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**THE OBJECTIVES OF COMPETITION LAW AND POLICY
AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY**

-- LITHUANIA --

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LITHUANIA

THE OBJECTIVES OF COMPETITION LAW AND POLICY AND THE OPTIMAL DESIGN OF A COMPETITION AUTHORITY WITHIN THE OVERALL GOVERNMENT

1. The Objectives of Competition Policy in Lithuania

The main objectives of competition policy are summarised in the Law on Competition of the Republic of Lithuania (further Competition law), however, the very need to protect competition is identified in the Constitution of the Republic of Lithuania. Article 46 of the Constitution asserts that:

Lithuania's economy shall be based on the right to private ownership, freedom of individual economic activity, and initiative.

- The State shall support economic efforts and initiative which are useful to the community.
- The State shall regulate economic activity so that it serves the general welfare of the people.
- The law shall prohibit monopolisation of production and the market, and shall protect freedom of fair competition.
- The State shall defend the interests of the consumers.

Five principles laid down in this article provide for the constitutional foundation of the national economy. Each of them should be interpreted in coherency with others.

The first principle makes it clear that one of the most fundamental values is freedom of individual economic activity. However, such freedom is not without limits. According to the third constitutional principle the state can impose certain restrictions on economic activity when they serve the general welfare of the people.

The fourth constitutional provision "the law shall prohibit monopolisation of production and the market, and shall protect freedom of fair competition" not only presumes the belief that it is in the public interest to rely on competition for efficient allocation of resources and improvement of welfare but also the concern that individual behaviour sometimes might fail to preserve socially desirable features of such self-regulation. Thus the state has to ensure that certain economic behaviour, such as anticompetitive agreements, abuse of a dominant position, and creation or strengthening of a dominant position by means of mergers is not allowed. On the other hand, the constitutional principle explicitly states that nobody is allowed to introduce a monopoly. Therefore even the state doesn't have a right to grant exclusive rights to a particular business undertaking due to which the relevant market might become monopolised. Furthermore, the state authority or local government institutions have to refrain from decisions which distort or are capable of distorting fair competition.

In general, the Constitution seeks to create a reasonable balance between the interests of an individual and those of society. The same applies to the constitutional principles of the organisation of the national economy. In this particular case, such a balance is supposed to be achieved by protecting freedom of fair competition. Due to new challenges brought by complex and constantly changing economic

environment the proportion of prohibitions and permissions may fluctuate. However, while the content of the laws changes the constitutional principles remain the same.

Lithuania introduced its first Competition law in 1992. After signing Europe Agreement with the EU in 1995 Lithuania had to honour its commitment to harmonize national competition policy with the Articles 81 and 82 of the EC Treaty. This implied quite radical changes and one of them was the new Competition law that was enacted in 1999.

The main objectives of the competition policy in Lithuania are identified in a purpose clause. Article 1 of the Competition law establishes that:

1. The purpose of this Law is to protect freedom of fair competition in the Republic of Lithuania.
2. The Law shall regulate the actions of the public and local authorities and undertakings, which restrict or may restrict competition as well as actions of unfair competition, shall establish the rights, duties and liabilities of the said institutions and undertakings and the legal basis for the control of competition restriction and unfair competition in the Republic of Lithuania.
3. This Law seeks for the harmonisation of the Lithuanian and the European Union law regulating competition relations.

Thus the main objective of the law is “to protect freedom of fair competition in the Republic of Lithuania.” This echoes the constitutional principle “the law ... shall protect freedom of fair competition.” Aforementioned article explicitly requires that the state authority or local government institutions should refrain from decisions which distort or could distort fair competition. Finally the law “seeks for the harmonisation of the Lithuanian and the European Union law regulating competition relations” because Lithuania must honour commitment to harmonize national competition policy with the Articles 81 and 82 of the EC Treaty.

The need to harmonize national competition policy with the Articles 81 and 82 of the EC Treaty is consistent with the goal to protect freedom of fair competition. Therefore neither the Competition Council of the Republic of Lithuania nor the relevant courts confront the dilemma of making trade-offs between conflicting objectives. It is worth mentioning that the old Competition law didn't explicitly identify the objectives of the competition policy, however, it included enhancement of production efficiency and competitiveness among the goals of merger control. Neither the old law nor the new one takes into account any other goals of industrial or social policy. However, in order to avoid possible conflict with other laws the prohibitions contained in the competition law are not applicable “in cases where [competition law] or laws governing individual areas of economic activity provide for exemptions and permit certain actions prohibited under [competition law].”

2. The Design of the Competition Authority

In Lithuania the competition authority has a two-tier structure. The Competition Council consists of a chairman and four members who are appointed by the President of the Republic upon nomination by the Prime Minister. The Chairman serves for a term of five years while the members serve for a term of six years. The terms of two members expire every three years so the Council is partially renewed without a total loss of continuity. The Competition Council adopts decisions regarding violations of the competition law but all investigations are carried out by the Administration of the Competition Council. At present, the

Administration of the Competition Council consists of eight divisions and employs around 45 people. Five divisions out of eight are engaged in investigations related to the competition law. The present design was introduced only in 1999. The preceding competition authority was the State Competition and Consumer Protection Office which was directly accountable to the Government while its earliest predecessor Agency of Prices and Competition was a constituent part of the Ministry of Economy in the early 1990s. The State Competition and Consumer Protection Office conducted investigations, however, competition cases were decided by the Competition Council made of several members from the Competition Office and various interest groups.

The change in the composition of the Competition Council is consistent with the introduction of the main objective of the competition policy, which is “to protect freedom of fair competition.” Representation of interest groups would have made sense if some other objectives had to taken into account, e.g. industrial or social policy. However, such representation is unnecessary when the Competition Council has to protect freedom of fair competition.

After 1999 the competition authority not only received substantial powers of enforcement, but also gained significant independence. It is important that in Lithuania the Competition law prohibits the state authority or local government institutions to adopt decisions which distort or are capable of distorting fair competition. The Competition Council has powers

To examine the conformity of legal acts or other decisions adopted by public and local authorities with the requirements of Article 4 of this Law, and, where there is sufficient cause, apply to public and local authorities with the request to amend or revoke legal acts or other decisions restricting competition. In case of failure to satisfy the requirement the Council shall have the right to appeal against such decisions, except for the statutory acts issued by the Government of the Republic of Lithuania, to the Higher Administrative Court.

However, enforcement of such prohibition would not be effective if the Competition Council lacked independence from the executive branch of the government. The fact that the President of the Republic of Lithuania is elected by a direct vote and it is he or she who appoints the Chairman and the Members of the Competition Council helps to achieve this goal. On the other hand, according to the Competition law “the Chairperson of the Competition Council or, in his absence, another member of the Competition Council appointed to act for him shall have the right to participate in the meetings of the Government of the Republic of Lithuania without the right to vote and must voice his comments should the decisions proposed for adoption contradict this Law.” Exercising this right it is possible to protect freedom of fair competition ex-ante.

The budget of the Competition Council is decided by the Parliament upon proposal from the Government. The law doesn't provide the Competition Council with additional revenues from fees, fines or other sources. However, such revenue sources would provide the Competition Council with more independence.

The courts complement the enforcement of competition policy objectives. The plaintiffs can bring up their cases directly in court without filing a complaint with the Competition Council. However such instances are very rare. On the other hand, all decisions of the Competition Council in competition cases may be appealed against to the specialized administrative court because the law provides such right to business undertakings, natural persons, and government institutions.