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QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

Contribution from Lithuania

-- Session III --

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CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Lithuania--

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. Organising your agency and preparing for work

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

The first legal act governing competition in Lithuania was the competition law adopted in 1992. This initial law was supplemented by various regulatory provisions that together constituted the Lithuanian competition regime. The law proscribed abuses of dominance, anticompetitive restrictive agreements, acts of unfair competition and certain types of anticompetitive conduct by executive bodies of government. The law also provided for merger control. However, the law did not contain the necessary procedural rules and powers of the competition authority in respect of investigation of infringements.

Under the 1992 law the Competition Council initially existed within the Agency of Prices and Competition under the Ministry of Economy, and was formed on the basis of the former State Price Committee. In 1995, the Agency was reorganised into the State Competition and Consumer Protection Office under the Government, the director of which was appointed by the Government. The former Competition Council was under the State Competition and Consumer Protection Office. The Competition Council consisted of seven members from different institutions, who were appointed by the Government for terms of three years. Council members did not work full time; and used to meet only once-twice per month for making decisions.

The former Competition Council had enforcement responsibility also for consumer protection, monitoring state aids, and antidumping.

Such structure of the competition authority didn't work well. Council members being from outside were not involved in a daily work of the competition agency and were not motivated to go deeply into competition matters. Furthermore, having accumulated additional functions, such as antidumping and consumer protection, the former competition authority had not enough qualified recourses for dealing with quite different and even contrary to competition matters. Lack of professional staff, and office space and equipment were also among the main challenges faced by the Lithuanian competition authority.

The situation has changed after the new competition law was enacted in 1999. The law attained a dual objective: created an independent competition authority - the Competition Council and established more effective procedural rules. The new law was followed by numerous by-laws. The separate Law on Coming into Force of the Law on Competition adopted in 1999, provided for the reorganisation of the former Competition and Consumer Protection Agency into the Administration of the Competition Council. The Administration of the Competition Council was formed to fulfil the functions of the

Competition Council. Its specific structures and management procedures were elaborated and approved by the Competition Council.

In addition to the supervision of the Law on Competition, the Competition Council also carries out functions assigned by the Law on Prices, and the Law on Advertising. Additional duties with which the Competition Council was charged, namely, consumer protection and antidumping, have been transferred to other governmental institutions.

It would be almost impossible to establish competition regime in Lithuania without the knowledge and experience of consultants and experts from international organisations and mature agencies. The Lithuanian Competition authority has had support from U.S., Denmark, European Commission, Sweden, Germany and OECD, and received very extensive technical assistance in both anti-trust and state aid fields. Foreign experts provided assistance in drafting the first competition laws and secondary legislation; acted as lecturers at seminars and workshops; gave advice on everyday cases (long-term advices); and hosted Lithuanian specialists in their home authorities. The Competition Council still maintains good relations with the previous experts.

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

At times of the enforcement of the first competition law in Lithuania, the level of competition culture was not adequately developed, the many hardly understood or, rather, misunderstood the purpose or the methods of operation of the competition authority, quite frequently expected from the Competition Council things falling completely out of the competence and scope of the Competition Council (e.g., the public expected that the Competition Council is in power to directly cut the prices of goods or reduce the inflation, etc.).

Therefore, to achieve a satisfactory level of the implementation of competition policy in Lithuania, it was very important not only to make competition law and competition policy public, but also to educate the public about the authority's work – to help consumers, the business community and other parts of government understand the rationale for competition enforcement and why it benefits them. A variety of means were used for doing so:

- publish all substantive decisions of the Council;
- publish annual reports describing the agency's activities and important cases;
- cultivate relations with the press; issue press releases announcing important decisions or cases;
- make speeches or other public appearances at appropriate occasions;
- organise seminars or conferences on competition policy for interested parties – lawyers; business people, consumer groups;

- publish guidelines explaining the substantive analysis that the agency employs in specific types of matters, or outlining procedures that are followed by the agency.

The Competition Council also performed an important work in preventing restriction actions of public and local authorities and actively participated in drafting and amending the legal acts prepared by different institutions seeking to harmonise the provisions of these acts with the competition rules.

Existing procedures in the government provided for submission of draft new legislation to the Competition authority for comment on issues of competition policy. In exercising this responsibility the Council commented on dozens of pieces of legislation in that period. Very often representatives of the Competition Council consulted with other ministries on specific cases or proposed regulations. However, their advice was not always heeded. The Competition Council had limited resources, so it had carefully select the matters in which it would participate and could be effective as competition advocate within the Government.

Following the requirements on harmonisation of the competition law, in 1998, the Lithuanian competition authority jointly with the Law Harmonisation Committee “Competition” drafted the Recommendations on implementation of the competition principles in the following sectors of the economy: postal services; energy sector, and transport sector. These Recommendations contained the review of fundamental EC Regulations and Directives related to promotion, enhancement and enforcement of competition in the mentioned sectors of the economy. Besides, measures were taken to review legal acts effective in the Republic of Lithuania that were regulating the functions of such sectors with allowance for their compatibility with the standards specified in the Treaty of Rome. All the ministries and other governmental institutions, that were responsible for drafting and screening of legal acts in such spheres of activity, were been made familiar with the Recommendations.

The developed competition culture, increased public awareness and educated business society and consumers through making the requirements of the Law on Competition a public domain could be regarded as one of the main achievements of the Competition Council.

The Competition Council continues to place significant emphasis on the Council’s role as competition advocate. The Council publishes its all substantive decisions, annual reports describing the Council’s activities and important cases, publishes guidelines explaining the substantive analysis that the Council employs in specific types of matters, or outlining procedures that are followed by the Council, cultivates relations with the press; issues press releases announcing important decisions or cases, makes speeches or other public appearances at appropriate occasions, develops a page on the World Wide Web (www.konkuren.lt).

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

In the early years, abuses of a dominant position occurred relatively more frequently than restrictive agreements, as monopolies and dominant positions were very common in the Lithuanian economy. They usually were created by privatisation of formerly state-owned monopolies, and had significant impact upon Lithuanian consumers. Therefore, the Council confronted mostly with the abuse of dominance cases in such sectors as railway, post and telecommunications. Market definition and conditions of entry were often especially problematic to the dominance analysis in those cases.

Successful prosecution of the abuse of dominance cases related to post, railway and telecom served as a very effective tool to enhance the Council's reputation both within the government and throughout the private sector.

As regards non-cartel restrictive agreements, the 1992 law did not impose restrictions on vertical agreements unless one of the parties was a dominant undertaking. This was to a certain extent influenced by the U.S. antitrust law.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

The substantive provisions prohibiting restrictive agreements in the 1992 law contained general prohibitions of agreements that restrict competition and also prohibitions of specified types of conduct. The specific prohibitions included agreements among competitors fixing prices or terms of sale, allocating markets or sales volumes, and bid rigging.

In the early year, there were only few prosecutions of cartel cases in Lithuania. Prosecuting cartels was difficult, as under the 1992 law the Lithuanian competition authority lacked sufficient powers to prosecute cartels. Evidence of illegal agreements was not easy to obtain, especially when the subjects of the investigation were not co-operative. However, it was also common that subjects voluntarily produced evidence of the illegal activity, often because they did not know that the conduct was unlawful.

The best example of a successful cartel prosecution was the intravenous solutions case of 1998. It should be noted that this was the first international cartel: the illegal agreement allocated markets between Lithuania and Latvia. Successful prosecution of that case required close co-operation between the competition agencies in the affected countries, and showed the importance of such co-operation.

Under the 1999 law powers of the Competition Council have been increased and include the application of bigger penalties and other measures. Officers of the Competition Council are entitled to enter business premises, to review and to make copies of all available documents, including internal correspondence, to seize relevant documents and other material, etc. Entering premises, reviewing and copying relevant documents is allowed only upon approval of a judge.

With the introduction of the 1999 law, detection and prosecution of cartels became a high priority within the Competition Council and it has been especially successful in prosecuting them. Some investigations were rather noticeable in terms of the scope of work involved, as well as complexity of issues addressed. This in the first place holds true for investigations of the situation in telecommunications, fuel and construction markets. The fines imposed by the Competition Council were significantly higher in comparison with previous years. Imposing of bigger fines, especially in cases of restrictive agreements, serves as a warning to companies operating in other markets that prohibited agreements will not remain undisclosed.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

N/A

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Both the 1992 law and the new law of 1999 provide for premerger notification and merger control. The 1992 law provided that the Council would establish the size thresholds for notifications. Those thresholds were set at a relatively low level: notification was required if the merging parties together had any of the following: annual turnover of 8 million Lt., total capital of 2 million Lt., or 300 employees. These thresholds generated a relatively large – and growing – number of notifications: 17 in 1994, 31 in 1995, 38 in 1996, 77 in 1997, and 158 in 1998. The law required the Council to adopt a decision on the merger within one month after notification. The period could be extended for up to nine months, but only with the agreement of the parties.

The law of 1999 was an improvement on the 1992 law in some respects. The notification threshold was set at combined turnover of 30 million Lt, each party having at least 5 million Lt. As it was expected, a higher threshold reduced notifications by at least one-half. The law provided that the Council must within one month after notification make a final decision on the merger or decide to extend the examination. In the latter event, the final decision had to be made within four months of notification.

According to the amendments made in 2004, the term of the four months allowed to the Competition Council to pass the final decision has been liberalised, i.e. upon a duly grounded request of the applicant undertaking it may be extended for an extra month. This may be of special importance in some individual more complex cases when the Competition Council intends to permit the concentration subject to certain conditions and obligations and the extra month is necessary for the undertaking concerned to analyze and propose the appropriate coordinated undertakings which would prevent the creation or strengthening of the dominant position.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Notified mergers have occurred in many sectors of the economy. In approximately half of the transactions a foreign economic entity was involved. All types of mergers have been notified – horizontal, vertical and conglomerate – with horizontal and conglomerate being the larger categories. To date, almost all notified mergers have been approved by the Council. Only a few mergers have been disapproved completely.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

The undertakings as well as other persons who believe that their rights protected by this Law have been violated shall have the right to appeal to the Vilnius Regional Administrative Court against the resolutions of the Competition Council.

During the period of 1993-1999, the Lithuanian Competition agency considered a total of 262 cases involving possible substantive violations of the competition law. Most of the cases (108) were related to unfair competition, 47 – abuse of a dominant position, 45 – illegal concentration, 39 – activities of state government bodies restricting competition, 18 – fail to fulfil the obligations of the Competition Institution, 4 – restrictive agreements (cartels). Out of all cases only 25 cases were appealed to the court (for instance during recent two years (2006-2007) were appealed even 12 cases), and the Competition Council prevailed in most of them.

To reach the final decision (we count both the first and the appeal instances) in some cases it took about 7 months in other – about 2 years (now it takes a little bit less). Despite such long period for reaching the final decision of special significance is the fact that the court acknowledged decisions of the Competition Council as legitimate in more complex cases dealing with infringements most harmful for economy and consumers.

Therefore the judicial practice has been tangibly beneficial in terms of the efficient enforcement of the competition policy as well as consolidating the legal basis for the functioning of the national competition authority.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

Up to now, the Competition Council has not developed any special programme for interacting with judges. Training of judges in the field of competition is apparently insufficient. Who is to undertake training of judges in this particular area? As of today we clearly lack appropriate training programmes for judges.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

The shortage of resources, both financial and personal was (and still is) a problem. Because of the budget that was not sufficient, there were limited possibilities to hire experts from outside in the course of investigations, if needed, to constantly train the staff, especially new employees, to employ economists or lawyers accordingly to the needs of the Competition Council. The Competition Council also had a problem with employee turnover – retaining good professionals in the agency. Part of the problem was a disparity in pay between positions in the Administration of the Competition Council and positions elsewhere in the public and private sectors. The positions in the Competition Council were paid at a lower rate than comparable positions in the ministries. Therefore, many highly qualified specialists, attracted by higher salaries elsewhere, left for other institutions or private sector.

In order to overcome the disparity in salaries, the Competition Council has worked within the Government to encourage review of these standards and sought for additional resources, however up to now, the disparity exists.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

The experience accumulated by the Lithuanian Competition Council has shown that in order to be able to meet all the challenges that the young authority is facing, it is of utmost importance to ensure the independence from a variety of interests, political influence and control. Therefore, it is vital to establish the independence of the authority from the Government and the Parliament in the competition law. Should the institution fail to attain that, it will proceed being under the influence and pressure of various interests, will be in no position to ensure the efficient oversight of competition law and represent itself as an efficient instrument for the protection of competition in the country. It is particularly vital in the country in which, as a rule, the level of competition culture is not adequately developed.

The Lithuanian competition authority started its work in 1992 as a part of the Government, and was not fully free of political influence. The experience accumulated during several years has shown that in order to be able to meet all the challenges that the authority was facing, it was important to ensure its independence from a variety of interests, political influence and control.

This was particularly vital, as at that times the level of competition culture was not adequately developed, the many hardly understood or, rather, misunderstood the purpose or the methods of operation of the Competition Council, quite frequently expected from the CC things falling completely out of the competence and scope of the CC (e.g., the public often expects that the CC is in power to directly cut the prices of goods or reduce the inflation, etc.).

The Law of 1999 changed the status of the Competition Council and provided it with a greater measure of independence. The Competition Council is an independent public authority of the Republic of Lithuania, responsible for the implementation of competition law and policy. Decisions of the CC are taken without any possibility of interference by the Government. The Council is a collegiate body, composed of 5 persons who take their decisions by majority vote. The law provides that the Chairman and four members of the Competition Council are appointed by the President, according to the proposal of the Prime Minister. The Chairman serves for a term of five years, and the four members serve for a term of six years, except that initially two members serve for a three year term. The same person can not be appointed for more than two consecutive terms of office.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

a)

- to adopt an adequate legislation;
- to create an independent agency with sufficient capital resources;
- to recruit a proper staff;
- to receive a technical assistance from abroad;
- to develop a competition culture.

b)

- inadequate legislation;
- interference from the government;
- too broad range of functions (responsibilities);
- lack of human and capital resources;
- lack of international cooperation.