

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

**Working Party No. 3 on Co-operation and Enforcement**

**ROUNDTABLE ON THE APPLICATION OF ANTITRUST LAW TO STATE-OWNED ENTERPRISES**

**-- Lithuania --**

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## **1. The definition and importance of SOEs**

1. In the Republic of Lithuania the Civil Code provides with the provision concerning the definition of public and private persons. Art. 2.34 establishes, that legal persons shall be divided into public and private persons. Further on it states that public legal persons shall be legal persons established by the state or municipalities, their institutions or other non-profit-seeking persons whose goal is to meet public interests (state and municipality enterprises, state or municipality institutions, public institutions, religious communities, etc.).

2. The Civil Code is applicable for the regulation of public persons only in a subsidiary manner, i.e. specialized laws take precedence here. One of such laws is the Law on State and Municipality Enterprises of the Republic of Lithuania, which provides for with the procedures of establishment, management, business, reorganization and dissolution of public legal persons, as well as more precise definition of the state owned enterprise.

3. SOE, according to the abovementioned law, is an enterprise established from the capital of state (or municipality) or transferred to state (municipality) pursuant to order established by the laws, and the ownership of which belongs to the state (municipality), and property of which is administered, used and disposed of on a basis of the right of trust. A SOE is a legal person of limited civil liability. The law on SOEs also establishes that the goal of SOE is to provide public services, produce production and engage in other type of activity in pursuance of meeting public interest.

4. Due to the law, the civil legal capacity of SOEs is defined as the following: enterprise can be in possession of or achieve such civil rights and obligations that are not contrary to its statute/bylaws and goals of business.

5. The main sectors in the Republic of Lithuania in which SOEs are particularly important are mostly the standard ones: gas transmission and distribution, nuclear sector, railways, airport, electricity transmission and distribution, postal services, state seaport and others.

## **2. Rules applicable to SOEs**

6. In the Republic of Lithuania the rules applicable to private enterprises and state owned enterprises *may* differ to a certain extent – it depends on a case and its peculiarities, i.e. whether traditional competition rules (prohibition of restrictive agreements and abuse of dominance) or imposition upon public authorities a duty not to discriminate separate undertakings are applicable, whether there are special laws providing with more detailed and prevailing provisions that should be applicable to a particular sector or economic activity, etc. Therefore, if special laws applicable to a particular economic sector or activity of the state owned enterprise establish different conditions for business activities, special treatment in such cases can be granted. The outcome of the case in such situations depends on the type of sector in which relevant enterprises engage in their business activities and on existence of special laws the provisions of which prevail over the requirements of the Law on Competition. On the other hand, in the absence of such special laws the same treatment is granted to SOEs as to private enterprises. It is important to mention that in the past the Law on State and Municipality Enterprises provided a right for the founder of the SOE to determine for the enterprise prices and tariffs of merchandise (services) and regulations for calculating them (this right had to be explicitly established in the statute/bylaws of the SOE). However, this provision is no longer applicable since 2003.

7. The Law on Competition provides for with a general purpose to protect freedom of fair competition in the Republic of Lithuania which is applicable to both private and public enterprises. Moreover, the Law also outlines that it shall regulate the actions of the public administration subjects and

undertakings, which restrict or may restrict competition <...>, shall establish the rights, duties and liabilities of the said institutions and undertakings and the legal basis for the control of competition restriction <...> in the Republic of Lithuania.

8. However, Art. 2 of the Law on Competition provides for that it shall prohibit undertakings from performing actions which restrict or may restrict competition, regardless of the character of their activity, *except* in cases where this Law or laws governing individual areas of economic activity provide for with exemptions and permit certain actions prohibited under this Law.

9. In this context Art. 4 of the Law on Competition is relevant in an indirect way. The provisions of the Law foresee that when carrying out the assigned tasks related to the regulation of economic activity within the Republic of Lithuania, public administration subjects shall ensure freedom of fair competition. Public administration subjects shall be prohibited from adopting legal acts or other decisions which grant privileges to or discriminate against any individual undertakings or their groups and which bring about or may bring about differences in the conditions of competition for competitors in the relevant market, except where the difference in the conditions of competition cannot be avoided when the requirements of the laws of the Republic of Lithuania are complied with.

10. The Competition Council of the Republic of Lithuania during numerous cases concerning infringement of Art. 4 has developed a scheme for application of this rule, which requires to ascertain of the entirety of the following circumstances:

- the act or decision of institution privileges or discriminates different undertakings or their groups;
- due to such act or decision differences in the conditions of competition for competitors are created or may be created in the relevant market;
- different conditions for competition are not determined by the requirements of the laws of the Republic of Lithuania.

### **3. Antitrust enforcement and SOE**

11. The Competition Council basically deals with two types of enforcement procedures concerning SOEs – one regarding Art. 4 and obligation upon public institutions to ensure fair competition in the market therein, and Art. 5 and 9 of the Law on Competition, regarding traditional prohibitions of entering into prohibited agreements and abuse of dominant position.

#### ***3.1 Enforcement of Article 4 of the Law on Competition***

12. During one year the Competition Council investigates approximately 4-5 cases regarding infringement of Art. 4 of the Law on Competition, with the exception during 2008, as 9 resolutions pertinent to it have been adopted. Having analyzed the resolutions, a conclusion can be drawn that mostly often infringements of this provision concern unlawful procedure of public procurement organized by municipality institutions.

13. In several cases the Competition Council recognized the infringement when public procurement procedure according to the provisions of the Law on Public Procurement should had been organized, but the municipality administration failed to fulfill such obligation.

14. For example, in a recent case No. 2S-7 of 2009, concerning organization and administration of cleaning works of public territories in Lentvaris town, municipality administration unilaterally signed a

contract with one undertaking, “Trakų paslaugos”, UAB which is owned by this municipality without organizing public procurement, i.e. the undertaking was privileged, whereas other possible competitors discriminated thereby. Discrimination by which different conditions for the competition are created is explicitly prohibited by the Law on Competition. Public procurement which could have created possibilities for other undertakings to compete was not organized, and such omission of municipality institution could not be justified by provisions of specialized laws, therefore a commission of infringement was recognized.

15. A similar case with the same outcome, i.e. a failure of municipality institutions to organize public procurement procedure and unilateral grant of privilege to provide services of waste administration (administrative function) as well as waste utilization (economic function) to particular undertakings (at the same time depriving other possible competitors from a possibility to compete in a relevant market) was decided in 2008, case No. 2S-27. The Association of public utilities and waste administration undertakings lodged a complaint against several municipalities, because they unilaterally granted rights for local regional waste administration centers (owned by municipalities) to not only administer this function, but also engage in economic activities. Such unilateral conduct and heavy restriction of competition (the agreement with undertaking was open-ended) was not proven to be prescribed by any special law, therefore rendering the grant of municipalities unlawful. It is important to underline that municipality had a right to grant a right to organize the system of waste administration, however, waste utilization business according to the laws was regarded as economic activity and competitive procedure had to be provided and ensured for it. The focus, when deciding such cases, has to be on the nature of activity that undertakings or institutions are engaged in, with no difference as regards legal status of the undertaking or the way it is financed. This resolution of the Competition Council was appealed to the courts, but the court of first instance has dismissed the complaint.

### **3.2. *Enforcement of Art. 5 (Art. 81) and 9 (Art. 82) of the Law on Competition and EC Treaty***

16. The application of traditional competition law rules, i.e. prohibition of entering into prohibited agreements, as well as abuse of dominant position, to activities of SOEs is based on principle of competitive neutrality – that publicly owned enterprises compete fairly in the market without having any privileges in comparison to other undertakings due to their legal status and ownership of property.

17. In the practice of the Competition Council there had been a number of cases that concerned investigations of SOEs and their activities. Principally sectors of railways, airport and postal services were investigated.

18. The most recent case in this context was the adoption of the final decision by the Supreme Administrative Court of the Republic of Lithuania (the SACL). The decision of the Court overruled the appeal filed by the Lithuanian post company AB Lietuvos paštas – a state owned enterprise. By its ruling the SACL acknowledged the validity of the conclusion in the Resolution of 27 September 2007 of the Competition Council to the effect that AB Lietuvos paštas had infringed the requirements of Art. 9 of the Law on Competition by having abused its dominant position in the relevant market by establishing different prices for the mail delivery. The SACL concluded that AB Lietuvos paštas was holding a dominant position in the market for reserved (universal) mail services. In this position the company has been abusing its dominant position and was seeking to oust its two competitors from a closely related market – that of invoice printing, binding and enveloping. The investigation was conducted to assess the results of the tender announced by UAB Vilniaus energija to procure combined invoice printing-enveloping and delivery services. The prices of all three competitors for the service of invoice printing, folding and enveloping were to a large extent comparable; thus the companies could compete in terms of their prices. AB Lietuvos paštas, however, was in an advantageous position to offer much more attractive mail delivery prices being aware in advance of the prices offered by competing companies, since in order

to submit a competitive tender the latter had to use the mailing services and fixed the rates set up specifically by AB Lietuvos paštas.

19. Another case regarding SOEs was the examination of actions of the state enterprise Vilnius International Airport by the Competition Council in 2007 as concerns the compatibility of its behaviour with the requirements of Art. 9 of the Law on Competition (prohibition of abuse of dominance). The investigation was performed in response to the application filed by UAB RSS Motors seeking to determine a possibility of abuse of a dominant position by the Vilnius International airport in the provision of airplanes with fuels in the Vilnius International airport. UAB RSS Motors lodged a complaint against the actions of the Vilnius International Airport, as it firstly required submitting the fuel supply agreements with the customers and other related instructions, and secondly – refused to allow a second fuel vehicle to the airport, which in the opinion of the applicant was contradictory to the provisions of the Law on Competition. While operating in the management and organisation market in the Vilnius airport the SE Vilnius International Airport was also competing with the applicant RSS Motors in the market for the provision of airplanes with fuels in the airport in question, i.e. performed commercial activity.

20. Having regard to the findings of the investigation the Competition Council concluded that the requirement of the SE Vilnius International Airport to UAB RSS Motors to submit the contracts with the customers, as well as refusal to allow entry for a second vehicle, would not be justifiable even for the purpose of the administration of the Vilnius international airport, therefore such actions were recognised to constitute an infringement of Art. 9 of the Law on Competition since the possibility to learn the contents of the contracts concluded with the customers of the competitors and refusal of granting entry for additional vehicle reduced competition.