

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

Working Party No. 3 on Co-operation and Enforcement

**INSTITUTIONAL AND PROCEDURAL ASPECTS OF THE RELATIONSHIP BETWEEN
COMPETITION AUTHORITIES AND COURTS, AND UPDATE ON DEVELOPMENTS IN
PROCEDURAL FAIRNESS AND TRANSPARENCY**

-- Lithuania --

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The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 18 October 2011.

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1. Introduction

1. The Competition Council of the Republic of Lithuania (hereinafter the Competition Council) is not a pre-trial institution, but it is the institution entrusted with the enforcement of competition rules. First of all, public enforcement of competition rules is ensured by investigation by the Competition Council and imposition of sanctions. This involves prohibited agreements (Article 5 Law on Competition of the Republic of Lithuania (hereinafter the Law on Competition)), abuse of a dominant position (Article 9), mergers (Articles 10-15) and actions of unfair competition (Article 16). The Competition Council is also empowered to conduct investigations concerning legal acts or other decisions by entities of public administration (Article 4) and has the right to oblige them to revoke or change legal acts or decisions that restrict or distort competition, and in failure of them to do so, has the right to appeal to the court. Lastly, the Competition Council has the right to appeal to the court in defence of public interest.

2. Private enforcement of competition rules can be initiated by an undertaking whose legitimate interests are violated by actions of unfair competition (Article 17) or any natural or legal person that incurred damage due to violation of the Law on Competition (Article 46). In cases of private enforcement of competition rules the Competition Council is to give a finding on the issues pertaining to the application of the Law on Competition either under request of the court or under its own initiative.

3. Proceedings concerning the public enforcement of the competition rules are regulated by the Law on Competition and the Law on Administrative Proceedings of the Republic of Lithuania (hereinafter the Law on Administrative proceedings). Proceedings concerning the private enforcement of competition rules are regulated by the Law on Competition and the Code of Civil Procedure.

4. The cases in public enforcement of competition rules are adjudicated by the courts of special jurisdiction – the administrative courts. There are two stages of proceedings before the administrative courts – the first instance and the appeal instance. There is also a quasi-judicial institution - the Chief Administrative Disputes Commission, which the undertakings can appeal to against decisions of the Competition Council, in general concerning procedural issues. The cases in private enforcement of competition rules are dealt by the courts of general jurisdiction and the proceedings are divided into three stages of litigation – the court of first Instance, the court of Appeal and the court of Cassation.

2. The relationship between the courts and the Competition Council

5. The relationship between the Competition Council and the courts differs depending on the factual situation and the status of the Competition Council in the proceedings. The Competition Council may be the plaintiff (applicant) (e.g. when the Competition Council appeals to the court in defence of public interest), the defendant (e.g. when the resolutions of the Competition Council imposing sanctions are appealed against) or its position may be neutral (e.g. when the Competition Council is requested to give a finding (in essence similar to the expert finding) on the application of competition rules).

6. The Competition Council may apply to the court: a) in defence of public interest; b) for court authorization to conduct inspections in the premises of the undertakings or to apply restrictions for economic activities of the undertakings; c) for interim measures; d) for sanctions against the chief executive of the undertaking. The Competition Council may also be a defendant when the resolutions of the Competition Council are appealed against by the undertakings.

2.1. Defence of public interest

7. The Competition Council has the right to apply to the court to ensure proper implementation of competition rules in relation to legal acts or other decisions by entities of public administration that restrict

or distort competition. The Competition Council has the right to appeal against the legal acts or other decisions adopted by entities of public administration in regulating economic activity, except for the statutory acts issued by the Government of the Republic of Lithuania. After having examined the compliance of certain legal acts (bylaws) with the provisions of the Law on Competition the Competition Council is to address the entity of public administration with a request to amend or repeal legal acts or other decisions restricting competition. In case of failure to comply with the requirement, the Competition Council has the right to appeal to the court with a request that the entity of public administration revokes or changes the legal acts or decisions that restrict or distort competition. In this case the Competition Council acts as an applicant.

8. The Competition Council has the right to bring an action in order to protect state and individual interests safeguarded by the Law on Competition. The right to appeal to the court in defence of public interest is dependent on the provisions of law, which means that the Competition Council has the right to bring such action only if the legal provisions directly envisage such a possibility. The public interest in such cases basically may concern any of the actions or decisions of private or public entities and the Competition Council is obliged to prove the existence of public interest. As the proceedings are regulated by the Code of Civil Procedure, the proceedings are adversarial. The Competition Council acts as a plaintiff and has the rights and obligations of the plaintiff. However, in practice the Competition Council has never used this right because usually it uses its powers to enforce Law on Competition by investigating alleged infringements of the Law on Competition and imposing certain sanctions or obligations directly to the undertakings or entities of public administration.

2.2. Findings in private cases

9. The Competition Council may be required to give a finding in private cases involving a question of applicability of competition rules. The Competition Council may also give such a finding under its own initiative. The position of the Competition Council must be neutral, so that the finding is objective and impartial and it is the court that makes the final evaluation of the situation concerned, thus, settling the dispute between private parties. The Competition Council has the right to access to the file, give oral or written explanations, produce evidence, participate in the examination of the evidence and lodge petitions.

2.3. Authorisation of actions by the Competition Council

10. The Competition Council for the purpose of investigation of the alleged infringements of the competition rules is to conduct inspections in the premises, land and means of transport used by the undertaking and other premises, land and means of transport, including residential and other premises of heads and employees of the undertaking only with the court authorization. In this case the authorized officer of the Competition Council applies to the court with the request for the authorization of the abovementioned actions. If the authorised officer of the Competition Council disagrees with the decision to reject the application for court authorization, he has the right to appeal against the decision within seven days.

11. The Competition Council has the right to apply for interim measures in order to prevent a substantial or irreparable damage to the interests of undertakings or public interests. One of the interim measures, in particular to oblige the undertakings to perform certain actions is to be imposed only upon receiving court authorization. The decision of the Competition Council on the application of interim measures may be appealed against.

12. Upon receiving a court authorisation the Competition Council may, by its resolution, establish the following restrictions of economic activity of undertakings which fail to comply with the imposed sanctions: to temporarily suspend export and import operations, bank operations, the validity of the permit (licence) to engage in certain economic activity. The resolutions of the Competition Council are binding on the institutions which may apply such restrictions and must be implemented without delay. The restrictions are lifted after the implementation of the sanctions imposed by the Competition Council.

2.4. Application in request for personal sanctions for the chief executive of the undertaking

13. If the Competition Council, after having examined all the relevant facts, decides that the chief executive of the undertaking contributed to the infringement of the Law on Competition and the conditions entrenched in the Law on Competition are satisfied, the Competition Council is to submit an application to the court for sanctions against the head of the undertaking. The request is to be submitted when the infringement decision against an undertaking becomes final.

2.5. Appeals against the actions and decisions of the Competition Council

14. Undertakings suspected of having violated the Law on Competition have the right to appeal to the Competition Council against the illegal actions of the authorized investigating officers. After the Competition Council adopts a decision on the issue, such a decision may be appealed to the court.

15. The resolutions of the Competition Council imposing sanctions upon undertakings or imposing an obligation upon the entities of public administration to revoke or change legal acts or other actions that restrict competition can be appealed against to the court.

16. In these cases the Competition Council acts as a defendant before the court.

3. The procedure applicable to public enforcement of competition rules

17. Public enforcement of competition rules can be conducted in various ways: a) the Competition Council conducts investigations and imposes sanctions upon the undertakings; b) the Competition Council has the right, after an investigation, to oblige the entities of public administration to revoke or change legal acts and other decisions that restrict or distort competition. If the entity of public administration fails to fulfil its obligation, the Competition Council has the right to apply to the court with a request to oblige the entity of public administration to implement the resolution of the Competition Council; c) the Competition Council has the right to apply to the court in defence of public interests.

18. As mentioned in point 8, the Competition Council has the right to bring an action in defence of public interest subject to the rules of the Code of Civil Procedure. The Competition Council can bring an action only when the legal provisions envisage such a possibility, it acts as a plaintiff on behalf of the state and has all the rights and obligations pertaining to the legal procedural status of the plaintiff. The Competition Council has also the right to appeal to the court of Appeal or court of Cassation against the decisions of the lower courts.

19. However, the most common procedure is when the Competition Council after an investigation adopts a resolution and imposes sanctions upon the undertakings. The undertakings as well as other persons who believe that their rights, protected by the Law on Competition, have been violated have the right to appeal to the court against the resolutions of the Competition Council. The parties to the proceedings have the right to appeal against the resolutions of the Competition Council to impose sanctions provided for by the Law on Competition, to refuse to impose sanctions where there is no legally established basis for action, to terminate the case in the absence of proof of infringement and to remand the case to the Competition Council for a supplementary investigation. In practice the parties to the

proceedings are suspected undertakings, undertakings whose interests have been violated due to restrictive practices, entities of public administration, associations or unions representing the interests of undertakings and consumers.

20. As it is mentioned in point 7 the Competition Council also investigates legal acts or other decisions by entities of public administration when they regulate economic activity and when the legal acts or other decisions restrict or distort competition. After the investigation, the Competition Council may pass the resolution imposing an obligation upon the entity of public administration to revoke or change the acts or decisions concerned. The entities of public administration have the right to appeal against the resolutions of the Competition Council. The proceedings are the same as in case of appeals by undertakings. However, in such proceedings the Competition Council has the right to appeal to the court with a request to oblige the entity of public administration to implement the resolutions of the Competition Council if the entity of public administration fails to comply with the obligations by the Competition Council.

21. Under the case law of the Supreme Administrative Court of Lithuania (the court of Appeal in competition cases), only the resolutions of the Competition Council to cease investigations, the infringement decisions and the decisions to refuse to open an investigation can be appealed against to the court. Whereas resolutions to open, to prolong or to complement an investigation cannot be appealed against. The Supreme Administrative Court concluded that these resolutions are procedural documents necessary for investigation of relevant facts. Although these decisions influence legal status of the undertakings (e.g. they are obliged to provide the Competition Council with information necessary for the investigation), they are of procedural rather than of material nature.

22. A written complaint is to be lodged within 20 days after the delivery of the resolution or publication of its operative part in the official gazette. The period of 20 days may be renewed if the court of first instance decides that the period was overdue due to serious reasons. The complaint is to be lodged by the undertaking itself or by its legal representatives.

23. If the appeal is admitted by the court, the Competition Council is the defendant. The parties to the proceedings have the right to access to the file and to make copies, except for the confidential information. They also have the right to participate in the investigation of the evidence, give questions to other parties to the proceedings as well as witnesses, specialists and experts, give written and oral explanations, remove any of the judges from the panel before the beginning of the hearing. The parties also have the right to ask the court not to make the case file public and to get the copies of all court decisions.

24. The case is held in an open session only after all the interested parties are properly informed about the date and time of the court session. However, the absence of one of the parties does not impede the hearing on condition that the parties have been properly informed. In evaluating the validity of the Competition Council resolution, the court in competition cases undertakes a comprehensive review of the question whether or not the conditions for the application of the relevant competition rules are met. However, its review of complex economic appraisals made by the Competition Council is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has not been any manifest error of appraisal or a misuse of powers.

25. Upon investigation of the complaint against the resolution of the Competition Council, the court is to take one of the following decisions: a) to leave the resolution as it stands and to reject the complaint; b) to revoke the resolution or its individual sections and to remand the case to the Competition Council for a supplementary investigation; c) to revoke the resolution or its individual sections; d) to amend the resolution on concentrations, application of sanctions or interim measures.

26. The parties have the right to appeal to the court of appeal within 14 days after the delivery of the decision of the court of first instance. The decision of the court of appeal is final and cannot be further appealed. However, the parties to the proceedings have the right to apply for the renewal of the process under the Law on Administrative Proceedings (e.g. when new fact emerge which the parties where not familiar with earlier).

27. Unless the court of first instance decides otherwise, the lodgement of a complaint does not suspend the implementation of the resolutions of the Competition Council. The parties to the proceedings have the right to apply for interim measures. In practice the most common interim measure applied for is to stay temporally the enforcement of the Competition Council resolution, in particular the enforcement of fines.

4. The procedure applicable to private enforcement of competition rules

28. Private enforcement of competition rules is regulated by the Code of Civil Procedure. Usually private enforcement is exercised in cases of unfair competition, e.g. cases of unauthorised use of a mark identical or similar to the name, registered trade mark or unregistered well known trade mark; imitating the product or product packaging of another undertaking; using, transferring, disclosing the information representing a commercial secret. The Competition Council is entitled to investigate only those actions of unfair competition that violate the interests of the multitude of undertakings or consumers. If that is not the case, an undertaking whose legitimate interests are violated by actions of unfair competition is entitled to bring an action before the court seeking: a) termination of the illegal actions; b) recovery of the damages; c) imposition of an obligation to make one or several statements of specific content and form, denying the previously submitted incorrect information or providing explanations as to the identity of the undertaking or its goods; d) seizure or destruction of the goods, their packaging or other means, directly related to unfair competition, unless the infringements can be eliminated otherwise.

29. During the proceedings in court the parties to the proceedings have similar rights as in cases of public enforcement (see point 23 above). However, the proceedings in cases of private enforcement are adversarial as the dispute is between two private parties. Thus, the parties to the proceedings have the obligation to provide evidence, to change, decrease or increase their claims or make a settlement.

30. Undertakings which violate the Law on Competition must compensate for damage caused to other undertakings or natural and legal persons. An undertaking or other persons whose legitimate interests have been violated by actions performed in contravention of Articles 101 or 102 of the Treaty on Functioning of the European Union or other restrictive practices prohibited by the Law on Competition (abuse of dominant position, anti-competitive agreements) are entitled to bring an action before the court seeking termination of the illegal actions or recovery of the damages. Upon request by the court or under its own initiative the Competition Council is to give a finding on the application of competition rules in cases of private enforcement of competition rules. The finding is not decisive or is not considered to be evidentiary, the final decision in such cases lies within the discretion of the relevant court. However, this kind of private enforcement is not usual in Lithuania as it requires considerable efforts by the undertakings or other persons concerned to prove before the court that certain actions infringed competition rules. Therefore, usually undertakings prefer to lodge a complaint to the Competition Council to investigate suspected anti-competitive practices, rather than bring an action against other undertaking directly to the court.

5. Recent developments relating to procedural fairness and transparency

31. The most significant development in the enforcement of competition law is the institute of individual responsibility for competition law infringements. When the conditions for responsibility of the

chief executive of the undertaking set in the Law on Competition are met, the Competition Council is to submit an application to the court for individual sanctions against the head. The Competition Council is obliged to motivate the application. However, the court is not bound by the application of the Competition Council: the court may reject the application or it may impose other sanctions than the Competition Council has applied for. Therefore, the sanction upon the chief executive of the undertaking is to be imposed only by the court. The head of the undertaking has the rights established in the Law on Administrative Proceedings, including the right of defence.

32. The recent developments relating to procedural fairness are also due to new jurisprudence of Lithuanian courts. As mentioned above, the resolutions of the Competition Council to open, prolong or to complement an investigation cannot be appealed against as the influence of such decisions are of procedural rather than material nature. This gave more clearance to the undertakings concerned on the scope of the decisions the Competition Council that may be appealed against to the court, however, final decisions of the Competition Council (prohibition decisions, other decisions that reflects final conclusions of the investigation) are subject to the appeal and the undertakings' right to defence is not eliminated or limited.

33. There are no substantial changes or recent developments regarding procedures held in the Competition Council during the investigation of the alleged infringement of the competition rules.