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**THE PROMOTION OF COMPETITIVE NEUTRALITY BY COMPETITION AUTHORITIES -
Contribution from Latvia**

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The Promotion of Competitive Neutrality by Competition Authorities

– Contribution from Latvia –

1. Introduction

1. In the recent years the Competition Council of Latvia (CC) has developed its approach towards competitive neutrality matters. 3 main directions how CC ensures competitive neutrality can be distinguished. Firstly, CC uses its advocacy powers. It encounters preparation of opinions on the draft legislation and advocating for amendments in existing legislation, preparation of opinions on activities of public administrative bodies. CC actively cooperates with business NGO's and during the drafting of legislation in Cabinet of Ministers and parliament. Secondly, Article 88 of State Administration Structure Law imposes an obligation for public administrative bodies to consult with CC and receive CC opinion prior establishing a new SOE or allowing to expand the scope of activities of existing SOE. Law also obliges public administrative bodies once in 5 years to reassess all activities of SOE and present its evaluation to CC and NGOs. Thirdly, in 2020 came into force articles 14.¹ and 14.² of Competition Law that prohibit public administrative bodies and SOEs to distort competition and provides liability for competitive neutrality infringement. Mentioned articles provide CC with enforcement powers towards competitive neutrality infringements.

2. Advocacy of the Competition Council

2. In respect of legislation CC in order to ensure competitive neutrality may use its advocacy powers determined also by Competition law. Competition Law provides the rights to the CC to prepare and submit opinions regarding draft regulatory enactments to be examined by the Cabinet which directly or indirectly affect issues on the protection as well as elaborate draft legislation for submission to the Ministry of Economics for further legislation process¹. Furthermore, Cabinet of Ministers 07.09.2021. regulations No 606 "Rules of procedure of Cabinet of Ministers" provides the right of CC to participate in the State secretaries' meetings in the advisory capacity. As well as determines that opinion of Competition Council is required if draft is related to matters of competition protection and

¹ Art.6 (3) of the Competition Law

"The Competition Council, as an institution subordinate to the Ministry of Economics, shall:

- 1) within the scope of its competence, draw up and submit draft regulatory enactments to the Ministry of Economics in accordance with specified procedures;
- 2) prepare and submit opinions regarding draft regulatory enactments to be examined by the Cabinet which directly or indirectly affect issues on the protection, maintenance or development of competition; and
- 3) in the event of privatisation, reorganisation and demonopolization of State or local government undertakings (companies), submit, if necessary, to the institution concerned written proposals or opinions regarding observance of the principles for the protection, maintenance or development of competition". [http://www.kp.gov.lv/uploaded_files/ENG/Competition_law.pdf]

development. CC also follows the list of drafts in harmonisation process and provides its opinion if draft may have impact to competition, if the responsible ministry hasn't requested opinion of the CC.

3. CC participates in inter-institutional meetings as well as in State Secretaries' meetings to defend its position, if the recommendations of the CC are not taken into account. During the further legislation process CC may participate in the meetings of the Cabinet of Ministers Committee and meetings of the Cabinet of Ministers.

4. During the legislation process in the Saeima (parliament), CC has the rights to participate in the meetings of parliamentary committees and submit its opinion in writing but can't submit legislative proposals to the parliament independently. According to Law on Rules on Procedure of Saeima proposals for draft laws in legislative process may be submitted to the Saeima only by members of the parliament and ministers. Therefore, initially CC may address its proposal to the Minister of Economics or the deputy.

5. In case if the issue of competitive neutrality in the legislation already in force is revealed (e.g., during market supervision or through a complaint received from undertaking or association), CC can submit proposal to the relevant ministry.

6. If competitive neutrality problem is caused by regulations of the municipalities and regulatory enactments of municipality doesn't correspond to the law CC is entitled to request the Ministry of Environmental Protection and Regional Development to intervene according to the Law on Municipalities. CC also has elaborated Competition Assessment Guidelines for Decisionmakers² to help policymakers assess the impact of their decisions on competition and to choose options more favourable to the competition.

3. The powers of CC to consult public bodies on participation in a SOE

7. Amendments in Art. 88 of State Administration Structure Law³ (in force from 01.01.2016.) provides obligation to state and municipalities before establishing capital company or reassessing participation in SOE once in the 5 years⁴ to consult with the CC and the relevant entrepreneurs NGOs. Obligation to reassess participation in the SOEs according to the law is not binding to the SOEs with strategic importance in sectors like energy, railway etc. State and municipalities shall carry out the evaluation of the commercial activity of the SOE including also the economic evaluation in order to substantiate that the participation is the most effective way to fulfil the necessary tasks of SOE. According to the State Administration Structure Law such conditions need to be fulfilled to justify the entry of a public person into the market:

- a market failure is prevented⁵

² Available in Latvian (<https://www.kp.gov.lv/lv/media/1069/download>, [2015])

³ <https://likumi.lv/ta/en/en/id/63545-state-administration-structure-law>.

⁴ Art.4 and Art.7, Law on Governance of Capital Shares of a Public Person and Capital Companies <https://likumi.lv/ta/en/en/id/269907-law-on-governance-of-capital-shares-of-a-public-person-and-capital-companies>.

⁵ A situation when the market is incapable to satisfy the public interest in the relevant field on its own.

- strategic goods⁶,
 - strategic properties⁷
8. CC has elaborated guidelines Preconditions and evaluation for public persons participation in a capital company⁸ (2019) as well as Self-assessment tool for the assessment of participation in a SOE⁹ (2020) to facilitate the reassessment procedure for public bodies and promote broader evaluation of impact on market and competition in it, in order to choose the most favourable solution to competition.
9. CC additionally requires that possible competitive neutrality risks are evaluated before the entrance into the market as well as in reassessment procedure of participation in SOE.
10. State aid assessment is out of the scope of the CC, and it is in competence of Ministry of Finance to evaluate compliance to the state aid rules.

4. Competitive neutrality regulation in Competition Law

11. Amendments of Competition Law that give enforcement powers to CC to deal with competitive neutrality infringements came into effect in January 1, 2020. It must be noted that the whole legislative process including draft law consultation with stakeholders, debates and adoption in the parliament lasted almost 6 years. Aim of the legal framework was to ensure that public administrative bodies and SOE do not hinder competition leveraging public power, resources, rights etc. as competitive advantage.
12. Article 14.¹ of Competition Law¹⁰ establishes that public (state and municipal) administrative bodies and SOE in which a public administrative body has a decisive influence are prohibited from hindering, restricting or distorting competition.
13. Article also provides a list of possible distortions, i.e.:
1. Discrimination of market participants by creating different conditions for competition. A precondition for the application of this paragraph is different treatment of a public person towards several market participants who remain in a comparative level-playing field and at the same time it is not possible to justify the different treatment of them. CC refers to this paragraph also in respect of public procurements.
 2. Conferring advantages for the SOE. This paragraph includes obligation to SOE to prevent risks of cross-subsidization. Competition law does not prevent public persons from operating in the market but indicates the need to set the prices of services in accordance with market price, including all existing costs from commercial activity, as well as the need to separate the functions of commercial activity from public functions.

⁶ the activity of a capital company of a public person or a capital company controlled by public persons results in the creation of goods or services that are strategically important for the development of an administrative territory of the State or a local government or the State security;

⁷ the properties that are strategically important for the development of an administrative territory of the State or a local government or the State security are administered.

⁸ Available in Latvian (<https://www.kp.gov.lv/lv/media/1060/download>).

⁹ Available in Latvian (<https://www.kp.gov.lv/lv/media/1063/download>).

¹⁰ <https://likumi.lv/ta/en/en/id/54890>

3. Actions that force private company to leave a relevant market or create barriers for entry or make it difficult to operate in a market. In most cases CC refers to this paragraph when competitive neutrality issue has emerged from regulatory enactments or decisions of public administrative body.
14. It also must be kept in mind that the list of distortions is not exhaustive, and the legislator has left the list of distortions opened.
15. In accordance with section 4 of Article 14.¹, Article 14.¹ can be applied insofar as the specific activity does not necessarily result from the requirements laid down in other laws or actions that result from abuse of dominance of SOE or public body.
16. To facilitate for public administrative bodies the application of the new provision of the Competition Law in practice, the Competition Council prepared competitive neutrality assessment guidelines¹¹ in 2019.

4.1. Procedure for neutrality infringements

17. CC initiates cases on its own initiative, considering the priorities, as well as the impact of the alleged infringement on competition and on essential public interests. Competition Law states that in the case if CC recognizes a breach of competitive neutrality, CC is obliged firstly to negotiate with respective public administrative body or SOE to prevent and restrain it from further breach of competitive neutrality.
18. If the negotiations with SOE are unsuccessful, CC may take a decision establishing a violation of competitive neutrality, and therefore impose a legal obligation and a fine. With legal obligation CC can oblige SOE to execute certain actions or restrain SOE from performing certain actions. For example, with legal obligation CC could impose an obligation to SOE not to apply internal regulatory enactments or decisions, to amend the provisions of agreement, to renew cooperation with a market participant, to inform the public about amendments to the regulations and their further application or change of the form of cooperation. Still CC may not impose a legal obligation which makes it impossible to fulfil the autonomous functions of a municipalities and state administration tasks delegated thereto.
19. Competition law also allows CC to impose a fine against SOEs that amounts up to 3 % of the net turnover for the previous financial year of SOE.
20. In the case if the negotiations are unsuccessful with state or municipality administrative body, Competition law does not provide CC rights to issue an enforcement decision and impose a fine against public institution. In case government institutions is involved CC has the right to refer its report through Ministry of Economics to the Cabinet of Ministers. In the case of municipalities CC is entitled to submit its opinion to the Ministry of Environmental Protection and Regional Development, which supervises the legality of actions of municipalities.

¹¹ Available in Latvian (<https://www.kp.gov.lv/lv/media/1066/download>).

4.2. Example. Grave digging service in municipalities

21. CC in response of an anonymous submission initiated market surveillance and it turned out that in several municipalities of Latvia only municipal companies can provide this service. Market surveillance revealed these municipal companies are not only entitled to exclusive rights to provide grave digging service that is one of the indispensable services for provision of funerals but also offer whole package of funeral services. CC considered that in such way these companies thereby obtain advantages in comparison with other market participants. Due to negotiation procedure with these municipalities it was achieved that market of grave digging services was opened to all market participants and respective regulatory enactments amended.

5. Competitive neutrality issues in public procurements

22. The basal principle in the public procurements is that the contracting authorities have an autonomy to determine the requirements in the public procurement documentation, however it is not absolute principle and the contracting authorities must observe provisions of public procurement legislation as well as the competition neutrality in the design of the procurement documentation.

23. In any case, provisions of the procurement documentation must be aimed solely to achieving the objectives of the procurement and meeting the needs of the contracting authority. Therefore, the action of the contracting authority, imposing appropriate requirements to candidate or tenderer, cannot infringe its boundaries objectively towards receiving the most qualitative performance. The contracting authority shall have the right to determine such procurement selection and evaluation criteria, which shall, as far as possible, exclude doubts regarding the possibility of an inappropriate offer.

24. The compliance of public procurement with the regulatory framework can be estimated by the Procurement Monitoring Bureau (hereinafter - PMB) and CC, but each authority evaluates the compliance of public procurement with regulatory enactments within its competence.

25. Although the CC monitors public procurement compliance from competitive neutrality's perspective, the main competent authority in the field of public procurement is the PMB. In order to ensure effective control of procurement procedures, a mechanism has been established which provides that persons, who consider that a violation of public procurement legislation has occurred, have the right to express their objections in accordance with the procedures and within the time limits laid down in the public procurement legislation.

26. It must be noted that only persons, who are actually and potentially interested in being awarded a procurement contract, are entitled to submit a complaint the PMB regarding the provisions for selection of candidates or tenderers, technical specifications and other requirements which relate to the specific procurement procedure, or regarding the activities of the contracting authority or the procurement commission during the course of the procurement procedure.

27. According to the Public Procurement Law, the PMB monitors the legality of procurement by the contracting authority if the estimated contract price of public supply contracts or of service contracts is EUR 42 000 or more and the contract price of public works contracts is EUR 170 000 or more.

28. The CC competence in evaluation of competition neutrality aspects in procurements is broader and is not limited to the threshold value of the contract. The CC is entitled to request the contracting authorities to provide explanations regarding observance of the competition neutrality in any procurement which is made by the contracting authorities.

29. Taking into account that the PMB acts as a “court” settling a dispute between the interested supplier and the contracting authority, the compliance of the claim raised by contracting authority to public procurement legislation the PMB may only be evaluated if the interested supplier has submitted an application to the PMB.

30. The CC is entitled on its own initiative to ask explanation for contracting authority on its requirements in procurement documentation regarding the proportionality and impact of the specified requirements on competition and whether it is possible to impose less restrictive requirements on competition and there is no need for a market participant's submission as a prerequisite.

31. As to whether the requirements in a public procurement are sufficiently effective to achieve the objectives, the CC has a limited right of evaluation and the result depends on the contracting authority observations. An important aspect for evaluating the procurement requirements is the explanation provided by the contracting authority regarding the necessity of the requirements made, and it is not enough to find that other solutions exist. If the requirements are not disproportionate, the CC probably could not oblige the contracting authority to reduce or modify the requirements set out only because, in theory, it might be possible.

32. Both institutions (PMB and CC) may assess the same qualification or technical requirements which contracting authority have included in procurement documentation. The PMB assesses public procurement requirements in context of the public procurement framework and related regulatory enactments, examining whether the specific public procurement procedure complies with the requirements of the relevant regulatory enactments. While CC would assess these requirements in the context of competitive neutrality clauses determined in the Competition law. Meanwhile CC and PMB if necessary mutually may consult each other to ensure consistent application of the legislation.

33. The PMB may influence the progress of the specific public procurement procedure and impose certain legal obligations, such as prohibiting the contracting authority from entering into procurement contract or general agreement.

34. However, the right to apply legal obligations (in the context of the principle of competition neutrality) has also been granted to CC on the basis of the provisions of Article 14.² of the Competition Law.

35. The fact that the requirement included in the procurement documentation complies with the regulatory enactments in the field of public procurement does not automatically assume that it will be in conformity with the provisions of the Competition Law and there is no risk of a breach of competition neutrality.

36. CC is entitled to exercise its powers and to consider the conformity of the public procurement procedure with the requirements of competition neutrality, to the extent that CC does not interfere with the competence of the PMB. In the case of a favorable PMB decision to the contracting authority, CC would not assess the application of the regulatory enactments in the field of public procurement, but only the validity of the reasons made by the contracting party and their conformity with competition neutrality.

37. In cases when CC identifies anti-competitive requirements in procurement documentation, CC negotiates with contracting authority on the requirements laid down in public procurement, drawing its attention on the risk of a breach of competition neutrality. There are number of cases closed during the negotiations and the contracting authority takes note of CC views and specifies the requirements of the procurement documentation.

38. If contracting authority -SOE- does not take note of CC views and do not specify the requirements of the procurement documentation then CC may impose a legal obligation and penalty to SOE at the time of the procurement process and after the conclusion of the contract.

39. The legal obligation will depend on the type of non-compliance identified by CC and the possible solution that could most effectively achieve the objective of the legal obligation to prevent distortion of competition.

40. It is not excluded that if CC determines that any of the requirements set out in the procurement have been unfounded and thus affected the competitiveness of the tenderers, including potential tenderers, and the outcome of the public procurement procedure, CC will be entitled to take a decision which includes the legal obligation to terminate the specific contract between the SOE and the winning tenderers. This would be considered to be the final solution and would only be applicable in particularly serious cases where it was recognized that this was the most effective way of preventing the consequences of non-compliance.

41. In cases where a potential distortion of competition can be prevented by more lenient means, for example by requiring the SOE to modify certain contractual conditions, such as a reduction in the duration of the contract, CC will prefer the solution in question. If the contract had been completed, CC would not be able to impose a specific legal obligation that would eliminate the discrepancies or consequences identified by CC.

5.1. Example. Procurement of car number plates

42. CC received a complaint regarding procurement of car number plates production that was announced by SOE «Road Traffic Safety Directorate» and was won by a company that has manufactured and supplied car number plates for needs of SOE «Road Traffic Safety Directorate» (hereafter - Directorate) for more than 10 years.

43. CC initiated a market surveillance, examining the problems of qualification requirements in the procurement. Also, CC compared price for car plates that is being paid by consumers in Latvia with other Baltic states, and concluded that price in Latvia was much higher.

44. As a result of market surveillance, CC provided a list of recommendations to Directorate that it should observe in its next procurement.

45. The main conclusions and recommendations were:

- Requirements of the procurement provided advantages to a company that has manufactured and supplied car number plates for needs of Directorate for more than 10 years and is located in the building of Directorate on the basis of a rental agreement.
- CC especially highlighted requirement to produce and deliver car plates in 30 minutes. CC pointed that only an enterprise that is located in the same building was able to fulfill this requirement.

- CC suggested to Directorate in its next procurement to develop a procedure on how to offer to applicants lease of premises where production of car plates could be fulfilled.
- In order to promote competition, CC suggested to Directorate to set a longer term for the first delivery of car plates from the day of concluding the procurement contract compared to the previous 45 days.

46. In the next procurement, Directorate took into account most recommendations of CC. Although the same company won the procurement, the price was 3 times lower than previously.