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ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES

-- Note by Lithuania --

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LITHUANIA

1. Multifunction Competition Authorities: Lithuanian Experience

1. Starting with the adoption of the first Law on Competition in 1992¹ (and later the new Law on Competition which was enacted in 1999² and revised in 2012³), further development of competition legislation was directed to a gradual harmonisation of national competition rules with the EC (and later the EU) competition law standards.

2. In accordance with the EU competition rules, the modern Law on Competition covers the following three main areas: 1) prohibition of anti-competitive agreements; 2) prohibition of abuse of a dominant position; and 3) control of mergers and acquisitions.

3. In addition, the Law on Competition: 1) prohibits state and municipal authorities from restricting competition; and 2) prohibits acts of unfair competition. None of these functions have undergone any changes recently, so for the purpose of this paper these areas will not be discussed.

4. However, at the moment the Competition Council is entrusted with enforcing rules (in some cases even with regulating) in certain areas of law which are not typically considered to be a part of antitrust rules and which were acquired quite recently. Among these functions is the enforcement of the prohibition to use misleading and unlawful comparative advertising (Art. 19(2) of the Law on Advertising⁴) and enforcement of the Law on the Prohibition of Unfair Practices of Retailers⁵. In addition, the Competition Council has been appointed as a regulator of the railway transport market (Art. 7(5) of the

¹ English version of the Law on Competition (enacted in 1992) is available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=21166

² English version of the new Law on Competition (enacted in 1999) is available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=85566

³ English version of the revised Law on Competition is available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=455440

⁴ The Law on Advertising was adopted in 2000 and revised in 2013. The changes did not affect the range of functions of the Competition Council. The revised Law on Advertising (in Lithuanian) is available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=460628

⁵ At the moment, a revision of this law is in progress, but the changes will affect more procedural matters and some substantive rules. It does not seem at the moment, that the Competition Council will acquire or divest any functions. English version of the Law on the Prohibition of Unfair Practices of Retailers is available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=406491

Railway Transport Code⁶). This latter function will likely be divested in the near future. One function, i.e. enforcement of the Law on Prices⁷, already has been divested recently.

5. These changes were mainly initiated by Seimas (the parliament of the Republic of Lithuania) or by the Government.

6. In some cases, the underlying reason for change was the aim to harmonise the national law with the EU law. For instance, the enforcement of prohibition of misleading and unlawful comparative advertising was assigned to the Competition Council by the Law on Advertising which was designed to harmonise the Lithuanian rules with those of the EU.

7. Factors that misleading and unlawful comparative advertising may be used not only in B2C, but also in B2B cases led to decision to allocate this function to the Competition Council (and not to consumers' interests protecting agency only). Thus the Competition Council could more effectively deal with such infringements by being able to investigate both B2C and B2B cases. In addition, the Competition Council already had the competence to enforce rules against actions of unfair competition (which include the use of misleading advertising and unlawful comparative advertising). However, the Competition Council is authorised to investigate only those cases where actions of unfair competition violate the interests of the majority of economic entities or consumers (Art. 16(4) of the Law on Competition). This leads to a high threshold to launch an investigation (there has been only one such case throughout the history of the Competition Council⁸). In contrast, the Law on Advertising does not establish such thresholds and so allows the Competition Council to protect the interests of consumers and fair undertakings more effectively. On the other hand, the fines for violations of the Law on Advertising are much smaller than for committing actions of unfair competition under the Law on Competition⁹.

8. The rationale for adoption of the Law on the Prohibition of Unfair Practices of Retailers was not influenced by the EU laws and practices. The reason for this law was that the large food retail chains were perceived to wield significant bargaining power, even if they were not dominant. The argumentation went, that bargaining power may have led retailers to unfair practices and could harm food and beverage suppliers. In addition, it was thought that unfair practices may breach the rules prohibiting abuse of dominant position if they were conducted by a dominant retailer. Therefore it was determined that in those cases the Law of Competition would be applied. Since the Competition Council enforced the Law on Competition it was assigned to enforce this law as well.

9. However, before enactment of this law there were discussions about the rationale for its enactment. The Competition Council called to explore some other options by drawing attention to the fact that the Civil Code already foresaw a possibility to bring an action before a court in cases when a contract or its condition unjustifiably gives the other party excessive advantage (Art. 6.228). In addition, this

⁶ English version of the Railway Transport Code is available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=246832

⁷ English version of the Law on Prices is available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=21173

⁸ 2010 May 31 resolution of the Competition Council No. 2S-14 "Concerning the compliance of the actions of AS Viasat advertising digital television services with Article 5 of the Law on Advertising and Article 16 of the Law on Competition".

⁹ According to Art. 22(1) of the Law on Advertising, fines for infringements of the Law on Advertising can reach up to 120 000 litas (about 34 754 euro) whereas for violations of the prohibition of actions of unfair competition the Competition Council could impose a fine of up to three per cent of the gross annual income in the preceding business year (Art. 36(2) of the Law on Competition).

provision could be amended in order to specify what practices would be considered unfair. The Competition Council also argued that the bargaining power of retailers may be lessened by encouraging competition between them. Lastly, the Competition Council proposed the possibility of a self-regulation mechanism to deal with these issues. However, these options were not explored by the parliament.

10. The Law on the Prohibition of Unfair Practices of Retailers was adopted in 2009 with the purpose to limit the use of market power by retailers having significant market power and to balance interests of suppliers and retailers having significant market power (Art 1(1) of the Law on the Prohibition of Unfair Practices of Retailers). This law essentially deals with abuses of superior bargaining position of large food retail chains towards food and beverage suppliers¹⁰.

11. The law prohibits these retailers from carrying out any actions contrary to fair business practices whereby the operational risk of the retailers is transferred to suppliers or they are imposed supplementary obligations or which limit the possibilities of suppliers to freely operate in the market and which are expressed as requirements for the supplier, for instance, to pay directly or indirectly „entry“ fees; to compensate for the lost or smaller-than-expected income of the retailer from the sale of goods received from the supplier; to compensate for the operational costs of the retailer related to equipping new stores or renovating the old one, etc. (the full list of 10 prohibited actions is provided in Article 3(1) of the Law on the Prohibition of Unfair Practices of Retailers).

12. In addition, the Competition Council must carry out the monitoring of this law and by 1 March submit to the Government an annual report specifying the objectives sought when adopting this law, objectives achieved upon adoption of the law, negative consequences (if any) and, where necessary, recommendations on the improvement of this law or a conclusion that there is no such necessity (Art. 14 of the Law on the Prohibition of Unfair Practices of Retailers).

13. The legislature interestingly appointed the Competition Council as the regulator of the railway transport market. Initially, only some functions and only on a temporary basis were attributed to the Competition Council as a result of amendments of the Law on the Railway Transport Sector Reform¹¹ in 2009. However, in 2011 the full regulatory responsibility was assigned permanently through amendments to the Railway Transport Code. Now this role comprises of monitoring the railway transport sector and regulating relations between the public railway infrastructure manager and railway undertakings (carriers), as well as examining disputes between them and supervising their negotiations (Art. 7(5), 7(6) and 7(8) of the Railway Transport Code). Although before the adoption of these amendments it was pointed out that regulatory functions are not typical for the Competition Council and may even conflict with its role as the enforcer of fair competition, these concerns were not acknowledged and this function was allocated to the Competition Council. In the meantime options are being considered to transfer this function to another entity as the regulatory function conflicts with the general nature of Competition Council as of a competition enforcer.

14. As new competences were assigned, these new functions had to be set in laws and could not have been implemented merely by internal changes in the Competition Council. Some internal changes also had to be made in order to deal more effectively with increased range of tasks. For instance, the Unfair

¹⁰ The Law on the Prohibition of Unfair Practices of Retailers applies only for the food sector.

¹¹ These functions were monitoring of competition in the railway transport sector and examination of pre-trial disputes over the allocation of public railway infrastructure capacity, collection of charges for the use of the public railway infrastructure and the amount or structure of such charges (Art 9(1) of the Law on the Railway Transport Sector Reform). The Law on the Railway Transport Sector Reform was repealed in 2011. English version of the Law can be found here: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=246831

Commercial Practices Investigation Division was established. The division investigates the use of misleading and unlawful comparative advertising, acts of unfair competition which are prohibited by the Law on Competition and those unfair practices that are prohibited by the Law on the Prohibition of Unfair Practices of Retailers¹².

15. It shall be noted that all the aforesaid changes were initiated by other public administrative entities. The Competition Council certainly had the possibility to participate in the process by providing its opinions and arguments and thus to influence somewhat the shaping of regulation. However, the Competition Council's position usually was more acknowledged in cases of designing procedural rules. Since the scope of functions increased, requests for additional funding were approved.

16. These changes brought new challenges as the acquisition of new functions required to allocate part of resources to enforcement of these new areas. It shall also be noted that in some cases the new functions may be similar to those of other institutions. For instance, the allocation of competences between the Competition Council as enforcer of prohibition of misleading advertising and the State Consumer Rights Protection Authority as enforcer against unfair commercial practices creates a more complicated consumer protection system and sometimes these competences may not be very clearly distinguished.

17. The acquired new functions are of a complementary nature to the competences of the Competition Council. Enforcing prohibition against such unfair practices as misleading or unlawful comparative advertising or unfair practices of retailers in itself does not oppose the goals in the antitrust field¹³. However, the assigned role of regulating railway transport market is not compatible with the nature of the Competition Council to enforce and promote freedom of competition. Moreover, in Lithuania regulatory responsibilities are usually allocated to separate regulatory institutions.

18. The enforcement of the Law on the Prohibition of Unfair Practices of Retailers is one of the biggest challenges. After it came into force on April 1, 2010 it required resources for the above-mentioned monitoring function and there were no signals from suppliers that either the law had much positive impact, or that it was being violated. Since 2012 the Competition Council has established some violations of this law¹⁴ and some suppliers noted improved bargaining position. However, the benefit and effect of this law are still questioned from time to time.

19. It should also be noted that just recently the function of enforcement of the Law on Prices has been divested. This function was assigned to the State Price and Competition Office (the predecessor of the Competition Council) in 1993 through amendments of this law. The law required public administrative entities to co-ordinate the prices of products with the competition authority. On November 11, 2014 the law repealing the Law on Prices with its subsequent amendments was adopted¹⁵, but the law itself will

¹² In contrast, the assigned role of the railway transport market regulation had no substantial impact on structural changes.

¹³ In contrast to those situations where, for instance, a park service may have to reach a balance between its goals of protecting the nature of a park, and at the same time providing access to visitors who wish to drive there. See Biber, E. (2009), 'Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies', 33 *Harvard Environmental Law Review*, p. 3. Available at: http://www.law.harvard.edu/students/orgs/elr/vol33_1/Biber.pdf

¹⁴ Until now the Competition Council has passed three resolutions with findings of infringements of the law. One case is pending before a court.

¹⁵ The Law on the Repeal of the Law on Prices No. I-413. Available (in Lithuanian) at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=486984&p_tr2=2

come into effect on May 1, 2015. In the meantime the Law on Prices has become a dead letter and this change will not substantially affect the activities of the Competition Council.

20. Summarising all the above, the Competition Council of the Republic of Lithuania has undergone through a number of acquisitions (and a divestment) of functions. These changes had to be implemented by adopting or amending laws and in some cases by some structural changes within the administration of the Competition Council. Some of the acquired functions do not reflect the nature of the Competition Council to enforce and safeguard freedom of competition and will likely be divested in the near future.

2. Independence from Government: Lithuanian Experience

2.1 Overview of Recent Changes

21. In recent years, the Lithuanian Competition Council has undergone changes aimed at strengthened its institutional independence. An important catalyst for these changes was the 2010 report¹⁶ of the National Audit Office of Lithuania (the “2010 Audit Report”).

22. The 2010 Audit Report concluded that:

1. Neither independence nor accountability of the Competition Council were sufficiently regulated;
2. The Competition Council could not prioritise its activities and was essentially required to investigate all complaints if they met certain formal requirements;
3. The Competition Council had no independent (free of Government’s influence) financing and the financing it had was not sufficient.

23. The Seimas (the Parliament of the Republic of Lithuania) has addressed some of these findings by revising the Law on Competition¹⁷ in 2012¹⁸ and the Law on Advertising¹⁹ in 2013²⁰.

24. The revised Law on Competition now explicitly states that when performing its statutory functions the Competition Council is free and independent in its decision making (Art. 17(1) of the Law on Competition²¹).

25. The 2012 amendments have also clarified the Competition Council’s accountability. As before, the chairperson of the Competition Council is required to submit the authority’s annual reports to the

¹⁶ Report No. VA-P-20-10-26 “Protection of Freedom of Competition” of the National Audit Office of Lithuania, 2010-12-30. Available at: http://www.vkontrole.lt/audito_ataskaitos.aspx?tipas=2. Press release in English available at: http://www.vkontrole.lt/pranesimas_spaudai_en.aspx?id=17285

¹⁷ Enacted in 1999. English version of the law can be found here: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=85566

¹⁸ English version of the revised Law on Competition is available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=455440

¹⁹ Enacted in 2000. English version of the law can be found here: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=117415

²⁰ The revised Law on Advertising (in Lithuanian) is available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=460628

²¹ Unless stated otherwise, numbers of articles in this paper designate the numbering of the revised Law on Competition.

Seimas and to the Government (Art. 20(1)(4) of the Law on Competition), but with the 2012 amendments the Seimas has been specifically named as the body to which the Competition Council is accountable (Art. 17(1) of the Law on Competition).

2.2 Institutional Model

26. The current Law on Competition, enacted in 1999, establishes the institutional model of an integrated agency, under which the Competition Council both investigates cases and takes enforcement decisions.²² The 2012 amendments have created an exception to this model by introducing the antitrust liability of CEOs of firms having been found guilty of anticompetitive agreements or abuses of dominance (Art. 40 of the Law on Competition). In this capacity the Competition Council acts within the bifurcated judicial model whereby it establishes the CEO's role in the company's antitrust infringement and then may refer the case to the Vilnius Regional Administrative Court asking the court to impose sanctions – a disqualification or a financial penalty – on these individuals (Art. 41(1) of the Law on Competition). In ruling on the case, the court is not bound by the proposal of the Competition Council in relation to sanctions and their scope (Art. 41(2) of the Law on Competition).

27. Within the Competition Council, the investigative and decision-making functions are separated. The administration of the Competition Council²³ carries investigations, while the college of five Council members adopts decisions.²⁴ Each Council member votes independently and individually. The resolutions are adopted by a majority of at least three Council members, including the chairperson. The Council members participating in the meeting are not entitled to abstain from voting (Art. 19(7) of the Law on Competition).

2.3 Appointment and Dismissal of Council Members

28. The Council consists of the chairperson and the remaining four members. All Council members are appointed for a term of six years by the President of the Republic of Lithuania on the proposal of the Prime Minister. The same person may be appointed for not more than two consecutive terms of office. The 2012 amendments have made it possible for the chairperson of the Competition Council to appoint two deputies from the existing Council members (Art. 19(1) of the Law on Competition).

29. The chairperson and other members of the Competition Council must be Lithuanian citizens of good repute with a university degree in law or economics (at least Master's degree or equivalent) (Art. 19(2) of the Law on Competition). During their term of office the chairperson and members of the Competition Council may not engage in any other activity, except for scientific, educational or creative work (Art. 19(5) of the Law on Competition). They are also subject to general civil service requirements such as avoiding conflicts of interests, e.g. they have a duty of providing information regarding their interests, abstaining from matters involving such interests, etc.

30. The chairperson and members of the Competition Council can be dismissed from the office only in limited cases specified by Article 19(3) of the Law on Competition:

²² Under the 1992 Law on Competition, the structure of competition regime followed the bifurcated agency model by comprising of two institutions – the State Price and Competition Office which carried out investigations and the Competition Council which adopted the decisions.

²³ The Competition Council employs its own administrative staff under the general civil service rules or employment contracts and can change the structure of administration.

²⁴ Currently, the Competition Council only has four appointed members, including its Chairperson, with one Council member seat remaining vacant since 2010.

1. at their own request;
2. upon the expiry of their term of office;
3. upon being elected or appointed to another office;
4. when a court judgement establishing conviction comes into force;
5. if instances of material breach of duties are revealed;
6. if, by their acts, they discredit the name of the chairman or the member of the Council;
7. for health reasons;
8. if instances of non-compliance with the citizenship and good reputation requirements are revealed.

2.4 Prioritisation

31. The revised Law on Competition allows the Competition Council to open or close investigations based on its enforcement priorities (Art. 24(4)(8) and 28(3)(3) of the Law on Competition). With such powers of prioritisation absent before the 2012 amendments, the Competition Council was forced to allocate a large part of its resources to investigating complaints that were not necessarily dealing with the most important violations. The possibility to prioritise its investigations allows the Competition Council to act more independently by assessing the magnitude of a competition problem and the expected impact of the authority's intervention effect.

32. In July 2012, following the amendments introducing its prioritisation powers, the Competition Council declared interventions that significantly contribute to the protection of effective competition and thus maximise consumer welfare as its sole enforcement priority. With the priority set, the Competition Council also published the Prioritisation Principles, according to which, when deciding on whether a particular case should be investigated, the authority will consider: a) the potential impact of an investigation on effective competition and consumer welfare; b) the strategic importance of such an investigation; and c) the rational usage of resources.

33. Analogous provisions of prioritisation were set in the revised Law on Advertising in 2013, followed by the publication of the Competition Council's enforcement priority and its Prioritisation Principles in advertising cases.

2.5 Budgetary Autonomy

34. Overall, the above-mentioned changes have produced a positive effect, especially on the Competition Council's ability to channel its limited resources to most important cases. However, although the statutory amendments have been significant in increasing the independence of the Competition Council *de jure*, it remains necessary to strengthen its *de facto* independence which is closely tied to the way the authority is being funded.

35. It should be noted that the Competition Council is a budgetary institution financed from the Lithuanian state budget (Art. 17(4) of the Law on Competition). The Competition Council also charges merger notification fees. These fees, however, are rather modest (as from 1st of January approximately from EUR 1,622 to 3,244) and, moreover, the final receiver of the fees is not the Competition Council

itself, but the State Tax Inspectorate. This makes the Competition Council entirely dependent on allocations from the state budget as drafted by the Government and approved by the Seimas.

36. This situation may cause substantial fluctuations to the size of the Competition Council's budget. For instance, during the period of financial crisis in 2010 the Competition Council's budget was reduced by almost 35 per cent. The 2010 Audit Report also concluded²⁵ that an independent source of funding was an important factor in order to ensure that the Competition Council could properly execute the enforcement of the Law on Competition not only in respect of actions of private economic entities, but also in respect of public administration entities (including the Government)²⁶.

37. Total dependency on budget allocations decided each year by the Government and the Seimas creates a risk that activities of the Competition Council may be influenced or otherwise undermined by reducing its budget. This issue constitutes the biggest challenge in the area of institutional independence.

38. In the meantime, possibilities of alternative sources of funding – such as, for example, merger fees or percentage of fines – are being explored. However, these considerations are only preliminary and nothing definitive can be said about them at the moment.

2.6 Conclusion

39. To summarise, the independence of the Competition Council has increased with the amendments to the Law on Competition and the Law on Advertising. However, challenges related to the authority's budgetary autonomy still remain.

²⁵ Report No. VA-P-20-10-26 "Protection of Freedom of Competition" of the National Audit Office of Lithuania, 2010-12-30, p. 9.

²⁶ According to Art. 18(1)(1) of the Law on Competition, the Competition Council controls the compliance not only by economic entities, but also by entities of public administration with the requirements of this Law. Art 4 of the Law on Competition prohibits state and municipal authorities from restricting competition.