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Contribution from Latvia

-- Session II --

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Please contact Ms. Lynn Robertson if you have any questions regarding this document [phone number: +33 1 45 24 18 77 -- E-mail address: lynn.robertson@oecd.org].

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Judicial Perspectives on Competition Law

-- Latvia --

Latvia: Evaluation of economic evidences in competition cases during investigation and court proceedings

1. During the last three years, the Competition Council of the Republic of Latvia (hereafter – the CC) had significantly enhanced the level of economic argument utilization in both its enforcement and advocacy activities. This has led to an introduction of a more solid infringement effects analysis and a clearer emphasis on the benefits, delivered by efficient.
2. Essentially, the CC’s current experience with economic evidence analysis before courts may be stratified into three main groups:
 1. cases handled via approaching the existing infringements as violations by objective, where the courts themselves have decided to consider additional economic evidence to evaluate the actual effects of the infringements in question;
 2. cases in which undertakings have used external experts to conduct and submit economic analysis, concerning the wider context and the actual effects of the infringement, enabling the CC to deliver a corresponding economic opinion; and
 3. cases the CC handled by directly implementing economic analysis methods.
3. One of the most significant cases, belonging to the first group, was the Moller case,¹ concerning an infringement in bid-rigging by independent Volkswagen auto dealers, which created an intra-brand cartel (market sharing). During the investigation at the authority and court proceedings in Regional Administrative Court the prosecuted undertakings proposed to reassess the relevant case on efficiency grounds arguing that official Volkswagen auto dealers would be able to deliver higher quality standards and enhance inter-brand competition via sharing of the bids organized by public and private entities between the Volkswagen brand product dealers. Authority in its decision rejected these arguments arguing that this is an object restriction and there are no objective grounds for using such economic methodology. Usually different restricting requirements included in specifications by bid organizers also likely facilitated that only dealer of certain car brand able to apply for tenders mostly restricting inter-brand competition. The court, somewhat unconvinced by the arguments presented in decision of CC, allowed for the undertakings to present a third-party conducted economic assessment, which implied an existence of “*quality enhancing efficiencies as a result of exchange of information*”, echoing the stance of the prosecuted undertakings and asked CC to provide additional economic arguments. The CC delivered an opinion on the presented economic assessment, highlighting numerous inconsistencies and methodological biases in the quantitative methods, employed by the analysis justifying the market sharing on efficiency grounds. Currently, a judgement by the court in this case is expected by mid-2018.

¹ [CC decision](#) (Moller case), December 15, 2014 (available in Latvian). [CC press release](#) in English, 20.01.2015.

4. A case, belonging to the second group, was the Knauf case,² which exposed an abuse of dominance carried out by the largest plasterboard producer in Baltics that at the same time is wholesaler active in the Latvian domestic market as well as at Lithuania and Estonia markets. The conducted investigation by the CC had disclosed the presence of a retroactive loyalty rebate scheme, which facilitated an effective foreclosure of the plasterboard retail market in Latvia to all new potential entrants nearest located at Poland and Finland and existing smaller wholesalers facing high market entry barriers.

5. Five largest building material retailers in Latvia had been involved in the loyalty rebate scheme, thus making it impossible for any new entrants to engage in distribution of substantial volumes of plasterboard to clients and consumers. The loyalty rebate scheme made switching to alternative plasterboard suppliers considerably costly and to a certain extent inefficient from the point of view of ensuring sustainable long-term supplies. After receiving the CC statement of objections, the accused dominant producer procured a professional economic consultancy to deliver an economic analysis of the situation, resulting in an application of the as efficient competitor test (hereafter – AEC test) in the context of evaluation the possibility of external potential competition converting into actual market entry. The CC, using the same data and AEC test methodology applied by the consultancy, came to conclusion that method does not demonstrate sufficiently that possible market entry is real. Initial analysis of CC showed that efficient market entry threshold is equivalent to the amount of 40% of the market.

6. The proceedings in this case were concluded with an administrative agreement between the CC and the parties involved. Undertakings admitted to pay a fine and further actions were not brought to the court.

7. An important case, belonging to the third group, was the AKKA/LAA abuse of dominance case,³ concerning an Article 102 infringement by the Consulting agency on copyright and communications/Latvian authors' association (hereafter – AKKA/LAA), a collective management organisation handling copyright for musical works, the only entity authorised in Latvia to issue licences for the public performance of musical works in respect of which it manages the copyright. AKKA/LAA collects the fees from which Latvian and international copyright holders are remunerated. CC compared the rates applied in Latvia with those applied in Lithuania and Estonia, concluding that the rates applied in Latvia were significantly higher than those applied in Estonia and, in most cases, higher than those charged in Lithuania. Furthermore, the CC compared the fees in force in 20 other Member States by employing the purchasing power parity index and found that the rates calculated by AKKA/LAA in Latvia exceeded the average level of those charged in those other Member States by 50% to 100%. Basing on this economic evaluation and other arguments at the case CC concluded that there is abuse that resulted in excessive prices and imposed a fine.

8. AKKA/LAA brought an action before the Latvian Regional Administrative Court, seeking the annulment of the contested decision, raising four pleas in support of that action. The Latvian Regional Administrative Court partially annulled the contested decision, concluding that “*CC was right to find that there had been an abuse of a dominant position by the AKKA/LAA, the comparison of rates for the same type of*

² [CC decision](#) (Knauf/Norgips), September 30, 2016 (in Latvian). [CC press release](#) in English, 26.10.2016.

³ [CC decision](#) (AKKA/LAA), April 2, 2013 (in Latvian). CC press release

services between Latvia, Estonia and Lithuania was justified and the AKKA/LAA had provided no explanation for the fact that the rates applicable in Latvia were significantly higher than those applicable in Estonia and Lithuania. However, since the CC had improperly considered the sums collected for the remuneration of authors, the court ordered the CC to recalculate the amount of the fine within two months following the delivery of its judgment.” After a series of appeals in the national courts, the ECJ had been requested to provide a preliminary ruling, which had been published on 14 September 2017,⁴ stating that “[2] For the purposes of examining whether a copyright management organisation applies unfair prices within the meaning of point (a) of the second paragraph of Article 102 TFEU, it is appropriate to compare its rates with those applicable in neighbouring Member States as well as with those applicable in other Member States adjusted in accordance with the PPP index, provided that the reference Member States have been selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis. It is permissible to compare the rates charged in one or several specific user segments if there are indications that the excessive nature of the fees affects those segments. [3] The difference between the rates compared must be regarded as appreciable if that difference is significant and persistent. Such a difference is indicative of abuse of a dominant position and it is for the copyright management organisation holding a dominant position to show that its prices are fair by reference to objective factors that have an impact on management expenses or the remuneration of right holders.”

9. This case shows considerable in-depth courts interest to analyse economic arguments and methods during court proceedings in national courts. The request to ECJ for a preliminary ruling about the methodology may be a sign of change that court is approaching to verify also economic concepts in the line with EU case law.

10. The practice of administrative courts reveal the trend that courts in Latvia are carefully evaluating economic and other analytic arguments while examining cases. Although in some cases it shows new approaches by courts are not in line with national and EU case law, for example when trying to evaluate efficiency arguments in bid-rigging cartel case. The lack of economic expertise of behalf of the Latvian courts and lack of sufficient specialisation in general administrative courts should be balanced by courts requirement for the parties to show their in-depth analysis in court and courts careful impartial evaluation of these arguments in the light of actual case law in competition cases. Such approach creates an opportunity for the CC to better test its economic argumentations vs. arguments of economic experts outsourced by the opposing party. This also puts pressure on the CC and helps to train it its economic expertise in long term.

11. Talking about a development of an in-depth economic analysis standard that could be used as benchmark in case law or standard of proof it must be admitted that also among EU countries the relevant standards applied by the competition authority vary substantially, depending on authority’s expertise and availability of enough resources, specifics of the respective national court (proceedings) systems and their actual level of economic expertise.

12. Also, considering the rapid implementation of digital solutions in almost every sector of the modern open market economy as well as rising sophistication of business-orientated processes, the introduction of digital economic analysis tools with

⁴ The [Case C 177/16](#) (Autortiesību un komunikēšanās konsultāciju aģentūra/Latvijas Autoru apvienība), September 14, 2017.

exponentially rising levels of structural complexity seems eminent, hence increasing the probability of posing additional standards for courts (in terms of the arising multidisciplinary aspects of the cases presented) in the proximate future.

13. In the CC's view, the relevant efficient mechanisms of promoting the role of economic argumentation in cases and their consideration on a doctrinal level (by the courts) include sufficient advocacy measure as well as the inevitable "professional education" of judges in the field of economic. Possible efficient solutions, addressing the relevant set of issues, may be defined as certain number of national judges beginning to specialise in competition law matters, providing consequential training (perhaps, by the CC itself or other field professionals) for the mentioned judges.