RCC OECD-GVH

Regional Centre for Competition in Budapest (Hungary)

OECD-GVH RCC Newsletter

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Contents

OECD

Gazdasági Versenyhivatal
The Hungarian Competition Authority

Foreword

Dear Readers,

Welcome to the first edition of the OECD-GVH Regional Centre for Competition in Budapest (RCC) newsletter. The RCC is now in its 9th year and continues to provide successful training programmes to competition agencies in Eastern and South-Eastern Europe.

One aspect of this shared learning experience that is easily overlooked, but which is at least as important as the training itself, is the interaction that takes place between seminar participants. The workshops provide a forum for communication and the exchange of experiences and for getting to know each other better – and not only between the target countries themselves but also between them and the OECD expert speakers from around the world. If the RCC can contribute to increasing knowledge and expertise, and if it can also create easy "pick-up-the-phone" relationships, then its work can be considered a success.

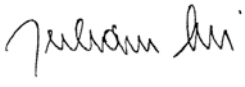
This newsletter's purpose is to further contribute to these aims. We seek to provide information about ongoing developments and interesting cases in the participants' jurisdictions, and also on the RCC programme itself. The summaries of the Competition Committee meetings and of the Global Forum on Competition provide some insight into the recent work of the OECD and provide links to work products.

Our first call for contributions was very successful and reflects the willingness of the participating competition authorities to share their experiences on a wide range of issues that we hope are relevant to all our readers. In this edition, Albania reflects on competition law as a means for poverty reduction, Croatia shares its excitement about entering a new era in competition law enforcement on its accession to the European Union on 1 July 2013, Bulgaria informs us about an initiative in competition advocacy, Hungary starts a series on the adoption of the GVH's leniency policy and Russia provides insights into competition law related intellectual property rights issues.

Dear Readers, please let us know what you would like to see in this newsletter. Do get in touch with each other if you feel that another authority might have relevant advice for you. And if you have any questions about competition law (concepts, theories, terminology etc.) that you have always wanted to ask - send them to us. We will try to answer them in a short Q&A column, without identifying the enquirer.

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

Sabine Zigelski
OECD



Miklós Juhász
President of the GVH

RCC Activities in 2013

Date	Event
21 January	**Heads of Authorities' Meeting** Discussion of ongoing and future programme requirements and initiatives with the heads of the participants' authorities.

Heads of Authorities' Meeting
21 January 2013

22 – 23 February	**Seminar on European Competition Law for National Judges** **Restrictive Agreements: Cases, Trends and Open Questions** The seminar discussed recent developments in European and national competition cases involving restrictive agreements, including vertical agreements. Following the approach of the November 2012 competition law seminar for judges, this seminar explored open questions and broader trends in European competition law and their effects on restrictive agreements cases, with the same emphasis placed on the influence of economic concepts on case analysis, debates about policy goals and their impact on case outcomes, and the effects of all of this on private enforcement before national courts.

Seminar on European Competition Law for National Judges
22-23 February 2013

19 – 21 March

Workshop on Exclusionary and Discriminatory Practices: Tying/Bundling, Price Discrimination and Loyalty Rebates

Analysis of abuse of dominance is one of the most challenging areas of competition policy. This seminar focused on a subset of dominance abuses: exclusionary and discriminatory practices such as tying/bundling, price discrimination, and loyalty rebates. The seminar addressed these issues from both a theoretical and practical perspective in order to help participants understand better why and how such cases might be brought. Throughout, speakers addressed theoretical bases of concern, common legal benchmarks, and practical tools for distinguishing potentially anticompetitive conduct from more benign behaviour. In addition, experts and representatives from participating competition authorities presented actual cases that illustrated the relevant concepts and the experiences of competition authorities in evaluating and prosecuting price related abuses. The participants also worked through a hypothetical case that raised many of the issues discussed in the workshop.

Workshop on Exclusionary and Discriminatory Practices
19-21 March 2013

17 – 18 April

Training Seminar for GVH Staff: Recent Case Law in Antitrust and the UCP Practice in Member States

The seminar provided an overview of competition cases in Europe with regard to the application of antitrust and UCP practice. Day one of the seminar focused primarily on the recent enforcement practice of Art. 101 TFEU, with a special emphasis on developments relevant to the NCAs. Day two provided an overview of recent case practice and developments concerning online sales, patent wars, merger prohibitions and UCP practice and also provided insights into case investigation techniques.

Training Seminar for GVH Staff

17-18 April 2013

14 – 16 May

Advanced Level Workshop: Analysis and Procedures of Complex Mergers

Various aspects of complex mergers were dealt with in the presentations given by experienced speakers from OECD countries and in the case studies presented by the participants. The presentations covered market definition, theories of harm, economic methodology and remedies, all relating to real cases. Internal and external problems that may be encountered, planning and structuring of cases, and specific practical examples as well as the international dimension of merger analysis were also addressed. On the final day participants engaged in a case exercise on remedies.

Advanced Level Workshop on Mergers

14-16 May 2013

11 – 13 June
Rovinj, Croatia

Workshop on Cartel Investigation Procedures: Leniency Programmes, Dawn Raids and Public Procurement Issues

Many competition authorities around the world give high priority to cartel detection and prosecution. Effective leniency programmes and investigation tools as well as increasing public awareness were focal points of the seminar. The presentations highlighted how leniency programmes can be implemented successfully and provided insights into best practices of onsite investigations and the subsequent evaluation of documentary and other evidence. Another issue dealt with in the seminar was how to raise awareness of cartels that

affect public procurement. The topics were addressed and discussed in lectures and case studies by competition experts from OECD countries as well as in case studies presented by the Croatian competition authority. Two practical exercises for all participants provided opportunities for learning and the exchange of experiences and opinions.

Workshop on Cartel Investigation Procedures

11-13 June 2013, Rovinj, Croatia

1 – 3 October **Kazan, Russian Federation**	**RCC – FAS Joint Seminar for CIS Countries** **Competition in the Electricity Markets** The seminar aims to provide an overview of a range of competition law related problems that are characteristic to electricity markets. Experts from OECD countries and from FAS will give presentations and exchange experiences.
15 – 16 November	**Seminar on European Competition Law for National Judges** **Introduction to Competition Law – Basic Legal and Economic Concepts** The November 2013 seminar will be the first of three introductory level competition law seminars to provide judges with less experience in competition cases an opportunity to become familiar with the basic legal norms and economic concepts in competition cases and their application by national courts, focusing on restrictive agreements. Two seminars in early 2014 will focus on unilateral conduct and the assessment of damages in competition cases.
10 – 12 December	**Advanced Level Seminar: Intellectual Property Rights and Competition Law** The workshop will explain the fundamentals of intellectual property rights and will focus on all related interfaces with competition law such as abuse of dominance, anticompetitive agreements, mergers and other related issues such as barriers to entry, standard setting and collecting societies.

Agendas of past events can be found on:
http://www.oecd.org/daf/competition/oecd-gvhregionalcentreforcompetitioninbudapest.htm

Report About OECD Activities

Competition Committee Meetings: 25-27 February 2013

Competition Assessment Recommendation

Changes to the OECD's 2009 Recommendation on Competition Assessment and the revised version of the implementation report were discussed and approved.

During the discussion held in October 2012, when the draft report on the implementation of the OECD 2009 Recommendation on Competition Assessment was presented, it was agreed that the Recommendation needed to be extended to include subsidies, state aid and competitive neutrality, and that the role envisaged for competition authorities in the process of competition impact assessment could be strengthened. The Secretariat therefore developed a new draft text and slightly amended the implementation report.

Impact Assessment of Competition Authorities activities

A Hearing on "Impact assessment of Competition Authorities' activities" was held.

This Hearing formed part of the long-term project on the evaluation of competition authorities' activities. It focused on how competition authorities regularly assess the expected impact on consumers of all their enforcement and advocacy activities (or of subsets of them, e.g. all cartel investigations). The discussion identified which methodologies, and in particular which assumptions and criteria, these assessments rely upon, why they are different across jurisdictions and how greater uniformity could be achieved. An expert paper by Prof. Stephen Davies (East Anglia University and ESCR Centre for Competition Policy at UEA) served as a basis for the discussion. Some agencies, and the EU, reported on their experiences in performing such assessments.

Licences for local and regional transportation services

A roundtable discussion was held on how contracts/licences for the provision of local and regional transportation services are allocated.

The roundtable began with a presentation by Prof. A. Fels (Dean of the Australia and New Zealand School of Government), who presented the outcome of an inquiry in the taxi industry that has just been completed in the state of Victoria (Australia). The rest of the discussion was aimed at understanding the tendering/allocation mechanisms used in different jurisdictions to ensure greater competition in the provision of local and regional bus services.

Key issues

- What kind of allocation mechanisms are employed to allocate contracts?
- What are the key characteristics of these contracts? How do they ensure price competition while preserving quality and safety?
- Who supervises the execution of contracts?

- What mechanisms are there in place for disciplining contractors that do not deliver the services as expected?
- Who provides and ensure the maintenance of the necessary infrastructure?
- What results (in terms of efficiency and quality) have been obtained so far?

The discussion was based on 15 country contributions and benefitted from the participation of Prof. Marco Ponti (Politecnico di Milano), Dr. Anne Yvrande-Billon (Université Sorbonne), and Ms Clare Kavanagh (Transport for London).

Discussion on International Co-operation

The ongoing international co-operation project was discussed. The session began with a presentation of the key results from the survey conducted by the OECD and International Competition Network. The subsequent discussion was based on a Secretariat note outlining possible avenues for future OECD work.

The five issues for consideration by the delegates were:

1. Is there scope to improve co-operation within the current legal framework and existing constraints?
2. Would a system of mutual recognition of decisions of other antitrust enforcers make cross-border enforcement more efficient and less burdensome?
3. Are there ways in which agencies could improve the incentives offered to firms involved in mergers and cartel/unilateral investigations to grant confidentiality waivers?
4. What legal provisions exist in various jurisdictions which allow for the exchange of confidential information with other competition authorities? And how effective have these provisions been in ensuring co-operation in specific cases?
5. What are the differences in definitions of "confidential information" at national level? What are their common traits and differences?

In order to respond to the delegates' interest to enhance the above discussion with experiences from other policy areas, the Secretariat invited two experts to discuss international co-operation between enforcers in the fields of anti-bribery and consumer protection: Ms Petra Borst, public prosecutor from the Office of the National Public Prosecutor for Corruption in the Netherlands; and Mr Fernand Van Gansbeke, Director, DG Enforcement and Mediation, Belgian Ministry of Economy.

Competition law and policy indicator

The Secretariat reported on the outcome of the work it has undertaken, with the support of the delegates, on the development of one or a set of competition law and policy indicators.

Following a number of conference calls and exchanges of comments on draft proposals on the possible structure and content of the indicators, the Secretariat presented to the Committee a list of questions that could be used to build a set of indicators. These questions covered all the main institutional and legal features of competition regimes that could be scored against an internationally agreed best practice and also included questions on their implementation. The

discussion was based on a short note by the Secretariat.

Roundtable on Vertical Restraints for online sales

The development of the internet and e-commerce is having a profound impact on firms' business models, consumers' behaviour and on the overall economy. It should improve competition among suppliers and yield higher consumer and social welfare. Yet the digital ecosystem presents its own competitive risks. The availability of information may allow firms to monitor each other and favour the adoption of collusive conduct; the existence of network externalities may lead to the creation of dominant players; consumers may be fooled by misleading and non-verifiable information. Moreover, manufacturers and distributors have strived over the years to establish a distribution system that offers consumers pre-sale and post-sale services which enhance their evaluation of the goods and services they buy, increase their welfare and make all market players better off. The diffusion of online sales may disrupt or jeopardise this system and in the medium/long-term harm firms and consumers as well.

Key issues

- What pro-competitive effects have on-line sales brought about?
- What are the threats?
- Does the development of e-commerce call for specific rules to deal with vertical restraints in online sales? For an overall revision of existing related guidelines?
- Is the distinction between price and non price constraints useful for competition analysis in the context of online sales?
- Are there specific reasons why manufacturers might limit their online distributors' ability to compete on price?
- Is the distinction between active and passive sales valid for online sales in order to assess the competitive risk of customer or territorial restrictions?
- What are the competitive implications related to the three different types of trade (pure online sales, mixed sales/same format, mixed sales/different format)?

13 country contributions as well as notes by Dr Paolo Buccirossi (Lear consulting firm) and Professor Baye (Indiana University), provided the background for the discussion.

Papers relating to the above discussions can be found at http://www.oecd.org/daf/competition/workinprogress.htm and later at http://www.oecd.org/daf/competition/roundtables.htm

Global Forum on Competition – 28 February and 1 March 2013

http://www.oecd.org/competition/globalforum

Competition and Poverty Reduction

This full day session built on discussions first held at the 2012 OECD-IDB Latin American Competition Forum on how competition can help lower the prices of essential goods and services for the poor and what competition authorities can do to help. The session examined how competition policy can help reduce poverty by stimulating employment, innovation and growth.

There has been significant progress against extreme poverty in recent years, but it remains one of the most important challenges that governments face. If the poverty benchmark is set at an income of US$2.00 per day, then nearly 45 percent of the world's population remains poor. Poverty also remains a key problem in developed countries, particularly in the aftermath of the 2008 global economic crisis. Governments are therefore looking in many policy areas, including competition policy, for answers that will help them to reduce poverty. To assist in this effort, this session of the Global Forum explored the impact of competition on the poor as both consumers and as small entrepreneurs or wage earners. The primary inquiry was whether competition actually alleviates poverty or not.

The morning part of the session took the form of a hearing. In this format, the audience put questions to a panel of experts, the panellists responded, and all participants took part in a free-flowing discussion. The objective was for delegates to learn from the experts about the causes of poverty, the ways in which theory predicts that competition will affect the poor, the ways in which competition has affected poverty in practice, and the ways in which other policies and conditions may affect competition's ability to reduce poverty.

The panellists contributing to the discussion were: Eleanor Fox (Walter J. Derenberg Professor of Trade Regulation, New York University School of Law, US); Cécile Fruman (Manager, Private Participation in Infrastructure and Social Services, Investment Climate, The World Bank Group); David Lewis, the former Chair of South Africa's Competition Tribunal (Executive Director, Corruption Watch, South Africa); Susie Lonie, one of the creators of the M-PESA mobile payment service in Africa (Mobile Payments Consultant, SJL Consulting Services Ltd, United Kingdom); Hassan Qaqaya (Head, Competition Law and Consumer Policies Branch, International Trade Division, UNCTAD); and Alan Winters (Professor of Economics, University of Sussex, UK).

The afternoon part of the session was in the format of a traditional OECD roundtable, with the Chairman directing questions to delegates based on the written contributions. The panellists intervened from time to time with comments and questions of their own. The aim of this part of the meeting was for the delegates to learn from each other as they discussed experiences concerning the effects that competition law enforcement and advocacy have had on poverty in their countries.

Key issues

- How should poverty be defined?
- What factors cause poverty to persist?
- How does theory predict that competition will affect poor consumers of essential goods and services?
- How does competition actually affect poor consumers in practice?
- How does theory predict that competition will affect poor entrepreneurs and wage earners?
- How does competition actually affect them in practice?
- Which yields better results in the fight against poverty: competitive markets or "pro-poor" interventions such as subsidies and trade barriers?
- Should competition authorities prioritise cases that are likely to benefit the poor? More generally, what actions should competition authorities take to help poor people?

Competition Issues in Television and Broadcasting

This session considered policy responses and regulatory and competition challenges in the television and broadcasting industry. Broadcasting lies at the intersection of both media and telecommunications, and therefore shares regulatory and competition issues with both. The on-going convergence of traditional broadcasting with new media poses new challenges for OECD and non OECD countries alike.

The following issues were addressed during the discussion:

- How has technological convergence and the development of new media services affected the market for television broadcasting?
- Where in the value chain is television broadcasting most vulnerable to the exercise of market power today and in the future?
- How do the geographical effects of the digital divide reduce opportunities for consumers to benefit from improved and more competitive television broadcasting services?
- How should competition agencies take these factors into account when planning an investigation or considering the application of remedies?

The roundtable was chaired by Mr. Ashok Chawla (Chairperson, Competition Commission, India). During the course of the Roundtable four expert speakers shared their views: Agustín Díaz Pinés (Economist, Information, Communications and Consumer Policy Division, OECD Directorate for Science, Technology and Industry); Allan Fels (Professor of Government and Director of International Advanced Leadership Programs, Australia and New Zealand School of Government); David Hyman (General Counsel, Netflix); and Christophe Roy (Deputy General Counsel, Distribution and Competition, Canal+ Group). The discussions were based on the panel presentations, a Secretariat background note and the 36 written contributions received from countries.

Key Findings of the OECD/ICN Survey on International Enforcement Co-operation

This session considered the key findings in the OECD Secretariat report on the OECD/ICN questionnaire on international co-operation that was launched last summer. This session was an opportunity for delegations to discuss

the status of international co-operation and the possible ways forward for a more effective and efficient enforcement system at an international level. The results of the survey will also inform decisions on future work that the OECD and the ICN will undertake to foster more and better international co-operation between enforcement agencies.

The session sought to:

- review the final results from the OECD/ICN questionnaire on international enforcement co-operation
- ensure that the draft Secretariat report reflects to the extent possible experiences from a wider set of countries
- consider ways in which competition agencies can improve their role in international co-operation, including promoting international co-operation among established and new agencies

Antonio Capobianco (OECD Secretariat) presented the findings of the report. Representatives from the ICN and Eleanor Fox (Walter J. Derenberg Professor of Trade Regulation, New York University School of Law, United States) then provided comments on the report's findings.

Competition as a tool for fighting poverty

Some reflections after the Global Forum on Competition organised by OECD, Paris, February-March 2013

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Poverty is a relative concept. A simple comparison by The Economist (2005) of the salary of a miner in the USA which is estimated at USD 521 per month and that of a doctor in Kongo (or Albania) which is around USD 600, indicates that salaries are comparable. But in reality this doesn't mean anything. If one compared the living standards of the respective countries, the worker in the USA would be considered to be a poor person whereas the doctor in Kongo or Albania would be considered to be rich.

Although the trend of surpassing the poverty limit of $2 per day tends to be positive all over the world, discussions about the instruments that should be used to soften poverty through reforms in the market are still necessary. The focus of this article is only on the policies of

competition rather than on the large number of other poverty factors and their solutions. Restrictions of competition in markets due to the abusive behaviour of dominant companies or anticompetitive agreements among competitors keep prices for consumers at a high level, higher than they would have been if markets were competitive. According to the OECD[1] it is widely accepted that when consumer goods and services are offered at higher prices than those of the competitive equilibrium, the poorest consumers are the ones most widely and deeply hit.

The causes of price increases can be complex, such as supply shortages, demand increases, exchange rate influences etc., but when prices increase due to an illegal cooperation among the goods and services providers or due to abusive practices resulting in prices much higher than the costs (the case of the mobile phone companies in Albania) or by fixing the selling prices (flour case) it is the competition law and policy which plays the main role. Another way competition helps the poor is by opening markets and offering more possibilities for small businesses (self-employed people), entrepreneurs in financial difficulties and employees as opposed to markets dominated by monopolies or cartels. Yet there is another thesis arguing that competition, because it creates efficiencies, can lead to job cuts through innovation and technological change and affect even qualified workers. This is an issue to be discussed by the political forces, who should not permit competition benefits to be enjoyed only by economic superpowers but who should design special programmes dedicated only to SME and new businesses.

From the standard microeconomic perspective, competition effects are more tangible for poor consumers. Normally the competitive process leads to better prices, avoids inefficiencies and brings prices down towards marginal cost, thus resulting in more options for consumers, higher quality and productivity and in many more possibilities for innovation. An intervention from the authorities either to destroy a cartel or to stop an abuse of a dominant position results in consumers being offered more choice or cheaper products because the companies operating in the market will be forced to compete and as a result they will be part of the market because they deserve it and not because they break some of the rules of competition.

An exemplary case is the one of cartels in public procurement. Supposing that a country has an anti-poverty programme but, as it is widely seen, and not only in Albania, public procurement often attracts bid–rigging. Keeping prices high through an illegal cartel agreement will bring less procurable quantity and as a result fewer goods and services for the poor. The intervention employed to destroy this cartel will decrease prices and result in increased benefits for the society. By coincidence when the OECD talks about cartels it refers to the flour market on which the Albanian Competition Authority has carried out an investigation and has fined two competitors because of the existence of an agreement on price fixing. What happend in the market? The OECD assumed and it was practically proven in the Albanian case that there are two big companies in the wholesale flour market which have an agreement on the prices offered to bakeries. As a result the bakeries charge artificially high prices to the consumers for the final bread product. This calls for the intervention of the Competition Authority to terminate the price fixing

[1] More on: http://www.oecd.org/competition/globalforum/programmeanddocuments.htm#S1< : Background paper by the secretariat

agreement. Once the agreement has been terminated, bread prices will decrease and this will mainly benefit poor consumers.

When talking about the other form that anti-competitive behaviour can take, that of an abuse of market power, the perfect case to illustrate this in Albania is the mobile telephony market. An intervention of the Albanian Competition Authority in 2007 set the regulator in motion to provide the third and fourth licence, to facilitate a change of operator without a change of mobile phone number. Even more important was the fact that the regulator was compelled to approve the methodology which established the long-term average cost. It is possible to measure how this affected consumers and especially poor people. The access cost to the telephony service is almost 0 and this fact primarily helps the poor to have access to this service. You could talk approximately 15-20 min with 1000 lek in 2008 in and out of the network but nowadays with the same amount of money you can talk 300-1000 min inside the network, without limits inside the same group, 60-100 min outside of the network and you can surf the net free of charge. The banking system still remains one of the most difficult areas of access for the poor. The opening and the management of a bank account is expensive, as well as credit for the self-employed and poor enterprises (it's as strange as real that even though you are called an entrepreneur, you remain poor if you are in debt) being difficult to be obtained. According to the statistics of the OECD 1 billion people own a mobile phone but not a bank account, providing a strong signal that the banking system needs to facilitate access of the poor, pensioners and rural citizens. The idea of a Postal-Bank, even in Albania, should be taken into consideration and be positively developed as an instrument to assert competitive pressure on the commercial banks and in order to provide an avenue of access for social classes on a low income.

What can competition do to ease poverty? Competition Authorities have to keep doing their job via law enforcement, capacity building and through the use of advocacy to assist in the establishment of a competition culture. But this is not enough! A pro-competition policy from all the law enforcement agencies, regulatory entities, central government and even the local government would create a more competitive environment with more benefits for all consumers. The markets which require the most attention are the ones where poor people have to spend more, such as essential facilities – electric power, running water, telephony, food (for example it is more important to deal with the flour market rather than with the perfumes market), markets that support small entrepreneurs (banks and telecommunication) and to support the sectors which offer employment to poor people (for example the fashion industry in the case of Albania).

Bulgaria: National Health Insurance Fund Act Restricts Competition in the Retail Market of Reimbursable Drugs

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The Bulgarian Commission on Protection of Competition (CPC) adopted an opinion under Art. 28 of the Law on the Protection of Competition (LPC) on the compliance with competition rules of the Sample Contract of the National Health Insurance Fund (NHIF) with pharmacies. The NHIF is the organisation granted the exclusive power under the Bulgarian Law on Health Insurance (LHI) to administrate and manage statutory and mandatory health insurance. The Sample Contract under the LHI is negotiated and agreed on annually between the NHIF and the Bulgarian Pharmaceutical Union (BFU). The Sample Contract sets the terms and conditions for the contracts between the NHIF and the pharmacies for the sale of reimbursable drugs.

The Sample Contract for 2013 sets out a formula for the minimum time that is to spent on the servicing of prescriptions for reimbursable drugs - 6 or 9 minutes per prescription. Thus, the formula imposes a maximum limit on the number of reimbursable drugs that can be sold by pharmacies in each half-month period, depending on the number of pharmacists employed by the pharmacy. The Sample Contract contains a provision which provides that reimbursable drugs sold above the limit will not be paid by the NHIF to the pharmacies.

Based on its detailed analysis, the CPC established that the minimum time set out for the servicing of prescriptions for reimbursable drugs and the corresponding formula could result in the imposition of a quota limitation on the retail trade of reimbursable drugs in Bulgaria. According to the CPC, this limitation impedes and restricts competition in the national retail market of reimbursable drugs and could harm consumers (patients) in several ways:

- ✓ redistribution of patients between pharmacies without taking into account the quality and the prices offered by the pharmacies;
- ✓ less incentives for efficient pharmacies to offer better services and more competitive prices to its customers, since they cannot benefit from increased volume of sales;
- ✓ overall decline in the quality of the services offered in pharmacies, as pharmacies are guaranteed a certain volume of sales of reimbursable drugs regardless of the quality of the services provided simply because patients cannot use their preferred pharmacy;
- ✓ pharmacies are discouraged from being contract partners of NHIF and from offering reimbursable drugs as they can continue selling non-reimbursable drugs without the minimum time limitation;
- ✓ The patients are limited in their choice of pharmacy. In small towns and villages where there is only one pharmacy selling reimbursable drugs patients might not

get their drugs in time or would be forced to either buy them from the one existing pharmacy or to travel to bigger cities in order to obtain reimbursable drugs, thus incurring travel costs that may exceed the reimbursed value of the drugs.

The CPC made a proposal to the NHIF that it should revoke the Sample contract provisions that limit the retail sale of reimbursable drugs. The NHIF has published a press-release on the decision of the CPC. The disputed provisions are currently not being applied as they are also subject to a court appeal by an interested company (pharmacy) and the court has suspended their application until a final decision is made on the merits of the case.

For further information: Decision (in Bulgarian) http://reg.cpc.bg/Decision.aspx?DecID=300036195

Croatian competition enforcement challenges after 1 July 2013

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As of 1 July 2013 Croatia will be the 28th Member State of the EU and this will bring significant changes for Croatia in the field of competition law and policy, first and foremost the direct application of EU competition rules - Articles 101 and 102 of the Treaty on Functioning of the EU (further: TFEU). New powers will thus be conferred on the Croatian Competition Agency (further: CCA) in the area of antitrust (abuse of dominance and assessment of agreements between undertakings). In proceedings before the CCA, both EU law and national law will be directly applied in all cases where trade between member states may be affected.

Regulation 1/2003 and the Notice on Cooperation between EU National Competition Authorities[2] provide for different scenarios in a system of parallel competences. Cases can be dealt with by a single national competition authority, possibly with the assistance of the national competition authorities of other Member States, by several national competition authorities acting in parallel or by the European Commission.

For Croatia this means that generally national cases in which only the Croatian Competition Act applies will remain under the control of the CCA. Parallel action by two or three national competition authorities may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one national competition authority would

[2] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 2004/C 101/03, 27 April 2004. For all relevant legislation see http://ec.europa.eu/competition/antitrust/legislation/legislation.html

not be sufficient to bring the entire infringement to an end and/or to sanction it adequately. In that situation, the CCA will be expected to conduct the investigation jointly with the national competition authorities of the respective Member States. The European Commission will normally deal with cases with cross-border effects on competition in more than three EU Member States or in cases of special relevance in order to ensure effective enforcement.

Furthermore, Regulation 1/2003 establishes the European Competition Network (the "ECN") in order to ensure close cooperation between the Commission and national competition authorities. It commits members not only in terms of decision-making and cooperation in individual cases, but also in the creation of a common competition policy and approach to the practice of individual national authorities in the implementation and enforcement of competition law.

After signing the Accession Treaty of Croatia to the EU, the CCA started participating in the work of the ECN even though formal membership in the ECN starts from the day of accession (1 July 2013).[3]

In addition to Regulation 1/2003 and the direct application of EU competition rules, the EU Merger Regulation 139/2004 on the assessment of concentrations should be also mentioned.[4] According to the provisions of this Regulation mergers with a community dimension have to be notified to the European Commission. After its accession to the EU the CCA will also have the power to assess mergers which have an effect on trade between Member States in those cases where the European Commission decides to refer this particular merger to the CCA.[5]

Challenges for the CCA in participating in the system of parallel competences

Participation in the above explained EU system will bring completely new competences to the CCA, including the conduction of proceedings with the application of Articles 101 and 102 TFEU alongside national law. Moreover, the CCA will be required to cooperate in some cases with other European competition authorities by exchanging information or collecting information and evidence that is obtainable in its territory. It can be assumed that a request from the European Commission or a national competition authority to another Member State for assistance in investigations and dawn raids (inspections of business or private premises) will be particularly demanding because the CCA still lacks experience in these areas. As the European Commission can always decide to lead the investigation and complete the proceeding, a certain level of unpredictability remains for the CCA and for the parties concerning final case allocation.

To date, the CCA has had experience in bilateral cooperation with some national competition authorities from the EU and multilateral cooperation with EU Member States in international fora such as the International Competition Network (ICN). New and enlarged tasks will include participation in the meetings of the Advisory Committees to the Commission where representatives of

[3] Accession Treaty of Croatia to the EU signed on 9 December 2011 in Brussels, published in the Official Gazette-International Agreements, 2/2012.
[4] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1, 29.1.2004. Relevant legislation: http://ec.europa.eu/competition/mergers/legislation/legislation.html
[5] *Ibid,* Articles 4 and 9 of the Merger Regulation 139/2004.

Member States participate and discuss general topics of competition as well as specific cases. There will be more meetings to attend on a regular basis and a necessary adjustment period to learn how the national competition authorities of the EU Member States work in every day practice.

Adjustment and adaptation are therefore crucial words to denote the first period of participation of Croatia in the EU competition law system.

The Development of the Leniency Programme in Hungary

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The Hungarian Competition Authority (GVH) launched its leniency programme in 2003. Inspiration for the introduction of the Hungarian leniency programme came from the Leniency Programme of the European Commission on Hungary's accession to the European Union on 1 May 2004. The fight against hard core cartels has always been a top priority of the GVH.The main objective of the leniency policy is to provide the GVH with an effective tool for detecting and investigating secret cartel agreements.

The first leniency programme was published in the form of soft law in the Notice 3/2003 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority (first Leniency Notice).[6] It set out the framework of the Hungarian leniency programme.

For a leniency programme to be effective it is essential that it is reliable, effective and attractive for potential whistle-blowers. The Leniency Notice mentioned above was qualified as a soft law instrument. While the GVH actually confirmed that it was bound by the rules of the Notice, the business community was not convinced that the appeal courts would also respect the GVH's decisions based on the Leniency Notice. Applicants feared that the appeal courts might overrule GVH-decisions on leniency issues, even though it had never occurred in practice. Legal practitioners repeatedly called for a leniency programme that was more reliable and predictable. The resulting legal uncertainty had to be addressed by the legislator.

In 2006 the European Competition Network[7] published its Model Leniency Programme.[8] The objective was to converge the existing leniency programmes in the Member States by means of soft harmonisation and to provide recommendations for the

[6] The legal basis of the Notice was provided by Section 78 (3) of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Competition Act)

[7] The European Commission and the national competition authorities in all EU Member States cooperate with each other through the European Competition Network (ECN) on the basis of EU Regulation 1/2003.

[8] Link: http://ec.europa.eu/competition/ecn/documents.html (2006 and 2012 revised programme).

introduction of leniency policies in those member states where none existed. In addition, the ECN Model Programme sets out the essential substantive and procedural requirements that ECN members believe every leniency programme should contain. By having approved the ECN Model Programme, the heads of the EU competition agencies have entered into a political commitment to ensure that the programme achieves its intended results.

Consequently, some revisions needed to be made to the Hungarian Leniency Programme in order to ensure that it fully reflected the ECN Model Programme. With this in mind, a significant amendment to the Competition Act was adopted in June 2009. The basic rules of the Leniency Programme were incorporated into the Competition Act and the Programme became regulated at a level which provides the highest degree of legal certainty in Hungary. Since 1 June 2009 the Hungarian Leniency Programme has been composed of the following three legal instruments: Section 78/A and 78/B of the Competition Act, the Application Form for Leniency (Application Form) and the Explanatory Notes of the President of the GVH on the Application of the Rules Concerning Leniency (Explanatory Notes). The latter two documents are considered to be soft-law instruments. To enhance legal certainty, leniency rules have become legally binding and the Competition Council has been empowered to also adopt conditional and final decisions on leniency issues.

The new leniency policy only applies to hard core cartels and other types of horizontal agreements, whereas vertical agreements have been excluded from the scope of the leniency programme. The provisions 78/A and 78/B of the Competition Act offer undertakings either total immunity from fines or a reduction of the fines. In order to obtain immunity from fines pre-inspection (Type 1 A) or post inspection (Type 1 B) immunity applications can be lodged with the GVH. The Competition Act, in compliance with the Model Programme, distinguishes between Type 1A and Type 1B immunity applications in terms of the threshold of sufficient evidence that needs to be put forward in order for immunity be awarded.

The Application Form and the Explanatory Notes contain the detailed set of leniency rules. The Application Form provides guidance on the type of information that needs to be submitted with the different applications and it explains the basic procedural rules for submitting applications. The Explanatory Notes provide a thorough, practical explanation of the leniency procedure that is set out in the Competition Act. The fact that the explanatory rules were placed in soft-law instruments facilitated the GVH to formulate, interpret and to revise the leniency rules in a flexible and pragmatic manner.

Although the GVH regularly updates its leniency regime on the basis of its practice and according to the new amendments made to the Model Programme, it must be noted that the operation of a leniency programme is only one method among many that are used by authorities in their fight against cartels. Ex officio detection is equally important and the GVH has many tools at its disposal: it has wide investigatory powers (including the power to undertake forensic IT investigations), the informant fee reward was introduced in 2010, and a separate Detection Unit consisting of former police officers was also set up in 2013. These instruments – together with the leniency policy – supplement and strengthen each other and form a coherent system that is available to the GVH.

But leniency programmes can only operate effectively if they are compatible with the other legal instruments that are used against illegal cartels, such as criminal law and public procurement law instruments. The following steps were taken towards shielding leniency applicants in every related field of law in order to create incentives for filing leniency applications:

In 2005, criminal sanctions were introduced against members involved in bid-rigging cartels[9]. They prescribe that individuals involved in bid rigging cartels shall face imprisonment penalties of up to five years. The Criminal Code[10] stipulates that the perpetrator of the criminal act shall be exonerated from punishment if the individual reports the operation of the cartel to the GVH and other competent authorities unless the GVH already has knowledge of the cartel activity. Consequently, this provision applies to pre-dawn raid immunity applicants (Type 1 A) and therefore the potential post dawn raid leniency applicants (Type 1B, reduction of fine applicants) may be reluctant to reveal bid-rigging cartels for fear of finding themselves under criminal investigation. In addition, the GVH has a statutory obligation to notify the criminal authorities when it discovers a bid-rigging case. So the possibility of being subject to criminal liability had a negative impact on the GVH's leniency programme in bid-rigging cases. Luckily the new Criminal Code[11], which will enter into force on 1 July 2013, addresses this issue by extending the personal scope of those leniency applicants who are entitled to be protected against criminal liability. Consequently, the new rules that will be in place will be more compatible with the leniency regime of the GVH, while at the same time less deterring for the potential whistle-blowers. According to the new rules, type 1A immunity applicants shall be exempted from public prosecution if they report the cartel to the police or the GVH first hand (before the authorities have knowledge of the case) and if they also cooperate with the police and the GVH. A novelty of the new criminal code is that those who are granted conditional immunity with a Type 1B application or a conditional reduction of fines will be shielded as their exposure to criminal liability will be limited as well. The criminal punishment may be reduced up to zero. In contrast to the provisions of the currently effective Criminal Code the new rules will automatically apply to the former employees and executives of the company so that these individuals will be able to also benefit from the preferential rules.

Besides the criminal rules, cartelists also have to fear public procurement consequences. The Public Procurement Act[12] stipulates that tenderers against which the GVH has imposed fines for cartel infringement may be excluded by the contracting entities from tender procedures. However, this rule does not apply to enterprises that were awarded immunity under the leniency programme of the GVH.

Another consequence of detected cartels are follow-on claims and compensations payable to injured parties. It has long been argued that leniency applicants may be in a more adverse situation in follow-on proceedings than the other cartel members due to their admission of the infringement. To solve this situation, in 2009, new rules with regard to civil damages claims were included in the Competition Act in favour of those undertakings that benefited from immunity during the GVH's proceedings. In particular, the joint and several liabilities of

[9] Cartels affecting public procurement and concession procedures
[10] Act IV of 1978 on the Criminal Code, Section 296/B
[11] Act C of 2012 on the Criminal Code, Section 420
[12] Act CVIII of 2011 on Public Procurement Section 57 (1) b)

leniency applicants with other cartel members were eliminated pursuant to the Competition Act[13]. The immunity applicant therefore has the right to refuse to provide compensation for any damage caused by the applicant insofar as it may be collected from another infringer.

Since the introduction of the Hungarian leniency programme the GVH has received 11 applications. There are several explanations with regard to the low number of leniency applications. Some say that applications might be influenced by the fact that Hungary's closely knitted business community lacks a vigorous competition culture. Fear of exclusion from the business community might therefore prevent companies from denouncing cartels, and unfortunately this cannot be offset by the benefits of granting leniency. Others say that with the introduction of criminal consequences for bid-rigging in 2005 the legislator might have created a strong disincentive for potential leniency applicants in cartel cases involving public procurement. This reasoning is supported by the fact that the highest number of leniency applications occurred in 2004, the year preceding the introduction of criminal sanctions. After the amendment of the Criminal Code, an average number of only 1 or 2 leniency applications per year were filed at the GVH in bid rigging cases. Harmonising leniency rules with criminal rules was therefore essential, and hopefully, the above mentioned new criminal provisions will create better incentives to potential leniency applicants in the field of bid rigging cases.

[13] Section 88/D

Antitrust regulation in the field of intellectual property

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Currently, the expert community in the Russian Federation is actively discussing possible ways to apply competition law to intellectual property.

Achieving this goal is not possible without an analysis of the "best global practices" that have already outlined such paths quite a while ago. Such practices include, in particular, the «Antitrust guidelines for the licensing of intellectual property», prepared by the Federal Trade Commission and the U.S. Department of Justice and published in 1995, as well as the «Guidelines for the use of intellectual property under Antimonopoly Act», prepared by the Commission for Fair Trade of Japan and published in 2007 (hereinafter - Antitrust Guidelines).

So, to begin with, let us draw a parallel between the legal status of the owner and that of a legal entity with a dominant position on a product market.

It seems that the conditions of a dominant position (Article 5 of the Federal Law "On the Protection of Competition") to a certain degree apply to the owner of a "legal" monopoly of exclusive rights, but the dominant position on the market cannot be inferred merely from the fact of possession of the intellectual property - the position of the holder of the rights may be determined as dominant, if such a patent has been implemented by its owner in the production of particular material goods. That is, if the results of the analysis of the state of competition determine that such a material product, by virtue of the intellectual property embodied in it, has no comparable substitute products, and therefore, this product can determine its own product market boundaries on which its producer holds a dominant position.

However, it might very well prove difficult to determine the geographic and product market boundaries using the method described above in the area of exclusive rights, particularly in view of the fact that the intellectual rights are not used by their owner to produce any goods, meaning that they have no material implementation or that they are embodied in a method for the production of some product or other (that being a technology). In such cases, the U.S. Antitrust Guidelines propose to treat as the relevant product markets the markets of corresponding technologies, raising them to the ranks of products. Bearing in mind the above, in order to preclude the abuse of patent rights aimed at the prevention, elimination or restriction of competition, it is possible to use the legal institution of a compulsory license, which is available in the Civil Code of the Russian Federation and is applied in accordance with the provisions of the Paris Convention for the Protection of Industrial Property.

Let us know consider the ways in which competition law can be applied to license agreements that provide the right to use intellectual property, and which, among other things, are expressly mentioned in Article 40 of the Agreement on Trade-Related Aspects of Intellectual Property Rights. From the point of

view of antitrust law such license agreements, because of their subject matter and legal character, have a mixed legal nature. As such, license agreements can be considered as "vertical" agreements, when for example, the legal owner of the rights (licensor) transfers to the licensee the right to use the patent, which embodies the legal protection for the spare parts for the goods, which are produced by the licensee, or if the licensee carries out research activities, the results of which are protected by a patent, with the rights of using that patent being provided to the licensee for the production of goods. However, if the licensor and the licensee are competitors on a particular product market, which is subject to the license agreement, then such a contract may have the characteristics of a "horizontal" agreement. To some extent, the legal nature of license agreements is similar to franchise agreements. In franchise agreements the legal owner of a set of exclusive rights, including the rights to the trademark, service mark, and the rights, as envisioned by the contract, to other subjects under rights of exclusivity, such as a commercial designation, production technology (know-how), grants these rights to a user for a fee and for a time period or without a time limitation for his utilisation in his business.

Antitrust Guidelines in the United States, as well as similar Guidelines of the Fair Trade Commission of Japan, offer several ways to determine the permissibility of such agreements.

In particular, licensing practices are considered to be permissible if they do not contain conditions that are directly anti-competitive (for example, do not contain provisions that are banned «per se», in particular, price setting and price maintenance), and if the combined share of the parties on any product market affected by the conditions set in the license agreement, does not exceed twenty per cent. It is also noted that the transfer of exclusive rights that is subject to antimonopoly control over economic concentrations, has to be treated differently.

When considering the proposed criterion of admissibility, it seems important to bear in mind that the license agreements entered into with a view to conceal cartel collusion between its participants, and containing provisions on the setting and maintenance of prices or market division, should be subject to an unconditional prohibition, regardless of the market share of the parties.

There are also other restrictive conditions of licensing agreements such as the so-called «tying arrangements», that is, agreements with additional requirements. Those are, for example, situations of «package licensing», when the licensor imposes on the licensee an inclusion in the license not only of the right to use a patent, for which the licensee made a request, but also several other patents, which the licensee is not required to obtain permission to use, given the higher royalties. Cross-licensing agreements and the agreements on the creation of patent pools are worthy of being mentioned separately. Patent pools are not directly defined in the legislation of the Russian Federation, however, their nature is quite clear and can be defined as the conclusion of an agreement between entities which provides for the reciprocal granting of rights for patent use. Such agreements may have the potential to influence the sales price of the goods. Thus, patent pools may under certain conditions, in our opinion, be regarded as anti-competitive agreements.

It should be noted that the goal of antitrust law is not to destroy the legal framework that protects intellectual property rights. Antitrust

law shall prevent the abuse of "legal monopolies" in those cases where their use results in the prevention, restriction or elimination of competition without an objective justification. The very need for the use of anti-monopoly law with regard to intellectual property rights is derived from best global practices and is a vivid illustration of the universality of the norms of antimonopoly legislation. Thus it follows that the spread of anti-trust requirements with regard to intellectual property is a trend that needs to be accepted and developed, finding the balance between the need for the legislative protection of exclusive rights and the inadmissibility of the abuse of intellectual rights to unfounded and unfair restriction of competition.

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