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COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

**PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT
PROCEEDINGS**

-- Lithuania --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.

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1. Decision-making process

What procedures does your agency have in place to ensure that decision-makers consider all relevant evidence and remain open to considering different explanations for the conduct under investigation? Are independent teams used internally? Is there an independent review of the case by specialized economists? Are there other channels of input directly to the decision-makers? Are outside analysts or experts used to help decision-makers? What other techniques or practices has your agency adopted to promote sound decision-making?

1. The Lithuanian Competition Council must comply with procedural rules laid down in legal acts of the Republic of Lithuania. Basic procedural principles (i. e. principle of impartiality, equity, *etc.*) and general issues of the proceedings carried out by the Competition Council (*e. g.* investigative actions, grounds for opening and closing of the proceeding, right to be heard, right to access the case material, *etc.*) are established in the Law on Public Administration and in the Law on Competition. In more detail procedural issues are regulated in the Rules of the Procedure of the Competition Council. The administrative procedure carried out by the Competition Council provides few procedural aspects which are intended to guarantee that decision-makers (the Competition Council as a decision-making body which consists of 5 members) consider all relevant evidence and explanations towards the alleged infringement.

2. During the investigative phase of the administrative procedure the Competition Council adopts all necessary decisions regarding inspections, prolongation of the investigation and other decisions relevant to the investigation. Usually, when certain question is to be presented to the Competition Council, investigation team must produce a notice on the process of the investigation: what investigative actions have been made, what evidences have been found, what are the next planned investigative actions and *etc.* Thus the Competition Council is able to follow the process of the investigation from its beginning and, if it is needed, by itself draw investigators attention to certain issues regarding possible relevant evidence and possible assessment of the investigated behavior of the undertakings concerned. In consequence by being active from the beginning of the investigation the Competition Council as a decision-making body is able to consider all relevant evidence and evaluate the conclusions made by the investigation team in the statement of objections, which is a final investigative document and in which all alleged charges of the infringement of the competition rules against certain undertakings must be stated.

3. Furthermore, before presenting the draft statement of objections to the Competition Council, investigators must present it and all case material to the in-house lawyers of the Competition Council, who are not directly included in the investigation, for a legal assessment on the statement of objections to be made. For the purpose of making the legal assessment the draft statement of objections and the case material is revised, *e. g.* whether there are enough evidences to support the alleged infringement of the competition rules, whether there are other relevant evidences that were not discussed in the draft statement of objections but which are important in the context of a certain alleged infringement, whether the factual and legal reasoning in the draft statement of objections is sufficient to exclude possibilities to acquit or to justify investigated behavior and whether there are other relevant issues that might be important for the Competition Council while deciding on the conclusions of the investigation. The legal assessment and the statement of objections are presented to the Competition Council at the same time, so the Competition Council gets additional information on relevant evidences or other relevant matters related to the investigation of the alleged infringement and thus can decide whether any revisions or amendments need to be made in the statement of objections or even can decide to direct investigators to continue investigation and to take a closer look at certain circumstances, evidences or to give more reasons on the alleged infringement. This internal procedure is applied before the Competition Council adopts official decision to complete the investigative phase of the administrative procedure and approve final statement of objections which is then sent to the undertakings concerned. This procedure is intended to ensure that in the statement

of objections will be discussed all relevant matters of the investigation and reasoned conclusions on the alleged infringement of the competition rules will be made thus guaranteeing to the undertakings concerned their right to be heard and give explanations on the precisely investigated and examined evidences and precisely made primary conclusions of the alleged infringement.

4. The internal procedure of the approval of the statement of objections is not the only internal procedure to ensure that the Competition Council will consider all relevant evidences and different explanations on the case. This possibility is guaranteed also by another administrative proceeding phase – preparation for the hearing of the case. During this procedure investigators receive written explanations from the undertakings concerned on the conclusions made in the statement of objections and they must summarize arguments of the undertakings concerned and give their reasoned opinion on these explanations to the Competition Council. It must be mentioned that written explanations submitted by the undertakings usually contain a lot of arguments and comments on evidences which significantly differ from ones stated in the statement of objections. Thus prior to the hearing of the case the Competition Council is introduced with alternative interpretations and explanations of the facts or other circumstances discussed in the statement of objections. Meanwhile the duty of the investigators to give reasons and arguments on these written explanations and present them to the Competition Council also serves as additional information to the Competition Council about possible alternative explanations or information about other evidences that may be relevant in the case.

5. During the hearing of the case, which according to the Law on Competition must be held orally, the Competition Council also has an opportunity to hear and thus take into account oral explanations of the undertakings concerned. Moreover, the Competition Council has a right to ask the undertakings concerned to clarify their position, arguments or other relevant information in order to make reasonable decision concerning alleged infringement. In cases where Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are applied, following provisions of the Council Regulation (EC) No. 1/2003 before adopting final decision the Competition Council must also take into account the opinion on the certain case of the European Commission.

6. Additionally, the Law on Competition provides that during the investigative phase the assistance of the outside specialist and experts on certain issues may be used if this necessity arises. Furthermore the Competition Council as a decision making body in certain cases if it finds it useful or necessary in order to ensure proper investigation and analysis of a complex case, may decide to create an investigation team from the Competition Council's specialists qualified in different fields as well as create an independent team of specialist to give independent from the investigators' opinion or revision of certain issues related to the case concerned or make any other use of the in-house specialists until making its final decision on the infringement of the competition rules.

7. Finally it is important to mention that the documents prepared during the investigation that are mentioned above (*e. g.* statement of objections, legal assessment) or opinions and explanations expressed by the investigation team, outside or in-house experts or specialist are not binding on the Competition Council when it makes its final decision on the infringement of the competition rules. The Competition Council remains open to alternative explanations until the moment of the adoption of the final decision. Final assessment of the relevant evidences and behavior under consideration is made by 5 members of the Competition Council as persons who are entitled to express their opinion based on their professional knowledge and experience by voting. All members of the Competition Council have a right to discuss different positions if they exist on relevance of certain evidences and possible explanations, justifications of the alleged anticompetitive behavior under consideration. Final decision on the infringement of the competition rules is adopted by majority votes of the members of the Competition Council.

2. Confidentiality

How does your agency balance a defendant's right to review and respond to evidence that will be used against it with the need to protect confidentiality? Are there special procedures available for disclosure necessary to protect rights of defense, e. g. by limiting the disclosure to legal representatives so as to ensure that business secrets are not divulged to competing businesses? How is confidential information defined? What rules apply to the protection of confidential information obtained from parties by your agency? Is such information automatically considered to be confidential, or does the party have to identify it as such? If such information is to be disclosed to other parties or made public, does the party have a prior right to object to the disclosure? How does your agency balance the benefits of public disclosure of ongoing investigations with the need to respect the confidentiality of targets of proceedings and possible effects on their reputation? What are the penalties for negligent/intentional violation of confidentiality rules?

8. In the administrative proceeding that is carried out by the Competition Council the most important issue concerning confidential information is related to the confidential information which contains undertakings' commercial secrets. Competition rules do not describe this type of information; instead it is outlined in other laws. For instance, the Civil Code of Lithuania prescribes that information shall be considered to be a commercial (industrial) secret if a real or potential commercial value thereof manifests itself in what is not known to third persons and cannot be freely accessible because of the reasonable efforts of the owner of such information, or of any other person entrusted with that information by the owner, to preserve its confidentiality. The information that cannot be considered commercial (industrial) secret shall be determined by laws.

9. Following provisions of the Law on Competition the Competition Council and its staff are obliged to respect and to protect from disclosing to other persons information that contains commercial secrets. The Law on Competition stipulates that commercial secrets of undertakings disclosed to the Competition Council and its administrative staff in the course of exercising control over compliance with this Law must be kept confidential and, in the absence of the undertaking's consent, must be used only for the purposes the information was provided.

10. To ensure balance between protection of the commercial secrets of the undertaking and the proper investigation of the alleged anticompetitive behavior of the undertaking there are few issues that are dealt with during the investigation.

11. First of all it must be mentioned, that as it follows from the provisions of the Civil Code, undertakings concerned must have interest in protecting their commercial secrets as such information is not automatically considered to be confidential and in consequence the Competition Council and its staff do not have a duty to protect it. For this reason persons must be active and thus must request the protection of the confidential information clearly identifying it and explaining the reasons, why this information must be protected as commercial secret. That kind of request can be submitted to the Competition Council at any stage of the administrative procedure, but the person concerned must be aware, that if that kind of request will be lodged later that the investigative stage of the administrative procedure is completed, there is a risk that the information it wishes to protect may be disclosed to other undertakings as they at this time gain their right to access case material. According to the Law on Competition, upon completion of the investigation, the parties to the proceedings shall be presented with the statement of objections and shall be provided access to the documents of the case, except documents containing commercial secrets of another undertaking. In such cases, the consent of this undertaking shall be required. Thus, if the undertaking concerned didn't lodge the request to protect its commercial secrets, this information is disclosed to the parties of the investigation. By trying to avoid that kind of situations the investigators of the certain case

always encourage undertakings or persons concerned to request the protection of their commercial secrets as soon as they submit that kind of information to the Competition Council.

12. The following is an example of the procedure. The investigator, who in any stage of the investigation or the examination of the case has received the request of an interested person concerning the protection of commercial secrets, shall within 10 working days pass a duly grounded decision concerning the protection of the information furnished by the undertaking concerned. Prior to the taking of the decision concerning the protection of the commercial secrets, the civil servant shall have a right to establish a time limit within which the undertaking having lodged a request concerning the protection of its commercial secrets shall submit the extract of the document containing no commercial secrets and the description of each part of the document intended to be treated as classified. In the event the undertaking that has filed a request concerning the protection of its commercial secrets, fails to submit the extracts and descriptions of the documents, the information sought to be protected by the undertaking shall not be deemed constituting a commercial secret. The undertaking concerned shall be notified of the decision passed. If the protection to the information is granted, the staff of the Competition Council is responsible for the proper safekeeping of the information containing commercial secrets. The list of the documents containing these secrets must be created and these documents must be filed into a separate file, which must be kept safely and separately from other case material.

13. The protection of the commercial secrets may be granted even during the hearing of the case. For instance, although the hearing of cases of the Competition Council usually is held publicly, the Competition Council, following the provisions of the Law on Competition, may, on its own initiative or at the request of the persons (undertakings) concerned, announce a closed hearing of the case, when it is necessary to protect commercial secrets of undertakings.

14. The precise identification of commercial secrets is important for the proper investigation of the case. The nature of the investigation of the alleged anticompetitive behavior stipulates that most of the undertaking's decisions that are investigated as possible infringement of the competition rules usually are commercial decisions. Undertakings under investigation are interested in protecting as their commercial secrets even anticompetitive decisions or any commercial data on which anticompetitive decisions are based. However this interest may in some cases conflict with the public interest to clearly determine and prohibit anticompetitive behavior. Thus the decision whether certain information should be protected as constituting commercial secrets of the undertaking concerned is adopted taking into account all relevant circumstances including the nature of the information, the nature of the alleged infringement of the competition rules, the evidential value of the information concerned, *etc.* The distinction between two different situations in this respect must be made.

15. It must be mentioned that the Competition Council understands the importance of the protection of the commercial secrets and usually grants protection for it, if undertaking concerned makes a reasoned request and this information does not make the essence of the certain case. Even if the confidential information has an evidential value for the case, depending on the case, it still may be protected from other persons by undertaking special means, *e. g.* making extracts without confidential information of the Competition Council's official documents that must be announced publicly or other way made available to other persons (statement of objections, decision on the infringement of the competition rules, *etc.*). This is usually the case when the protection is needed for the commercial secrets of the undertaking, against which the investigation was carried out and the decision was adopted. Thus the undertaking concerned is able to get access to this information and exercise right of defense without any limitations; only access to this information by other persons or parties of the case is limited.

16. On the other hand problems may arise if the information on which the Competition Council could base its decision constitutes commercial secrets of the person (undertaking) other than the suspected

infringer of the competition rules. This issue is important in the context of the right of defense, to review and respond to the evidences that are used against certain undertaking. In order to avoid the violation of the right of defense, the Competition Council does not use as evidence in the case information, which certain accused undertaking cannot access, including information containing other persons commercial secrets, unless this person's consent to disclose its confidential information is given. For this reason, as it was mentioned above, it is very important for the undertakings concerned to make reasoned requests for the protection of their commercial secrets and for the Competition Council to make reasoned decisions, whether certain information submitted to the Competition Council for the purposes of the investigation indeed is information consisting commercial secrets. However it must be mentioned that despite these possible difficulties managing information consisting commercial secrets, until now the Competition Council did not have any problems concerning disclosure of the commercial secrets or breach of the right to defense for the misuse of this information.

17. It is important to note, that these procedures applied for the protection of commercial secrets may *mutatis mutandis* applied in respect of other confidential information, *e. g.* private information, information consisting state, professional or bank secret. The duty to protect that kind of information is established in certain legal acts of the Republic of Lithuania, *e. g.* the Law on State Secrets and Official Secrets. Thus the Competition Council in any way must take proper measures to protect it and take this fact into account while using it as evidence in certain case.

18. For the misuse of any form of the confidential information liability may be applied. The Law on Competition states that disclosure of commercial secrets of undertakings by the Competition Council and its staff shall incur liability under law. This liability may occur under civil, labour, administrative, and even criminal law, depending on the type of confidential information disclosed, as well as other factors. If, for instance, commercial secrets were revealed, under the civil law the responsible person would be bound to compensate damages resulting from the disclosure. However, the Criminal Code states that a disclosure of a commercial secret in certain cases can be punished by taking away or restricting the right to work in that position, a fine, an arrest, or incarceration for a period of up to 2 years.

19. The Competition Council is functioning transparently and therefore it does disclose publicly information about ongoing investigations, except certain cases when, following provisions of the Law on Competition some of the decisions of the Competition Council may be held confidential (usually in order to secure the fact of the opening of the investigation until inspections are made). However, while disclosing information of the ongoing investigations the Competition Council always states that investigations do not necessarily mean that the undertakings concerned have infringed the Law on Competition. The Competition Council respects the right of defense of the undertakings concerned, especially the right to be heard during the investigation.

3. Requests for information to targets of investigation

Does your agency have procedures to review information requests with the party? Is the party informed of the theory of the case and reasons for requesting the information? Can the party ask for a reconsideration of the information requested and/or deadlines, or appeal to a reviewing office within the agency? Do procedures and practices differ if the addressee of the request for information is not a party to the proceeding?

20. While carrying the investigation investigators of the Competition Council have some special rights in order to request information for the purpose of the investigation. Following provisions of the Law on Competition investigators have rights to get information (data, documents, *etc.*) from the undertakings, against which the investigation is carried out, and from any other undertakings, public institutions or other persons, if they have information relevant to the investigation. It must be noted, that these requests are

obligatory only in case if the addressees are properly informed about the legal background of these requests, *i. e.* the investigator must provide information about the investigation concerned (give a copy of the decision of the Competition Council to start the investigation) and must present document confirming his powers to request the information during the investigation (usually authorization to carry out investigative actions for certain investigator is given in the decision of the Competition Council to start the investigation). The Law on Competition does not make any difference between requests for information addressed to the undertakings under investigation, other parties of the proceeding and any other addressees. All of them must submit requested information, if grounds for this request are properly presented to them. If they do not submit the requested information, grounds for their liability under administrative law may arise.

21. None of the regulations of the administrative proceeding carried out by the Competition Council provide for formal procedure of reviewing or reconsidering of the information requested or of the deadlines for the submission of the requested information. However, the addressees may always contact the investigator for the clarification or for the reconsideration of the request, giving their reasons why the request, in their opinion, is unreasoned or cannot be executed or not executed in time. Thus the addressees of the request and the investigator may find a common solution of problems that arise because of the requested information.

22. On the other hand, if the addressee – undertaking which behavior is investigated – thinks that the investigator misuses its investigative powers, this addressee may lodge the complaint to the Competition Council within 10 days from the reception of the request. The Competition Council its decision on these actions of the investigator must adopt within 10 days from the receipt of the complaint. This decision then may be appealed to the Vilnius Regional Administrative Court. Other addressees of the requests of the information may lodge their complaint following general rules established in the Law on Administrative Proceedings.

4. Agreed resolutions of enforcement proceedings

At what stage or stages of an investigation and/or litigation can the parties resolve an enforcement matter by means of a mutually agreed disposition with your agency? Are there restrictions on the types of cases that can be settled in this manner? Does your agency actively seek to settle cases?

23. The Law on Competition does not provide for the formal settlement procedure when an agreement with the Competition Council may be reached. However, the parties of the procedure, *i. e.* undertakings suspected of the participating in the anticompetitive agreement, until the completion of the investigative stage of the administrative procedure may admit their anticompetitive behavior and, if fulfill certain other conditions, they may be exempted from fine or get a reduction of it (leniency program).

24. As a form of a settlement procedure for any cases when anticompetitive behavior of the undertakings is investigated, these undertakings may acknowledge the material circumstances established by the Competition Council in the course of the investigation (*i. e.* the circumstances described in the statement of objections). In general it means that undertakings acknowledge that they, however, did indeed violate the competition rules. That kind of acknowledgment may be expressed in written explanations on the statement of objections or may be expressed orally during the hearing of the case (in this case this fact is clearly recorded in the minutes of the hearing). The fact of the acknowledgement is taken into account when the Competition Council makes its decision on the infringement of the competition rules and, following provisions of the Law on Competition, this fact is considered to be a mitigating circumstance thus constituting grounds for reduction of a fine usually by 10 per cent of the fine, which would be imposed on the undertaking concerned otherwise. It must be mentioned, that the investigators during the

investigation and the Competition Council during the hearing of the case always encourage undertakings concerned to acknowledge the infringement of the competition rules and thus benefit from the reduction of fines to be imposed.

25. If the settlement is not reached during the Competition Council's administrative procedure, later settlement (*e. g.* during the appeal against the Competition Council's decision procedure in administrative courts) and any benefits from it are not possible. Of course it is possible that the undertaking concerned acknowledges its participation in the infringement of the competition rules during judicial procedure in administrative courts; however this fact could only lead to the settlement of the judicial case but would not change the decision of the Competition Council and sanctions imposed on the undertaking by it.

5. Judicial review and interim relief

At what point in the competition law enforcement process does an independent judicial body have an opportunity to review the conclusions of your agency as to whether a violation of the law has occurred? What level of deference does the judicial body grant to the agency's decision? If the agency's decision has resulted in a sanction or remedy, what is the effect of the pending judicial review on that sanction or remedy? Can the judicial body grant interim relief? What is the timing of the review by the judicial body, and are there procedures for expedited review of time-sensitive business transactions or conduct?

26. An independent judicial body (Vilnius Regional Administrative Court) can review the conclusions of the Competition Council when the undertakings as well as other persons who believe that their rights, protected by the Law on Competition, have been violated, appeal against the decision of the Competition Council. A written complaint can be lodged not later than within 20 days after the delivery of the resolution of the Competition Council or publication of its operative part in the official gazette "*Valstybės žinios*". In certain cases, only the parties to the proceedings have the right to appeal. The decision of the Vilnius Regional Administrative Court further may be appealed to the Supreme Administrative Court of Lithuania, which adopts final decision in the case.

27. The Law on the Administrative Proceedings and the Law on Competition stipulates that the court has a right to adopt decision *inter alia* to amend the decision of the Competition Council or even revoke it (partially or fully). However following the provisions of the Law on the Administrative Proceedings the court shall not make assessment of the disputed administrative act and acts (or omission) from the point of view of political or economic expediency and shall only establish whether or not there has been in a specific case an infringement of law or secondary legislation act, whether or not the entity of administration has exceeded its competence, also whether or not the act (action) contradicts the objectives and tasks for the purpose whereof the institution has been set up and vested with appropriate powers.

28. From these provisions it follows that the judicial body may review in full the decision of the Competition Council. However, because of the nature of the competition law and cases, when decisions of the Competition Council is based *inter alia* on the economical reasoning and assessment (*e. g.* the definition of the relevant market, establishment of the dominant position, *etc.*), especially in complex cases, the court may not be able to make a full revision of the Competition Council's decisions. The judicial revision basically is limited only to the legal assessment of the case, *e. g.* is the infringement properly qualified; are evidential and reasoning thresholds met; were any violations of the principal procedures, especially rules intended to ensure objective evaluation of all circumstances, made. Meanwhile economic assessment falls outside the revision of the court, except some obvious errors of the economical reasoning are detected by the court. Thus it can be concluded that, despite the fact that the court has a right to fully revoke the decision of the Competition Council, the court still grants some level of deference to the

Competition Council's decision as far as the issues related to the economic assessment of the certain case are concerned.

29. The Law on Competition states that the lodgment of a complaint to the Vilnius Regional Administration Court against the Competition Council's decision does not suspend the implementation of it, unless this court decides otherwise. The court may grant an interim relief only if the grounds established in the Law on the Administrative Proceedings exist either by its own initiative or after the request of the interested party. Usually the court grants interim relief and suspends the validity of the Competition Council's decision only in cases if there is enough evidence that after the final decision in the judicial case is adopted it would be impossible to implement it.

30. According to the provisions of the Law on Administrative Proceedings the period for the preparation for the hearing of the case must not last longer than 1 month after the complaint has been lodged. The hearing itself must be finished and the judgment of the court concluded within 2 months from the day the decision to hear the case was made. The court may extend the time limit of the hearing for a period of up to 1 month. The judgment of the Vilnius Regional Administration Court may be appealed to the Supreme Administrative Court of Lithuania where the same time limits would be applied. However, in practice these terms of the judicial review are usually longer and it takes up to 6 months for the Vilnius Regional Administrative Court to adopt its decision and up to 1 year for the Supreme Administrative Court of Lithuania to adopt its final decision of the case. There is no possibility to have an expedited review of the cases related to the review of the Competition Council's decisions.