

# REGULATORY BARRIERS TO COMPETITION IN PROFESSIONAL SERVICES – NOTE BY THE LITHUANIAN COMPETITION AUTHORITY

## 1. Introduction

1. The Lithuanian Competition Authority has used a broad range of its statutory powers vis-à-vis some of the professional services. In this Note, both enforcement and advocacy activities of the Lithuanian competition agency are discussed. Most of agency's efforts so far have been focused on the regulatory barriers to competition in notarial services. However, some of the activity also pertain to the profession of architects. From the Lithuanian experience, it seems that a competition agency can affect outcomes of the regulatory environment in professional services, at least in its capacity as an advocate of competition. Furthermore, in those jurisdictions where competition authorities are empowered to enforce competition law against public authorities, the possibility is open to try to remove restrictions by enforcing against anti-competitive regulation.

## 2. Enforcement of Competition Law in Lithuania Against Regulatory Restrictions of Competition in Professional Services of Notaries

2. Professional services are often subject not only to the regulation imposed by the state but also to self-regulatory measures adopted by the members of the profession. The latter way of regulation in some cases may restrict competition in breach of antitrust rules. And this was indeed what the Lithuanian Competition Authority found in its decision from 2018. Lithuanian Competition Authority decided<sup>1</sup> that Lithuanian Chamber of Notaries (self-regulatory association of Lithuanian notaries), through its management body (Presidium), as an association of undertakings, adopted anti-competitive decisions which restricted competition on the market for notarial services.

3. Prices for notarial services are regulated in Lithuania by the Decree of the Minister of Justice<sup>2</sup>. However, in some cases this Decree leaved room for interpretation which could result in different prices charged by particular notaries. However, the Presidium of the Lithuanian Chamber of Notaries issued non-public rules which stipulated that provisions of abovementioned Decree should have been interpreted by all notaries in a way which resulted in higher prices for consumers. For example, in the case of a mortgage, when the customer had not indicated the price of secured property, according to the aforementioned Decree, a notary could have charged any price for its services between 14,48 Eur and 144,81 Euros. However, the Lithuanian Chamber of Notaries held that in such cases notaries must have always charged the maximum amount of 144,81 Euros. Lithuanian Competition Council concluded that this and other similar self-regulatory measures restricted competition and constituted an infringement of competition law. The fine of 88 400 euros was imposed on Lithuanian Chamber of Notaries for this infringement. In addition, fines totalling 45 000 euros were imposed on eight particular notaries due to their participation in adoption of decisions of the Presidium of Chamber of Notaries.

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<sup>1</sup> Decision of the Competition Council on Actions of Lithuanian Chamber of Notaries and of Notaries, 26 April 2018, No. 2S-2 (2018).

<sup>2</sup> The Decree of the Minister of Justice of 12 September 1996, No 57, On List of Prices for Notarial Actions, Preparation of Draft Transactions, Consultations and Technical Services. Available in Lithuanian at: <https://www.e-tar.lt/portal/lt/legalAct/TAR.13FFBD4957A6/asr>

4. This decision of Lithuanian Competition Authority was appealed to courts and Lithuanian Supreme Administrative Court in the course of its proceedings submitted the request<sup>3</sup> for a preliminary ruling to the Court of Justice of the European Union<sup>4</sup>. The main question referred is whether notaries in Lithuania should be considered undertakings and thus whether they are subject to competition law. As of 15 September 2021, the case is pending before the Court of Justice.

5. Furthermore, State regulation of prices of notarial services was also subject to enforcement of the Lithuanian Competition Authority. This was possible because in Lithuania, the competition agency is empowered to investigate actions of public authorities (below the level of the Cabinet of Ministers), whenever they give rise to a restriction of competition. As has been already mentioned, the Lithuanian Minister of Justice adopted the Decree<sup>5</sup> which established fixed and minimum prices for some notarial services. The Lithuanian Competition Authority held that such rules restricted price competition between notaries because they could not offer prices for their services which were lower than the minimum or fixed prices, as established by the Decree<sup>6</sup>.

6. Lithuanian Ministry of Justice brought forward several justifications for the adopted rules on pricing of notarial services. Most important alleged justifications are provided below.

7. Firstly, the Ministry argued that minimum remuneration for notarial services is required to ensure economic independence of notaries. The Ministry also provided a comparison of salaries of notaries with the salaries of members of some other legal professionals and argued that minimum salary of notaries corresponded to average salaries of judges of regional courts and chief prosecutors. However, the Competition Council dismissed these justifications because comparison between average salaries (of judges and prosecutors) and minimum salaries (of notaries) was not adequate. Moreover, it was not clear why for the purposes of a comparison, salaries of judges of regional courts were used (rather than salaries of lower district courts' judges) and of chief prosecutors (rather than of ordinary prosecutors)<sup>7</sup>. On the other hand, when average salaries of all compared legal professionals were taken, the available data showed that average salaries of notaries were three times higher than average salaries of judges of regional courts and chief prosecutors<sup>8</sup>.

8. Secondly, the Ministry of Justice pointed out that setting fixed or minimum prices is necessary to ensure availability of notarial services in the whole territory of Lithuania. In opinion of the Ministry, notaries would not be able to be attracted to some regions of the country if minimum prices were not regulated. However, the Ministry did not support its argument with any data. The Competition Council held that, on the contrary, in absence of the respective rules, some notaries would be able to reduce their prices below the level of currently regulated minimum prices

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<sup>3</sup> Request of the Supreme Administrative Court is available in Lithuanian at:

<https://www.lvat.lt/data/public/uploads/2021/02/2021-02-18nuasmenintanutartisbylojeea-25-629-2021.docx>

<sup>4</sup> Case C-128/21 – Lietuvos notarų rūmai and Others.

<sup>5</sup> The Decree of the Minister of Justice of 12 September 1996, No 57, On List of Prices for Notarial Actions, Preparation of Draft Transactions, Consultations and Technical Services.

<sup>6</sup> Decision of the Competition Council on Prices for Notarial Services Established by the Minister of Justice, 7 December 2020, No. 1S-128 (2020). Available in Lithuanian at:

[http://kt.gov.lt/uploads/docs/docs/4646\\_5c93ad948ead43fbb9a482523def81d7.pdf](http://kt.gov.lt/uploads/docs/docs/4646_5c93ad948ead43fbb9a482523def81d7.pdf)

<sup>7</sup> Decision of the Competition Council on Prices for Notarial Services Established by the Minister of Justice, 7 December 2020, No. 1S-128 (2020), Paragraph 204.

<sup>8</sup> Decision of the Competition Council on Prices for Notarial Services Established by the Minister of Justice, 7 December 2020, No. 1S-128 (2020), Paragraph 207.

and thereby attract additional customers which would make their activity as a whole more profitable<sup>9</sup>.

9. After dismissing justifications of the Ministry of Justice, the Competition Authority recognised that such price regulation harmed consumers because they could not reap full benefits of the price competition between the service providers. As a means of further confirming that setting of minimum prices was not an appropriate way of regulation of the profession of notaries, in its decision the Competition Authority explicitly relied upon materials of OECD related to professional services<sup>10</sup>. In this case, maximum prices were not questioned because of their contribution in preventing unreasonably high prices for notarial services<sup>11</sup>. The Lithuanian Competition Council decided that thereby the Minister of Justice acted in breach of the Lithuanian Competition Law<sup>12</sup> which prohibits anti-competitive decisions of public authorities. The Lithuanian Competition Council imposed the fine of 45 000 euros upon the Lithuanian Ministry of Justice.

10. This decision of the Lithuanian Competition Council was appealed and is currently pending before the Vilnius Regional Administrative Court<sup>13</sup>. Vilnius Regional Administrative Court's proceedings in this case were stayed until the Supreme Administrative Court of Lithuania delivers its judgement in the aforementioned case on anti-competitive decisions by the Chamber of Notaries (which, in turn, is pending due to the request for a preliminary ruling of the Court of Justice of the European Union).

11. However, obviously, enforcement cannot be used to affect laws adopted by the Parliament. And this is where competition advocacy is a useful tool available to the Lithuanian Competition Authority in addressing regulatory barriers to competition in professional services. In the next part, advocacy efforts of the Lithuanian Competition Council regarding professional services of notaries and architects are discussed.

### **3. Advocacy of the Lithuanian Competition Authority Aiming at Promotion of Competition in Regulation of Professional Services of Notaries and Architects**

12. In addition to imposing fines upon the Lithuanian Chamber of Notaries and several notaries, the Competition Council in the aforementioned decision regarding anti-competitive agreement, provided a recommendation to the Lithuanian Government. During the investigation of the case the Competition Council collected evidence showing that Lithuanian Ministry of Justice, before setting prices for notarial services, consulted Lithuanian Chamber of Notaries and thus the association of notaries contributed to the setting of prices for notarial services. Lithuanian Ministry of Justice consulted Lithuanian Chamber of Notaries because this was mandated by the provision of the law. In its recommendation, the Lithuanian Competition Authority suggested abolishing of an obligation to consult with the Lithuanian Chamber of Notaries before setting prices for notarial

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<sup>9</sup> Decision of the Competition Council on Prices for Notarial Services Established by the Minister of Justice, 7 December 2020, No. 1S-128 (2020), Paragraph 219.

<sup>10</sup> In its decision the Competition Council of Lithuania referred to the following OECD documents: OECD Policy roundtable: Competitive Restrictions in Legal Professions (2007); OECD Competition Assessment Review: Portugal, Volume II – Self – Regulated professions (2018).

<sup>11</sup> Decision of the Competition Council on Prices for Notarial Services Established by the Minister of Justice, 7 December 2020, No. 1S-128 (2020), Paragraph 184.

<sup>12</sup> Article 4(1) of the Lithuanian Competition Law.

<sup>13</sup> Case No. e14-1471-816/2021, proceedings No. 3-61-3-04065-2020-2.

services. This recommendation of the Competition Authority was taken into account and eventually the respective provision of the law was amended by the Lithuanian Parliament.

13. In terms of advocacy, Lithuanian Competition Authority also engaged with the Parliamentary Committee on Budget and Finance regarding the legal framework for the notarial services. While the aforementioned Committee of the National Parliament considered possible reform of the legislation pertaining to notarial services, Lithuanian Competition Council in its recent letter<sup>14</sup> provided several suggestions regarding the competition assessment<sup>15</sup> of certain legislative provisions in force. The Competition Council supported its considerations by OECD materials related to these issues. Firstly, in this letter Lithuanian Competition Authority pointed out that limitation of the number of notaries in Lithuania restricts competition. This general restriction cannot be justified by the intention to ensure availability of notarial services in more remote areas, especially given that this restriction has no potential positive effect in densely populated areas, besides restriction of competition<sup>16</sup>. Secondly, Lithuanian Competition Authority observed that almost an absolute ban on advertising of notarial services in Lithuania restricts competition, limits possibility for consumers to take informed decisions and can potentially cause higher prices for the services<sup>17</sup>. Thirdly, notaries are exclusively entrusted to provide certain services (e.g. confirmation of some transactions). According to the Lithuanian Competition Council, this reduces potential supply of such services and may cause higher prices. Chairman of the Lithuanian Competition Council also presented authority's position in the hearing of the Parliamentary Committee on Budget and Finance regarding the matter. As of 15 September 2021, there was no draft legislation registered by stakeholders proposing any changes to the provisions discussed by the Lithuanian Competition Authority in the aforementioned Letter.

14. The Lithuanian Competition Authority also engaged in advocacy with the Ministry of Environment as regards regulation of the profession of architects. By the letters from 2019 and 2021 the Lithuanian Competition Authority pointed out that some self-regulatory bodies of architects in Lithuania operated under conditions of potential conflict of interest. In particular, regional councils of architects consisted only from architects and assessed architectural designs which could affect their eventual implementation. Furthermore, the admission commission which assesses qualification of architects also consisted of architects. Lithuanian Competition Council concluded that such legal framework allowed architects to assess architectural designs or qualification of their competitors and thus determine their ability to engage in economic activity. Lithuanian Competition Authority recommended to change the rules on composition of respective self-regulatory bodies and ensure that majority of members are non-architects. This recommendation has been taken into account only partly, by providing in laws that members of the respective bodies shall refrain from participation in consideration of issues which could give rise to a conflict of interest. However, majority of both bodies are still practicing architects and therefore potential risks to competition are not fully eliminated.

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<sup>14</sup> Letter of the Lithuanian Competition Council to the Committee on Budget and Finance of the Lithuanian Parliament from 13/07/2021.

<sup>15</sup> In Lithuania competition assessment of draft legislation is to be performed by the body which proposes draft legislation. The role of the Lithuanian Competition Council in this process is to consult respective bodies regarding methodology of the assessment.

<sup>16</sup> Here, the Lithuanian Competition Authority supported its assessment by the following OECD document: OECD Competition Assessment Review: Portugal, Volume II – Self – Regulated professions (2018), page 129.

<sup>17</sup> Here, the Lithuanian Competition Authority supported its assessment by the following OECD document: OECD Policy roundtable: Competitive Restrictions in Legal Professions (2007), pages 43, 47, 55.