

# CPI Antitrust Chronicle

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### **Lithuanian Competition Authority Follows the Path to Prioritization**

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# Lithuanian Competition Authority Follows the Path to Prioritization

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## I. INTRODUCTION

The Lithuanian Competition Authority (“Competition Council”), having recently celebrated its 20<sup>th</sup> anniversary, has joined other competition enforcers around the world and, in July 2012, released its Notice on Agency’s Enforcement Priorities (“Enforcement Priorities Notice”).

The reasoning behind the adoption of the Enforcement Priorities Notice was the intent to solve a conundrum faced by the Competition Council. Because of the ever-increasing number of investigations within the authority, some strategically important investigations were not carried out or were not allocated enough resources. Such a conundrum stems from a combination of factors, including the nearly 1200 complaints alleging anti-competitive practices in breach of the Law on Competition<sup>2</sup> received by the authority in 2011, combined with both a statutory duty to reply to any complaint within a 30-day period and limited human resources. The Enforcement Priorities were, therefore, adopted to allow for an effective and rational allocation of resources on matters having the greatest public interest, rather than minor investigations unlikely to bring benefits to consumers.

## II. A SINGLE PRIORITY AND THREE GUIDING PRINCIPLES

The Enforcement Priorities Notice specifies that the agency will launch an investigation, or otherwise intervene in the market, in cases when such intervention would significantly contribute to fostering effective competition resulting in more substantial benefits to consumers.

The tendency to consider benefits to consumers as an enforcement objective can be traced back to the summer of 2011 when the Competition Council, for the first time, published a report about the estimated benefits to consumers resulting from the work of the agency during the previous 3 years.<sup>3</sup>

While the Notice only sets out a single enforcement priority centered on consumer welfare that could be brought by the intervention of the competition authority; the document, nevertheless, further elaborates on the principles to be employed for a successful implementation of such a priority.

The main principles employed for deciding whether a matter falls within the enforcement priority include:

1. potential impact of an investigation on effective competition and consumer welfare;

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<sup>2</sup> Law on Competition of the Republic of Lithuania, No. XI-1937, Official Gazette, No. 42-2041.

<sup>3</sup> [http://www.kt.gov.lt/en/info/doc/news\\_2011-10-06.pdf](http://www.kt.gov.lt/en/info/doc/news_2011-10-06.pdf).

2. strategic importance of such an investigation; and
3. rational use of resources.

The first principle is meant to cover the assessment of the nature and extent of a possible infringement, as well as the assessment of the type and value of the goods in question. The Notice further elaborates that harm to consumers is more likely when the conduct in question directly affects prices, quality, or availability of the products, particularly consumer products. It also specifies that the more significant the number of undertakings and consumers concerned, the more unlikely it is that the issue will fall outside of enforcement priority.

The second principle includes the evaluation of the preventive effect of the investigation, the novelty of the type of the alleged infringement, and whether other institutions are better placed to address the issue.

The third principle provides that the Competition Council will seek to perform investigations in cases where the expected results of the investigation are proportionate to the resources required for conducting such an investigation.

Application of the Enforcement Priorities may result in the Competition Council refusing to open an investigation based on a complaint, or the Competition Council closing an already ongoing investigation. The Enforcement Priorities Notice, however, clearly stipulates that such decision of the authority should not be understood as concluding that activities of the undertakings concerned are in line with the Law on Competition.

### III. ENFORCEMENT PRIORITIES PUT IN PRACTICE

Since its adoption in July 2012, the Competition Council has already applied the Enforcement Priorities Notice four times. All of these cases included refusals to open an investigation based on a complaint, since the issue did not fall within the enforcement priority.

Two of the adopted decisions<sup>4</sup> directly applied the “use of resources” principle. In both cases the applicants requested an investigation of the competitive effects of decisions adopted by governmental agencies<sup>5</sup> while the same decisions were under appeal before the local courts. The Competition Council ruled that, as the legality of the decisions was being deliberated in the courts that have the power to repeal those decisions, an investigation into the competitive effects of the same decisions by the Competition Council would result in an unreasonable use of resources. The decision of the Competition Council concluded that refusal to initiate an investigation was based on the fact that the appropriate outcome of the investigation might be obtained without having the investigation carried out by the Competition Council.

Another decision<sup>6</sup> relied on the principle regarding the possible impact of the intervention on consumer welfare and efficiency. The complaint concerned the conduct of a

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<sup>4</sup> July 5, 2012 decision No. 1S-97; August 21, 2012 decision No. 1S-110.

<sup>5</sup> Under Article 4 of the Law on Competition, the Lithuanian Competition Council is entrusted with ensuring that public and local authorities adopting legal acts or other decisions do not grant privileges to or discriminate against any individual undertakings or their groups and do not bring about differences in the competitive conditions on the relevant market, except where these differences cannot be avoided under the laws of the Republic of Lithuania.

<sup>6</sup> July 30, 2012 decision No. 1S-102.

collective copyright management association. The complainant alleged possible abuse of dominant position by the association setting different methods for calculating a royalty fee for the complainant compared to those applied to the complainant's competitors. The Competition Council refused to intervene, relying on the fact that the identified method has been modified in April 2011, thus bringing the allegedly anticompetitive behavior to an end. Relying on the changes in the market, and acknowledging that the intervention of the Competition Council would not influence competitive conditions on the relevant market and would not bring additional benefits to consumers, the Competition Council decided not to open an investigation into the matter. Such reasoning is in line with the statement in the Notice that it is not necessary to assess the complaint based on all of the established principles when an assessment under one of them leads to a conclusion that the conduct in question does not fall within the enforcement priority.

The fourth decision<sup>7</sup> was also based on the principle of impact on consumer welfare and efficiency, as well as on the principle of rational use of resources. The complainant had requested an investigation into the allegedly anticompetitive conduct of AB Lietuvos paštas (Lithuanian Post Office) in submitting public bids. The allegation of an abuse of dominant position in the reserved postal services market resulted from lower fees offered by AB Lietuvos paštas in public procurement bids compared to fees it offered the complainant and other corporate clients, thereby trying to exclude them from the tenders.

Having evaluated the complaint, the Lithuanian Competition Council refused to open an investigation since the complainant and other competitors actually submitted bids offering lower prices than AB Lietuvos paštas did. The conduct of AB Lietuvos paštas, therefore, did not prevent the applicant and other competitors from effectively competing in the public tenders. The decision also stated that there was no ground for assuming that prices to consumers would have been higher absent the alleged infringement.

The decision of the Competition Council also stipulated that, since the subsidiary of AB Lietuvos paštas was awarded a contract in one of the public tenders and the Communications Regulatory Authority had opened an investigation into it, the investigation of the same conduct by the Competition Council would result in an unreasonable use of resources.

#### **IV. CONSIDERATIONS FOR THE FUTURE**

While it is doubtful whether the first four instances of applying the Enforcement Priorities Notice are sufficient to draw any conclusions about the tendencies for its future application, it is clear that the first months have not seen any refusals to open a cartel investigation by claiming that it would not fall within the priorities. It, therefore, remains to be observed whether such a tendency continues.

Overall, the Enforcement Priorities Notice is undoubtedly a welcome addition to the toolbox used by the Competition Council, in particular on its 20<sup>th</sup> anniversary, when benefits to consumers have become a clearly defined and articulated objective. The application of the Notice, however, still remains to be tested in courts.

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<sup>7</sup> July 30, 2012 decision No. 1S-103.