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The Future of Effective Leniency Programmes – Note by Lithuania

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This document reproduces a written contribution from Lithuania submitted for Item 5 of the 137th meeting of Working Party 3 on 13 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/the-future-of-effective-lenency-programmes-advancing-detection-and-deterrence-of-cartels.htm>

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1. Introduction

1. This Note overviews the legal framework for the leniency programme in Lithuania, the number of leniency applications and their dynamics as well as presumable reasons thereof. The Note also touches upon practical difficulties that arise in applying the existing legal framework. It discusses the role of the competition authority in strengthening the effectiveness of leniency programme.

2. In the view of the Lithuanian Competition Council, despite moderate increase of the number of leniency applications, other detection tools and investigative approaches will retain their significance aiming at effective detection of anticompetitive agreements.

2. Legal Framework and its Interpretation

3. National legal provisions¹ establishing conditions for leniency in Lithuania fully correspond to the framework stipulated in the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market² (hereinafter – the Directive). Additionally, national regulation establishes a possibility for an undertaking, which is a party to a prohibited agreement between **non-competitors** for the direct or indirect price setting, to apply for leniency³.

4. The Rules on the Exemption from and the Reduction of Fines of the Participants of Prohibited Agreements⁴ provide that the condition “the undertaking disclosed its participation at the prohibited agreement to the Competition Council” is fulfilled when the undertaking **voluntarily** discloses its participation in the prohibited agreement.

5. The described provisions came into force in 2020 after the transposition of the Directive⁵. As a result, the Competition Council had to take a few decisions related to interpretation of the legal framework for leniency programme.

6. In one case, the Competition Council received a leniency application requesting full immunity from fine regarding a resale price maintenance agreement, which was

¹ Law on Competition of the Republic of Lithuania, Article 38.

² Article 19.

³ Law on Competition of the Republic of Lithuania, Article 38.

⁴ The Rules on the Exemption from and the Reduction of Fines of the Participants of Prohibited Agreements, adopted by the Competition Council resolution of 30 July 2020 No. 1S-79 (2020) “Regarding confirmation of the Rules on the Exemption from and the Reduction of Fines of the Participants of Prohibited Agreements”, point 8.

⁵ The legal framework that was in force prior to the transposition of the Directive established in principle the same legal regime for the leniency applicants, however, there were some changes introduced in the description of some of the conditions and their explanations. Some procedural novelties were also introduced to the legal framework, e. g. the possibility to provide leniency application orally.

provided after the leniency applicant had received the Competition Council's request for information. The question arose whether in such circumstances the leniency application can be qualified as provided voluntarily. The Competition Council held that a decisive factor in such cases is the content of request for information addressed to the undertaking, i. e. had the undertaking been able to provide answers (and documents) to the received request for information without disclosing its participation in the anticompetitive agreement but still complying with the request, the leniency application could have been qualified as provided voluntarily. However, in the case mentioned, the request for information expressly required the undertaking to provide contract containing terms that restricted competition. Therefore, the Competition Council decided that leniency application was not submitted voluntarily.

7. In the same case, the Competition Council also assessed whether the distributor's leniency application in relation to a resale price maintenance agreement provided after the Competition Council had already received a copy of the contract containing the same anti-competitive clauses from another distributor belonging to the same supplier's distribution network satisfied the condition that "*the undertaking is the first of the parties to the prohibited agreement to have provided, in the view of the Competition Council, sufficient evidence allowing to conduct an inspection or to state the existence of an infringement, on condition that at the moment of provision of leniency application the Competition Council did not have sufficient evidence allowing to conduct an inspection (or had not already carried out such an inspection) or to state the existence of an infringement*". The Competition Council held that the decisive factor in such cases is whether the authority had already been aware of the infringement that the potential leniency applicant referred to. In the case concerned, the Competition Council decided that it had already had knowledge of the infringement in question, i. e. about the supplier's anti-competitive pricing arrangements with different distributors. As a result, the leniency application was assessed as failing to satisfy the condition requiring that at the moment of the provision of leniency application the Competition Council did not have sufficient evidence allowing to conduct an inspection (or had not already carried out such an inspection) or to state the existence of an infringement.

8. Another issue arose in the practice of the Competition Council, when an undertaking presented leniency application regarding a vertical anticompetitive agreement related both to resale price maintenance and online sales restriction. As already mentioned, the Law on Competition establishes the possibility for undertakings to be exempted from the fines or to be granted a fine reduction for participation in agreements between non-competitors only if those agreements concern the direct or indirect price setting. For this reason the Competition Council held that the undertaking might be exempted from the fine for the participation in a resale price maintenance agreement, but not for the participation in an agreement (or episode of an agreement) to restrict online sales. Such approach might arguably disincentivise the participants of resale price maintenance agreements from applying for leniency in cases, when such agreements contain other hardcore restrictions as well. However, in the Competition Council's view, current legal framework does not leave space for different interpretation.

3. Proactive Anticompetitive Agreements Detection Tools and Investigative Approaches

9. The number of leniency applications presented to the Competition Council are not particularly high (see Part IV of this Note). For this reason, most of the anticompetitive agreements investigated by the Competition Council are detected using other tools and approaches, e. g. in the years 2020-2023, the Competition Council adopted 5 infringement

decisions regarding anticompetitive agreements and neither of the mentioned cases was opened based on the leniency application⁶.

10. In the recent years, the Competition Council detected a few anticompetitive agreements as a result of proactive approach taken by the authority. E. g., the Anticompetitive Agreements Investigation Unit has appointed an employee responsible for the intelligence activities. Based on the information collected by this official from various open sources, the authority managed to identify several suspicious cases. After assessing the initial information, the authority requested information from undertakings. Based on the collected information, the authority was able to detect several anticompetitive agreements.

11. In 2017, the Competition Council concluded cooperation agreement with the Public Procurement Office and the Special Investigation Service of the Republic of Lithuania. The agreement enables the three institutions to cooperate by providing each other assistance and sharing information. Several investigations of anticompetitive agreements were opened and infringements found⁷ by the Competition Council based on the information provided by the mentioned institutions. However, there are some legal limits restricting the potential of the mentioned cooperation. Part of the information held by the Special Investigation Service is of restricted use. Such information cannot be shared with other institutions, unless legal acts expressly provide such possibility and the prosecutor's office allows that in a particular case. In 2021, the Competition Council had to terminate a cartel investigation since the major part of the evidence in the mentioned case was received from the Special Investigation Service and the national court held that the Special Investigation Service illegally transferred some information to the Competition Council.

12. The Competition Council actively cooperates with national contracting authorities in the field of public procurements. The agency provides advice and methodological assistance to the contracting authorities on the detection of agreements between economic operators which distort competition. Based on the advice and assistance received from the Competition Council, the contracting authorities take decisions to disqualify economic operators from the procurement procedures⁸. The Competition Council also organises trainings to the contracting authorities related to the detection of anticompetitive agreements and encourages the contracting authorities to share any information related to such agreements with the competition authority⁹.

⁶ In some of the mentioned cases, participants of the infringements presented leniency applications regarding reduction of fines in the ongoing investigations.

⁷ The Competition Council decision adopted on 21 December 2017 No. 2S-12 (2017), available online: https://kt.gov.lt/uploads/docs/docs/3283_87bf68087f4a90a01248d8b84476abe0.pdf; The Competition Council decision adopted on 26 June 2019 No. 1S-87 (2019), available online: https://kt.gov.lt/uploads/docs/docs/3936_33b13f83eb59fc822f4102e1b8b51cee.pdf; etc.

⁸ The mentioned legal framework for suppliers' disqualification was established as a result of transposition of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65). See also 2022 November 29 "Director Disqualification and Bidder Exclusion – Note by Lithuania". Available online: [https://one.oecd.org/document/DAF/COMP/WD\(2022\)76/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2022)76/en/pdf).

⁹ As an example of this activity, on 19 October 2022, the Competition Council in cooperation with the Public Procurement Office of the Republic of Lithuania organised an event for contracting authorities where, among other topics, it was discussed how the officials of the contracting authorities may recognise the signs of bid-rigging. This event attracted more than 200 participants.

13. The above-mentioned cooperation proved to be effective. E. g., in 2021, the Competition Council adopted an infringement decision¹⁰ stating that five companies rigged their bids, including the price, in public procurements for the purchase of food products organised by or for the benefit of educational institutions and social service providers. This investigation was opened based on the information provided by two contracting authorities.

14. In 2019, amendments of the Law on Competition came into force establishing the possibility for whistleblowers who provide evidence enabling the Competition Council to detect anticompetitive agreements to be rewarded between 1,000 and 100,000 euros. Up to the day of drafting this report, the Competition Council consulted up to 10 potential whistleblowers.

15. In conclusion, the Competition Council considers that it is crucial to develop a toolkit of diverse instruments used for the detection of anticompetitive agreements instead of relying exclusively on the leniency programme.

4. Statistical Trends and Quality of Leniency Applications

16. The numbers of leniency applications in Lithuania are quite low. E. g., in 2022 the Competition Council received 2 full immunity leniency applications (plus 1 summary application), in 2021 – 1, in 2020 – 4. In comparison, in 2010-2019 the authority received 6 full immunity leniency applications in total. Despite relatively low numbers of leniency applications, no decrease of these numbers is observed in Lithuania, in contrast to some other European countries.

17. One of the possible reasons for moderately growing leniency application numbers, in the view of the Competition Council, may be the scarcity of damage claims in Lithuania. However, in 2023 national provisions came into force requiring the contracting authorities to file damage claims in case anticompetitive agreements were detected in public procurements organised by these authorities. The rebuttable presumption that damages in such cases equal 10 % of the value of contract goods or services was also established. It is yet to be seen how these legislative novelties will influence a number of damage claims and possibly a number of leniency applications. Another reason for the increase in a leniency application number presumably may be the active role of Competition Council and the use of alternative *ex officio* tools in detecting anticompetitive agreements as well as generally growing awareness of illegality and possible negative consequences of participation in anticompetitive agreements.

18. Concerning the quality of leniency applications received by the Competition Council, the trend of improvement can be observed. Undertakings address the authority for consultations related to the leniency programme. What is more, companies often hire qualified lawyers who can provide extensive legal advice on leniency. Professional lawyers also frequently consult the Competition Council before providing legal advice to their clients. In recent years, the Competition Council observed not only the increased numbers of consultations regarding leniency programme, but also undertakings' and (or) their representatives' growing knowledge of the subject. E. g., undertakings provide more exhaustive leniency applications, more detailed evidence, etc. Despite the mentioned trend, there is still a lot of undertakings, especially smaller ones, that lack knowledge of both

¹⁰ The Competition Council decision adopted on 14 December 2021 No. 1S-135 (2021), available online: https://kt.gov.lt/uploads/docs/docs/5060_3c349fe89b09debc3eb71b3a3ef03723.pdf.

illegality of anticompetitive agreements and possibility to apply for leniency. The Competition Council continually puts effort into spreading knowledge of the mentioned topics.