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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

### **Working Party No. 3 on Co-operation and Enforcement**

#### **AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE**

-- Note by Lithuania --

**28-29 November 2016**

*This document reproduces a written contribution from Lithuania submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.*

*More documents related to this discussion can be found at [www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm](http://www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm)*

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-- LITHUANIA --

**1. Please provide a short description of i) mergers that your agency has prohibited in the last five years, detailing reasons, as well as whether remedies were offered and not accepted and the reasons for this and ii) a few important mergers your agency has cleared subject to remedies in the last five years.**

1. During the last five years, the Competition Council<sup>1</sup> cleared more than 150 mergers (concentrations), three of which were subject to remedies, and prohibited two mergers. Below we provide short descriptions of the mergers.

**1.1 Prohibited mergers**

*1.1.1 Prohibition to acquire 100% shares of AllePAL OÜ (online classified ads sector)*

2. In 2016, the Competition Council prohibited an already implemented merger whereby in 2014 AS Eesti Meedia acquired 100% of AllePAL OÜ shares<sup>2</sup>. UAB Plius and UAB Vertikali medija, which were related to AS Eesti Meedia, and UAB Diginet LT, which was related to AllePAL OÜ, were managers of classified ads websites. The merger did not have to be notified to the Competition Council, because it did not meet the thresholds set in the Law on Competition<sup>3</sup>. However, having suspected that the merger might have created or strengthened a dominant position or restricted competition, the Competition Council obliged the concentration parties to submit a merger notification<sup>4</sup>.

3. The Competition Council established that in the two relevant markets of website classified ads for real estate in Lithuania and website classified ads for vehicles in Lithuania the merger caused competition problems. The concentration parties were the biggest classified ads managers in the above-mentioned markets before the merger, and after the merger encompassed almost the entire markets as calculated by various criteria:

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<sup>1</sup> <http://kt.gov.lt/>

<sup>2</sup> Decision of 6 May 2016, [No. 1S-59/2016](#).

<sup>3</sup> Article 8(1) of [the Law on Competition](#) states that the intended concentration must be notified to the Competition Council and its permission must be obtained where the combined aggregate income of the undertakings concerned in the business year preceding the concentration is more than EUR 14 500 000 and the aggregate income of each of at least two undertakings concerned in the business year preceding the concentration is more than EUR 1 450 000.

<sup>4</sup> Article 13(1) of the Law on Competition states that the Competition Council may impose an obligation on undertakings to submit a notification on concentration and apply the concentration control procedure even though the aggregate income indicators established in the Law on Competition are not exceeded where it is likely that concentration will result in the creation or strengthening of a dominant position or a substantial restriction of competition in a relevant market.

**Table 1. Share of the concentration parties after the merger (by percent)**

Criteria	Online real estate classified ads	Online vehicle classified ads
Income	[90-100]	[90-100]
Actual (unique) number of visitors	[80-90]	[90-100]
Number of views	[90-100]	[90-100]
Number of ads	[40-50 – [50-60]	[60-70] – [70-80]

4. The concentration parties were close competitors, their clients had limited possibilities to change them for other service provider, despite an increase of prices for classified ads no new strong competitors emerged after the concentration, considerable costs were required to significantly increase visibility of the service, concentration parties were also a part of larger media group and could enjoy substantial resources and possibilities for advertising, there was no significant countervailing buyer power and there were no indications that new entrances would happen in the market in the foreseeable future.

5. Concentration parties argued that their market shares were much smaller, largely grounding their argument on possibilities to place ads in *Facebook* social groups (as well as competition from such internet platforms as *Ebay* and *Amazon*). However, at least in Lithuania at time of concentration evaluation *Facebook* could not be considered to be a competitor for concentration parties. For instance, the ads in *Facebook* were placed randomly in various groups and could not be searched through effectively by relevant criteria, such as the place of the flat, its price, number of rooms, etc.

6. The Competition Council found that the merger implemented in 2014 eliminated effective competition among classified ads websites and increased prices of classified ads for real estate and vehicles.

7. In addition, Competition Council examined the application of *AS Eesti Meedia* whereby the company asked to terminate the merger examination procedure since the company transferred the shares of *UAB Vertikali medija* to third parties. However, because the company informed the Competition Council about these changes only six days prior to the end of the merger examination, the Competition Council stated that it was not able to gather necessary data to assess whether the transfer of shares eliminated competition concerns identified by the Competition Council. As a result, the Competition Council did not satisfy the application and the merger was prohibited. In addition, the Competition Council obliged *AS Eesti Meedia* to restore the situation prevailing prior to the implementation of the concentration or to eliminate identified competition problems in the identified relevant markets within three months after the publication of the decision.

#### 1.1.2 Prohibition to acquire 100% shares of *UAB Maltosa* (beer malt sector)

8. In 2015 the Competition Council prohibited acquisition of 100% shares of *UAB Maltosa* by *Viking Malt Oy*<sup>5</sup>. *UAB Maltosa* and *UAB Viking Malt* (which was associated with *Viking Malt OY*) were the only two producers of pilsen malt in Lithuania.

9. The relevant market (pilsen malt production and supply in Lithuania) was heavily concentrated (HHI 4259,90). After the concentration the undertaking would have had about 80-90% of the market and the HHI would have been 7705,90.

10. The combined market share of both companies was quite stable, but fluctuated in comparison to each other, which indicated that they were competing with each other and it was established that they were

<sup>5</sup> Decision of 15 October 2015, [No. 1S-110/2015](#).

close competitors. There were no indications that other companies (both from abroad or from within Lithuania) could have emerged as a strong competitor to the concentrated undertaking. Malt production requires significant financial and time costs and the market was fully satiated by the production of the incumbent malt producers. There were many breweries in Lithuania, but only one of them could have had countervailing buyer power.

11. The Council found that the merger would restrict competition in the market of pilsen malt production and supply in Lithuania and the prices of pilsen malt could rise and could harm consumers.

12. *Viking Malt Oy* provided commitments. However, because the remedies offered did not eliminate competition problems, the concentration was prohibited<sup>6</sup>.

## **1.2 Mergers cleared subject to remedies**

### **1.2.1 Acquisition of up to 100 per cent shares of BTA Baltic Insurance Company AAS (insurance sector)**

13. In 2016 the Competition Council cleared subject to commitments the acquisition of up to 100 per cent shares of *BTA Baltic Insurance Company AAS* (hereinafter – *BTA*) by *VIENNA INSURANCE GROUP AG Wiener Versicherung Gruppe*<sup>7</sup> (hereinafter – *VIG*).

14. Competition concerns were established in the market of compulsory insurance against civil liability in respect of the use of land vehicles for international carriers.

15. Consequently, *VIG* submitted commitments<sup>8</sup> to sell the part of its business and (or) *BTA* branch in Lithuania related to the insurance against civil liability in respect of the use of land vehicles for international carriers.

16. During public consultations concerning the commitments, other insurance services providers stated their opinion that data concerning former clients (international carriers) of the concentration parties should also be provided. In addition, their opinion was that together with the business to be sold the employees should also be transferred and there should be a mechanism which would ensure that former clients of the concentration parties would not be lured back to the new undertaking after the concentration. Lastly, insurance service providers were of the opinion that the period to implement the commitments was long and might not ensure an effective resolution of the competition problems.

17. The commitments were amended. A lot of attention was placed on the obligation of *VIG* to preserve the economic viability, marketability and competitiveness of the business to be sold (Divestment Business), in accordance with good business practice, and to minimise as far as possible any risk of loss of competitive potential of the Divestment Business. Specifically *VIG* committed, e.g.:

- not to carry out any action that might have an adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the commercial strategy or the investment policy of the Divestment Business (including relationships with insurance brokers); e.g. prior the term not to terminate valid insurance contracts without a good cause

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<sup>6</sup> Please note, that the commitments provided by *Viking Malt OY* have been considered to be commercial secrets, therefore we cannot submit more detailed information about them.

<sup>7</sup> Decision of 18 August 2016, [No. 1S-97 \(2016\)](#).

<sup>8</sup> The Commitments in English are available as an annex to the decision.

- to delete the client base of the Divestment Business from IT systems to which VIG Affiliated Undertakings have access to, not to use the client base of the Divestment Business, not to share data from the client base of the Divestment Business with any third person except the Purchaser of the Divestment Business
- to take all reasonable steps, or procure that all reasonable steps are being taken, that all the policyholders of the Divestment Business remain with the Divestment Business during the Commitment Period, and not to actively solicit.

18. The Competition Council concluded that the amended commitments safeguard the viability of the business to be sold whereas the period for implementation of the commitments was considered to be proper by the Competition Council.

#### 1.2.2 *Acquisition of up to 100% of Alita, AB shares (alcohol beverages sector)*

19. In 2014 the Competition Council cleared the acquisition of up to 100% shares of *Alita, AB* by *UAB Mineraliniai vandenys* subject to commitments<sup>9</sup>.

20. The Competition Council evaluated whether the merger could have impact on these markets: brandy production and supply in Lithuania, sparkling wine production and supply in Lithuania, vodka production and supply in Lithuania, and bitter production and supply in Lithuania.

21. The Competition Council concluded that the merger would not negatively affect the brandy and sparkling wine production and supply in Lithuania markets.

22. In contrast, in the vodka and bitter production and supply in Lithuania markets both concentration parties had significant market shares and no other strong competitors. Thus, in these markets the concentration would have restricted competition.

23. Accordingly, *UAB Mineraliniai vandenys* provided commitments. The company committed to sell the business of vodka and bitter production and supply (brands and their related assets, property rights, raw materials, means of advertising, etc.) of *Alita, AB* to third parties. *UAB Mineraliniai vandenys* was also obligated to find a proper buyer and to conclude the selling agreement within a given timeframe. If it did not happen, then an appointed independent trustee would have the authority to sell the business.

24. During public consultations other interested parties had objections to these commitments. In their opinion, the commitments should have encompassed also the brandy and sparkling wine businesses, the vodka and bitter businesses to be sold had low-value brands and that the business would not be economically viable without transferring also all production equipment, personnel and factory premises. Moreover, some interested parties also stated that there were no sufficient safeguards to enforce the implementation of commitments within a proper timeframe.

25. These objections, however, were mostly unfounded. The Competition Council established that the brands to be sold were well-known and some undertakings publicly expressed their interest in acquiring them. In addition, in order for an entity to carry out alcoholic drinks production and marketing activities, it is not necessary to have production equipment, personnel or warehouses. Both the production of alcoholic beverages, as well as storage services can be ordered from third parties (for instance, retail chains have their own private label). In addition, *UAB Mineraliniai vandenys* committed to ensure the production for the buyer for up to 2 years (or other necessary period) of the brands to be sold for reasonable market prices.

<sup>9</sup> Decision of 5 December 2014, [No. 1S-190, 2014](#).

26. Finally, concerning the safeguards for implementation of commitments, they were amended so that if *UAB Mineraliniai vandenys* would not sell the business within the given timeframe to the proper buyer, then an appointed independent trustee would have the authority to sell the business. The trustee would be obligated to transfer the relevant assets to the buyer within a certain timeframe for a market price, i.e. without establishing in advance minimal price.

*1.2.3 Acquisition of up to 100% of AB Lietuvos draudimas shares (insurance sector)*

27. In 2014 the Competition Council cleared the acquisition of up to 100% of AB Lietuvos draudimas shares by *Powszechny Zakład Ubezpieczeń Spółka Akcyjna S.A.* (hereinafter – *PZU S.A.*) subject to commitments<sup>10</sup>. *PZU S.A.* (which was a Polish company) operated in Lithuania through its subsidiary *UAB DK PZU Lietuva*.

28. Having assessed the intended merger, the Competition Council found that the merger would restrict competition within the market of the insurance of land vehicles, except for railway vehicles, and the market of property insurance.

29. To address these concerns, *PZU S.A.* submitted merger remedies by which it committed to transfer its business in the above-mentioned two markets (to third parties (which would not be associated with the concentration parties)).

30. During public consultations insurance companies and other stakeholders expressed their opinions on the proposed remedies. Stakeholders stated what should be included in the business to be sold. In addition, stakeholders had concerns that the new undertaking would not use database of its former clients and that former clients would not be lured to the new undertaking. In addition, some stakeholders stated that the timeframe for the implementation of commitments was too long and there should be no option to extend it. Moreover, the stakeholders had doubts whether the requirements for the trustee were sufficient.

31. *PZU S.A.* amended the commitments and resubmitted them to the Competition Council. The Competition Council stated that the amended commitments were appropriate to resolve the competition concerns. The Council was of the opinion that the business to be transferred was sufficient to eliminate negative consequences of the concentration. The Competition Council stated that the implementation timeframe was appropriate and could be extended only by the Competition Council. The amended commitments also addressed the concerns regarding the database of former clients and the possibility to lure them to the new undertaking.

32. The Competition Council rejected the opinions that requirements for the trustee were not sufficient. The Competition Council stated that the trustee had to be appointed with the Council's approval and the opinions did not indicate what additional requirements had to be set. Thus, the Competition Council agreed to appoint one suggested trustee that will observe and evaluate whether *PZU S.A.* fully meets the conditions and fulfils the obligations imposed by the Competition Council.

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<sup>10</sup> Decision of 9 October 2014, [No. 1S-160/2014](#).

**2. Is your practice regarding prohibitions and remedies reflected in ‘best practice’ documents or in other guidelines? If yes, please describe the main factors/circumstances to be considered according to your soft law document. If not, are you planning to issue guidance in the near future?**

33. The Competition Council’s practice regarding prohibitions and remedies is not yet reflected in ‘best practice’ documents or in other guidelines. At the moment, there are no concrete plans to issue guidance in the near future.

**3. What challenges have arisen in the design of remedies?**

**3.1 *Lack of time***

34. According to the Lithuanian Law on Competition, if the Competition Council intends to pass a resolution to authorise concentration subject to the conditions and obligations, the term for the examination of the concentration may be extended by one month upon a justified request of the person who has submitted the notification. So, if the undertakings offer commitments (remedies) at the last stage of the term for the examination of the concentration, it is very difficult to agree on the proper terms and conditions of the obligations and to adopt a resolution to authorise concentration subject to the conditions and obligations in one month. If the commitments are offered too late, there is no time left to publish them for a public consultation and to give an opportunity for third parties to get acquainted with the contents of the commitments offered and to evaluate their validity and their effectiveness in solving competition concerns. The lack of time is in particular a problem when the remedies submitted by the undertakings do not resolve competition concerns and the undertakings do not agree with the assessment made by the Competition Council that the remedies are not sufficient.

**3.2 *Viability of a business***

35. When the parties offer divestiture commitments, for example to divest a part of business, it is difficult to assess the scope and content of the business that needs to be divested. If the divested business is too small, there is a risk that the effective competition will not be maintained and the competition concerns will not be fully eliminated. There is also a risk that a buyer will not be found or that such a business will not be viable.

**3.3 *Time limit for the commitments***

36. In case of the sale of a business, a few options on how the divestment will be implemented are usually offered. The options could be chosen and implemented depending on which one would be more acceptable to the buyers. In such cases, the time limits for implementing the commitments get longer. That is because if the first option is not implemented, additional time is needed in order to implement the other option (for example to transfer the Crown Jewels). The longer the time limits, the more risk to the viability of the business.

**3.4 *Purchaser requirements***

37. In order to ensure that the business is divested to a suitable purchaser, the commitments have to include criteria to define its suitability which will allow the Competition Council to conclude that the divestiture of the business to such a purchaser will likely remove the competition concerns identified. In certain cases of divestiture, there are doubts that the purchaser will have enough knowledge and ability to maintain the divested business as a viable and active competitive force. In these cases, special qualification requirements are needed (for example, the requirement to have experience in developing certain kind of businesses).

### 3.5 *Appointing a trustee*

38. It is very important to appoint a monitoring trustee as soon as possible from the moment the resolution to authorise concentration subject to the conditions and obligations is adopted. The selection of a trustee may take some time because of the lack of suitable candidates, who have necessary qualifications for the mandate. The number of suitable candidates also reduces because of possible conflicts of interests. During the time between the adoption of the resolution and the approval of the trustee, there is a risk on maintaining business viability.

### 3.6 *Implementation of remedies*

39. For reasons of clarity and common understanding of remedies, it is purposive to foresee situations in which it will be considered that remedies are not complied with and what are the repercussions of non-compliance. Especially, these provisions are required if there are several remedies which can be implemented and deadlines are set by which a particular implementation of the remedy must be chosen. A different interpretation of these provisions raises the risk of disputes that will arise in the future.

### 3.7 *How do you decide which remedy, or combination of remedies, is unable to cure the competition harm?*

40. Structural remedies are considered to be more appropriate than behavioral remedies. The divestiture of business or its assets, which may harm competition in relevant markets, is considered to be a most suitable remedy and is thought to remove the restriction of competition in relevant market.

### 3.8 *Which remedies have not worked in practice or not worked as effectively as anticipated?*

41. The Competition Council has no information regarding this matter.

### 4. **Has your agency's approach to accepting and/or rejecting remedies been tested in the courts? If yes, please describe the main points of the court's decision which upholds or rejects the agency's i) prohibition decision, ii) decision to clear the merger subject to remedies, and/or (iii) the agency's approach or analysis of proposed remedies.**

42. Both above-mentioned decisions concerning the Competition Council's refusal to clear the merger were appealed. However, there is still no final court decision in either case. The Competition Council's approach to accepting remedies has never been tested in the courts.

### 5. **To what extent does your agency consider the opinion of third parties/public in i) deciding whether to prohibit a merger, and ii) designing and implementing remedies? In your reply, please specify the role of market testing in your process. What is, in your view and experience, an effective market test and which lessons have been learnt over time to improve market testing? What other tools have you used to consider opinions of stakeholders in your analysis of remedy effectiveness?**

43. The Competition Council announces a brief summary about the concentration on its website. All parties concerned within the time limit can present in written form reasoned opinions, whether the concentration will create or strengthen a dominant position or substantially restrict competition in a relevant market.



44. Non-confidential versions of remedies are announced on the Competition Council's website, where the Competition Council invites all the parties concerned to provide opinion and suggestions with regard to the proposed remedies. Furthermore, the Competition Council sends questionnaires to selected market participants, which opinion would be of particular relevance for evaluation of proposed remedies. The Competition Council takes into account reasoned opinions of concerned parties, in which they provide their evaluation for design and implementation of remedies.

**6. In your experience, what mechanisms minimise the risk of ineffective implementation of remedies? In your reply, please specify the role of divestiture/hold separate/monitoring trustees in your process.**

45. The Competition Council has no experience in appointed separate divestiture and monitoring trustees.