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INDEPENDENCE OF COMPETITION AUTHORITIES--FROM DESIGNS TO PRACTICES

Contribution from Lithuania

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INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

- Lithuania -

1. Introduction

1. This paper is intended to provide information on relevant factors concerning *de jure* and *de facto* independence of the Competition Council of the Republic of Lithuania¹.

2. Characteristics that help to insulate the agency from political pressure

2. The Law on Competition of the Republic of Lithuania² explicitly establishes the independence of the Competition Council. The Law states that when performing its statutory functions the Competition Council is free and independent in its decision making. The Competition Council is accountable to Seimas (the Parliament of Lithuania) (Article 17(1) of the Law on Competition). The Competition Council is established as a stand-alone body and is not a part of a ministry.

3. The Competition Council is an integrated agency, i.e. the Competition Council both investigates cases and takes enforcement decisions, and has the right to impose fines (Article 35(1)(3) of the Law on Competition). However, in the case against a CEO of an undertaking which has been found guilty of anticompetitive agreements or abuses of dominant position, the Competition Council has to establish the CEO's role in the undertaking's antitrust infringement and then has to refer the case to the Vilnius Regional Administrative Court with a request to impose sanctions – a disqualification and (or)³ a financial penalty – on the individual (Article 41(1) of the Law on Competition). In ruling on the case against an individual, the court is not bound by the proposal of the Competition Council in relation to sanctions and their scope (Article 41(2) of the Law on Competition). In all other types of cases, the decisions of the Competition Council (for example, to fine undertakings, to block mergers, etc.) do not have to be approved by the courts to have effect.

4. Within the Competition Council, the investigative and decision-making functions are separated. The administration of the Competition Council carries out investigations, while the board of five Council members adopts decisions. Each Council member votes independently and individually. The decisions 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 (Article 19(7) of the Law on Competition).

5. The Competition Council can recruit its own staff independently. The career progress of staff and termination of the working relationship is decided within the Competition Council (except for the Council members, as mentioned below).

¹ www.kt.gov.lt.

² The Law on Competition can be retrieved from [here](#).

³ Financial penalty is supplementary to disqualification.

6. The fact that the Competition Council has a multi-member board instead of a single executive (commissioner) should help to insulate the decision-making from political pressure. Multi-member board has also the advantages of transitioning more smoothly during changes of office of Council members and allows the decision-making body to have greater (and more diverse) experience than a single person would have.

7. 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 Chairperson of the Competition Council can appoint two deputies from the existing Council members (Article 19(1) of the Law on Competition).

8. 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:

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.

9. Clear conditions for dismissals set in the law are important in order to avoid arbitrary dismissals and help to insulate the Competition Council from political pressure.

3. Reforms enhancing the independence of the Competition Council

10. In 2010 the National Audit Office of Lithuania conducted an audit of the Competition Council and published its results in the 2010 Audit Report “Protection of Freedom of Competition” (the “2010 Audit Report”)⁴.

11. 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 Governmental influence) financing and the financing it had was not sufficient.

⁴ Report No. VA-P-20-10-26 “Protection of Freedom of Competition” of the National Audit Office of Lithuania, 2010-12-30. Available at [here](#). Press release in English can be retrieved from [here](#).

12. The Seimas (the Parliament of the Republic of Lithuania) has addressed some of these findings by revising the Law on Competition in 2012.

13. 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 (Article 17(1) of the Law on Competition).

14. The 2012 amendments to the Law on Competition have also clarified the Competition Council's accountability. As before, the chairperson of the Competition Council was required to submit the authority's annual reports to the Seimas and to the Government (Article 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 (Article 17(1) of the Law on Competition).

15. In addition, the revised Law on Competition now allows the Competition Council to open or close investigations based on its enforcement priorities (Article 24(4) (8) and 28(3)(3) of the Law on Competition). Due to the fact that the Competition Council was not entitled to prioritise its cases 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 strategically important issues. 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.

16. 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 Principles⁵, 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.

17. The issues raised in the 2010 Audit Report concerning independent financing and allocation of more resources are yet to be resolved. In the meantime, a draft amendment of the Law on Competition concerning these matters has been introduced in Parliament by a group of MPs (for more on this draft amendment see Section 4 below) and is expected to be put for deliberations in autumn 2016.

4. Financing of the Competition Council

18. The Competition Council is a budgetary institution financed from the Lithuanian state budget (Article 17(4) of the Law on Competition). The Competition Council also charges merger notification fees. The fees range from EUR 1,621 to EUR 3,243, and the final recipient 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.

19. This situation may cause substantial fluctuations of 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.

20. The 2010 Audit Report concluded that an independent source of funding is 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).

⁵ Resolution of the Competition Council of 2 July 2012 [No. 1S-89](#) on the priority of the activities of the Competition Council while implementing the supervision of the Law on Competition.

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

22. Possibilities of alternative sources of funding – such as, for example, funding from undertakings – are being explored. There is a draft bill proposing the Competition Council to be financed not only from the budget, but also by fixed annual payments made by undertakings with annual sales in the preceding business year exceeding EUR 20 million. In addition, the draft bill proposes the merger fees to be paid to the Competition Council's account (now the fees are paid to the state budget)⁶

5. Decision-making autonomy and accountability

23. The Competition Council has a decision-making autonomy. It has been strengthened by amendments to the Law on Competition allowing the Competition Council to prioritise its activities.

24. The Government cannot decide which cases or market studies the Competition Council should or should not pursue. Neither can the Government overrule a decision of the Competition Council.

25. It is doubtful that supervision or strategic guidance of the government would contribute to effectiveness of competition enforcement. On the contrary, there would be a greater risk that competition enforcement could succumb to short-term political goals which would not necessarily reflect real competition problems or/and ensure efficient use of resources.

26. While being independent, the competition enforcement agency should be accountable for its activities, and that is the case in Lithuania. Article 17(1) of the Law on Competition states that the Competition Council is accountable to Seimas (the Parliament of Lithuania). Moreover, in practice the Chairman of the Competition Council has meetings with the President of Lithuania and the Prime Minister and informs them about the Competition Council's activities.

27. An additional and important aspect of Competition Council's accountability is the fact that its final decisions can be appealed to Vilnius Regional Administrative Court (decisions of which in turn can be appealed to the Supreme Administrative Court of Lithuania).

28. It should be noted that in Lithuania the court system is established as an independent power which is subject neither to parliamentary nor to the governmental control. The courts enjoy a wide discretion when conducting judicial review. As established in Article 34 of the Law on Competition, the courts have the authority to uphold or revoke the decisions of the Competition Council fully or in part, to refer the case back to the Competition Council for additional investigation and to amend some of the decisions.

29. On the other hand, the Law on Competition establishes that decisions of the Competition Council can be overturned by the courts only (Article 30(4) of the Law on Competition). Thus, although the Law establishes judicial review of Competition Council's decisions, at the same time the Law insulates the Council from political powers.

30. The Competition Council also publishes information (for instance, decisions, annual reports, newsletters, press releases, infographics) about its activities and actively seeks to educate the public about competition enforcement. We believe that these actions can increase transparency and accountability to the public while at the same time reducing the risk of undue interference of other actors into functions of the Competition Council.

⁶ Draft bill can be retrieved from [here](#).