

Unclassified

English - Or. English

10 May 2021

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

Working Party No. 2 on Competition and Regulation

Competition Enforcement and Regulatory Alternatives – Note by Lithuania

7 June 2021

This document reproduces a written contribution from Lithuania submitted for Item 1 of the 71st OECD Working Party 2 meeting on 7 June 2021.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm>

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JT03476184

Lithuania

1. Introduction

1. The Note by Lithuania overviews the legal framework of the regulated electronic communications sector and possible overlap of competences between the sectoral regulator and the competition authority. The Lithuanian sectoral law stipulates main principles for the regulation of electronic communications activities and confers the Communications Regulatory Authority a function of ensuring effective competition in this sector. The Lithuanian Competition Council has significant responsibilities in the electronic communications sector as well. From the legal standpoint, responsibilities of these two authorities seem to be defined and delimited. However, in practice, the boundaries of jurisdiction regarding responsibilities of the sectoral regulator and national competition authority may not be evident. This problem is discussed referring to a specific decision adopted by the Lithuanian Competition Council. It illustrates how the power to apply margin squeeze test *ex post* exercised by the Communications Regulatory Authority in principle corresponds to the respective power of the Competition Council to investigate abuse of dominance in the form of margin squeeze under the Competition Law. More in-depth collaboration between the sectoral regulator and the national competition authority should be merited in such ambiguous situations.

2. Regulated Field of Electronic Communications and Application of Competition Law: Legal Framework

2. The Lithuanian Law on Electronic Communications stipulates that the regulation of electronic communications activities shall be based, among others, on the principles of ensuring effective competition, transparency and non-discrimination¹. One of the main objectives of the Communications Regulatory Authority is to ensure effective competition in the field of electronic communications². The national regulator shall seek to create conditions for effective competition and its development in the field of electronic communications as well as conditions to prevent the abuse of market power by undertakings³. In this context, the Communications Regulatory Authority may impose certain *ex ante* obligations on undertakings with significant market power, i.e. obligations on transparency, non-discrimination, accounting separation, providing access, price control and cost accounting, functional separation, provision of services to end-users⁴.

3. The Law on Electronic Communications also provides for several significant responsibilities for the Lithuanian Competition Council. First, it shall enforce competition rules in the field of electronic communications in accordance with the Law on Competition⁵. Accordingly, the Lithuanian Competition Council applies provisions of the Law on Competition with regard to anti-competitive agreements, abuse of dominance and

¹ Article 2(1)

² Article 8(1) of the Lithuanian Law on Electronic Communications.

³ Article 14(1) of the Lithuanian Law on Electronic Communications.

⁴ Articles 17 to 23² of the Lithuanian Law on Electronic Communications.

⁵ Article 14(2) of the Law on Electronic Communications.

concentrations taking place in this particular regulated sector. The Lithuanian Competition Council shall consult and co-operate with the Communications Regulatory Authority when enforcing the Law on Competition in the field of electronic communications⁶.

4. The Lithuanian Competition Council also has some functions vis-à-vis regulatory tasks performed by the Communications Regulatory Authority. The Competition Council shall exchange information (including confidential) with the Communications Regulatory Authority, insofar as the latter authority supervises competition in the field of electronic communications⁷. In addition, the Competition Council shall advise the Communications Regulatory Authority when the latter performs functions related to the supervision of competition in the field of electronic communications⁸.

5. Even though the Lithuanian laws determine respective responsibilities of the sectoral regulator and of the national competition authority in the electronic communications sector, in practice, there is no straightforward answer to the question what the boundaries of jurisdiction of these agencies are. A specific illustration of this problem which is discussed below is the decision adopted by the Lithuanian Competition Council to refuse initiation of the proceedings against Telia Lietuva.

3. Possible Overlap of Competences of Authorities in Electronic Communications Sector

6. In this section we will illustrate how the intersection of institutional responsibilities for competition matters within a regulated electronic communications sector was resolved in Lithuanian jurisdiction. We will refer to the Competition Council's decision on refusal to open an investigation concerning Telia Lietuva (incumbent telecom operator)⁹.

7. The Communications Regulatory Authority has established that Telia Lietuva has a significant influence in the markets for wholesale (central and local) network access at fixed locations. Retail services provided on the basis of these wholesale services included internet access services provided over a public fixed network, public fixed telephone services based on internet protocol technologies, television services and other services. Telia Lietuva was active in both wholesale and retail internet access markets. The Communications Regulatory Authority did not impose any obligations on Telia Lietuva in the retail internet access market.

8. The Competition Council received several complaints¹⁰ regarding an alleged abuse of a dominant position by Telia Lietuva in the form of margin squeeze practices in the television and internet services market. According to the decision-making practice of the European Commission, case law of the European Union courts and the Lithuanian courts, the assessment of the actions of undertakings in the regulated electronic communications market, from the competition point of view, could fall within the remit of both, the Competition Council and the Communications Regulatory Authority. Prior to complaints received by the Competition Council, the Communications Regulatory Authority had

⁶ Article 12(1)(3) of the Law on Electronic Communications.

⁷ Article 12(1)(1) of the Law on Electronic Communications.

⁸ Article 12(1)(2) of the Law on Electronic Communications.

⁹ See: [The Competition Council's decision as of 8th of March 2019 No. 1S-27 \(2019\)](#)

¹⁰ Complaints by the Lithuanian Cable Television Association, as of 21st of November 2017; the Lithuanian Radio and Television Centre, as of 11th of August 2017; Bite Lietuva, as of 29th of March 2018.

already examined and adopted certain decisions regarding challenged activities of Telia Lietuva and their compliance with non-discrimination obligation.

9. Analysis of the decisions adopted by the Communications Regulatory Authority showed that in monitoring the compliance with ex ante non-discrimination obligation it compared prices of the Telia Lietuva for wholesale network access services with its prices for retail services which are provided on the basis of these wholesale services. Communications Regulatory Authority also assessed whether existing or potential customers of Telia Lietuva wholesale network access services intending to provide retail public electronic communications services on the basis of wholesale network access services acquired from Telia Lietuva, could compete with the prices of relevant retail services offered by Telia Lietuva. Such test, in principle, corresponds to the margin squeeze test applied in competition law which includes assessment of whether a vertically integrated undertaking could profitably provide retail services by acquiring its own wholesale services at the prices offered to its competitors.¹¹

10. The data available to the Competition Council confirmed that the Communications Regulatory Authority had examined and adopted decisions regarding the same circumstances as the applicants have indicated to the Competition Council (as far as alleged margin squeeze applied by Telia Lietuva is concerned).¹²

11. The Competition Council held that if it undertook an investigation of the Telia Lietuva actions, it would have to review the legality and validity of the decisions adopted by the Communications Regulatory Authority, while such powers are not granted to the Competition Council. Moreover, according to the case-law of the Supreme Administrative Court of Lithuania, the same conduct cannot be subject at the same time to different legal rules pursuing essentially the same objective, and the parallel application of both the Electronic Communications Law and the Competition Law under such circumstances would be incompatible with the objectives of these laws and the nature of regulation.¹³ Thus, the Competition Council held that the national regulator had already examined and adopted decisions concerning the Telia Lietuva actions challenged at the Competition Council.

12. The Lithuanian Law on Competition allows the Competition Council to refuse initiating investigation if it does not correspond to its priority. The Competition Council has established its enforcement priority¹⁴ together with principles which explain application of this priority, including the principle of strategic importance. After assessing all the circumstances described above, the Competition Council concluded that investigation of the factual circumstances specified in the complaint against the Telia Lietuva activities did not correspond to its enforcement priority, and in particular the principle of strategic importance, and refused to initiate an investigation. The Competition Council concluded that, taking into account the legislative provisions and powers conferred to the Communications Regulatory Authority, in this particular case, the latter is within the remit

¹¹ The Competition Council's decision as of 8th of March 2019 No. 1S-27 (2019), paragraph 62.

¹² The Competition Council's decision as of 8th of March 2019 No. 1S-27 (2019), paragraph 66.

¹³ The Competition Council's decision as of 8th of March 2019 No. 1S-27 (2019), paragraph 64.

¹⁴ The Competition Council Resolution No 1S-89 as of 2012-07-02 on the enforcement priority of the Competition Council while implementing the supervision of the Law on Competition, point 1: "Establish that the Competition Council's Enforcement Priority is to conduct investigations or otherwise intervene in the functioning of the market, only if such intervention could significantly contribute to the effective protection of competition and ensure the highest possible benefits to consumers (hereinafter - the Enforcement Priority)".

to resolve the dispute regarding alleged abuse of a dominant position by the undertaking in the regulated electronic communications market more effectively. Lithuanian Competition Authority noted that economic entities believing that their interests had been violated, had a right to appeal against the Communications Regulatory Authority's decisions to the court.

13. To sum up, the power to apply margin squeeze test *ex post* exercised by the Communications Regulatory Authority in *Telia Lietuva* case, in principle, corresponds to the respective power of the Competition Council to investigate abuse of dominance in the form of margin squeeze under the Competition Law. This may be considered as a duplication of functions, even though it is stemming rather from decision-making practice than from the legislative framework, as it was a discretionary choice of the Communications Regulatory Authority to apply a test similar to the margin squeeze test applicable for the purposes of competition law enforcement.

14. The fact that Communications Regulatory Authority has ruled on a similar issue does not automatically preclude the power of the Competition agency to enforce competition law and should, therefore, be assessed on a case-by-case basis taking into account the conduct that is being assessed as well as the purpose of such assessment. Additionally, the enforcement of Law on Competition is entrusted exclusively to the Competition Council. What experience shows, however, is that current legal framework lacks clarity on the precise delineation of the competences and in particular on the scope of the duty to cooperate and its' relation with the subsequent issue of competence allocation.