

OECD-GVH RCC Newsletter

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Foreword

Dear Readers,

In this newsletter we have tried to cover a broad range of subjects which reflect the array of topics that are relevant to you and which also form part of the programmes of the OECD-GVH Regional Centre for Competition in Budapest (RCC) and the work of the OECD Competition Committee. We encourage you to take advantage of the benefits that can be derived from the work and experiences of your peer competition authorities and from the work products of the OECD.

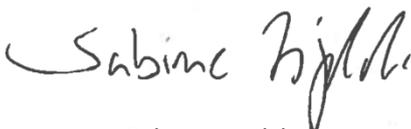
You will find summaries of the OECD Competition Committee meeting and of the Global Forum on Competition, both held in February 2014 in Paris. Many of you attended the Global Forum and will be able to confirm that it provides a great opportunity to exchange experiences with other authorities and to meet like-minded peers from all over the world. The next Global Forum will take place on 19 – 20 February 2015 in Paris.

One of the sessions of the Global Forum 2014 was dedicated to the Peer Review of Romania's Competition Law and Policy. "Peer review" is a core element of OECD work. The mechanisms of peer review vary, but it is founded upon the willingness of a country to submit its laws and policies to substantive questioning by other peers. The process provides valuable insights into the country under study, and gets to the heart of the way in which each country deals with competition and regulatory issues, from the soundness of its competition laws to the structure and effectiveness of its competition institutions. Romania has contributed an article which details its experience with the Peer review and the benefits it provided.

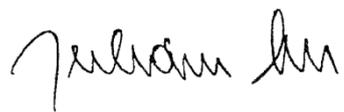
Other country contributions deal with the national experience with the leniency instrument in cartel detection (Serbia) and with competition regulation and control in the electricity sector (Russia). Hungary contributes insights into EU and Hungarian approaches to tackling buyer power problems.

As competition law violations often do not stop at national borders, we also provide you with an overview of the OECD's work with regard to international co-operation and with some practical guidance on information exchange between competition authorities.

We are happy to receive your comments and contributions! Please contact Sabine Zigelski (OECD – sabine.zigelski@oecd.org) and Andrea Dalmay (GVH – dalmay.andrea@gvh.hu).



Sabine Zigelski
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Miklós Juhász
President of the GVH

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RCC Activities in 2014

14 – 15 February

Seminar on European Competition Law for National Judges Abuse of Dominance

The seminar focused on abuse of dominance cases. It built on topics such as market power, consumer welfare and foreclosure effects, which were discussed in a previous seminar in order to discuss basic economic and legal concepts that are particularly relevant in Art. 102 cases. Topics included an assessment of substantial market power (dominance), barriers to entry and expansion, “excessive” prices, refusals to deal and low price strategies that might foreclose competitors. The seminar relied heavily on European cases and case hypotheticals to illustrate key concepts and to discuss how economic and legal questions can be resolved in actual cases before courts.



Seminar on European Competition Law for National Judges
14 – 15 February

11 – 13 March

Practice and Procedures in Merger Investigations

The seminar very specifically provided insights into investigation techniques and procedures in merger cases. Experts provided presentations on essential planning and investigation steps, questionnaires, market surveys and econometric data, the conduction of state of play meetings and remedies. Throughout the seminar the participants worked intensively on a hypothetical case and tried to solve relevant problems in breakout groups, supported by the OECD experts.

Practice and Procedures in Merger Investigations
11 – 13 March



10 – 11 April

GVH Staff Training

The aim of the two day seminar was two-fold – to provide an update on developments in the enforcement of and jurisdiction on Art. 101 TFEU (day 1) and to provide specific training in merger/antitrust/UCP case investigation techniques and the drafting of decisions (day 2).

On day 1 legal practitioners and authority representatives gave presentations on recent developments in the area of Art. 101 and provided insights into cases they have dealt with. On day 2 targeted trainings were given to specific groups of GVH staff, supported by experienced practitioners. The Council worked on the drafting of decisions and settlement strategies, the mergers staff dealt with economics and investigations in merger cases, the cartels staff practised interview situations and the UCP staff discussed problems related to health claims.



GVH Staff Training
10 – 11 April

9 – 10 May

Seminar on European Competition Law for National Judges Quantification of Damages in Competition Cases

The seminar focused on the quantification of damages in competition law litigation before national courts, building on the previously discussed topics of restrictive agreements and abuse of dominance. Once a violation has been found, how can victims recover damages? The seminar covered economic foundations, case law and the recently adopted European legal framework, and practical aspects of damages cases before national courts.

**Seminar on European
Competition Law
for National Judges**
9 – 10 May



3 – 5 June

Outside Seminar FYR Macedonia – Bid Rigging and Public Procurement

The seminar dealt with a special kind of cartels – bid rigging cartels. Characteristics of bid rigging cartels, their treatment as a criminal offence in many jurisdictions and ways of detecting bid rigging cartels, were examined. OECD materials on bid rigging and also on screens for cartel detection were used. As public procurement is often the victim of bid rigging another focus was on ways to alert public procurement officials to illegal cartel activities. There was also a comparison of the different approaches to competition advocacy and to co-operation between competition authorities and other government agencies in this area.. Participants shared their experiences with experts from OECD countries in lectures and case studies. Hypothetical case exercises complemented the presentations and discussions.



**Outside Seminar
in FYR Macedonia
Bid Rigging and Public
Procurement**
3 – 5 June

16 – 18 September

Competition Topics in Retail Markets

Retail markets, especially food retail, pose a lot of different challenges for 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 competition experts from OECD countries and in case studies presented by the participants.

14 – 16 October

RCC – FAS Seminar in Kazan, Russian Federation

Competition topics related to airports.

2 – 4 December

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.

Report About OECD Activities

OECD Competition Committee Meetings, 24-26 February 2014

Hearing on the Evaluation of Competitive Impacts of Government Interventions¹

This hearing continued the stream of work focused on evaluation that has been a theme of competition work over the last year. While the previous work has primarily focused on an evaluation of competition law interventions, there are many other types of government interventions, such as regulations, which can have a profound impact on competitive conditions. This hearing focused on the ex post review of these kinds of interventions.

¹ <http://www.oecd.org/daf/competition/evaluation-competitive-impacts.htm>

Roundtable on Investigations of Consummated and Non-Notifiable Mergers²

This roundtable discussion offered competition delegates the opportunity to share experiences on how agencies address the alleged anti-competitive effects of consummated mergers that have not been subject to merger notification, either because they fell below statutory notification thresholds, because there was no obligation to report the transactions (e.g., the notification system has other exceptions or is voluntary), or because the parties failed to meet their filing obligations. This is an area where agencies have different powers. Some agencies have the authority to review consummated and non-notifiable mergers under their merger review systems; other

² <http://www.oecd.org/daf/competition/investigations-consummated-non-notifiable-mergers.htm>

agencies may need to resort to general antitrust provisions on horizontal agreements and unilateral conduct or abuse of dominance.

The discussion focused in particular on three situations:

1. The review of mergers falling below the national notification thresholds.
2. The review of mergers that should have been notified but were not.
3. The subsequent review of previously cleared and consummated mergers

Role of Competition in Financial Consumer Protection³

This discussion focused on two key points. First, the role of switching rates in competition analysis. This looked at the way in which competition in the banking sector is assessed

³ <http://www.oecd.org/daf/competition/competition-in-financial-consumer-protection.htm>

OECD Global Forum on Competition, 27-28 February 2014

Fighting Corruption and Promoting Competition⁴

This session built on discussions first held at the Global Forum 2011 on Collusion and Corruption in Public Procurement and involved a debate on how corruption and competition intersect in the space where the public sphere meets the private sphere. The discussion explored this relationship and looked at ways in which public officials and competition authorities can work together to fight corruption and promote competition.

⁴ <http://www.oecd.org/daf/competition/fighting-corruption-and-promoting-competition.htm>

in different jurisdictions and whether or not the analysis suggests that competition for new customers is more intense. This incorporated a discussion on the work done on the searching and switching behaviour of individuals in the banking sector.

The second key focus was on the implications of banking separation for competition. This included a discussion of what benefits banking separation would deliver in terms of competition.

Peer Review of Competition Law and Policy in Romania⁵

The findings of the Peer Review of Competition Law and Policy in Romania were reported. This was followed by comments from the Romanian delegation and questions from the examiners.

Competition Issues in the Distribution of Pharmaceuticals⁶

This session looked at the market for the distribution of pharmaceuticals, a market which differs from other consumer markets.

⁵ <http://www.oecd.org/daf/competition/competition-law-and-policy-in-romania.htm>

⁶ <http://www.oecd.org/daf/competition/competition-distribution-pharmaceuticals.htm>

These differing features imply that market competition cannot fully be relied upon to achieve an efficient allocation of resources. In addition, many governments consider that drugs should be affordable and accessible to all citizens. Market competition cannot ensure that these equity and fairness concerns are

met. Hence, this market is heavily regulated. Even so, competition can and should play a role in ensuring that this market works well for consumers, so that they can benefit from higher quality, greater choice and variety, more innovation and lower prices.

The OECD Discussion on International Co-operation; What are the Issues?



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1. The OECD Work on International Co-operation between Competition Authorities

Globalisation and the increasing number of companies conducting business internationally has brought international enforcement co-operation back on the policy agenda of competition authorities. Today more than 120 countries around the world have adopted competition laws and have effective competition authorities to enforce them.⁷ As a result, there is a growing number of multi-jurisdictional competition cases and competition authorities are increasingly faced

⁷ According to the OECD research, there were 127 jurisdictions with a competition law, of which 120 had a functioning competition authority as of October 2013, while there were only 23 jurisdictions with a competition law and 16 with a competition authority in 1990.

with situations where their actions depend on co-operation with other enforcers.

International co-operation has been on the OECD agenda for many years. The Organisation has provided an ideal policy discussion forum and the work done at the OECD has produced a number of recommendations, best practices and reports to promote co-operation among competition authorities.⁸ This includes the 1995 OECD Recommendation on International Co-operation, the 1998 Recommendation concerning Effective Action against Hard Core Cartels, the 2005 Recommendation concerning Merger Review and the 2005 Best Practices for the exchange of information in cartel cases.⁹

As the issue is of particular interest to competition authorities around the world, international co-operation in competition enforcement remains one of the two strategic themes of the OECD Competition Committee. One of the important results from the current project is the OECD/ICN Survey on

⁸ You can see the relevant OECD work in this area <http://www.oecd.org/daf/competition/internationalco-operationandcompetition.htm> and access the report. The recommendations, best practices and reports are also available on the website.

⁹ All available at <http://www.oecd.org/daf/competition/recommendations.htm>

International Competition Enforcement Co-operation in 2013¹⁰ (“the OECD/ICN joint Survey”). It was developed based on the questionnaire survey¹¹ conducted by the OECD Secretariat and the International Competition Network to understand the competition authorities’ experience with international co-operation, to identify existing limitations and/or constraints and possible improvements that can foster better and more case co-operation. The current work focuses on the revision of the 1995 Recommendation on International Co-operation and on exploring new ways in which enforcement agencies can co-operate to reduce or facilitate the number of overlapping investigations, especially on mergers and cartels.

2. The 1995 Recommendation on International Co-operation

The 1995 Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade¹² is considered to be one of the most important OECD instruments developed by the Competition Committee. Its first version was adopted in 1967 and it evolved over time to reflect the developments and needs of co-operation as the reality of enforcement evolved. The current version was developed in 1995 and contains the following principles:

- *An advance notification:* when a Member country opens a competition investigation or proceeding which may affect important

interests of another Member country or countries it should notify the affected Member country or countries.

- *Co-ordination of parallel investigations:* When undertaking parallel investigations, Member countries should endeavour to co-ordinate their action insofar as appropriate and practicable.
- *Investigative assistance:* Subject to national laws of the relevant countries, Member countries should supply each other with relevant information on anticompetitive practices, for example, by assisting in obtaining information on a voluntary basis or by providing factual and analytical material from their files.
- *Consultations and Conciliations:* Consultations between Member countries are aimed at finding a mutually acceptable solution. When no satisfactory conclusion can be reached, the Member countries may ask the Competition Committee for conciliation.

The Recommendation has shaped the framework for international co-operation between competition authorities that exists today. However, the result of the OECD/ICN joint Survey as well as the recent discussions at the OECD have revealed that new issues have emerged and that the 1995 Recommendation should be revised to reflect the current status of co-operation between competition authorities. Even if the 1995 Recommendation and its modernised version can formally only address OECD Members, this does not mean that the recommended tools should not be used by all national competition authorities whenever the need for international co-operation arises. The tools are and will be designed to be universally applicable.

¹⁰ <http://www.oecd.org/daf/competition/oecd-icn-international-cooperation-survey.htm>

¹¹ The questionnaire survey was addressed to 120 competition agencies from around the world and 55 responses were used to develop the report.

¹² <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=192&InstrumentPID=188&Lang=en&Book=False>

3. Discussion on the Amendment of the 1995 Recommendation

Among the several areas in the Recommendation that require amendment, two are particularly important. These concern the modernisation of the notification procedures and the promotion of the exchange of information (including confidential information) between competition authorities.

3.1 Modernisation of notification procedures

The current Recommendation requires Member countries to make notifications in a rather formal way. Given the technological advances and other changes to circumstances that have taken place since 1995, the section on notifications will clarify that Member countries could use more flexible and/or informal means of notification, such as notification by email or by other electronic means. This amendment will provide competition authorities with enough flexibility and will facilitate timely co-operation. Also the circumstances in which a notification is required will be streamlined to ensure that notifications are made when necessary and useful for the receiving country, without excessive administrative costs being created.

3.2 Improving the ability of competition authorities to exchange information

The authorities' ability to exchange information is crucial in international co-operation, and especially the ability to exchange confidential information. The draft Recommendation aims to reinforce the authorities' ability to exchange confidential information by promoting confidentiality waivers and the adoption of so called "information gateways".

First, the draft Recommendation encourages competition authorities to promote the use of confidentiality waivers. A confidentiality waiver is a document issued by the source of the information which allows the recipient of the information (competition authorities) to discuss it or exchange it with other authorities. It is already used in many enforcement cases. The draft Recommendation intends to promote more use of it.

Second, as confidentiality waivers are not always available, especially in cartel cases, the draft Recommendation invites Member countries to adopt legal provisions allowing the exchange of confidential information between competition authorities without obtaining confidentiality waivers. Such legal provisions are so called "information gateways" and can be included in national legislation or in international agreements.

At the same time, confidential information may contain business secrets, personal information and/or other sensitive information. In order to protect the rights of the relevant parties, the confidentiality of the information should be strictly protected. The draft Recommendation addresses the issue by clarifying the safeguard obligations on both countries transmitting and receiving confidential information.

4. Conclusion

Globalisation of the economy, the increasing number of effective competition enforcers and the increase of business practices with cross-border effects are important drivers for international co-operation. The ongoing work at the OECD will provide insights into the ever-changing circumstances of competition law enforcement and will allow agencies to update their tools of co-operation to promote

effective and beneficial co-operation between authorities. In the longer term, competition authorities may need to consider new and enhanced tools of co-operation, such as the mutual recognition of other agencies' decisions or a one-stop shop for leniency markers or for mergers, or multilateral platforms for co-operation. For this reason, in parallel with the revision on the 1995

Recommendation, the Working Party No. 3 of the Competition Committee held an expert hearing on new tools of international co-operation in June 2014.¹³

¹³ <http://www.oecd.org/daf/competition/enhanced-enforcement-cooperation.htm>

Information Exchange Between Competition Authorities in Practice



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In the previous article Antonio Capobianco and Naoko Teranishi have summarised the OECD discussion on international co-operation and sketched out the OECD's future work in this area. One of the key sentences was "The authorities' ability to exchange information is crucial in international co-operation, and especially the ability to exchange confidential information."

When will the need for information exchange arise in a competition authority's day to day work? It is certainly not an everyday occurrence. Most cases are still regional or national and will not create a need to contact other enforcers. But even in these cases, contacting another authority might sometimes be a good idea. If a case poses difficult and new questions in terms of theories of harm and how to best deal with them, it can often be helpful to have a sideways look. There might be other national authorities that have dealt with a similar problem. Think for instance of competition problems with regard to access to airport facilities or significant

buyer power in the retail sector. Here an exchange with an experienced authority might be very helpful; as might a look at the direction a case has taken after a certain action. And this kind of exchange does not have to involve any confidential information at all, so could in principle be practised easily. All it needs is a contact in the other authority. The contact does not have to be the person in charge of the case, but he/she will certainly be able to direct you to the best placed person to answer your questions. It goes without saying that this communication should not be over burdensome. So never expect to have your case solved by someone else, and there might be limits in terms of the time the other side is able or willing to spare for this kind of conversation. But if mutual trust and understanding have been established over time and it is clear that the communication can and will be a two-way road, it will become easier each time. Usually the international sections in the authorities have a good contact list that can be used. Otherwise the International Competition Network (ICN) provides a comprehensive list.¹⁴

¹⁴ [ICN Contact List](#); some authorities do not regularly update – so make sure you provide up-to-date information yourself!

This kind of information exchange, informal and not involving confidential information, on an ad-hoc basis, is actually the kind of exchange that happens most often and is deemed to be highly useful by many authorities. The OECD Report on the OECD/ICN Survey on International Enforcement Co-operation¹⁵ highlights this fact. Authorities, regardless of the kind of proceeding, most often exchange information about:

- the status of investigations
- substantive theories of violation and harm
- public information
- public communication
- timing of the review.

In merger investigations the simple information, if permissible under national law, that you have received a notification or are investigating a merger that might be of potential interest to neighbouring jurisdictions as well, could be important. First, sometimes mergers are not notified even if there exists an obligation to do so – this gives other jurisdictions the chance to check. Second, for the investigation it will be useful to know who else is working on the case – giving you a chance to exchange views and to co-ordinate. Thirdly, in problematic cases, early information and parallel timing of procedures facilitate later co-operation on substantive issues, like the design of remedies. In Europe a system of early notification of other authorities has been established via the European Competition Authorities (ECA)¹⁶. Whenever it becomes known to one authority that a merger case will be notified not only in

its own jurisdiction but also in another ECA jurisdiction, it will notify¹⁷ all ECA authorities, thereby alerting them to the case and giving just very basic case information and more importantly the names and contact details of the investigators in charge of the case. Two recent ICN Merger Working Group Teleseminars¹⁸ provided good examples for useful exchanges of non-confidential information with regard to merger investigations, substantive assessment and remedies.

This kind of knowledge exchange is of course not limited to merger control but may be helpful in cartel investigations and abuse of dominance proceedings as well. Co-ordination with other authorities – again, if the information exchange is permissible under national law – may be vital for effective cartel prosecution in cross-border cases. The ICN Cartel Working group has published a good overview, including types of information to be shared, stages of the investigation, tools, limitations and examples.¹⁹ In unilateral conduct cases co-operation will be called for when a certain undertaking is dominant in more than one jurisdiction, even though the markets might still be national. Telecommunication markets could be an example. An exchange and co-ordinated action of several (small) enforcers has the potential to greatly improve the impact of the action in many of these cases.

¹⁵ OECD Intl. Enforcement Co-operation Report 2013; pp 67.

¹⁶ ECA is a forum for discussion of the competition authorities in the European Economic Area (EEA) (the Member States of the European Community, the Commission, the EFTA States Norway, Iceland, Liechtenstein and the EFTA Surveillance Authority).

¹⁷ ECA Notification

¹⁸ Teleseminar on Practical Aspects of International Co-operation in Merger Cases - Investigations, Nov. 2013; and Teleseminar on Practical Aspects of International Co-operation in Merger Cases - Assessment and Remedies

¹⁹ ICN Anti-Cartel Enforcement Manual – Chapter on International Co-operation and Information Sharing

If a co-operation is supposed to lead to a co-ordination of procedures and outcomes, however, exchange of non-confidential information will often not be sufficient. In these cases the instrument of choice is the “waiver”. A confidentiality waiver is a document issued by the source of the information which allows the recipient of the information (competition authorities) to discuss or to exchange confidential information with other authorities. Waivers seem to be a widely accepted instrument by the undertakings involved in merger proceedings. The obvious advantages for the merging parties are a potentially more co-ordinated and faster investigation process, a coherent competitive assessment and, where relevant, targeted and non-excessive remedies. In cartel proceedings and unilateral conduct cases the undertakings involved will often be less willing to grant waivers for confidential information exchange with other authorities. But this does not mean that a waiver cannot be obtained in these cases. Sometimes undertakings might be willing to grant them, if they are limited in scope – to procedures, certain types of documents/information, authorities to share with – or if they are co-operating in the framework of a leniency programme.

Here again the ICN provides excellent guidance on the use of waivers:

- The ICN Model Waiver²⁰ for merger investigations provides guidance and information on the use of waivers. Its annexes contain several waiver forms – the ICN model template and templates used by the US and the EU.

²⁰ ICN Model Waiver Mergers

- The ICN note on waivers of confidentiality in cartel investigations²¹ explains the use and limitation of this instrument in cartel proceedings. It provides templates for a procedural waiver and a full waiver.²²

For all waivers it has to be noted that they are granted by the undertakings involved on a purely voluntary basis. And the templates can be adapted – depending on the willingness of the competition authority to go along with it – to better meet the concerns of the granting undertakings. It is important to also keep in mind the limited scope of a waiver. It usually does not waive the confidentiality with regard to the use and sharing of information with third parties or the general public. And it does not waive confidentiality requirements that have to be met for information that has been obtained from third parties in an investigation. In addition, legal, legislative or political regimes in which competition agencies operate might impose individual limitations on the exchange of confidential information that have to be respected.

The OECD-GVH Regional Centre for Competition in Budapest (RCC) is one of the venues open to competition authorities of the Eastern and South-Eastern European Region to meet colleagues from neighbouring jurisdictions and to enter into communication and exchange, be it on a general or a case-related basis and might eventually foster more established forms of co-operation.

²¹ [ICN Waiver in Cartel Investigations - Explanatory Note](#)

²² [Procedural Waiver Cartels and Full Waiver Cartels](#)

OECD Peer-Review of Competition Law and Policy in Romania



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Peer reviews are a core instrument of OECD work and are extensively used by the states under review in order to improve cooperation and drive forward change. Essentially, a peer review is based upon the willingness of the applicant to openly submit its law and policies to substantive questioning by its peers – other competition authorities.

On 15 July 2013, the Romanian Competition Council (hereinafter referred to as RCC) officially expressed its willingness to be subject to a peer review of the competition law and policy in Romania by the OECD. The review was subsequently held in the OECD Global Competition Forum on 27 February 2014, on the basis of a draft Report that had been disseminated in advance to OECD members and non-members by the OECD Secretariat. In two and half hours, the RCC had the opportunity to share its experiences with its sister agencies, thus making the review a mutually beneficial exercise.

The report assessed the developments in the application of competition law and policy in Romania since the setting-up of the RCC as a single competition authority in 2004, with a focus on the activities of the previous three years (2010-2013).

In the introductory session, Mr. Liviu Voinea, Minister delegate for budget, Ministry of Public Finance, addressed all those present at the debate on behalf of the Romanian Government. He mentioned that Romania has the 7th largest economy in the EU and that it

has emerged from the financial and debt crisis with positive growth perspectives (3,5% in 2013), a historically low inflation rate, a stable exchange rate, a budget deficit below 3% of GDP, as well as with decreasing public debt and unemployment rates. He stressed the fact that Romania has remained engaged in the pursuit of stronger relations with the OECD and open to adopting its standards and to benefiting from the knowledge and experience-sharing opportunities offered by the OECD programmes. Romania's long track record of active participation in OECD committees and activities, as well as its proven capacity to share its expertise in various strategic fields at the regional level were also highlighted. At the end of his speech, he congratulated the RCC for its initiative of submitting itself to the peer review and of course the staff of the OECD Secretariat for the useful Report on findings on the competition law and policy regime in Romania.

Mr Bogdan M. Chiritoiu, President of the RCC, then entered into the core subject highlighting the latest and most important developments that have taken place in Romania in the field of competition and which address the main issues reflected in the report. Subsequently, a series of substantive questions from the lead examiners and from the floor were addressed to the Romanian delegation.

Both the review in the GFC and the Report itself concluded that Romania has a competition regime that is perfectly in line with internationally recognised standards and practices. It was also stressed that the RCC is a well-regarded enforcement agency in Romania. The pro-active role and the openness of the RCC towards reforms in order to improve the effectiveness of the

enforcement regime and its ability to make markets work better were highlighted in particular.

The main recommendations in the report focused on cartel enforcement, where better co-ordination with criminal prosecutors appears to be a priority, and on mergers and the need to consider an adjustment of notification thresholds and an evaluation of behavioural remedies. The report also made some recommendations concerning the RCC's institutional features so that it can successfully carry out its tasks and build a constructive relationship with the energy regulator.

More recently, on 8 April 2014, the OECD peer review Report on competition law and policy in Romania was released in Romania with a launching event in Bucharest. At this event, the findings of the Report were further confirmed by the appreciations received by the RCC from different stakeholders. For instance, the Prime-Minister of Romania expressed his satisfaction concerning both the RCC's pro-active role at the regional level, where it has established a good partnership with the Competition Council of the Republic of Moldova in the form of a Twinning project, and its great professionalism and role as a truly impartial referee on the market. The Prime-Minister of Romania assured the RCC that for the benefit of consumers it has the continued support of the Romanian Government.

It was very important for the RCC to submit itself to such a review because ever since 2006, when it was first granted observer status in the Committee, it has constantly aimed to increase its contribution to the goals, practices and high standards of the Committee and to observe the legal instruments of the organisation in the field of competition.

This peer review in the field of competition is the first that Romania has ever been subject to in a Committee of the OECD. This review came at an important moment, when strengthening and streamlining the competition law and policy regime in our country is very high on the RCC's 2014 agenda. Therefore, the analysis conducted by the OECD and the recommendations of this peer review are useful to the reform process.

On the conclusion of the extensive and rewarding work carried out by the RCC in cooperation with the OECD, the RCC can firmly state that this exercise has been useful for benchmarking our performance against that of our peers and for making consistent use of the work of the OECD and of more advanced competition law systems both in-house and at a national level. Last but not least, the review has provided the RCC with the opportunity to better communicate its activities, aims and objectives both at an international level (among the members and non-members of the OECD Competition Committee) and at a national level (among various stakeholders) in order to make the reforms happen in the core areas of interest of the competition authority.

To conclude, before Romania's accession to the EU in 2007, the RCC was mostly focused on meeting all EU requirements in the field of competition and especially in the field of state aid, and after accession to the EU and after having met its standards, the RCC's main objective shifted to ensuring that its enforcement and advocacy activities and its working methods were also in line with OECD standards. This was achieved through a steady absorption of the valuable know-how and best practices of the Organisation and its members at institutional, national and regional levels.

Therefore, Romania's accession to the EU and the acceptance of the RCC as an observer/participant in the work of the OECD Competition Committee ever since the end of 2005 have undoubtedly contributed to the current stage of development of the Romanian Competition Authority.

The 2014 OECD Report on Competition law and policy in Romania – A peer-Review may be consulted at the following link:

<http://www.oecd.org/countries/romania/competition-law-and-policy-in-romania.htm>

New Developments Concerning Buyer Power: a Common European Approach towards UTP Legislation?



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1. European Concerns in the Retail Sector

One of the hottest topics in the various forums of the ECN (European Competition Network) these days is the topic of the buyer power of big, multi-national retail chains in the food chain industry and the unfair trading practices (UTPs) they could potentially apply vis-à-vis their often (much smaller) weaker counterparts: their suppliers.

According to the Global Competition Review,²³ Andreas Mundt, president of Germany's Federal Cartel Office, said at the European Competition Day in Athens that authorities need to intervene in negotiations between suppliers and purchasers and lay down hard law to protect competition in the retail sector. Mr. Mundt, however, is not the first in the European competition 'family' to suggest that stricter rules should apply to large scale retail chains across Europe. The European

²³ see:

<http://globalcompetitionreview.com/news/article/35735/hard-law-needed-against-anti-competitive-retail-agreements-says-mundt/>

Commission published a green paper²⁴ on the matter on the 31 January 2013. The Green Paper identified the following seven common unfair trading practices:

- Ambiguous contract terms
- Lack of written contracts
- Retroactive contract changes
- Unfair transfer of commercial risk
- Unfair use of information
- Unfair termination of a commercial relationship
- Territorial supply restrictions

However, the Commission did not suggest that a European-wide regulation system should be adopted. Similar to the UCP directive in the food-retail sector, it has ordered a study to assess the impact of recent developments in the European retail sector on consumers. The study will examine whether increased concentration (of retailers/food manufacturers) or other factors (such as shop type/size, private label success, socio-demographic characteristics) have hampered choice and innovation in the European food supply industry.

The study – according to the DG Competition – will be published in the near future.

²⁴ Green Paper On Unfair Trading Practices In The Business-To-Business Food And Non-Food Supply Chain In Europe (COM/2013/037 final)

Since it seems to be obvious that suppliers (mainly small and medium sized businesses) are facing more difficult challenges in the European Union due to the bargaining or buyer power of large-scale retail chains, some member states have already adopted their own regulation regarding UTPs.

2. The regulation of buyer power in Hungary

The Hungarian Competition Act does not define buying power. Thus abuse of buying power is not per se prohibited by the Competition Act, whereas the abuse of a dominant position (including dominant buying power) is prohibited in general. Due to the market structure in Hungary, the activities of large retail chains are not likely to be currently investigated based on Article 102 TFEU, in spite of the fact that certain conducts may be regarded as abusive if dominance could be proved. Nevertheless, the Hungarian legislator assumed that the concentration of the retail sector and the expansion of large retail chains might have a negative effect on the relationship of retailers with suppliers and could result in various abuses and unfair practices. Therefore, a concept different to that of dominance, namely that of 'significant market power', was introduced relatively early – in 2005 – by the legislator in the retail sector (primarily within agricultural and food retail) in Hungary.

Act No. CLXIV of 2005 on Trade sets out provisions applicable to traders having significant market power (SMP). According to the definition set out in Article 2 of the Trade Act *"the term "significant market power" refers to a market situation the consequence of which is that the dealer becomes or has become a contracting partner for the supplier and the latter is unable to reasonably forward its goods and services to the customers*

without the dealer which is able, due to the size of its share in the turnover, to influence regionally or all over the country market access of a product or a group of products". The Act on Trade sets out a presumption that a retailer has SMP when its turnover exceeds approx. 315,000,000 EUR. It is worth mentioning that currently all large retail chains (Tesco, SPAR, Auchan, Lidl, Aldi, etc.) in Hungary exceed this threshold, and therefore have SMP.

The Trade Act stipulates that companies falling under the scope of the Act shall not abuse their significant market power vis-à-vis their suppliers. The Trade Act provides for a non-exhaustive list of unfair business conducts which qualify as abuses of significant market power in Article 7, Paragraph (2), such as unjustifiably discriminating against suppliers, imposing unfair conditions on suppliers, unjustifiably altering contractual terms to the detriment of suppliers, charging fees one-sidedly to suppliers, etc.

According to the Trade Act, the Hungarian Competition Authority (HCA) is vested with the competence to conduct proceedings against retailers with significant market power for any case of abuse defined in the Trade Act. Since 1 August 2012 (due to an amendment²⁵), only non-food products fall under the scope of the Trade Act and for this reason only non-food product suppliers are protected by this law against the practices of retail chains with significant market power. These provisions are still enforced by the HCA.

²⁵ Act No. XCV of 2009 on the Prohibition of Unfair Distributional Practices Applied Towards Suppliers with regard to Agricultural and Food Products entered into force on 1 January 2010. It repeats the provisions of the Trade Act but it is only applicable to food and agricultural products and it is enforced by the National Food Chain Safety Office (NFCSO).

The HCA has limited case law regarding UTP-cases; however it is worth mentioning the SPAR-case (Vj/47/2010)²⁶. In 2010 the HCA initiated an investigation to find out whether SPAR had breached Article 7 of the Act on Trade when it forced its bonus system on suppliers in its contracts. The Competition Council ascertained that SPAR had abused its market power by unilaterally forcing the bonus-system on its suppliers without any benefit for them, thereby infringing the Act on Trade. The fine was 50,000,000 HUF (Approx. 170,000 EUR) and SPAR had to change its contracts, although the case is still pending at the courts.

3. Challenging Situation for Lawmakers and Enforcers

Many developments point in the direction of a common, European regulation concerning UTPs and buyer power. As a consequence it is worth considering the difficulties that a new, European competition law based regime in the field may present. First of all, competition law or competition policy may not be the right tool to solve the problems of the unequal bargaining positions of private parties during business negotiations. The regulator may easily find him- or herself in a position which is close to determining wholesale prices by the law.

And secondly, even if there was EU-wide legislation the problem of how to handle the constantly changing practices of the retail chains would still remain. Experience shows

that even if a public authority considers a practice unlawful and orders a retailer to stop applying it in its contracts, it will simply rename the clause in question (e.g. from shelf-fee to marketing-contribution fee). It is almost impossible to lay down a comprehensive list of UTPs, while the use of general clauses on the other hand leaves the problem open as to how enforcing authorities are to assess unfairness in each and every case.

Also, there might be other ways that could ease the situation of suppliers. If they achieved more market power via integration instead of protecting them with state legislation, they could negotiate better conditions in their business relations with retail chains. And this might be an overdue structural change that would otherwise be impeded by interventionist UTP action.

Either way, the unbalanced bargaining power of suppliers and retail chains remains one of the most severe problems of European economies, while lawmakers and public agencies struggle to find a solution which is acceptable for all parties concerned.

The OECD-GVH Regional Centre for Competition in Budapest will hold a seminar on competition problems in retail markets in September, where buyer power will also be examined.

²⁶ For an English summary please visit:
http://www.gvh.hu/en//data/cms993813/Vj047_2010_a_sz.pdf

Application of the Leniency Institute in the Republic of Serbia



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The granting of relief from a sanction or a part of it to a party to a restrictive agreement that reported its existence (*Leniency*), i.e. provided adequate evidence prior to or in the course of the investigation procedure, is an institute derived from the rule of reason, and aspects of pragmatism and efficiency that is applied to the prosecution of restrictive, and above all cartel arrangements, as the most complex and most extreme forms of the distortion of effective competition. An important and integral element of a cartel is the exchange of information that takes place between its members. Exchanges concerning price fixing and monitoring usually constitute the most harmful types of behaviour.²⁷ In order for an investigation into such a competition infringement to be as successful as possible, especially in cases of tacit collusion and consorted practices, which are often difficult to detect and to prove, public interest allows for the granting of immunity from a fine or the reduction of a fine instead of a full sanction being imposed on the co-operating party. This comes in exchange for information and evidence on illegal actions, prior to or in the course of a procedure. The relief granted from a legal sanction concerns both corporative and personal immunity.

²⁷ With regard to the form that consorted practices can take, those which are not stipulated in legal documents and which only have morally binding internal effects, represent the most important type of cartel agreements.

In order to receive immunity, four cumulative requirements have to be met by the applicant:

- the application has to be the first to inform the commission about a previously unknown agreement;
- the application must provide evidence and indicate its source or the location where the evidence can be found;
- the immunity applicant must not be the initiator or organiser of the restrictive agreement and
- the applicant must not have forced or enticed other undertakings to participate in the restrictive agreement.²⁸

In addition, the immunity applicant has to suspend without delay its involvement in the agreement, unless it is in the interest of the procedure that the participation continues.

The initiator of a cartel agreement cannot be relieved from sanctions, even if he fulfils all the other conditions.²⁹ The reason for this is that such a solution would enable an undertaking to misuse leniency by enticing its competitors to conclude a cartel agreement, and afterwards, with a high probability of winning some actual business benefits in the meantime, by reporting such an agreement to the competent authority. This would unduly relieve the instigator of all liability while high pecuniary penalties would have to be paid by all other parties to the agreement. This principle has existed in the competition law of the Republic of Serbia since 2009, and introduces a subjective standard implying the

²⁸ Article 2 of the Regulation on the relief of payment of the measure for protection of competition (Official Journal of the Republic of Serbia no. 50/10).

²⁹ Article 69, para 4 of the Law on Protection of Competition of the RS (Official Journal of the Republic of Serbia no. 51/09).

highest level of intent in terms of planning and organising a restrictive agreement.

In addition to immunity, Serbian law also allows for a reduction in the fine imposed on a party to a restrictive agreement that has submitted a leniency application in the course of an ongoing procedure, again provided that the respective entity did not initiate or force other parties to participate in the agreement. This situation primarily applies to additional evidence that enables the faster closing of a cartel investigation. In practice in the majority of cases a dawn raid is conducted on the basis of data provided by an immunity applicant, while, vice versa, a potential reduction in a fine is also available to a cartel participant whose business was the target of a dawn raid, provided that s/he contributes additional evidence. For her/him, however, immunity is no longer an option.

At first glance, being party to a cartel agreement and at the same time receiving immunity from fines seem to be two mutually exclusive antipodes in the application of competition law. However, at a second glance, the specific ratio legis of the institute of leniency shows that the detection of the existence of an illegal agreement is a necessary precondition for its prosecution. So the primacy is on the side of the utilitarian principle over the principle of equal treatment. It is considered to be an overall better result if illegal agreements are detected by granting immunity from sanctions than to not be aware of their existence and for the illegal conduct to therefore continue.

The Serbian Competition Authority has successfully dealt with seven leniency based cases since 2009.

Main Features of Antimonopoly Regulation and Control in the Electricity Sector in the Russian Federation



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The main objective of the reform of the power sector of the Russian Federation is to improve the efficiency of the industry's enterprises, create conditions for its development by incentivising investment and ensuring a reliable and uninterrupted power supply to consumers.

In the course of the reform the structure of the industry was changed: natural monopoly functions (power transmission, dispatching management) and potentially competitive ones (generation and sales of electricity,

maintenance and service) were separated, and instead of the vertically integrated companies that formally performed all these functions, separate entities, specialising in generation, transmission and supply were created. As a result, the conditions were set for the development of a competitive electricity market, where prices are not regulated by the state but are determined on the basis of supply and demand and where market participants compete, resulting in lower prices.

The companies formed in the course of the reform specialise in certain types of activities (generation, power transmission, etc.), and control the respective core assets. In January 2012 the Third Antimonopoly Package came into force. Its aim is to enforce the ban on the combining of competitive and natural

monopoly activities in electricity within the same groups of entities and within a single wholesale market price zone. The Package introduces as a sanction the compulsory sale of assets of entities that combine competitive and natural monopoly activities on the basis of legal action of the antimonopoly authority.

Antimonopoly regulation and control in the wholesale and retail electricity markets were established in Article 25 of the Federal Law of 26.03.2003 № 35-FZ³⁰ "On Electrical Energy". Their purpose is:

- Timely prevention, detection, restriction and (or) suppression of actions (or inaction) that have or may have the effect of preventing, restricting or eliminating competition and (or) infringing the interests of parties on the power market and electricity consumers, including agreements (concerted actions), aimed at changing or maintaining the price for electricity (capacity);
- Unjustified refusal to conclude a contract for the sale of electric energy;
- Unjustified refusal to conclude an agreement for the provision of services of a natural monopoly nature, when such a service is technically possible;
- Setting discriminatory or favourable conditions for certain entities on the wholesale or retail markets; creation of barriers to access to the Market Council and organisations that comprise the commercial and technological infrastructure; price manipulation in the wholesale and retail markets;
- Price manipulation in the wholesale and retail markets, including through the use of a dominant position; abuse of dominant position on the wholesale and retail markets.

³⁰ http://www.fas.gov.ru/legislative-acts/legislative-acts_16377.html

One of the central functions of FAS Russia falling within its competence to act on the electricity markets is its control **over the setting up of conditions for manipulation or the actual manipulation of prices in the wholesale and retail electricity markets** - a special form of violation of law in the electricity sector.

Another important function is the control of price manipulation in the capacity market for electric energy. This includes unjustified actions by dominant undertakings that lead to a significant change in the price of electricity or for capacity being traded on the market. Some examples are the submission of inflated or understated bids for the purchase or sale of electricity; and the submission of price bids on the basis of maximum capacity values of the generating equipment not corresponding to the volume of electricity effectively generated (volume withdrawal).

During the time period from 2008 to 2013, FAS Russia dealt with 4 cases of price manipulation in the wholesale market for electric energy (capacity) that constituted violations of the antimonopoly legislation:

Case #1³¹: in 2011, one case of violation of paragraph 1 of Article 10 of the Law on the protection of competition on the part of a large consumer of electricity was investigated. The violation resulted in an artificial lowering of prices in the wholesale market for electric energy (capacity) and harmed the interests of participants of the electricity (capacity) wholesale market. The violating company had abstained from making requests for the purchase of electricity (capacity), but did not actually intend to reduce its consumption of electricity.

³¹ http://fas.gov.ru/fas-news/fas-news_31512.html

Case #2³²: FAS Russia established that a generating company had submitted economically unfounded bids on the market. According to the results of an expert assessment, undertaken within the framework of the case investigation, it was determined that the company's specific fuel consumption was inflated on average by 26-40%. The manipulation was achieved by submitting unreasonably high price bids, as well as by the diversion of capacity. Thus, in some instances the company overpriced its electricity knowing that the electricity would still be sold, while in other cases it deliberately avoided selling electricity for the next day from one of the generating power stations, in the expectation that extra profits would be made from the electricity sales from other power stations or on the balancing market.

Case #3³³: FAS Russia established that a generating company had filed day-ahead price bids for electricity generators that were, on average, 70% higher than the previous ones (which resulted from the use of gas, while the bids were based on fuel oil - a more expensive fuel). As a consequence there was a significant change in the price of electricity on the wholesale electricity market, thus also resulting in a change in the prices for consumers.

Since 2012 the antimonopoly legislation of FAS Russia has been complemented by a new 'warning' system. This is a new tool in the antimonopoly efforts of FAS Russia and is aimed at eliminating the consequences of an offence, as well as the causes and conditions that contributed to the offence, without the

need to initiate a formal investigation for a violation of antitrust laws. The warning system has allowed the number of antimonopoly violations taking place in the electricity sector to be reduced and has also enabled certain situations in the electricity market to be corrected fairly quickly.

The problems of compliance with antimonopoly laws on the wholesale and retail electricity markets, as well as the conditions for the development of competition in these markets were discussed at a joint workshop of FAS Russia and the OECD-GVH Regional Centre for Competition in Budapest that was devoted to "The development of competition in the electricity market", with the participation of representatives of the antimonopoly authorities of Hungary, Netherlands, the EC, Finland, Ukraine, Moldova, Russia and other CIS member states.

Holding similar seminars helps to develop and strengthen the international cooperation of antimonopoly authorities, and also allows the exchange of best practices for addressing violations of antimonopoly laws in the electricity sector.

³² http://fas.gov.ru/fas-news/fas-news_29062.html

³³ http://fas.gov.ru/fas-in-press/fas-in-press_34315.html

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