

Unclassified

English - Or. English

15 May 2024

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

Working Party No. 2 on Competition and Regulation

Competition and Regulation in Professional Services – Note by Lithuania

10 June 2024

This document reproduces a written contribution from Lithuania submitted for Item 8 of the 77th meeting of Working Party 2 on 10 June 2024.

More documents related to this discussion can be found at
www.oecd.org/competition/competition-and-regulation-in-professional-services.htm

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1. Introduction

1. The Lithuanian Competition Council has used a broad range of its statutory powers vis-à-vis some of the professional services. In this Note, both enforcement and advocacy activities of the Lithuanian competition agency are discussed. Most of the agency's efforts so far have been focused on the regulatory barriers to competition in notarial services. However, some of the activity also pertain to the profession of architects, judicial officers and dentists. From the Lithuanian experience, a competition agency can affect outcomes of the regulatory environment in professional services, at least in its capacity as an advocate of competition. Furthermore, in those jurisdictions where competition authorities are empowered to enforce competition law against public authorities, the possibility to remove restrictions by enforcing against anti-competitive regulation exists. The Lithuanian Competition Council completed several investigations concerning regulated professions which also brought positive changes in the competitive landscape. Last but not least, the Covid-19 pandemic brought notable changes within liberal professions by integrating electronic services into daily operations of notaries and judicial officers. This transition brought favourable changes for customers and fostered competition within the sector.

2. Enforcement in the notarial market

2. The Competition Council primarily focused its efforts on fostering competition within the notarial market, dedicating significant resources and attention to this sector. Through various initiatives and interventions, the Competition Council aimed to enhance market dynamics, promote fair competition, and safeguard consumer interests within the realm of notarial services.

3. In 2018, the Lithuanian Competition Council determined that the Lithuanian Chamber of Notaries, functioning as a self-regulating association of notaries in Lithuania, had, through its governing body (the Presidium), engaged in anti-competitive practices that impeded competition within the notarial services market. During this period, pricing for notarial services in Lithuania was governed by the Minister of Justice's Decree. However, certain provisions of this Decree were open to interpretation, potentially leading to varying pricing practices among individual notaries.

4. Nevertheless, the Presidium of the Lithuanian Chamber of Notaries established rules aimed at clarifying the methods for calculating the fees payable by notaries and mandating that all notaries interpret the Decree in a manner that consistently resulted in higher prices for consumers. For instance, concerning mortgage transactions where the value of the secured property was unspecified by the client, the Decree permitted notaries to charge fees ranging from 14,48 to 144,81 Euros. However, the Chamber insisted that notaries uniformly impose the maximum fee of 144,81 Euros in such cases.

5. The Lithuanian Competition Council determined that these and similar self-regulatory measures imposed by the Chamber constitute an agreement restricting competition and violated competition laws. Consequently, the Chamber of Notaries was fined 88,400 euros. Additionally, fines totalling 45,000 euros were imposed against eight individual notaries, acting as undertakings, for their involvement in the Presidium's decision-making process within the Chamber of Notaries.

6. In parallel, the Competition Council found that the Lithuanian Ministry of Justice set prices for notarial services upon agreement with Lithuanian Chamber of Notaries, as mandated by the law. As a result, the association of notaries directly contributed to the setting of prices for notarial services. In response to the Council's suggestion to eliminate the requirement for reaching an agreement with the Lithuanian Chamber of Notaries regarding pricing regulations, the corresponding legal provision was modified by the Lithuanian Parliament by eliminating such requirement.

7. The state regulation of fees for notarial services also fell under the purview of the Lithuanian Competition Council's enforcement. The Lithuanian Minister of Justice enacted a Decree establishing both fixed and minimum prices for selected notarial services. In 2020, the Lithuanian Competition Council determined that such regulation prevented price competition among notaries, as they were unable to offer prices lower than the minimum or fixed rates set forth in the Decree. Consequently, the Competition Council ordered the Ministry of Justice to revise the pricing framework and eliminate fixed and minimum prices. However, the court case is temporarily suspended, and in the meantime, legal regulation governing notarial fees has been amended to be even stricter, resulting in the implementation of solely fixed prices at present.

8. As of today, both decisions of the Competition Council are pending before administrative courts. In the first case described in paragraphs 3-5, the European Court of Justice (ECJ) recently delivered a preliminary decision¹ in which the legal status of notaries was analysed. In this decision, ECJ emphasised that notaries should be considered as undertakings and Chamber of notaries – an association of undertakings. ECJ elaborated that the fact that an entity has, for the pursuit of part of its activities, prerogatives of a public authority does not, of itself, prevent it from being classified as an undertaking, within the meaning of competition law, in respect of its activities which are economic in nature, provided that those activities can be dissociated from the exercise of prerogatives of a public authority. ECJ stressed that the notarial activity of authenticating documents which express unilateral commitments or agreements freely entered into by the parties did not directly and specifically form part of the exercise of official authority. Furthermore, in the case at hand, subject to verification by the referring court, the notarial activities referred to in the clarifications, which consist in the approval of mortgage transactions, the affixing of enforceable clauses, the execution of notarial deeds, the preparation of draft transactions, consultations, the provision of technical services and the validation of exchange contracts, in certain situations, did not appear to be connected with the exercise of prerogatives of a public authority. Also, ECJ took into account that notaries established in Lithuania carry out, within the limits of their respective territorial jurisdictions, a large part of their activities in conditions of competition, since the first paragraph of Article 28 of the Law on the Notarial Profession provides in that regard that notarial acts may be drawn up with any notary, except in matters of succession.

3. Policy initiatives and the Competition Council's advocacy efforts

9. In spite of ongoing litigation in the courts, new amendments in legal regulation that could potentially impact competition have been proposed.

10. Recently, a draft law has been proposed suggesting that the Chamber of Notaries engage in supervisory activities and take on the responsibility of ensuring that notaries

¹ Judgement of 18 January 2024, Lietuvos notarų rūmai and Others v Lietuvos Respublikos konkurencijos taryba, C-128/21, ECLI:EU:C:2024:49 ([available online](#)).

adhere to legal regulations regarding the fees for notarial services. If adopted, the Chamber of Notaries could establish criteria to determine when certain behaviours are deemed unfair competition and develop protocols for addressing instances of non-compliance with these standards. Moreover, the proposals aim to strengthen the representation of notaries and judicial officers in several regulatory bodies responsible for overseeing the profession, while reducing the representation from the Minister of Justice and societal representatives.

11. The Competition Council provided its opinion that the proposed legislation might impede competition among notaries in setting their fees and could have detrimental effects on consumers. The Council stressed that this regulation encourages an association of undertakings to gather data on the pricing practices of competing undertakings, grants broad discretion to define actions that could qualify as unfair competition and take subsequent actions. Additionally, the Competition Council emphasised that there should not be an issue with applying lower fees in the first place; rather, the legal regulations should be revised, and restrictions on applying lower fees should be eliminated.

12. Furthermore, with the increasing representation of profession in the supervisory bodies, the amendments create situations potentially leading to conflicts of interest and could enhance the capacity of previously mentioned associations to enact decisions that potentially could limit entry into the relevant market and impede effective competition.

13. Following the opinion of the Competition Council, the Ministry of Justice modified its proposed amendments and implemented certain adjustments which limited the extent to which the Chamber of Notaries is entitled to supervise the profession.

14. There have been similar initiatives to grant more powers to self-regulatory bodies in other sectors posing the risk of conflict of interest. For example, in 2022, certain amendments were discussed, according to which the licensing of dentists and other healthcare professionals would fall under the purview of the dentist association. The Competition Council expressed concern that such regulation could potentially limit competition, as the dentist association could determine competitors' ability to entry to the market. Similar concerns were raised in the market for architectural services. The legal framework stipulates that the association of architects, while implementing public administration functions, i.e., organising qualification improvement courses for architects, also engages in economic activity by conducting such courses itself and competing with other undertakings. As the association is entitled to verify the quality of the courses offered in the market, it could establish unfair standards for its competitors. Moreover, regional architects' councils assess architects' projects. According to the Competition Council, this arrangement may give rise to conflicts of interest, as council members, who are also practicing architects, evaluate the work of their competitors. The legislation described above is still in force.

4. Technological developments

15. Initiatives that yielded positive changes fostering competition and ultimately benefiting customers also took place. During the Covid-19 pandemic, electronic notarial and judicial officers' systems were introduced.

16. Currently, all notarial actions can be performed remotely, except for the approval of the will, confirmation of the fact that a natural person is alive and present in a certain area, acceptance of wills and personal wills equivalent to official wills for safekeeping. In 2023, a total of 1 531 434 notarial actions were performed in Lithuania, out of which 46 723 were conducted remotely. Electronic systems are further developed by integrating new functions.

17. One of the key benefits of integrating e-systems is the improved accessibility to notarial services across Lithuania. As many tasks can now be completed through the electronic system, clients no longer need to physically visit a notary's office. This not only allows to locate a suitable notary for their needs easier, but also helps individuals residing in remote or underserved areas, as well as those with limited mobility or time constraints. Furthermore, since geographic barriers are significantly reduced, notaries residing in even the most remote parts of Lithuania can now compete for clients regardless of their location, competition between notaries can be more effective. Moreover, these changes could offer a solution to an ongoing issue encountered by the Ministry of Justice, namely, the reluctance of notaries and judicial officers to live in distant regions of Lithuania.

18. When it comes to the operations of judicial officers, currently users can upload electronic enforceable documents into the electronic system. Approximately 25,000 documents are uploaded into judicial officers' system every year.

19. The introduction of e-systems into the operations of notaries and judicial officers represents a significant step forward in modernising their processes. By digitising various aspects of their work, such as document preparation, authentication, and record-keeping, e-systems have undoubtedly enhanced efficiency and convenience for both service providers and clients.

5. Challenges and successes in competition advocacy

20. In Competition Council's experience, the biggest challenge related to the advocacy initiatives in the regulated markets is preconceptions existing towards liberal professions and their status as undertakings. Liberal professions, despite their unique characteristics and societal importance, fall within the scope of this definition. This classification is crucial as it subjects liberal professionals to the rules and regulations governing competition law. While benefits of competition are widely acknowledged in general, representatives of liberal professions often engage in discussions regarding the extent to which competition law should apply.

21. The amendments to the Law on Competition of 2019, which mandated legislators to perform competition assessment, marked a pivotal shift by integrating competition considerations directly into the legislative process. This development represents a fundamental recognition of the importance of fostering competition across various sectors of the economy and ensuring that legislative measures align with the principles of competition law.

22. By requiring competition assessment, legislators are now compelled to scrutinise proposed laws and regulations to assess their potential impact on competition. This includes evaluating whether proposed measures may unduly restrict competition, hinder market entry, or otherwise distort competitive dynamics. Such scrutiny is essential for promoting market efficiency, innovation, and consumer welfare.

23. Prior to these amendments, the Competition Council undoubtedly played a crucial role in advocating for competition principles during the legislative process. However, the burden of identifying and addressing potential anticompetitive effects largely fell on the Competition Council alone. The introduction of competition assessment redistributes this burden, now placing it evenly on legislators themselves. This shift represents both a challenge and an opportunity for legislators. It imposes a responsibility to justify the procompetitive effects of proposed measures or provide reasonable explanations why certain measures do not have a restrictive effect on competition. On the flip side, this creates

an opportunity for a deeper understanding of competition law principles and their implications for legislative initiatives.