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COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

**ROUNDTABLE ON PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND
ADMINISTRATIVE PROCEEDINGS**

-- Lithuania --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 16 February 2010.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

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1. Introduction

1. Proceedings concerning the application of the competition rules, including both non-merger antitrust proceedings and merger review, are regulated by legal acts of the Republic of Lithuania (the Law on Competition of the Republic of Lithuania (hereinafter the Law on Competition) and the Rules of Procedure of Competition Council) in detail. The main principles of public administration (such as the principle of objectivity and the requirement to motivate the decisions) are applied to the proceedings of the Competition Council too. The Law on Administrative Proceedings of the Republic of Lithuania (Article 89) establishes that an administrative act must be rescinded if it is illegal because it was adopted in violation of the principal established procedures, especially in breach of the rules intended to ensure an objective evaluation of all circumstances and the validity of the decision. This rule is applied to the resolutions adopted by the Competition Council.

2. The procedures applied by the Competition Council of the Republic of Lithuania are similar to those of European Commission, but one should take in mind that the cases examined by the Lithuanian competition authority are much lesser in extent and complexity. Most often there are no disputes due to procedural issues so judicial practice is poor. Nevertheless recently investigated undertakings exercise their procedural rights more active demanding the clarity and transparency of the decisions.

3. According to applicable law there are a few stages of the investigation however not all of them are achieved in some cases. First of all there is a possibility to open the investigation examined and if there are data enough allowing to reasonably suspect the infringement the actions of investigation specified in the Law of Competition are carried out. Upon the completion of the investigation the Competition Council may send the findings of authorised officers regarding the restrictive practices to parties of the proceeding. After receiving their written comments the case is examined in a public hearing and a prohibition decision can be adopted or the case terminated due to the lack of evidence. The termination of the case can be adopted without a public hearing upon the completion of the investigation. The final decision is declared in the resolution of the Competition Council and the parties of the proceeding shall have the right to appeal to the administrative court against this resolution. The main aspects of the investigation are discussed further on.

2. The opening of the investigation

4. The case could be based on a complaint by an undertaking or on the initiative of the Competition Council and in both cases there should be a motivated decision. The request for investigation must be examined not later than within 30 days from submission of the application and documentation. The Competition Council must examine all possible competition rules infringements and can not choose cases only with the most significant impact or cases which are relevant with a view to defining competition policy. It is possible not to start investigation only according to the grounds specified in the Law on Competition (for example if the facts indicated in the application are of minor importance, there are no data available allowing to reasonably suspect the infringement, the applicant has failed to provide documents required). The resolution to refuse to start the investigation can be appealed to the administrative court, so the refusal of the Competition Council must be clearly justified. Cartel cases are often initiated by the Competition Council, however in 2009 the first application for leniency was received and maybe there will be more such occurrences.

5. The Competition Council examines the possibility of competition rules infringement in the initial stage of investigation. If there is such a possibility the justified decision due to investigation of the restrictive practices shall be taken. The undertakings can appeal against this decision. At the moment of the first investigative measure address to them (normally a request for information or an inspection),

undertakings are informed of the fact that they are subjects to an investigation as well as about purpose of such an investigation.

3. The investigative phase

6. The initial period for the investigation is 5 months, as it is stated in the Law on Competition. The Competition Council may extend this period by justified resolution each time by up to 3 months and the number of extensions is unlimited that is why the exact length of specific investigation is unknown. In some cases the investigation could proceed up to several years, yet generally timespan is about a year, depending on human resources.

7. During the process of investigation officers are empowered to conduct inspections at the premises of undertakings, or in certain circumstances, also at private premises, to require undertakings to provide the Competition Council with all necessary information, to get oral or written explanations from the persons connected with the activity of the undertakings under investigation. The scope of the request for information is defined by authorized officers however undertakings may provide all necessary information they think the officers need. Pursuant to Article 34 of the Law on Competition the parties to the proceedings shall have the right to be heard and to give explanations both in writing and orally. During the investigative phase the authorized officers may hold informal meetings with the parties subject to the proceedings, complainants or third parties, nevertheless generally such meetings take place at the request of the parties. The parties are invited to substantiate their statements or presentations in writing. If meetings take place at the request of the Competition Council generally the statements or presentations are officially protocolled. In more complex cases informal meetings with the parties can be hold at the request of authorized officers due to have a discussion with the undertakings about the more complex and significant circumstances of the investigation. The procedures of such informal meetings are not regulated and depend on the complexity of the case and initiative of undertakings. The meetings with the members of the Competition Council who are responsible for the adoption of the final decision¹ are not organized during the investigation, yet it would be a specific case demanding more detail analysis or there would be certain request of an undertaking and a decision of member's of the Competition Council to grant such meeting.

4. Completion of investigation

8. Once through the investigation measures authorized officers have reached a preliminary view of the main issues raised by the case there can be different procedural paths for the Competition Council proposed: (i) to finish the investigation and present to the parties the written findings of an authorized officer (with a view to adopting a prohibition decision); (ii) to terminate the investigation if it becomes evident that there is no composition of the infringement; (iii) to terminate the investigation with offered commitments suitable to address the competition concerns arising from the investigation.

4.1 Procedures leading to a prohibition decision

9. Before adopting the final decision the Competition Council shall give the parties the opportunity to be heard and the document with the findings of the authorized officers regarding the restrictive practices is presented (the Statement of Objections). There is a preliminary position of the Competition Council regarding the alleged infringement of competition rules, factual basis and matters of law about the investigation reported. Regardless the initial opinion of the parties the Statement of Objections is a

¹ The Competition Council shall consist of the Chairperson and four members. The Competition Council is responsible for all decisions in all competition cases.

comprehensive document with all arguments and conclusions needed, moreover there is a possibility of imposition of a fine or other remedies indicated.

10. The parties (suspected undertaking(s), the initiator of investigation and third parties) shall be offered to submit their written comments on the findings of the authorized officers within the 14 days period with the prolongation possibility (up to few months) in order to ensure that the right to be heard is appropriately observed. The parties are granted access to the complete investigation file with an exception of confidential documents.

11. The Law on Competition (Article 33) establishes oral hearing for all competition cases before adopting the final decision so that the parties are allowed to develop their arguments orally which have been submitted in writing already. The hearing of cases at the sessions of the Competition Council shall be public with an exception of closed hearing when it is important to keep commercial secrets of undertakings. The members of Competition Council, the officers responsible for the investigation, associated Competition Council's services including the legal service and the parties to the proceedings are attended at the hearing. The parties to the proceedings shall be notified in writing of the place and time of the hearing of the case. The chairman of the hearing is the chairperson of the Competition Council or other member of the Competition Council when the chairperson is absent. The very first of speaking is the officer responsible for the investigation who presents the main findings of the investigation. After that the complainant, the undertaking suspected of infringement of the Law on Competition and third parties are allowed to speak. After every speech there are questions asked by the members of the Competition Council, the officer responsible for the investigation and the third parties. The questions to the authorized officers are not allowed (with an exception of permission of the chairman of the hearing), for there is no such right to the parties of the proceedings established by the legal acts. The Supreme Administrative Court of Lithuania ruled that such procedure does not infringe the right to defense for the proceedings of the Competition Council is an administrative procedure and the parties do not enjoy the rights of the parties of judicial proceedings. The public hearing is protocolled and the parties have the right to make their comments about the protocol.

12. After the oral hearing the decision is announced in a two-week period. If having regard to the parties replies given in writing and the oral hearing and on the basis of the assessment of all information obtained allegations are substantiated, the Competition Council will proceed towards adopting a prohibition decision. If however the allegations are not substantiated the Competition Council will close the case or remand the case for supplementary investigation. After the supplementary investigation the parties are notified of the findings of the officers again and they have the right to submit their comments. After that a new oral hearing is organized. The final decision of the Competition Council is stated in a justified resolution in all cases.

13. Article 36 of the Law on Competition states that the resolution of the Competition Council must state the circumstances of infringement, evidence of guilt, explanations given to the Competition Council by the undertaking suspected of infringement, complainant and third parties as well as their assessment, the motives and legal grants of the resolution to be adopted. The Competition Council is obliged to justify its decision, to consider the arguments of the parties and to assess them. The resolution must be based only on those findings and facts and circumstances of the investigation with respect to which the undertaking suspected of infringement had an opportunity to give explanations.

4.2 Procedure for terminating the investigation when there is no evidence of the infringement found

14. In case the investigation is terminated without finding any prove of the alleged infringement the justified resolution is announced in a webpage of the Competition Council and the interested parties

(complainant and the undertaking suspected of infringement) are informed in written form. The resolution explains all relevant circumstances and decision established. The resolution can be appealed to the administrative court. If there are defects of the investigation detected during the judicial procedure the court can make a decision to remand the case to the Competition Council for supplementary investigation. If the case is closed after the public hearing the decision is published in the official gazette.

4.3 *Commitments procedure*

15. The Law on Competition (Article 30) establishes that the investigation can be terminated if the actions did not result in the significant damage to the interests protected by the law, and the undertaking suspected in the infringement voluntarily ceases the actions and submits to the Competition Council commitments in writing that are intended to address the competition concerns identified by the Competition Council. If the Competition Council accepts these commitments it shall adopt a decision which makes them binding on the parties subject to the proceedings. There were several times when the investigation was terminated on this ground. The last one was in year 2009 when the vehicle traders of Lithuania submitted the commitments not to require performing the technical maintenance of vehicles covered by warranty in authorized service stations only. The undertakings are allowed to submit their commitments in any stage of investigation, even when it is completed and the findings were send to the parties for their comments. Interested parties may be invited to submit their observations however the Competition Council is empowered to assess the appropriateness of the commitments by itself. After the termination of investigation on this ground the operative part of the resolution shall be published in the official gazette. There must be relevant circumstances and sufficiency of the commitments of the undertaking evaluated. Commitment decisions are not appropriate in cases when not all requirements of the Law on Competition (as mentioned above in Article 30) are fulfilled. The decision to terminate the investigation and commitments of the undertaking are announced in the webpage of the Competition Council.

5. Adoption and publication of resolutions

16. All resolutions of the Competition Council are passed by majority vote with at least three members of the Competition Council participating in the voting. The voting is protocolled, all resolutions, i.e. their operative parts, passed after public hearing, and accepted commitments are published in the official gazette. The whole resolution is published in the website of the Competition Council. The resolutions of the Competition Council shall be delivered to the parties to the proceedings.

6. Procedures in merger cases

17. Procedures in merger cases are regulated in detail by the Law on Competition and by the resolution on procedure for the submission and examination of notification on concentration by the Competition Council. The Law on Competition (Article 13) states that the Competition Council shall examine the notifications of concentration within four months from the receipt. If the Competition Council does not adopt the resolution within this period the undertakings shall have the right to implement the concentration according to the conditions specified in the notification. The only one exception established by the law is to extend the examination of the concentration upon the duly grounded request of the person notifying the concentration by one month if this person is going to submit commitments due to implementation of concentration. Such an exact period established by the law provides the undertakings with the sufficiently clearness nevertheless in more complex cases the very operative actions of the Competition Council are required to analyze the possible consequences of the concentration and to fit in limited timetable.

18. All notifications of concentration are published in the official gazette, indicating the nature of concentration and the parties concerned. All interested parties shall have the right to announce their objections and other comments. In case of receiving one or in case of possible refusal to grant the permission to implement the concentration the undertaking notifying the concentration and all other interested parties are invited to submit their oral explanations to the Competition Council.

19. If there is a possibility of the restriction of competition due to concentration, the undertaking is informed about the concerns of the Competition Council and has a chance to submit the commitments in order concentration to be permitted. The submitted commitments are exposed publicly and all interested parties shall have the right to announce their opinion. If there are any objections due to concentration the oral hearing is organized where all interested parties and members of the Competition Council are participating.

20. All final resolutions of the Competition Council upon the examination of concentration are published in the official gazette and website of the Competition Council.

7. Conclusions

21. Procedural issues of the competition cases are regulated in detail by Lithuanian legal acts and the Competition Council is obliged to follow all the requirements very strictly. The requirements for the passing resolutions allow the undertakings to announce their opinion and exercise their right to defense. The resolutions of the Competition Council are clearly motivated; there are relevant circumstances and legal assessment introduced. The undertakings exercise their right to appeal the resolutions to the court actively, so any uncertainty or obscurity can lead into revocation of the resolution. It is debatable if the procedural transparency should not be increased by notifying the parties with preliminary result in earlier stages of investigation. It would allow undertakings to respond to authorized officers more efficiently and to avoid the possible defects of the final decisions.