GVH three times in the last six years. The first attempt in 2007 was a follow-up on a similar DG COMP attempt to set up a framework for

<sup>4</sup> Exact numbers may not be disclosed

initiating ex-officio cartel investigations.<sup>5</sup> The methodology was based on a two-step analysis (first, an industry analysis using certain priorities to describe the level of competition, followed by a second step using critical events to detect suspicious activities). Due to the large amount of man-power and other resources needed for this type of analysis, we decided not to try it in practice.<sup>6</sup>

Our second attempt at approaching the issue was in 2010. Inspired by the presentation<sup>7</sup> (and previous works) of Joe Harrington, an ad hoc working team in the GVH tried to evaluate the issue again focusing on the use of econometric tools. While the team of the Chief Economist was highly capable of applying sophisticated methods, there was a lack of sufficient data. It turned out that not just the GVH, but also all other government institutions did not have access to the required data. The collection of the necessary data using monitoring tools would have been too costly in many ways, so the issue of cartel detection by econometric methodology once again went silent within the GVH.

The Competition Policy Section of the GVH picked the issue up again this year and set up a working group, the main task of which was to catch up with several other authorities in Europe, where economic analysis in cartel detection has been successfully used. It was decided that public procurement auctions would be focused on using the most successful cartel screening methods. Most of

<sup>5</sup> See for example A FRAMEWORK FOR INITIATING EX-OFFICIO CARTEL INVESTIGATIONS, Working Paper, DG COMP CET (2007)

<sup>6</sup> As it turned out the DG COMP itself later dropped the subject without trying it in practice, as did other competition authorities.

<sup>7</sup> Joe Harrington, "Screening for Cartels: The Next Step in Enforcement", CRA Annual Conference on Economic Developments in Competition Policy, Dec ), 2009, Brussels.



these methods are based on data from public or private procurement tenders. Public procurement actions are frequent, data are publicly available and bidding rings are known to be common. Although a new IT facility has been set up at the Public Procurement Authority, it has become apparent that it is still difficult to set up a database which is adequate for testing due to the present legal environment. The GVH cooperates with the Public Procurement Authority of Hungary. This cooperation covers which data and in what way the Public Procurement Authority in its own jurisdiction obliges the participants in public procurement procedures to constantly share. These data may be suitable for developing a system that helps detecting public procurement cartels.

In addition, acquiring information on public procurement cartels should be facilitated by the provision of the public procurement act in

force, according to which if during the process the tenderer perceives or assumes - based on solid grounds - that an obvious violation of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter: Competition Act) or Article 101 of the Treaty has been committed, it is obliged to – in accordance with the regulations on notifications or complaints of the competition act – notify the GVH. The public procurement act therefore places an obligation on a tenderer to inform the GVH if they suspect that there has been a violation of § 11 of the competition act.

The GVH will share its experience on this subject matter in the June 2014 workshop on bid rigging and public procurement.

## Pay-For-Delay Deals – What’s All the Fuss About?



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Pay-for-delay deals or, as they are also known, reverse payment settlements, are agreements between a branded, originator drug maker and a generic rival that settle lawsuits over the validity of the drug’s patents. The settlement will involve the generic rival’s delayed entry into the market and a payment or another kind of economic advantage given to the generic rival by the branded drug maker.

Competition authorities have been very active in this area recently – the US FTC as well as the European Commission are targeting these kinds of deals. National competition authorities are also increasingly focusing on the pharmaceutical sector.<sup>8</sup> What might be the reasons for this sudden interest in the pharmaceutical sector by competition law enforcement authorities? Have we not lived so far, for the most part, in peaceful co-existence with patent law, accepting the need for the temporary protection of costly research and developments that help bring

<sup>8</sup> See for instance France and the [initial findings of the pharmaceutical sector inquiry](#) or the [OFT statement of objections](#) against Glaxo Smith Kline.



about new and potentially very beneficial products and drugs?

No one wishes to dispute the benefits of patent protection in general. And a patent does not always grant market power.<sup>9</sup> But for pharmaceutical companies, when patent-protected market power exists, and high profits and a rather complicated body of patent law coincide, they offer a tempting incentive and opportunities to extend the comfortable period without competition by sharing some of the monopoly profit with potential competitors, if it cannot be helped, instead of entering into vigorous competition.

How do the deals work? The typical setting involves a generic company that is ready to enter the market and challenge the duration of the patent or the validity of the patent itself. This frequently results in a lawsuit and often lawsuits are resolved by settlement agreements. Settlements of patent disputes – as in many other areas of law – will in most cases be a highly efficient solution and lead to overall beneficial outcomes. In general a settlement is a perfectly legal and indeed, encouraged, solution.

Suspensions will be raised, however, when the settlement closely resembles a cartel agreement. If the branded drug manufacturer offers the generic would-be competitor a payment or other economic advantages in exchange for its promise to refrain from entering the market and to drop the patent lawsuit, this deserves heightened attention. The EU Commission has dubbed these kinds of agreements where a payment is made and the generics producer refrains from entering the market as “Type B. II.” agreements and singles

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<sup>9</sup> There may be more than one (patent protected or not) drug curing the same disease.

them out for critical scrutiny.<sup>10</sup> It is obvious that such an agreement would be considered to be a severe competition restriction by its very nature – an object restriction - after a patent has expired. As long as there is a valid patent, this is of course not as obvious, as there may be many valid reasons for ending a lawsuit and for entering into a business relationship that involves payments from one side to the other. So even Type B.II. agreements cannot be assumed to be per-se illegal but must instead be examined on an individual case by case basis.

DG Competition claims that between 2000 and 2007 delays of generic entry led to overcharges of up to € 3 billion.<sup>11</sup> And according to a US FTC study 66 pay-for-delay deals between 2004 and 2009 resulted in annual overcharges of roughly \$ 3.5 billion.<sup>12</sup> Given these numbers one would think that these deals should be a top priority for competition authorities – so why is it that we have seen only limited (successful) action in the past?

One of the challenges faced by competition authorities, and possibly the reason why they have been rather reluctant to tackle these agreements, is the fact that it is extremely difficult to prove that these agreements amount to cartels and that they are therefore illegal. What kind of proof is needed to establish that an agreement qualifies as a cartel? Very often it will involve showing that

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<sup>10</sup> [European Commission, Competition DG, 3rd Report on the Monitoring of Patent Settlements, 25 July 2012](#)

<sup>11</sup> [EU Commission, Pharmaceutical Sector Inquiry – Preliminary Report, Fact Sheet "Prices, time to generic entry and consumer savings"](#)

<sup>12</sup> [Pay-for-Delay: How Drug Company Pay Offs Cost Consumers Billions, January 2010, FTC Staff Study](#)

the challenge of the patent might have been justified and that the generics manufacturer would have had a high likelihood of winning its case. If we have to assume that the patent is not valid or has expired, then again an agreement between the so far monopolistic supplier of a drug and a potential entrant would clearly be an object restriction of competition. However, anyone who has ever dealt with patents and patent law in a competition context will be able to confirm that it is very difficult for a competition lawyer or economist to give an accurate assessment of the validity of a complex patent. This is often also made more difficult by the numerous patent divisions and tricky legal questions that may arise in this context. And resorting to expert advice will not always help to bring about a solution, as both sides to the dispute will employ their own experts, with often predictable results. In the end the competition authority inevitably has to take a stand. So the decision on the competition law problem will often have to adjudicate the patent dispute as well, making enforcers' lives much harder.

What approaches are being used then in the most recent cases in order to come to terms with or even get around these problems?

There is a long history of unsuccessful claims about allegedly illegal pay-for-delay deals in the United States. The US courts have traditionally held that the protection provided for by patent law is absolute and that competition law does not have a relevant role to play in this area. However, this traditional stance may have changed as a result of the Actavis<sup>13</sup> ruling by the US Supreme Court: Actavis and others had been sued by Solvay for infringing Solvay's patent on a branded drug by introducing generic products. The

generics had been approved of by the US Food and Drug Administration. Actavis and other generics producers in the end agreed with Solvay to refrain from entering the market for a number of years. In exchange they received millions of dollars for promoting the Solvay product. The Supreme Court held that patent-related settlement agreements can sometimes violate antitrust law and that the specific restraint at issue had the potential to result in genuine adverse effects on competition. The Court then made a very interesting statement: *"It is normally not necessary to litigate patent validity to answer the antitrust question. A large, unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the patent's validity."* Another interesting observation by the Court was that this finding did not necessarily stand in the way of settling patent disputes – as there were a lot of more competition friendly solutions to the problem, like allowing the generics' manufacturer to enter the market.

In support of the ruling, which nevertheless is very clear that every settlement has to be examined individually under a rule of reason approach, the US FTC is currently advocating a new law<sup>14</sup> that would introduce a presumption of illegality for reverse payment agreements. As this puts the burden of proof on the side of the parties to the agreement, such a presumption would indeed facilitate the work of the FTC and of private plaintiffs. And it would certainly ensure a more cautious approach by the agreeing parties and have a deterrent effect on potentially harmful deals.

The EC has been very active in the pharmaceutical sector since 2008 with a

<sup>13</sup> [US Supreme Court on Actavis](#)

<sup>14</sup> The [Preserve Access to Affordable Generics Act](#) was introduced in May 2013 by two US senators.

sector inquiry on pharmaceuticals and dedicated studies on patent settlements in the EU<sup>15</sup>, and has taken a very critical stance.

The EU Lundbeck Case (COMP/AT. 39226): The basic patent for Lundbeck's blockbuster drug had expired and generics producers had already entered or were about to enter the market. Lundbeck claimed that the generic competitors were violating a number of related process patents. In 2002 the generic producers agreed with Lundbeck not to enter the market in return for substantial payments to them amounting to tens of millions of euros. This included lump sums, purchases of generic stock by Lundbeck and guaranteed profits in a distribution agreement. The Commission quotes internal documents that refer to a "club" being formed and "a pile of \$\$\$" to be shared among the participants and fined it consequently as an anticompetitive agreement – with a fine of app. 146 million in total. Lundbeck has appealed the decision and allegedly argues that the agreements only prevent the competitors from making the drug in a way protected by the process patents and not from entering the market with the generic product.

In another case – the Servier case<sup>16</sup> – the Commission has sent out statements of objections to the French company Servier and to its generic competitors. The Commission has taken the view that they have agreed to limit competition by concluding patent settlements and that Servier, being presumably dominant in the market for the drug, has also strategically acquired key

competing technologies in order to delay the market entry of competitors.

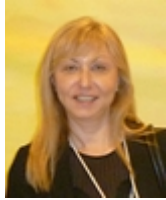
Johnson & Johnson and Novartis have just recently been fined by the Commission for concluding an anticompetitive pay-for-delay agreement. The agreement in 2005 deferred the generic market entry of a competing painkiller in the Netherlands. There were no regulatory barriers to market entry. Nevertheless, the agreement stipulated monthly payments from Johnson & Johnson to Novartis for as long as they did not launch a generic product in the Dutch market. Quotes from internal documents backing the anticompetitive object of the agreement are for example: "not to have a depot generic on the market and in that way to keep the high current price" or abstaining from entering the Dutch market in exchange for "a part of [the] cake". The sum of the fines imposed is 16 million Euros.

So is there a general message in all these enforcement efforts? First of all they certainly tell us that important jurisdictions consider some kinds of patent dispute settlements as posing serious problems to competition. Secondly, they try not to solve the underlying patent disputes. Instead they focus on the agreement and all forms of communication and documentation related to it in order to show that it was an anticompetitive agreement rather than a straightforward patent settlement. Thirdly, the existence of large payments or other kinds of unusual compensation to the alleged infringers by the patentee may be taken as a strong sign that there is something suspicious about the agreements. But this still has to be proven by the authorities. A reversal of the burden of proof would be helpful but at the moment does not exist in either the US or the EU.

<sup>15</sup> See the final report of the EU [Sector Inquiry on Pharmaceuticals and additional documents and the publications on the Monitoring of Patent Settlements](#).

<sup>16</sup> [DG Comp Lundbeck case](#) and [DG Comp Servier case](#).

## Modifications and Amendments to the Serbian Law on Protection of Competition



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With the passing of the Law on Protection of Competition ("Official Journal of the RS", no. 51/09, hereinafter: the Law) which came into force on November 1, 2009, competition law in Serbia was significantly harmonised with the EU acquis. However, experience showed that the particular legal solutions contained in this Act had negative effects on the ability of the Commission as a parliamentary body to carry out its law enforcement activities, as well as on legal certainty for undertakings. Therefore, in November 2012, the Commission initiated a procedure in order to pass the Act on Modifications and Amendments to the Law on Protection of Competition,<sup>17</sup> which was subsequently passed by the National Assembly of the Republic of Serbia on October 31, 2013. This Law will come into force on the eighth day of its publishing in the Official Journal. Modifications and Amendments that are of particular importance are presented below:

### New definition of a dominant position

The dominant position of an undertaking in a relevant market is to be determined on the basis of the market power of the undertaking in question, bearing in mind that only an undertaking with sufficient market power is capable of adversely affecting competition on a market. According to the law, the following factors must be taken into account in each

case when assessing the market power of an undertaking:

- structure of the relevant market and/or
- market share of the undertaking whose dominant position is being established, particularly if its market share is more than 40% on the established relevant market and/or
- existence of actual and potential competitors and/or
- economic and financial power and/or
- degree of vertical integration and/or
- advantages in access to sources of supply and distribution and/or
- legal or factual barriers to market entry for other undertakings, and/or
- bargaining power of buyers and/or
- technological advantages, intellectual property rights and other related rights.

The law provides that it is not necessary to establish every criterion in each individual case. An undertaking may hold a dominant position based on the ground of indicators established individually and with regard to their interdependence. By assessing the above mentioned factors in each case it can be established if an undertaking holds a dominant position in the defined relevant market, enabling it to "act to a considerable extent independently of other actual or potential competitors, purchasers, suppliers or consumers."

The modified definition requires that the previously existing presumption of the existence of a dominant position when an undertaking has a market share of 40% or more no longer applies. The burden of proof is

<sup>17</sup> See [www.kzk.org.rs](http://www.kzk.org.rs)

now solely on the Commission. However, the market share of an undertaking is still an exceptionally important indicator of market power as it shows whether an undertaking is able to act to a considerable extent independently of other actual or potential competitors, purchasers, suppliers or consumers. Nevertheless, market share is not in itself a sufficient indicator of a dominant position and this is why the Commission is under an obligation to determine whether an undertaking is in a dominant position in a market in each individual case by assessing the factors listed above. Consequently, a dominant position can still be established if an undertaking has a market share of less than 40% if an evaluation of the aforementioned factors supports such a finding. The burden of proof is always on the Commission.

The new provisions also define the concept of a so called "collective dominance." In such a case, the dominant position of the undertakings has to be determined using the same criteria as mentioned above, however, it is specifically stipulated that the dominant position may be established based on the market behaviour of two or more undertakings which are not affiliated in terms of the Law (Article 5), when they act as described by Article 5.

The legal modifications also introduce a new concept of the interruption and suspension of the procedure for the investigation of a competition infringement (provision in Article 58 of the Law is changed). The party against which a procedure is initiated may offer commitments aimed at eliminating its potential competition law infringing behaviour and preventing its reoccurrence. This possibility is not only available to parties in the case of marginal infringements of competition, as was previously the situation, but is also available for all kinds of

infringements. Proposed commitments can be behavioural or structural, depending on the competition law infringement in question and the measures which are necessary to effectively bring about its elimination. The Parties may propose conditions and deadlines for the implementation of the measures they are willing to undertake at the latest prior to the receipt of the statement of objections (Article 38, paragraph 2).

If the Commission finds that it is likely that the proposed commitments will eliminate the competition law infringing behaviour and prevent its reoccurrence, then it will issue a resolution on the interruption of the procedure which will contain the accepted commitments, the deadlines for their execution and the manner in which their successful implementation should be reported to the Commission. The procedure may not be interrupted for more than three years. The Commission is not strictly bound to the terms of the proposal. Before it makes any decision, the Commission must conduct a market test aimed at assessing the effects of the proposed commitments i.e. whether the proposed commitments are adequate and sufficient for the elimination of the competition infringement.

The party against which a procedure is initiated is obliged to fulfil the commitments stated in the resolution and the Commission is under an obligation to "check" whether the party has acted in accordance with the terms of the resolution. If the party has complied with the resolution the Commission must suspend the investigation procedure. If the party has not complied with the resolution the procedure for the investigation of a competition infringement will be resumed and the Commission must decide if a competition law infringement has taken place. If an infringement is established, the Commission

must impose a measure in order to bring about the elimination of the infringement (Article 59), and a measure for the protection of competition (Article 68). The new provisions aim to not only speed up proceedings and make them more (cost-) effective, but to also emphasise that sanctioning infringements is not a goal in itself, but secondary to the elimination of actions or conducts that have or may have significant negative effects on competition. Another important advantage of the new provisions is that they enable competition concerns to be resolved quickly.

Finally, the provision stipulating the limitation for determining and collecting fines has been harmonised with the corresponding provisions contained in Articles 25 and 26 of EU Regulation 1/2003, which regulate the application of the competition rules stipulated in Articles 81 and 82 of the Treaty on European Community (at present 101 and 102 TFEU). These "separate" the limitation period for the determination of an infringement and for setting a fine, and the limitation period for the procedure for the collection of such a fine.

This principle is generally supported by Serbian legislation, thus the previous solution in the Law on Protection of Competition was an exemption even in regard of domestic legislation. The legal modifications allow the limitation period to be suspended if any action is taken by a competent authority, i.e. the Commission, in line with Serbian law. It is obviously in both the public interest and the interest of the business community that effective sanctions are applied to competition law infringements. Full and efficient law enforcement implies the execution of sanctions pursuant to the Law. Besides, the extension of the limitation period for determining the fine to five, and at the maximum to ten years, will facilitate giving more weight to the principles of hearing of the party and establishing the material truth.

The passed modifications and amendments to the Law will result in both procedural and substantive-legal improvements and will enable the Commission to conduct its competition protection activities in a more efficient and up-to-date manner.

## Introduction of the Leniency Programme for Participation in Anticompetitive Concerted Actions in Ukraine<sup>18</sup>



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Ukrainian competition law began developing in the '90s. AMCU's actions and efforts were

focused on the de-monopolisation of the economy. Since the end of the '90s-the beginning of 2000s, under the influence of the ongoing economic processes, the emphasis in the AMCU's activities has shifted. The AMCU's enforcement activities are now aimed at combating anticompetitive concerted actions and appropriate changes have been made to

<sup>18</sup> The article was prepared using the information from The Voluntary Expert Review of Competition

Legislation and Policy: Ukraine. UN Conference on Trade and Development – New York, Geneva, 2013



Ukrainian competition law to reflect this change of focus.

The Law "On Protection of Economic Competition"<sup>19</sup>, adopted in March 2002, and the law "On the Antimonopoly Committee of Ukraine" which was amended in 2001 and in 2002, provide the legal basis for the activities of the Antimonopoly Committee of Ukraine.

The Law reflects most of the fundamental institutions and norms related to the protection of economic competition that existed in the legislation of the European Union at the time of its adoption.

In general, Article 6 of the Ukrainian legislation provides for a general prohibition on carrying out anticompetitive concerted actions, with the exception of certain types of concerted actions, in particular those that may be permitted on an individual or general basis by the Antimonopoly Committee of Ukraine or the Government of Ukraine, as well as certain types of vertical concerted actions, concerted actions by small or medium-sized enterprises and concerted actions with regard to intellectual property rights.

Article 6 contains a provision for the exemption from liability for those members of anticompetitive concerted actions that provide crucial information for identifying such offenses: "a perpetrator of anticompetitive concerted actions, who, in advance of the other participants of such actions, voluntarily reports this fact to the Antimonopoly Committee of Ukraine or to its territorial office and provides information that proves essential to a decision being made in the case, is exempt from liability for engaging

in anticompetitive concerted actions, as provided for in Article 52 of this Law."

The law obliges the Antimonopoly Committee of Ukraine to ensure that all information related to a person providing information on the existence of anticompetitive concerted actions is kept confidential. The law also stipulates that immunity may not be granted to an entity, as defined in Article 6, if it has:

- failed to take effective measures to stop its own anticompetitive concerted actions after reporting them to the Antimonopoly Committee of Ukraine;
- was the initiator of the anticompetitive concerted actions or provided administrative guidance for their execution;
- did not provide all the evidence or information regarding the violations that it was aware of, or could have easily obtained.

In accordance with Ukrainian legislation, the procedure allowing for an exemption from liability did not allow exemptions to be granted to participants of anticompetitive concerted actions who provided information after the first applicant. Later amendments to the legislation also failed to provide a perfect solution to all of the problems faced in the fight against cartels and collusive behaviour. This was due to a number of reasons. First of all, direct evidence is often hard to obtain as the culture of competition is still underdeveloped in Ukraine and market participants fail to realise that they are breaching the law. Secondly, while the amendment which was passed in 2005 which stated that "similar actions (or inaction) of entities on the product market, which lead or may lead to the prevention, elimination or restriction of competition, when the analysis of the situation on the particular product

<sup>19</sup> The text of the Law of Ukraine "On Protection of Economic Competition" is available at <http://www.amc.gov.ua/amku/control/main/uk/publish/article/100571>



market demonstrates an absence of any objective reasons for the commission of such actions (inaction) are also considered as anticompetitive concerted actions", showed the effectiveness of the use of economic analysis as a tool to prove anticompetitive concerted actions, it did not change the fact that it is a long and complex procedure, which requires a huge number of factors to be taken into consideration.

This and the small number of requests for exemption from liability for anticompetitive concerted actions, which, as a rule, were no longer acceptable by the time they were being submitted, that is, at a date, when the Antimonopoly Committee of Ukraine had already gathered evidence on its own and put forward a preliminary charge, meant that access to cartel related information needed to be improved.

As a result of the above, the Antimonopoly Committee referred to the experiences of the leading competition authorities of the world which have effective leniency programmes in place. On doing so it realised that the detailed procedure concerning the submission and consideration of applications for immunity had so far remained formally unregulated, thus creating an additional area of uncertainty for potential applicants.

Consequently, after a broad discussion of the draft of the act among the representatives of the legal and business communities, as well as with experts in the field of protection of competition, the Antimonopoly Committee of Ukraine has adopted its first regulatory act on leniency, intended for implementation of the relevant provisions of the Law - the so-called

"Procedure for exemption from liability"<sup>20</sup>. It came into force in September 2012.

Section I of the Procedure contains definitions of terms and a description of the prerequisites for immunity from fines or a reduction of fines. An applicant is defined as a natural or legal person who may apply for exemption from liability not only before or during the initiation of an investigation, but even later in the course of an investigation. The Procedure provides an explanation of how the competition authority will determine the following: who is the first applicant to make an a submission, the voluntary nature of the submission of the information; what type of information is considered as essential for deciding the case; if the commitments proposed by the applicant aimed at terminating its participation in the anticompetitive concerted actions are acceptable; and what conditions the applicant must follow when providing the agency with all the necessary evidence or information it requires.

Section II of the Procedure for exemption from liability contains detailed provisions on the submission of such statements. This section defines who may submit an application and to whom in the agency it is to be addressed. The contact information of the authorised officer of the Committee who is responsible for receiving applications is available on the official website of the agency. The Procedure also comprehensively enumerates the requirements as to the contents of the request and provides a detailed explanation of what is meant by the terms "information known to the applicant concerning all the participants of

<sup>20</sup> Full text of the document is available on the site of the Antimonopoly Committee of Ukraine: <http://www.amc.gov.ua/amku/control/main/uk/publish/article/90082>

anticompetitive concerted actions", "a detailed description of anticompetitive concerted actions", "information that could confirm anticompetitive concerted actions"; and sets out the requirements for documenting the relevant information in the case of submitting it in written or electronic format, as well as many other procedural issues. In case of the submission of incomplete information by the applicant, the Procedure allows the applicant to submit all of the required information at a later specified date on the receipt of a letter from the Committee stating that the applicant is the first to submit a leniency request. The Procedure also provides that in the interests of the investigation of the case and to protect the applicant, access to the application and to the identity of the applicant will be restricted. This increases the level of protection given to the applicant and to the information filed by him. Anyone violating these confidentiality requirements will face serious legal consequences.

Another important factor in the implementation of a more effective cartel deterrence and detection regime concerns the imposition of substantially higher fines on those violating the law on protection of economic competition: the amount of financial sanctions imposed in the last three years was almost three times of that imposed between 2007 - 2009.

The Antimonopoly Committee of Ukraine has not only adopted this new regulatory instrument but is also aware of the need for a corresponding wide outreach effort, especially to the business community. It has been one of

the Committee's main priorities in recent years to terminate collusive tendering in public procurement procedures. To this end, the Competition Authority carries out a variety of events, such as round-table discussions, open house days, participation in seminars, forums and other events that involve representatives of the business community. Such activities are carried out by both the central office of the Antimonopoly Committee and by its territorial divisions. In addition, the official website of the Antimonopoly Committee of Ukraine provides all of the information that is required by an applicant, including the Procedure for exemption from liability.

A few areas in which future work is to be undertaken in order to enhance the effectiveness of the leniency programme have been identified: more intense measures to ensure confidentiality at the stage of submission and acceptance of leniency requests and the need to consider the risks faced by applicants who fail to apply first for exemption from liability by possibly providing for an authorised person in the Committee who is able to guarantee such applicants that they will receive less severe sanctions.

In order to identify problematic areas of the Ukrainian leniency programme, the Antimonopoly Committee has contacted UNCTAD experts and now joint work is being carried out, the results of which the Antimonopoly Committee hopes will lead to a regime that is more effective at detecting, proving and preventing anticompetitive concerted actions in the markets of Ukraine.

## Analysis of Monitoring in the Banking Sector in Kosovo (2009-2011)



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The Kosovo Competition Authority, based on the obligation deriving from the Law on Protection of Competition no. 03/L-229, has been monitoring commercial banks in Kosovo and has been paying particular attention to interest rates for loans and deposits in order to gain an overview of the banking sector and to detect possible violations of competition law.

### Demand in the banking system

The demand side of the banks consists of individuals, small and medium sized businesses, corporations and the public sector.

### The financial markets in Kosovo

The banking sector in Kosovo consists of two levels. The Kosovo Central Bank operates as the first level bank and the commercial banks as the second level banks. The banking system was formed as an important component of the Kosovar financial system and consists of the Banking Sector, the Insurance Market and the Microfinance Institutions. The participants (and the number of institutions) are: Banks and the branches of foreign banks (8), Microfinance institutions (15), Non-banking institutions (5), Money transfer agencies (6), Money exchange offices (28), and Insurance companies (11).

Market definition and concentration in the banking sector

Product markets - banking products and services can be grouped into: (1) Deposits; (2) Loans; (3) Other products, (4) payments and transfers services, (5) Securities.

Geographic market - the relevant geographical market is defined as the whole territory of the Republic of Kosovo.

Market structure - in 2010 eight banks operated in the territory of the Republic of Kosovo. The geographical coverage of the branches of these banks was different for each bank because of the size of their investments, their length of stay in the market, and their strategies for their first years of existence (for new banks) etc. Pro Credit Bank and Raiffeisen Bank had greater geographical coverage and NLB, TEB, BpB, BE, BKT also had considerable geographical presence, whereas the Commercial Bank had its branches in only a few countries and regions. Of the eight commercial banks operating in Kosovo in 2010, six were owned by foreigners and two were under local ownership. The foreign owned banks dominated the banking system, managing 90.2 % of the total assets. The remaining percentage of the assets was managed by local owners. The banking system continued to be characterised by a high level of concentration, 77.4 % of the total bank assets were managed by the three largest banks. The two largest banks, Pro Credit Bank and Raiffeisen Bank, had a joint share of 68 % in the overall loan market. None of these banks exceeded the 40 % market share limit that would lead to a presumption of dominance according to the Law on Competition Protection.

Interest rate on loans and deposits - The movement of interest rates during 2010 was characterised by a decrease in deposits rates, while interest rates on loans slightly increased. The average interest rate on deposits (12 month-moving average) decreased from 4.3 % in December 2009 to 3.7 % in December 2010, while the average interest rate on loans increased to 14.6 % from 14.4 % between December 2010 and December 2009. *The difference between interest rates on deposits and loans at the end of 2010 reached 10.9 pp.*

Factors that determine the setting of interest rates on loans and deposits - The Kosovo Competition Authority has analysed the factors that the commercial banks used to determine their interest rates on loans and deposits and has identified several key factors:

1. Funding costs (deposits, loans that banks get from other institutions and capital costs),
2. Expected risk rates,
3. Operating expenses on proceeding loans,
4. Market conditions

Reasons for differences between interest rates and deposits loans - On the basis of the analysis of the interest rates and the reasons given by the commercial banks, several important factors have been identified:

- Differences in terms and lengths (loans have an average length which is much longer than the average length of deposits).
- The risk of loans - there is a higher risk of default on loans.
- No possibility of receiving funds from banks abroad - most of our banks do not get loans from foreign banks but only from international financial institutions.

- Lack of projects – no good projects which promise to bring a return on a loan in time.
- The low level of competition as a result of the small number of commercial banks.

Summary and recommendations: Growth and development of the banking sector (2000-2010) was associated with the creation of banks and an increase in their numbers, the expansion of their products and the expansion of their geographical presence covering the whole territory of the country. This growth has not yet had a considerable effect on lowering the interest rates on loans or on reducing the big difference that exists between the interest rates on loans and on deposits.

- The liberalisation of the banking sector should continue and the number of banks operating in Kosovo should increase.
- Consumers should be provided with efficient tools for effectively comparing banking products and services and should be able to make informed choices.
- Government bonds, saving funds and insurance agencies could interact more and play an important role in mitigating the strong position of the commercial banks.
- Bank rating has to be improved to facilitate lending by international creditors to the banks.

The Kosovo Competition Authority will continue to monitor the market closely and to intervene in any case in which there is a violation of competition law. This work will be facilitated by the increased knowledge that the Authority now has of the market.

## Recent Developments in Competition Law and Policy in Montenegro



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Montenegro, as a candidate country for EU membership, has committed to the full enforcement of the provisions of Article 73 of the Stabilisation and Association Agreement (SSA)<sup>21</sup>. This involves the application of the standards that arise from the competition rules contained in articles 101, 102 and 106 of the Treaty on the Functioning of the European Union - TFEU. Furthermore, it has been necessary to implement a transparent legal framework and to create an operationally independent institution. To this end, a new Law on Protection of Competition (hereinafter referred to as: "Law"), was adopted and came into force on 9 October 2013. This Law brought about a number of changes in the field of competition protection and introduced European competition law principles. The Law allows for the further development of competition law and policy through the adoption of a number of new legal provisions.

With the entry into force of the new Law, a number of new legal provisions were adopted which established a functionally independent entity - The Agency for Protection of Competition (hereinafter referred to as: "Agency"). The Agency was founded in February 2013, as an institution with public

<sup>21</sup> Stabilisation and Association Agreement, for Treaty Summary see <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=7281>

authority. Prior to its founding, competition law and policy were applied by a directorate within the Ministry of Economy.

The Agency performs administrative and professional work in the area of competition protection, including the assessment of restrictive agreements between undertakings, the investigation and establishment of potential abuses of dominant positions and the assessment and control of mergers and acquisitions.

In addition to the powers and authority provided for by the Law, a number of regulations, directives and rulebooks govern the area of competition protection. These have been adopted by the Government of Montenegro, on the proposals of the Ministry of Economy and are enforced by the Agency.

In this respect the Agency has already experienced significant changes in the manner in which it carries out its work and is now endowed with more authority and is able to tailor its work so that it meets the needs of both market participants and markets themselves.

With respect to the regulated framework for cooperation with the Government and Legislator (National Assembly) the Agency is authorised to do the following:

- Provide informal Guidance (Opinions) on the interpretation of the antitrust regulation (law and bylaws);
- Develop methods for investigating competition concerns;

- Draft bylaws and guidance to be adopted by the Government;
- Monitor and analyse the conditions of competition on all markets.

In line with EU practice, new legislation has been adopted on the definition of a dominant position and its abuse<sup>22</sup>, the definition of relevant product and geographic markets<sup>23</sup>, merger control<sup>24</sup>, as well as on special powers related to the execution of dawn raids by authorised officers in the Agency<sup>25</sup>. Moreover, the new law defines periodic fines for the violation of the procedures of the Agency in a different way than the previous law<sup>26</sup>. As a special incentive for the effective detection of cartels, the Law provides for the possibility of immunity from fines or a fine reduction for participants who are willing to cooperate with the Agency (Leniency programme).

In order to adequately enforce the new Law on Protection of Competition, it is planned that ten new by-laws will be passed. Out of these ten, three by-laws have already been adopted and entered into force in April 2013: rules of procedure on the method and criteria for the definition of the relevant market; rules of procedure on the content and the method of application for an individual exemption for restrictive agreements, and instructions on the content and the method for the

submission of merger applications. Five by-laws are pending with the authorities for approval, while two other by-laws have been drafted. Since it has been established, the Agency has adopted a number of internal rules, decisions and guidance.

The Montenegro Law on Protection of Competition is now to a large extent aligned with the EU *acquis*. An additional level of approximation will be made possible with the adoption of all the necessary by-laws for the implementation of the Law. The Montenegro authorities, business community and the NGO sector will closely monitor all enforcement activities in order to establish whether the existing legal system amounts to an efficient enforcement regime.

Regarding the organisational structure and the administrative capacities of the newly established Agency, it is divided into two departments: the department for merger control, establishing restrictive agreements and abuse of dominant positions and the department for general and financial affairs. The Agency currently employs twelve civil servants, and this includes the Director and six case handlers.

<sup>22</sup> Article 14 of the Montenegrin Law on Protection of Competition, for Montenegrin law on Protection of Competition see

<http://www.azk.me/1/doc/zakon-engleska-verzija/New%20Law%20on%20Protection%20of%20Competition%20.pdf>

<sup>23</sup> Rules of procedure on the method and criteria for definition of relevant market

<sup>24</sup> Article 50 of the Montenegrin Law on Protection of Competition

<sup>25</sup> Article 32 of the Montenegrin Law on Protection of Competition

<sup>26</sup> Articles 67 and 68 of the Montenegrin Law on Protection of Competition

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