

Unclassified

DAF/COMP/GF/WD(2016)26

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

19-Oct-2016

English - Or. English

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

Global Forum on Competition

INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution from Latvia

-- Session III --

1-2 December 2016

This contribution is submitted by Latvia under Session III of the Global Forum on Competition to be held on 1-2 December 2016.

Ms. Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division
Tel: +33 1 45 18 77, Email: lynn.robertson@oecd.org.

JT03403211

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/GF/WD(2016)26
Unclassified

English - Or. English

AN OVERVIEW OF THE INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

-- Latvia --

1 Structure of competition authority (board or single commissioner, recruitment process etc.)

1. The Competition Council of Latvia (the CCL) is a governmental institution of direct administration, supervised by the Ministry of Economics (hereinafter – supervising ministry). According to the Latvian Competition Law (hereinafter – the Law), directions regarding the initiation of the investigation of a particular case, the manner in which the investigation shall be conducted, or a decision taken, shall be independently adopted within the framework of its competence, and not given to the Chair and Board Members by the government, the supervising ministry or other persons. The CCL shall not coordinate its position or opinion with a higher institution.

2. The CCL has investigative and decision making body under one roof, as a single administrative competition authority, thus ensuring separation between investigation and decision-making. The Board as a *quasi-judicial* body is entitled to establish infringements in all antitrust and other cases investigated by the CCL as well as to impose fines by the decision, to decide on opinions and recommendations issued (to private or public bodies) after conclusion of market inquiries and other assessments done by CCL. Until 2010 when the Law was amended, the CCL had five Board Members, with two of them rotated from supervising ministry as civil servants. Now at the Board of the CCL there are 3 members selected according to professional criteria.

3. The Head of the authority (at the same time Chair of the Board) and Board Members are recruited by the supervising ministry. The recruitment for the investigation units is made by the CCL itself although the new positions have to be coordinated with the ministry and State Chancellery. The employees of the authority, incl. the Board Members, investigation experts and lawyers are civil servants. According to the Law, the mandate of the Board Members (also the Chair of the Board) can be renewed once. The supervising ministry is authorized to choose the selection process and so far three options were used by the supervising ministry: (i) after the end of the first term of mandate ministry recommends the candidate to be approved by the government, (ii) ministry selects and short list from the candidates the same Board Member, or (iii) selects and short list a new candidate.

4. This means that none of the Board Members at the end of the first mandate can be certain whether his/her candidature will be proposed by the supervising ministry for the second term. In addition, if the selection processes are organized non-transparently, in all cases it is still possible that unsuitable candidate can be appointed or remain at the office as the Head/Board Member for the next term. Everything depends on the political ethics and needs of the ministry, as well as on political party which oversees the ministry.

2. Budget

5. The CCL is financed from the state budget. The supervising ministry reviews all budgets for its subordinate institutions evaluating their tasks and priorities. The budget of the CCL is a part of the budget of the supervising ministry. The final draft of the budget for all institutions including the supervising ministry itself is submitted to and reviewed by the Ministry of Finance. After the evaluation, the whole state budget needs to be approved by the government. The final approval is made by the Parliament.

6. The CCL has 49 employees and its annual budget is 1,04 million euros. For comparison, according to the 2016 Global Competition Review data, among the 39 World's top competition authorities the CCL has the lowest budget. Overall the CCL remuneration is not competitive, even when compared with wage levels within the ministries or other regulatory or law enforcement agencies.

7. When allocating the budget, the needs of ministries usually are prioritized over their subordinate institutions. Even if institution is empowered with law to fulfill new tasks, it mainly has to perform new tasks within actual budget. From 2016, the CCL has two new tasks¹ however, the increase in budget is planned only in 2017. Also additional increase of the CCL funding in amount of EUR 57 000 per year will be gained in 2017 because of the merger fees introduced in Law since June 2016.

8. In order to improve the funding the CCL also proposed that part of fines imposed by the CCL for the violation of the Law has to be allocated to its budget. This proposal was not supported by the supervising ministry.

3. The main existing challenges in terms of legal and de facto independence of the Competition Council of Latvia

3.1 *Legal reforms to enhance the independence of the competition agency*

9. In order to strengthen functional independence, since 2013 the CCL implemented an internal prioritization and also has published guidelines that explain further priorities of the CCL. Since June 2016, the Law was amended giving the powers to the CCL to set priorities that strengthened authority's functional independence. Amendments to the Law provided the CCL with rights to improve the effectiveness of its case work, to prioritize cases and assess whether an official case investigation or other methods that also aimed to increase prevention and discontinue infringement with minor effect are the most effective. Thus, the CCL is able to focus its resources primarily to detection of infringements that cause the most damage and affect the essential part of public or any economic sector. At the same time, the CCL keeps track of the smaller irregularities (involving small market players, first-time offenders, or those affecting a small market share) using warning procedure and negotiation.

10. Anyway since 2012 the CCL has advocated for institutional (also financial and personnel) independence from the executive branch. Up to now Latvia has received recommendations from international organizations (European Commission, OECD) with regard to strengthening independence of competition authority. However, up to now significant efforts of the CCL to withdraw subordination from executive branch and to gain greater institutional independence have been neglected.

¹ To supervise relations between all retailers and suppliers and to lower the risk of distorted competition to advice public authorities if f or other institutions are planning to engage in commercial activities. These to functions have to be fulfilled within the CCL actual budget optimizing its already insufficient recourses.

11. Although in 2012, the CCL received a conceptual support from the governing minister the amendments proposed by the CCL and submitted in 2014 were not accepted. Frequent changes of ministers since 2012 (already four) have not facilitated further developments of CCL's proposals. There have been only discussions between the supervising ministry and the CCL, however, the ministry has been reluctant to the CCL's independence proposals, arguing there is no political support for such changes or there is no need to increase number of independent institutions in Latvia.

12. Nevertheless, the CCL strives to achieve its independence using other legal options. The CCL has prepared proposals which again have been submitted to the supervising ministry:

- The first proposal for the amendment provides the CCL with a sufficient power to enforce and challenge laws and governmental and municipal acts, if they infringe competition rules and are discriminatory;
- The second proposal allows the CCL to gain an exceptional status outside the civil service system as other independent authorities have (Latvia's Mass Media Council, the Public Utilities Commission, the Financial and Capital Market Commission, etc.). The amendments provide for discretion of the Parliament to decide on the budget request of the CCL. In addition, it foresees that the remuneration at the CCL would be set at the level comparable to other independent authorities located outside the unified wage grid;
- It is difficult for small institutions with limited resources to maintain the required quality and productivity levels in a long term. The CCL has expressed support for the concept of a possible merger of the CCL and the Public Utilities Commission of Latvia. The Public Utilities Commission is a completely independent body whose budget is comprised of contributions from members of regulated market. Competence of both institutions in certain sectors is quite similar, a possible merger could be a logical solution.

13. Currently only the first proposal has been included for the inter-institutional harmonization – to provide the CCL with necessary authority to take actions against public administrative bodies.

3.2 *De facto independence*

14. **Accountability, professionalism, neutrality could increase the reputation of the Authority and rise to certain extent authorities *de facto* independence.** Transparent and due cooperation with the NGO's having recognized the accountability, professionalism, neutrality of the CCL, can be a good counterbalance to political intervention in some situations. The CCL with an active, impartial and accountable position in public has managed to establish excellent reputation in society. This probably is one of the reasons why the authority is also quite well respected by the Government and the Parliament. The significant number of the investigated antitrust cases and competition advocacy activities has strengthened both knowledge and self-awareness of the CCL, thus given possibility to determine authority's plans according to objective priorities and to set aside politically motivated recommendations that several years ago were expressed quite frequently.

15. International developments towards higher common standards as well as recommendations stemming from international organizations such as OECD and European Commission are very important as they can raise awareness at national level (among politicians, governmental administration). In Latvia, the support from the OECD and the EC in form of recommendations at least has minimized possible influence on activities of the CCL in political or administrative way. But it cannot create long term stability due to frequent political and personnel changes at the supervising (ministry) level.

16. **Factors that may *de facto* affect authority's independence and neutrality negatively have to be removed.** The CCL in its current status is only partly independent and is not protected from external (political) pressure. Even if during the last period of time there was no pressure from supervising ministry, it does not mean that all the risks have been removed. By appointing inappropriate candidates in the Board, the reputation of the authority can be put at risk due to unprofessionalism. Moreover, if there is no support among the Members of the Board, the Head of the authority will have difficulties resisting the pressure from supervising authority by himself or herself alone. Especially if the person that leads authority have to report regularly about tasks fulfilled and is evaluated by the administration of the ministry through assessment procedure as a civil servant. Expressing opinion that differ from that of the higher administration of the supervising ministry during the mandate can hinder the necessary cooperation with regard to budget approval, elaboration of legislative proposals, etc.

3.3 *Main challenges*

17. To sum up, possible conflict with executive branch may seriously interfere with the work, decision-making, and affect cooperation. Therefore, for the CCL it is important to challenge existing legal set up of institution and advocate for strengthening of institutional, functional, personal and financial independence of the authority, specifically for certain reasons:

1. **Effective application of Law regardless of the legal status of body (private or public).** Currently the legal status and regulation does not make the opinion of the CCL binding to public institutions. Competition distortions created by public administrative bodies require not only advocacy but also effective enforcement tools for prevention of the distortions. The CCL has to have powers to intervene against anticompetitive actions of public administrative bodies distorting level playing field.
2. **Full functional independence and neutrality is impossible without institutional, personal and financial independence.** Competition rules apply universally to economic activity and require equal enforcement according to economic principles. Each sector of the economy and market player is viewed objectively and no political or private interest group should have direct or indirect influence on decision making process. Ministries and other government institutions usually tend to protect internal market, interests of government (also acting as representatives in state owned enterprises).

The legal status of the CCL (e.g. subordination to the executive branch in the form of supervision) needs to be altered to ensure neutrality, to remove the inherent conflict of interests with the executive branch, and to minimize risks of political influence on decision making. In Latvia there is a large proportion of public sector, the turnover of the state owned enterprises accounts for around 18% of annual GDP. Moreover, some of them maintain dominant position in the markets even after liberalisation. Therefore, the independence is especially important when decisions address state owned enterprises where the ministries are representatives for state as shareholder. To avoid conflict of interests, the CCL has to be distanced from the government and thus isolated from any political influence.

3. **Sufficient financial resources and autonomous budgeting.** The CCL has to have autonomous rights to plan, to submit and to defend the annual budget before the Parliament like independent institutions do (the State Audit Office of Latvia, the Public Utilities Commission of Latvia, The Financial and Capital Market Commission of Latvia etc.).

4. **Personal independence of the Board Members due to quasi-judicial nature of decision making.** Higher standards for authorities which have been recognized as *quasi-court* have to be set, versus those who carry out only investigations. Selection of representatives of the Board Members must be based on professional criteria, and transparent selection procedure. High professional ability is important along with independence and accountability in decision making, in order to deal with possible political or other external intervention. Appointment of the Members should be done both by Government and Parliament, as well as dismissal of the Members should be limited only to *cause majeure* cases.

Overall authority has to be accountable to public and to stakeholders (Government, Parliament, associations of undertakings, etc.). Evaluation of the tasks fulfilled by the Head of authority has not to be done by supervising ministry or other body what represents executive branch. That's because previously made decisions or opinions expressed by the CCL which contradict the position of the ministries may negatively affect the evaluation of the Head of the authority.

5. **Autonomous management tools.** For efficient fulfillment of tasks and strengthening of capabilities the authority has to have autonomous management tools at its disposal, inter alia:
- to make decisions on the number of employees, new employment positions and salaries for these positions within the allocated budget;
 - to determine the remuneration which is comparable to other law enforcement and regulatory institutions. Currently the remuneration of the CCL is defined by a unified wage grid applied to all civil servants in public sector. It is discriminatory low compared to other law enforcement and regulatory institutions which have exceptional status outside this unified wage grid. This leads to a persistent resignation of the employees who are moving to a private sector or other regulatory institutions;
 - to flexibly plan their budget spending on financial and personnel matters without a constant approval from the supervising ministry;
 - to set the internal structure and procedures of the organization independently (most internal procedures need to be approved by the supervising ministry and thus the process, although highly formal, often is delayed).