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Competition for-the-market

– Contribution from Lithuania –

1. Introduction

1. According to Article 46 of the Lithuanian Constitution, as interpreted by the Lithuanian Constitutional Court, public authorities have no absolute discretion as to the method of selection of service providers and are bound by constitutional imperatives to select service providers using a competitive tender. This provision of the Lithuanian Constitution is implemented by the Law on Competition of the Republic of Lithuania (Law on Competition) and, in particular, by the Article 4 thereof. Article 4 of the Law on Competition (Article 4) stipulates that public administration entities shall be prohibited from adopting decisions which grant privileges to or discriminate against any undertakings and which give or may give rise to differences in the conditions of competition for undertakings competing in a relevant market, except where the difference in the conditions of competition may not be avoided when meeting the requirements of the laws.

2. The Competition Council of the Republic of Lithuania (the Competition Council) has enforcement powers as to the Article 4 and frequently makes use of them. Article 4 applies, in particular, when the public authority appoints a concessionaire without ensuring competition for-the-market in the form of tender. This is considered to grant privileges to the appointee and thus to create differences in the conditions of competition. Besides using its enforcement powers, the Competition Council also on a regular basis engages in advocacy activities vis-à-vis public authorities, especially, when concessions are granted anti-competitively by the parliamentary or governmental acts with regard to which Article 4 is inapplicable. The Competition Council, however, has officially admitted that competition for-the-market may produce suboptimal results in some naturally monopolistic market structures.

3. Private market power gained through collusion can also effectively restrict competition for-the-market. Enforcement against bid-rigging provides deterrent effect on such practices. Thus, prohibition of bid-rigging and provisions of Article 4 complement each other with a view to enhancing competition for-the-market.

2. Competition for-the-market and anti-competitive decisions of public authorities

4. As a general principle, public authorities (including municipalities) in Lithuania have an obligation to select a concessionaire¹ through a competitive tender. This obligation is enshrined in the Lithuanian Constitution² as well as in the Law on Competition. Public

¹ The terms “concession” and “concessionaire” are used in this text in a broad meaning and include also cases where public authorities award contracts to companies in the context of application of public procurement rules.

² Article 46 of the Lithuanian Constitution stipulates that “The law shall prohibit the monopolisation of production and the market, and shall protect freedom of fair competition.” The Lithuanian Constitutional Court clarified that public authorities have no absolute discretion as to the method of

authorities are not allowed to grant privileges to or discriminate against specific companies. This obligation is enforced by the Competition Council pursuant to Article 4. The Competition Council has enforced against anti-competitive decisions of public authorities in the context of concessions on a number of occasions.³

5. Article 4 applies to decisions which give rise to differences in the conditions of competition for undertakings. The courts have established that in order to prove the infringement it is not required from the Competition Council to show actual effects on the competitive conditions; potential effects are sufficient for these purposes.⁴ Furthermore, according to the Lithuanian case law, exclusive rights granted to a concessionaire without a tender are deemed to cause absolute differences in competitive conditions.⁵

6. The Competition Council has specified in its decisions⁶ what is the theory of harm applicable for infringements of Article 4 in such cases. Namely, in absence of competition for-the-market, the right to provide services is granted to one company which has no incentives to be efficient. Hence, the prices are higher and the quality is lower as compared to a provider selected through a competitive procedure.

7. In one of its decisions applying Article 4 of the Law on Competition, the Competition Council pointed out that conditions of a tender must be clear, transparent and non-discriminatory.⁷

8. Due to the abovementioned legal context the Competition Council actively supports pro-competitive tenders both using the enforcement and the advocacy tools.

9. In terms of enforcement of Article 4, the Competition Council used to be particularly active with respect to the sector of management, collection and transportation of waste. As of 1 January 2004, the Competition Council has adopted 13 decisions finding breaches of Article 4 on the part of municipalities which entrusted companies with provision of the waste management services.⁸ Application of Article 4 requires to define

selection of service providers and are bound by constitutional imperatives to select service providers using a competitive tender (Ruling of the Constitutional Court, 15 January 2015, No. KT3-N1/2015).

³ See, for example, the decision of the Competition Council on Decisions of Klaipėda city municipality regarding traffic control and supervision of public areas and roads, 20 November 2018, No. 2S-6 (2018); decision of the Competition Council on Decisions of Kaunas city municipality regarding cemetery maintenance services, 2 May 2016, No. 2S-4/2016; decision of the Competition Council on decisions of Šiauliai city municipality regarding public bus services, 6 January 2016, No. 2S-1/2016; decision of the Competition Council on decisions of Kaišiadorys district municipality regarding waste management services, 26 June 2014, No. 2S-6/2014.

⁴ Judgement of the Supreme Administrative Court of Lithuania, 26 March 2009, Case No. A-822-441/2009.

⁵ Judgement of the Supreme Administrative Court of Lithuania, 15 June 2015, Case No. A-1581-502/2015.

⁶ See, for example, Decision of the Competition Council on Decisions of Klaipėda city municipality regarding traffic control and supervision of public areas and roads, 20 November 2018, No. 2S-6 (2018), paragraph 56.

⁷ Decision of the Competition Council on Decisions of Šiauliai city municipality regarding public bus services, 6 January 2016, No. 2S-1/2016, paragraph 81.

⁸ See few recent examples: decision of the Competition Council on decisions of Panevėžys city municipality regarding waste management, 16 July 2015; decision of the Competition Council on

the market as a part of analysis. In Article 4 cases regarding waste management, the geographic market was defined as municipal territory and only one service provider was allowed to enter this market. Consequently, in these decisions the Competition Council dealt with a problem that municipalities eliminated competition for-the-market of waste management. As the step after this series of decisions the Competition Council conducted a market study on waste management.⁹ The study showed among other things that prices tended to be lower in municipalities where a concessionaire had been selected through a competitive procedure. On the other hand, prices tended to be higher in those municipalities where a concessionaire had been appointed directly and had faced no competition for-the-market. The Competition Council has started no Article 4 investigations concerning this sector since the completion of the market study. Nevertheless, even after the completion of the market study, the Competition Council continued to engage in advocacy activities aiming at competitive selection of the service providers. In September 2017 (that is, 2 years after completion of the market study) the Competition Council one more time assessed the situation in all Lithuanian municipalities with regard to collection and transportation of wastes and concluded that out of 60 municipalities, in 20 municipalities the service provider was appointed uncompetitively.¹⁰ In 2015, when the market study was completed, the number of uncompetitively selected providers was similar. However, assessment in 2017 showed that in 5 municipalities there were ongoing competitive tenders. The latter fact may be understood as the positive impact of the market study and subsequent advocacy. The Competition Council is considering assessing the state of play in municipalities with regard to these services again in the future.

10. In cases regarding Article 4 public authorities sometimes put forward an argument that they conducted an assessment which showed that granting a concession to the public company without a competitive tender is the most appropriate way to regulate the market.¹¹ However, in these cases authorities did not provide any acceptable evidence to support their claims. The Competition Council decided and the Court confirmed¹² that in order to show the absence of acceptable potential providers, a public authority had had to organise a competitive tender which had not been done in those cases. The Competition Council, with a view to assess if there was interest on the part of undertakings to provide these services, had enquired several undertakings about their willingness to participate in a tender and provide services in question. These enquiries showed that there had been undertakings willing to provide relevant services and such undertakings had been discriminated by anti-competitive decisions of public authorities.

decisions of Kaišiadorys district municipality regarding waste management services, 26 June 2014, No. 2S-6/2014.

⁹ Decision of the Competition Council on completion of market study regarding waste management, 30 April 2015, No. 1S-47/2015.

¹⁰ Information available at the website of the Competition Council: <http://kt.gov.lt/lt/atviriu-duomenys/komunaliniu-atlieku-surinkimo-ir-vezimo-paslaugos-teikejo-parinkimo-budai-lietuvos-savivaldybese>

¹¹ Decision of the Competition Council on Decisions of Klaipėda city municipality regarding traffic control and supervision of public areas and roads, 20 November 2018, No. 2S-6 (2018), paragraph 55; Decision of the Competition Council on Decisions of Šiauliai city municipality regarding public bus services, 6 January 2016, No. 2S-1/2016, paragraph 93.

¹² Judgement of the Supreme Administrative Court of Lithuania, 21 November 2017, No. eA-2166-624/2017.

11. In the case *Busturas*¹³ regarding public bus services in Šiauliai city the Competition Council examined municipality's decision to grant concession to the public company without a tender. The Competition Council concluded that such decision contravened Article 4 of the Law on Competition because it granted privileges to one undertaking which had no incentives to operate efficiently. Because of that, more public expenses for compensations to the service provider could be needed and passengers could be charged higher prices. Conducting this assessment the Competition Council relied on the position expressed at the OECD Roundtable 'Methods for Allocating Contracts for the Provision of Regional and Local Transportation Services'. In this case the Competition Council held that there were three ways to organise local public bus services: 1) competition in-the-market for all the undertakings willing and capable to compete; 2) competition for-the-market as regards one or several routes; 3) competition for-the-market as regards the entire routes network. The Competition Council did not indicate which method had to be chosen but clarified in its decision that the chosen option must be justified by the analysis of available alternatives.¹⁴ Furthermore, the Competition Council specified that the third option can be implemented only once it is shown that no one is discriminated, and provision of services in this way is more efficient and beneficial for a public interest.¹⁵ The Court confirmed this decision of the Competition Council.¹⁶ On 16 July 2019 the municipality has launched the tender (which is still ongoing) for the public bus services in Šiauliai.

12. In the decision-making practice of the Competition Council there were also cases where undertakings competed in-the-market, but significant investments into infrastructure were needed for entering the market and this constituted serious entry barrier. Under such circumstances public authorities often agree to build the infrastructure necessary for the provision of services. However, afterwards in selection of a concessionaire they are required to respect Article 4 and ensure competition for the right to entry the market and compete therein with other operators. As a rule, such arrangements appear in services which are important for the society, but public authorities do not always act in compliance with the Competition Law in these cases. For example, in one of its latest decisions¹⁷ regarding Article 4, the Competition Council dealt with granting of the concession allowing to operate the swimming pool in Vilnius city. The Competition Council held that the Vilnius city municipality must have provided the concession following the competitive selection of a concessionaire. By directly granting the concession the municipality breached Article 4 of the Law on Competition.

¹³ Decision of the Competition Council on decisions of Šiauliai city municipality regarding public bus services, 6 January 2016, No. 2S-1/2016.

¹⁴ Decision of the Competition Council on decisions of Šiauliai city municipality regarding public bus services, 6 January 2016, No. 2S-1/2016, paragraphs 78-81.

¹⁵ Decision of the Competition Council on decisions of Šiauliai city municipality regarding public bus services, 6 January 2016, No. 2S-1/2016, paragraph 80.

¹⁶ Judgement of the Supreme Administrative Court of Lithuania, 21 November 2017, No. eA-2166-624/2017.

¹⁷ Decision of the Competition Council on the decision of Vilnius city municipality regarding the swimming pool, 4 June 2019, No. 1S-67 (2019).

13. The Competition Council also conducted a market study which concerned entry of generic reimbursable pharmaceuticals to the market.¹⁸ The Competition Council assessed legal framework which determined the procedure of including pharmaceuticals into the list of reimbursable medicines (only pharmaceuticals within the list could be reimbursed to the patient). The Competition Council concluded that rules in force prevented cheaper generic drugs to enter the market and compete in it. In particular, generic drugs had to be 50 % cheaper to enter the list than a patented drug which had already been on the list. In practice, this meant that if a generic drug was cheaper than the patented one, but difference in price was less than 50 %, market entry would be impossible. The Competition Council recommended the Government to amend relevant provisions and encourage entrance of generic drugs into the markets of reimbursable pharmaceuticals rather than restrict it. After the recommendations were passed by the Competition Council, the Government amended the rules as to the prerequisites of the entrance to the list of reimbursable drugs by reducing the required difference in price to 30 %.¹⁹ After the enactment of amendments, in 2018 the amount of consumption of generic drugs increased to 53,3 % of all consumed reimbursable drugs²⁰, as compared to 51,2 % of all consumed reimbursable drugs in 2017²¹. However, it is difficult to unequivocally judge the isolated effects of the amendment induced by the Competition Council because the Ministry of Health of the Republic of Lithuania has alongside changed the whole regulatory framework of reimbursable drugs in many other ways.

14. Nevertheless, the Competition Council has admitted that in some specific areas competition for-the-market may not secure optimal results. For example, in its decision regarding Klaipėda city municipality²² the Competition Council pointed out that the management of the city lighting network due to its infrastructural specificity is a natural monopoly and thus the most efficient outcomes would be achieved by appointing a single entity to operate the network. This was decided, in particular taking into account that the municipality may be not in a position to effectively control the proper use and maintenance of lighting infrastructure if it was transferred to a private operator.²³ The Competition Council closed this part of the case for priority reasons, because inappropriate management of infrastructure would impair public interest of quality, availability and continuity of the

¹⁸ Conclusions of the Market Study of the Competition Council on Reimbursable Pharmaceuticals (approved by the Decision of the Competition Council of 6 December 2016, No. 3S-92 (2016)).

¹⁹ Government resolution on Description of the calculation of basic prices and additional charges regarding pharmaceuticals and medical treatment measures for outpatient medical care, 13 September 2005, No. 994, point 12.

²⁰ See 2018 report of the National Health Insurance Fund (p. 9) which is available at: <http://www.vlk.lt/veikla/veiklos-sritys/kompensuojamieji-vaistai/Statistika/Documents/1001%202018%20%20Komp%20vaist%C5%B3%20suvartojimo%20ataskaita.pdf>

²¹ See 2017 report of the National Health Insurance Fund (p. 9) which is available at: <http://www.vlk.lt/veikla/veiklos-sritys/kompensuojamieji-vaistai/Statistika/Documents/1017%20Komp%20vaist%C5%B3%20suv%20ataskaita.pdf>.

²² Decision of the Competition Council on Decisions of Klaipėda city municipality regarding traffic control and supervision of public areas and roads, 20 November 2018, No. 2S-6 (2018).

²³ Decision of the Competition Council on Decisions of Klaipėda city municipality regarding traffic control and supervision of public areas and roads, 20 November 2018, No. 2S-6 (2018), paragraph 82.

services, and hence there was no evidence that continuation of the case with a view to the competitive selection of the operator would bring substantial benefit to consumers. However, other decisions of the municipality in the same case concerning management of traffic control equipment were found to infringe Article 4 of the Law on Competition because there were no above-mentioned exceptional circumstances in relation to the latter services. The part of the decision by which the Competition Council found an infringement was appealed by municipality and the case is still pending in courts.

15. In 2017 the Competition Council also expressed its official position regarding competition for the operation of heat supply infrastructure.²⁴ The Competition Council stated that municipal heat supply in Lithuania is a natural monopoly. Therefore, regulation is imposed upon undertakings operating in this sector. The Competition Council specified that when the municipality decides to entrust heat supply to a private undertaking, there must be a competitive tender where the best bidder can be selected. In one of its decisions regarding the heat supply sector, the Competition Council held that the prolongation of the contract with the private company *Litesko* constituted an infringement of Article 4 of the Law on Competition because possibility of prolongation had not been stipulated in the initial tender conditions and granted privileges to *Litesko*.²⁵ The court confirmed this decision of the Competition Council.²⁶

16. When restriction of competition is imposed by the law of the Lithuanian Parliament or by the resolution of the Lithuanian Government, Article 4 of the Law on Competition is not applicable.²⁷ The Competition Council closed its investigation regarding entrusting public company *Infostruktūra* with provision of safe network connection services to public authorities after establishing that *Infostruktūra* was actually entrusted with these activities by the law.²⁸ On the other hand, even with respect to anti-competitive Parliament's and Government's acts the Competition Council engages in advocacy activities. For example, the Competition Council suggested to the Government that the provider of universal postal services should be selected through a competitive procedure which would ensure competition for-the-market.²⁹ However, the Government disregarded this suggestion of the

²⁴ The opinion was expressed in the official letter of 20 July 2017 of the Competition Council to the member of the Šiauliai City Municipality Council. The same information was published as the press release at: <http://kt.gov.lt/lt/naujienos/del-savivaldybiu-bedu-kalta-ne-konkurencija>

²⁵ Decision of the Competition Council on decisions of the Alytus city municipality regarding a contract with "*Litesko*", 9 September 2015, No. 2S-2/2015. Confirmed by the judgement of the Supreme Administrative Court of Lithuania, 14 July 2017, No. eA-809-552/2017.

²⁶ Judgement of the Supreme Administrative Court of Lithuania, 14 July 2017, No. eA-809-552/2017.

²⁷ Articles 4(2), 18(1)(3) of the Law on Competition.

²⁸ Decision of the Competition Council on appointment of "*Infostruktūra*" as a safe network provider, 28 June 2019, No. 1S-88 (2019).

²⁹ See press release of the Competition Council which is available at: <http://kt.gov.lt/lt/naujienos/konkurencijos-taryba-ragina-perziureti-planus-suteikti-isimtines-teises-lietuvos-pastui>

Competition Council and appointed the incumbent postal operator as a provider of universal postal services.³⁰

17. One of the challenges of enforcement of Article 4 of the Law on Competition is related to the application of in-house exception of public procurement rules. This exception stems from the EU law and allows a public authority to award the contract directly to the company which it fully controls and which provides 80 % of the services to that public authority.³¹ However, the Competition Council decided in several instances³² and the courts confirmed³³ that notwithstanding the in-house exception, public authorities have to respect the Law on Competition which prohibits direct award of contracts as distorting competition. Thus, it was established that direct award of the contract may contravene Article 4 of the Law on Competition even when conditions of the in-house exception are satisfied.

18. Subsequently, after significant advocacy efforts of the Competition Council, the Law on Public Procurement of the Republic of Lithuania was amended and the article which stipulates conditions of in-house contracts was supplemented by the additional condition which is absent in EU public procurement law. Namely, in-house contracts may be awarded subject to the condition that public procurement fails to ensure that the quality of the services performed, their availability or their continuity can be guaranteed. This additional condition was questioned by the Supreme Court of Lithuania which referred the case to the Court of Justice of the EU asking for a preliminary ruling.³⁴ The Court of Justice ruled in the case *Irgita* that it is open to a Member State to impose on a contracting authority conditions, not laid down in Article 12(1) of Directive 2014/24, if it is to conclude an in-house transaction, including conditions to guarantee the continuity, good quality and availability of the service.³⁵

19. Another challenge related to the enforcement of Article 4 used to be lack of deterrence for the infringements. Absence of fines for infringements of Article 4 resulted in little deterrent effect of the enforcement. Hence, recidivism and reoccurring types of infringements were a general trend (sequence of cases in waste management is an eloquent example). Prior to 2017, the Competition Council had the power to impose behavioural remedies on public authorities after finding an infringement of Article 4. However, this power was not reinforced by any deterrent fining mechanism. Therefore, typically, public authorities had no effective incentives to implement remedies. Since 2017 the Competition

³⁰ Government resolution „On obligation to provide universal postal services“, 15 May 2019, No. 467.

³¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, 65), Article 12.

³² See, for example, decision of the Competition Council on decisions of Kaišiadorys district municipality regarding waste management services, 26 June 2014, No. 2S-6/2014; decision of the Competition Council on decisions of Kaunas city municipality regarding cemetery maintenance services, 2 May 2016, No. 2S-4/2016.

³³ See, for example, Judgement of the Supreme Administrative Court of Lithuania, 29 March 2016, No. A-347-552/2016; Judgement of the Supreme Administrative Court of Lithuania, 26 January 2018, No. eA-1475-556/2018.

³⁴ Decision of the Supreme Court of Lithuania, 13 June 2018, No. e3K-3-120-469/2018.

³⁵ Court of Justice of the EU, Case C-285/18 *Irgita*, 3 October 2019, ECLI:EU:C:2019:829, paragraph 49.

Council is entitled to impose fines on public authorities for infringements of Article 4 of the Law on Competition; maximum fine is 60 000 euros³⁶. In addition, the Competition Council now has the power to impose periodic penalty payments on public authorities of up to 600 euros for every day of not implementing remedies related to Article 4.³⁷ In its decision-making practice the Competition Council has already imposed fines for breaches of Article 4 of the Law on Competition³⁸ as well as for not implementing remedies related to Article 4³⁹. It remains to be seen whether or not the current level of fines for public authorities provides sufficient deterrent effect.

3. Competition for-the-market and anti-competitive agreements of bidders

20. As has been said in the previous section, the Competition Council pursues enforcement activities with regard to decisions of public authorities that distort competition for-the-market. Moreover, as a more typical activity for competition authorities, the Competition Council enforces against anti-competitive agreements of companies participating in tenders. These two functions of the Competition Council complement each other by ensuring deterrence from anti-competitive activities both at the level of authority granting a concession and at the level of a concessionaire. Within such a framework competition for-the-market cannot be bypassed by transferring restrictions of competition to the different level.

21. When undertakings operate in the market where bids are rigged, Competition Council in such decisions specifies that participants of the tender by submitting their bids confirm that they position themselves as competitors and this is sufficient to find that collusion between them constitutes an anti-competitive agreement.⁴⁰ Therefore, the Competition Council does not define markets precisely in such cases. Such approach is approved by courts.⁴¹ In conclusion, typically bid-rigging cases pursued by the Competition Council involve relevant markets with several undertakings – bidders – operating in them.

22. In the past, bid-rigging investigations of the Competition Council concerned the markets which were broader than the relevant market defined for the tenders where bids were rigged. At the moment of submission of this contribution, the Competition Council has not had bid-rigging cases where tender would encompass the whole market and thus collusion would take place in the setting of competition for-the-market. However, there is nothing in law to prevent such investigations to be completed in the future.

³⁶ Article 36(5) of the Law on Competition.

³⁷ Article 36(6) of the Law on Competition.

³⁸ *See* decision of the Competition Council on Decisions of Klaipėda city municipality regarding traffic control and supervision of public areas and roads, 20 November 2018, No. 2S-6 (2018); decision of the Competition Council on the decision of Vilnius city municipality regarding the swimming pool, 4 June 2019, No. 1S-67 (2019).

³⁹ Decision of the Competition Council on non-implementation of the remedies imposed on Panevėžys city municipality, 13 November 2018, No. 2S-5 (2018).

⁴⁰ *See*, for example, Decision of the Competition Council on public procurement of construction services, 23 January 2017, No. 2S-1(2017), paragraph 81.

⁴¹ Judgement of the Supreme Administrative Court of Lithuania, 21 June 2012, No. A⁵⁵²-2016/2012.