YEARBOOK of ANTITRUST and REGULATORY STUDIES
www.yars.wz.uw.edu.pl

Peer-reviewed scientific periodical, focusing on legal and economic issues of antitrust and regulation.

CARS Centre for Antitrust and Regulatory Studies
Centrum Studiów Antymonopolowych i Regulacyjnych
Centre for Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
www.cars.wz.uw.edu.pl

The Impact of EU Competition Rules on Lithuanian Competition Law

by

Rimantas Antanas Stanikunas* and Arunas Burinskas**

CONTENTS

I. Introduction
II. EU competition law to be followed by the Member States
III. Lithuanian competition law and its enforcement
  1. The competition law reform in Lithuania
  2. The competition law of Lithuania
  3. The Lithuanian Competition Council as the National Competition Authority
  4. Defence of public interest and challenging administrative abuses
  5. Private enforcement of Lithuanian competition law
IV. Lithuanian judicial review and competition case law
  1. Judicial review procedure
  2. Jurisprudence and case-law
V. Conclusions

Abstract

This paper provides a study of the impact of EU competition rules on Lithuanian legislation and legal practice. It was found therein that the Lithuanian law on competition, its competition authority and courts do not adhere to all objectives of EU competition law consistently. In Lithuania, the most followed objectives of EU competition law are primarily that of the internal market and consumer welfare.

The European Commission looks at both: competition and the creation and preservation of the internal market, as promoting consumer welfare and an efficient

* Professor at the Vilnius University; r.stanikunas@glimstedt.lt.
** Ph.D. candidate at the Vilnius University; burinskas.arunas@gmail.com.

allocation of resources; it proclaims that the role of competition law is to prevent harm to consumers.
The Lithuanian law on competition fully corresponds to the provisions of the Treaty. Full compliance is endorsed by the National Competition Authority while Lithuanian courts strive to maintain such policy by referring to the internal market and consumer welfare standards. Both the Lithuanian competition authority and its courts defend consumer welfare from higher prices, reduced output, less choice or lower quality of goods or services, or diminished innovation.
Existing legislation and other procedural rules entitle the competition authority and courts of Lithuania to enforce competition law without significant obstacles. Applicable procedures ensure transparent, independent, and professional decision-making by the competition authority, confidentiality, as well as an effective process of investigation and information collection.
The Commission's move towards the realignment of competition law with modern economic thinking on efficiency and welfare has begun. It entails not just the adoption of the consumer welfare standard, but also the application of the 'effects' approach. However, EU Courts have not been unambiguously following the consumer welfare standard, as endorsed by the Commission. They protect competitors themselves, rather than competition, ruling in favour of small or medium-sized firms in order to keep markets open and achieve fairness. They tend to protect the structure of the market from indirect possible long-term effects on consumers, rather than just from immediate direct effect on them.
Some evidence was found of a 'more economic' approach being applied over the last decade as it started to find its way into the enforcement of Lithuanian competition law. Although this trend is likely to increase in the future, it is, nevertheless, still not the prevailing approach in Lithuania. At the same time, the national competition authority and courts strictly follow the guidelines and communications of the Commission on this issue.

Résumé

Dans cet article, les auteurs présentent une étude de l'impact des règles de concurrence de l'UE sur la loi et la pratique juridique lituaniennes. Les auteurs ont constaté que le droit de la concurrence, l'autorité administrative et les tribunaux de la Lituanie ne respectent pas tous les objectifs du droit communautaire de la concurrence d'une manière uniforme. En Lituanie, les objectifs les plus suivis du droit de la concurrence de l'UE sont principalement ceux du marché unique et du bien-être des consommateurs.
La Commission européenne examine à la fois la concurrence, la création et la préservation du marché unique autant que la promotion du bien-être des consommateurs et une allocation efficace des ressources. Elle proclame le rôle du droit de la concurrence dans la prévention des dommages faites aux consommateurs. En Lituanie, la loi sur la concurrence correspond pleinement aux traités de l'UE. Cette conformité est approuvée par l'autorité administrative. Les tribunaux de la

Lituanie s'efforcent de maintenir cette politique en faisant appel aux normes du marché et de la protection des consommateurs individuels. En Lituanie, l'autorité administrative et les tribunaux défendent le bien-être des consommateurs contre la hausse des prix, la baisse de la production, la limitation du choix ou la détérioration de la qualité des biens ou des services, ou la diminution de l'innovation.
Tous les actes juridiques et autres règles de procédure permettent à l'autorité administrative et aux tribunaux de la Lituanie d'appliquer l'appareil de droit de la concurrence sans obstacles importants. Les procédures prévues assurent que les décisions sont prises d'une façon transparente, indépendante et professionnelle par l'autorité administrative, autant que la confidentialité et l'efficacité du processus d'enquête et de collecte de l'information requise sont maintenues.
La démarche de la Commission vers la réorganisation du droit de la concurrence en conformité avec la pensée économique moderne sur l'efficacité et le bien-être a commencé. Elle implique non seulement l'adoption de la norme de protection des consommateurs, mais aussi l'approche «effets» à l'application de celle-ci. Toutefois, les juridictions de l'UE n'ont pas été sans ambiguïté en suivant le concept de la norme de protection des consommateurs adopté par la Commission; ils protègent les concurrents eux-mêmes plutôt que la concurrence, en faveur des petites et moyennes entreprises, afin de maintenir l'ouverture des marchés et d'atteindre l'équité; ils ont tendance à protéger la structure du marché avec des effets sur les consommateurs qui serions indirects et possibles à long terme, et pas seulement à l'effet direct et immédiat.
Les auteurs ont trouvé des preuves de l'approche «plus économique» au cours de la dernière décennie. Il a commencé à trouver sa place dans l'application du droit de la concurrence de la Lituanie. Cette tendance semble à augmenter. Cependant, il ne reste encore pas en vigueur dans l'approche de l'autorité administrative et les tribunaux. En Lituanie, l'autorité administrative et les tribunaux suivent les directives et les communiqués de la Commission sur cette question strictement.

Classifications and key words: goals of competition law; competition law; Lithuania; impact of EU competition rules

I. Introduction

A competitive market environment, which allows new firms to challenge incumbents, efficient firms to grow and inefficient ones to exit can help boost economic growth and living standards. Two main policy ingredients are necessary for a growth-enhancing competition environment. First, market regulation should be formulated so as not to hamper competition. Second, anticompetitive behaviours that hinder the functioning of the market should be prohibited and punished within an effective antitrust framework,

while mergers that may reduce competition should be blocked, or at least remedied[1].

Therefore, the main purpose of competition policy is to ensure the proper functioning of a free-market state. Competition policy covers such matters as the prohibition of cartels, merger control, abuse of a dominant market position, block exemptions, as well as the equal treatment of public and private enterprises. Competition policy should be discussed from two perspectives: firstly, as relations between companies themselves and the interaction between enterprises and consumers; and secondly, regulations and relations between companies and the State (especially in state aid matters)[2].

However, before considering EU competition policy, some of its objectives must be noted first. In general, EU competition policy aims to create and preserve the internal market as it promotes consumers welfare and an efficient allocation of resources.

It shall be noted in addition that Council Regulation 1/2003, also known as the 'Modernisation Regulation'[3], granted National Competition Authorities (hereafter: NCAs) and courts the power to enforce Articles 101 & 102 TFEU directly. It also began the 'modernisation' of EU competition law whereby the Commission began a move towards the realignment of EU competition law with modern economic thinking on efficiency and welfare.

The adoption of the consumer welfare standard by the Commission has not been unambiguously followed by the EU Courts however. Although not expressly stated, many judgments (in particular those on Article 102 TFEU) protect competitors, rather than competition, favouring small or medium-sized firms (hereafter: SMEs) in order to keep markets open and to achieve fairness. EU Courts also tend to focus on protecting the structure of the market from indirect, possible long-term effects on consumers, rather than on immediate, direct effects.

In this context, countries such as Lithuania that joined the EU in 2004 and 2007, with their past administratively planned market activities and central allocation of resources that gradually made way to free competition and trade, had to build their competition laws from scratch. More importantly also, they had to create a competition culture!

---

[1] E. Alemani et al., *New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries. OECD Economics Department Working Papers, No. 1104*, OECD Publishing 2013.

[2] M. Kozak, "The Main Changes and Dynamics of Competition Law Rules in Poland and Lithuania in the Period of 1990-2004", [in:] *International conference of PhD students and young researchers: The Interaction Of National Legal Systems: Convergence Or Divergence?*, Vilnius 2013, p. 139–144.

[3] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.01.2003, p. 1–25 (Regulation 1/2003).

Lithuania has solved this huge challenge mostly by simply copying EU competition rules into their own legal system, including Commission guidelines. This has largely helped to address the problem of uniform application of EU competition rules in Lithuania and to comply with the so-called convergence rule established in Article 3 of Council Regulation 1/2003. Under this rule, NCAs have not only the possibility, but also the obligation to apply Articles 101 & 102 TFEU together with national competition rules in all cases where trade between Member States is affected. In practice, this means that while applying the competition rules established in the Treaty, NCAs have to follow the precedents and guidance provided by the European Commission and the Court of Justice of the European Union (hereafter: CJEU)[4].

So, trying to understand how Lithuania has successfully overcome this challenge and what struggles it faces even now, this paper provides a study of the impact of EU competition rules on Lithuanian legislation and legal practice.

It was found in this context that Lithuanian law on competition as well as its competition authority and courts do not adhere to all objectives of EU competition law consistently. In Lithuania, the most followed aims of EU competition law are primarily those of the internal market and of consumer welfare. There is clear evidence that in the 10 years since Lithuania has entered the EU, it has, as a new Member State, incorporated, implemented and interpreted EU competition rules directly following EU Treaties and regulations as well as according to the guidelines and communications of the Commission.

The paper contains an Introduction followed by four individual sections. The first presents a short description of EU competition policy. The second outlines the competition rules of Lithuania, including those on the competences of its competition authority and those on its competition law procedures. It then compares national and EU competition rules. The third section investigates Lithuanian jurisprudence and the case-law of its NCA. The last part contains conclusions.

II. EU competition law to be followed by the Member States

As this article aims to reveal the influence of EU competition law on its Lithuanian counterpart, some of the more distinct aspects of European competition law are briefly discussed first.

[4] D. Miniotas, "EU Competition law – no place for national rules?" [in:] *International conference of PhD students and young researchers: The Interaction Of National Legal Systems: Convergence Or Divergence?*, Vilnius 2013, p. 208-214.

EU competition law is a peculiar legal system because it pursues at least two major and equally important goals: (i) the promotion and achievement of market integration between its Member States, and (ii) the promotion of effective and undistorted competition. These aims may be respectively described as the "integration goal" and the "economic goal". In recent years, consumer welfare has been referred to as the central and ultimate objective of competition law by many commentators, even the Commission[5].

In its 2004 Guidelines on the application of what is now 101(3) TFEU[6], the European Commission formulated the objectives of EU competition law in a way that conceptualises competition as serving common aims alongside market integration, rather than as a means of advancing the internal market. It looks at both, competition and the creation and preservation of the internal market, as promoting consumer welfare and an efficient allocation of resources. The current Commissioner Joaquin Almunia stated in this context that consumer welfare is not just a catchy phrase but the cornerstone – the guiding principle – of EU competition policy[7]. Documents such as the Horizontal Merger Guidelines (2004)[8], the Non-Horizontal Merger Guidelines (2008)[9], and the Vertical Restraints Guidelines (2010)[10] all proclaim the role of competition law in preventing harm to consumers[11].

The EU is governed by two Treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU). It is the latter that contains the key provisions of EU competition law: Article 101 and 102 TFEU. Other relevant rules are laid down in Protocol 27 (Article 3(1)(g) of the EC Treaty); in Section 1 TFEU (Articles 101-106) containing rules applicable to undertakings; and Section 2 TFEU (Articles 107-109) covering State aid. Merger control has never been expressly part of a European Treaty and so its rules are to be found in Council Regulation 139/2004. The above primary rules are complemented by a large number of secondary legislation as well as by numerous notices and other soft-law instruments, by the case-law of the Commission and the jurisprudence of the CJEU.

---

[5] D. Miniotas, *op. cit*.

[6] OJ C 101, 27.04.2004, p. 97; published together with the package of Notices accompanying Regulation 1/2003.

[7] "Competition – what's in it for consumers?", European Competition and Consumer Day, Poznań, 24.11.2011, SPEECH/11/803, http://europa.eu/rapid/press-release_SPEECH-11-803_en.htm (28.04.2014).

[8] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.02.2004, para 8.

[9] Guidelines on the assessment of non- horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, para 10.

[10] Guidelines on vertical restraints, OJ C 130, 19.05.2010, para 7.

[11] A. Jones, B. Sufrin, *EU Competition Law: Text, Cases and Material*, Oxford 2014.

Council Regulation 1/2003 came into full effect on 1st May 2004 bringing an end to the cumbersome and much-criticised centralised enforcement of competition law by the European Commission. It abolished individual notifications under Article 101 TFEU and granted NCAs and national court the power to apply Articles 101 & 102 TFEU directly. In essence, this meant that the power to apply EU competition rules has been decentralised from the prevailing dominance and sole discretion of the Commission and assigned to the competition authorities and courts of all Member States[12]. Addressing the problem of uniform application of EU competition rules throughout the EU, the Commission established the aforementioned convergence rule (Article 3 of Regulation 1/2003) whereby the Commission preserved its dominance on EU competition policy matters. With the help of the newly established European Competition Network (hereafter: ECN), the Commission keeps a close eye on competition law developments in the Member States, seeking a uniform and consistent application of EU competition rules[13].

So competition law may approach more modern economic thinking based on the concepts of economic efficiency and welfare. This was a small revolution, often called the 'more economic' approach. It entails not just the adoption of the consumer welfare standard, but also the 'effects' approach to its application. However, the economic goal of EU competition law is concerned with improving allocative efficiency in ways that do not impair productive efficiency to the prejudice of consumer welfare.

As consumer welfare is the key objective of competition policy, the main argument in favour of public intervention is obviously that the latter would lead to lower prices and to an increase in consumer surplus. Customers will benefit in a direct and immediate way from price reductions. Excessive prices also harm downstream competition among manufacturers: when a company is dominant in input supply and sets excessive prices therein, downstream companies that depend on such supplies are hindered in their ability to compete vigorously or to enter new markets[14]. As mentioned, the adoption by the Commission of the consumer welfare standard has not been unambiguously followed by EU Courts.

The consumer welfare standard does not fit well with other considerations, unless consumer welfare is specifically understood as including some general notion of the 'well-being' of citizens. There is a specific question of the relationship between competition rules and industrial policy (state acts and policies that relate to the industry). The latter encompasses issues such

[12] D. Miniotas, *op. cit*.

[13] *Ibid.*

[14] J. Steenbergen, *(Excessively) High Pricing: What's the role for Competition Authorities?*, Vilnius 2013.

as employment, protecting domestic industry from foreign competition, regional development, encouraging 'national champions' and fostering particular sectors. The EU law provision on industrial policy (now Article 173 TFEU) entails the speeding up of industry adjustments to structural changes; encouraging an environment favourable to industry initiative and to the development of SMEs; encouraging an environment favourable to cooperation between undertakings; and fostering a better exploitation of the industrial potential of innovation, research, and technological development. In 2004, the Commission issued a Communication[15] that set competition at the heart of EU's industrial policy, rather than in its opposition. Hence, the question emerges here whether practices or mergers opposed by EU competition law may nevertheless be permitted because they deliver socio-political benefits. Wider considerations related to public policy are sometimes taken into account by the European judiciary and the Commission but the latter interprets Article 101(3) TFEU as a pure 'efficiency defence' and is of the opinion that factors other than efficiencies cannot normally be taken into account[16].

The need for an economic approach to Article 101(1) TFEU was stressed by the European Court of Justice (ECJ) in *Delimits* and the General Court (GC) in *European Night Services* and in *O2(Germany) GmbH & Co OHG v. Commission*. The Court explained that account has to be taken in particular of the economic context in which the undertakings operate in the products or services covered by the agreement as well as of the actual structure of the market concerned[17].

Article 102 TFEU prohibits one or more undertakings that hold a dominant position in the internal market or a substantial part thereof from abusing their dominance. Recent EU judgments have stated that the objectives of EU competition law are to protect competitors as well as consumers, the protection of competition 'as such', and preventing competition from being distorted[18]. Price discrimination is defined as a specific type of abuse in Article 102(c) TFEU, which refers to the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. It is widely believed that this provision aims to protect the customers of the dominant player rather than its competitors[19].

---

[15] COM (2004)293 final.

[16] A. Jones, B. Sufrin, *op. cit.*

[17] *Ibid.*

[18] *Ibid.*

[19] D. Geradin, C. Malamataris, "Application of EU competition law in the postal sector: overview of recent cases", [in:] Crew M.A., Brennan T.J.J., *The Role of the Postal and Delivery Sector in a Digital Age*, Cheltenham 2014, p. 116–130.

Yet at the same time, the Court of Justice (CJ) seems to side with legal literature that sees the main purpose of Article 102 TFEU as protecting consumers[20].

Mergers are frequently motivated by the desire of the parties to increase efficiency. It is important to note that the efficiencies achieved by a merger may offset its anti-competitive consequences[21]. Therefore EU competition law prohibits mergers only when they would significantly impede effective competition in the internal market, or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.

III. Lithuanian competition law and its enforcement

1. The competition law reform in Lithuania

As the purpose of this article is to show the influence of EU competition law on Lithuanian competition rules, a brief overview of the national competition law reform is provided which for illustrative purposes.

In the countries that joined the EU in 2004 and 2007, the implementation of EU rules was exceptional due to the governance method of top-down rule transfer and based on strong EU conditionality[22]. The EU has consistently required candidate countries to become accustomed to a competition framework similar to that of the EU well before the date of their actual accession. Lithuania adopted its competition laws more than ten years prior to entering the EU in 2004. In the field of merger control, Lithuania has been following the EU closely. The reform of Lithuanian competition law was also inspired by the European jurisprudence[23].

At the end of November 2001, Lithuania preliminary concluded its EU negotiations on the 'Competition Policy' chapter. It was one of the first candidate countries (together with Estonia and Latvia) to close its accession negotiations in this field. Progress of competition law and policy enforcement, legislative changes as well as key national cases (for example, concerning block and individual exemptions or abuse of a dominant position) were all

[20] *Ibid*.

[21] A. Jones, B. Sufrin, *op. cit.*

[22] K. Cseres, *Accession to the EU's competition law regime: a law and governance approach*, Amsterdam 2013.

[23] A. Svetlicinii, K. Lugenberg, "Merger Remedies in a Small Market Economy: Empirical Evidence from the Baltic States" (2013) 6–1 *Baltic Journal of Law & Politics* 1–26.

presented in the Annual Report on Competition Policy Developments in Lithuania[24].

Lithuania's first law on competition was adopted in 1992 and was based on the US approach. By contrast, the competition law reform of 1999 was meant to incorporate EU standards and practices, and to follow the EU's guidance. The new act No. VIII-1099 was adopted on 23 March 1999 and called the Law on Competition (hereafter: LC). Article 1 LC explicitly stated that its purpose was to harmonise national provisions with EU competition law. So the competition law of Lithuania has been developing under a strong influence of supranational and international law. The legal system governing competition matters has been changing from rather chaotic and incomplete, to a fairly sophisticated model with a rigid structure. Nowadays, Lithuanian competition law is based on the same rules as the competition principles that exist in EU law. Yet the harmonization process of national competition principles with EU law was not a simple task. The implementation of EU Directives into Lithuanian law, consumer protection issues, exceptions and the forms of State aid shaped not only legal changes but also the national thinking process on competition and consumer rights[25].

2. The competition law of Lithuania

The LC is the main Lithuanian legislative act directly devoted to the regulation of anticompetitive behaviour. All other legal acts, except for the Constitution and the laws passed by the Parliament, are seen as secondary legislation that cannot replace or amend the rules established by the LC[26]. Guidelines issued by the NCA do not have a legally binding power in the Lithuanian legal system, except for when they are approved by a resolution of the NCA.

Lithuanian competition law is a copy of the competition rules of the EU; all EU competition rules and even its guidelines have been adopted in the Lithuanian legislation without any significant amendment.

The prohibition of restrictive agreements is set out in Article 5 LC. Accordingly, a prohibited agreement (cartel) is, in the broadest sense, an agreement which restricts competition between competitors and eliminates the independence of their own decisions. Cartels do significant damage to other rivals and to consumers. The prohibition contained in Article 5 LC applies to agreements entered into between actual or potential competitors operating in

[24] M. Kozak, *op. cit*.

[25] *Ibid*.

[26] J. Gumbis et. al., *Competition Law in Lithuania*. Alphen aan den Rijn 2011.

the same market (horizontal agreements) as well as to agreements between entities acting on different levels of the production and distribution chain that set purchase, sale or resale conditions (vertical agreements).

The prohibition of an abuse of a dominant position is enshrined in Article 7 LC. An entity is generally regarded as having a dominant position in two cases: if it is not exposed to competition (no competition), for example, if it is the only vendor in the market, and if it can behave largely independently from its competitors (unilateral influence on the market). Undertakings that hold a dominant position in the market face more stringent competition law requirements than those who do not have market power over their competitors. Types of practices that constitute abuses of a dominant position include:

- direct or indirect imposition of unfair prices or other unfair purchase or selling conditions;
- restriction of trade, production or technical development to the prejudice of consumers;
- application of dissimilar (discriminating) conditions to individual operators;
- conclusion of a contract subject to the acceptance by the other contracting party of supplementary obligations which, by their commercial nature or purpose, are not directly related to the subject matter etc.

Undertakings have a duty to notify the NCA about an intended concentration and get permission to implement it if, in the business year preceding the concentration, the total gross income of the undertakings concerned exceeds LTL fifty million (EUR 14,48 million) and the aggregate income of at least two undertakings concerned is higher than LTL five million (EUR 1,448 million).

In small economies, structural merger remedies are off limited effectiveness as they prevent highly-efficient dominant firms from competing aggressively or from taking advantage of economies of scale. Since small markets can only support a limited number of competitors, one of the implications of competition policy would be to prioritise aggressive antitrust enforcement against restrictive agreements (including tacit collusion) and abuses, rather than attempting to regulate market concentrations through strict merger control and structural remedies. From the enforcement point of view, several problems have been identified associated with the use of structural remedies in small market economies. They have been used as arguments for greater flexibility as far as this type of remedy is concerned and include: a weak bargaining position vis-à-vis large multinationals, difficulty to enforce divestitures or prohibitions, preservation of efficiencies and other pro-competitive effects of the merger, monitoring costs. It should also be noted that, in small jurisdictions, it is

sometimes problematic to implement structural remedies simply because the consolidated nature of certain industries excludes most incumbents from being considered as potential purchasers of the divested assets. Such arguments follow the statements of some authors that (in light of the above constraints, which may limit the use of structural remedies) the Lithuanian competition authority increasingly considers the possibility of accepting behavioural remedies[27].

3. The Lithuanian Competition Council as the National Competition Authority

The Competition Council of the Republic of Lithuania (NCA) is the country's only authority which mission is to safeguard effective competition. The Competition Council consists of the chairperson and four members who shall be appointed by the President of the Republic on the recommendation of the Prime Minister of the Republic of Lithuania for a term of six years. The NCA is supported by administrative staff, which performs functions of the NCA, conducts individual investigations. The NCA has defined the structure of the administration as well as the principal tasks and functions of the structural divisions of the NCA.

Article 46(4) of the Constitution of the Republic of Lithuania specifies that the law shall prohibit monopolisation of production and of the market, and that it shall protect the freedom of fair competition. Article 1(1) LC provides in the same manner that the purpose of this act is to protect the freedom of fair competition in the Republic of Lithuania.

The amendments of the LC that entered into force in 2012 allowed the NCA to set its own priorities. Rules on the prioritisation of cases were thus enacted to ensure efficient allocation of the limited available resources. In order to provide more details concerning its enforcement priorities (and, thus, also the objectives of national competition law), the NCA adopted resolution No. 1S-89 'Concerning Priority of the Activities of the Lithuanian Competition Council' (Resolution of Priority) on 2 July 2012. The NCA proclaimed therein that effective competition and consumer welfare are the two main goals to be achieved. Such goals correspond to the objectives established under EU law. It was furthermore noted that most severe, negative effects on effective competition and consumer welfare are usually caused by actions that (i) directly affect prices of goods, their quality and variety; (ii) directly limit the possibility of the undertakings to act in the relevant market by closing or partitioning the

[27] A. Svetlicinii, K. Lugenberg, *op. cit.*

market or through expulsion from the market; (iii) directly affect the relevant part of the undertakings or consumers operating in Lithuania; (iv) directly related with goods intended for consumers[28].

The Lithuanian competition authority is not a pre-trial institution, but a body entrusted with the enforcement of competition rules. First of all, public enforcement of competition rules is ensured by investigation by the NCA and the imposition of sanctions. This involves prohibited agreements (Article 5 LC), abuse of a dominant position (Article 7 LC), mergers (Articles 8–14 LC) and actions of unfair competition (Article 15 LC). The NCA is also empowered to conduct investigations of legal acts or other decisions by entities of public administration (Article 4 LC) and has the right to place a duty upon them to revoke or change such legal acts or decisions if they are found to restrict or distort competition. If public administration bodies fail to comply with the NCA decision, the latter has the right to appeal their actions to the court. Lastly, the Lithuanian competition authority has the right to appeal to the court in defence of the public interest if the legal provisions directly envisage such a possibility. The NCA acts as a plaintiff and has the rights and obligations of the plaintiff; it is obliged to prove the existence of public interest.

Aside from the Resolution on Priority, the Lithuanian Competition Council adopted also a similar resolution on its main guiding principles for the implementation (though mostly initiation) of competition law enforcement and policy. The Lithuanian competition authority recognises therefore the importance of the clear establishment of key goals of competition law. Objectives of competition law were also identified by the judiciary and the scholars. The most commonly mentioned goals of competition law include: the integration of the internal market, protection of consumers, competitors, freedom of competition and economic efficiency. The judiciary and competition authorities generally recognise that multiple goals of competition law coexist[29].

The Lithuanian competition authority must comply with procedural rules laid down in the legislation of the Republic of Lithuania. Basic procedural principles (i.e. principle of impartiality, equity, etc.) and general issues on proceedings carried out by the NCA (e.g. investigative actions, grounds for opening and closing proceedings, right to be heard, right to access case material, etc.) are established in the Law on Public Administration and in the LC. In more detail, procedural issues are regulated in the Rules of the Procedure of the NCA adopted by its resolution No. 129 on 14 November 2002

[28] R. Moisejevas, A. Novosad, "Some Thoughts Concerning The Main Goals Of Competition Law" (2013) 20(2) *Jurisprudence* 627-642.

[29] *Ibid*.

(hereafter: PCA). The administrative procedure carried out by the Lithuanian competition authority contains some elements meant to guarantee that the decision-makers (the 5 members of the Competition Council) consider all relevant evidence and explanations towards the alleged infringement.

During the investigative phase of the administrative procedure, the NCA adopts all necessary decisions regarding inspections, prolongation of the investigation and other decisions relevant to the investigation. Usually, when a certain question is to be presented to the NCA, the investigative team must produce a notice on the progress of the investigation: what investigative actions have already been taken, what evidence has been found, what the next planned investigative actions are, etc. The NCA can thus follow the investigation from its beginning and if needed, it may draw the attention of the investigators to certain issues regarding possible relevant evidence and the possible assessment of the investigated behaviour.

Furthermore, before presenting the draft statement of objections to the Lithuanian Competition Council, the investigators must present it, accompanied by all case material, to the in-house lawyers, who are not directly involved in the investigation, for a legal assessment of the statement of objections to be made.

The internal procedure for the approval of the statement of objections is not the only institution meant to ensure that the NCA considers all relevant evidence and different possible explanations of the cases. This possibility is guaranteed also by another phase of the administrative proceedings – preparation for the hearing of the case. At this stage, investigators receive written explanations from the undertakings concerned on the conclusions made in the statement of objections, they must then summarise these arguments and give their reasoned opinion on these explanations to the NCA.

During the hearing of the case, which according to the LC must be held orally, the NCA has an opportunity to hear, and thus to consider, the oral explanations provided by the undertakings concerned. Moreover, it has the right to ask the undertakings concerned to clarify their position, arguments or other relevant information in order to make a reasoned decision concerning the alleged infringement. In cases where Articles 101 & 102 TFEU are being applied, the opinion of the European Commission must also be taken into account under the provisions of Regulation 1/2003 before the Lithuanian competition authority can adopt its final decision.

The most important issue concerning confidential information in the administrative proceedings carried out by the NCA relates to confidential information containing an undertaking's commercial secrets.

According to the provisions of the LC, the NCA and its staff are obliged to respect information that contains commercial secrets and to protect it from

3rd party disclosure. The LC stipulates that commercial secrets disclosed to the NCA and its administrative staff in the course of the enforcement of the LC must be kept confidential and must be used solely for the purposes for which the information has been provided, unless the undertaking consented otherwise.

Investigators of the Lithuanian competition authority have certain rights concerning requesting information for the purpose of their investigation. According to the LC, they have the right to get information (data, documents, etc.) from the undertakings subject to the investigation as well as from any other undertaking, public institution or other person, if they have information relevant to the investigation. It must be noted that an investigator must provide information about the investigation (give a copy of the NCA's decision to start an investigation) and must present documents confirming his/her powers to request the information during the investigation (an authorisation to carry out investigative actions for a certain investigator is usually given in the NCA's decision to start an investigation). The LC does not differentiate between information requests addressed to the investigated undertakings or other parties to the proceedings and any other addressees. All of them must submit the requested information, provided they were properly presented with the grounds for such request. If they do not submit the requested information, they might found themselves liable under administrative law. Information may also be collected during on-the-spot investigations – dawn raids – but a court decision sanctioning such action is needed here.

4. Defence of public interest and challenging administrative abuses

The Lithuanian competition authority has the right to involve the courts so as to ensure the proper application of competition rules in relation to legal acts or other decisions issued by public administration bodies that restrict or distort competition (Article 4 LC prohibits a specific type of anti-competitive conduct by administrative authorities: either decisions that discriminate or decisions that grant privileges to certain undertakings). The NCA has the right to appeal the legal acts or other decisions adopted by public administration bodies, related to the regulation of economic activity, except for the statutory acts issued by the Government of the Republic of Lithuania. The NCA can send the offending body a request to amend or repeal the contested legal act or decision. If such requirement is not complied with, the NCA has the right to submit to the court a request for that entity of public administration to revoke or change the restrictive legal acts or decisions. In this case, the Lithuanian competition authority acts as an applicant.

So the competition law of Lithuania authorises its NCA to challenge anti-competitive measures committed by public administration[30]. Article 4 LC prohibits the abuse of administrative powers: it prohibits public administration bodies from adopting and carrying out acts that grant privileges or discriminate. Lithuanian law provides that when carrying out the assigned tasks related to the regulation of economic activity within the Republic of Lithuania, entities of public administration must ensure freedom of fair competition. Specifically, it bans public administration bodies from discrimination, which may give rise to differences in the conditions of competition. Entities of public administration shall be prohibited from adopting legal acts or other decisions which grant privileges to, or discriminate against, any individual undertakings which may give rise to differences in the conditions of competition for undertakings competing in the relevant market, except where the difference in the conditions of competition is unavoidable.

The NCA has the power to place an obligation on the scrutinised body to discontinue or amend the measure in order to conform to competition rules. Most infringements of Article 4 LC concern violations by municipalities awarding public procurement contracts outside a competitive process, and most of these illegal awards are now gone[31]. Nowadays, this area constitutes the main field of the activities of the Lithuanian Competition Council.

5. Private enforcement of Lithuanian competition law

There is scope for private enforcement of competition law in Lithuania.

Private enforcement of competition rules can be initiated by an undertaking whose legitimate interests have been violated by actions of unfair competition (Article 16 LC) or any natural or legal person that incurred damages due to a violation of competition law (Article 43 LC). In cases of private enforcement of competition rules, the NCA must give a finding on the issues pertaining to the application of competition law either upon the request of the court or on its own initiative.

The legal basis for damages claims for breach of national and EU competition law can be found in Articles 47(1) LC, and Articles 6.245, 6.246 and 6.263 of the Civil Code of Lithuania. Those provisions establish the legal

[30] E. Fox, D. Healey, "When the State Harms Competition – The Role for Competition Law" (2013) 11–13 *NYU Law and Economics Research Paper*, p. 23.

[31] *Ibid*, p. 23.

basis for civil law damages claims, which applies to breaches of Lithuanian and EU competition law[32].

The basic principle behind such liability in Lithuanian law is that every person has a duty to act in such a way as not to cause damages to another person and, accordingly, that any harm caused as a result of an illegal act must be compensated by the person responsible for it upon a claim being made by the injured party (general tort law doctrine). Broadly, the conditions for tort liability are similar to those found in most European legal systems. The claimant is required to show: (i) the illegal action; (ii) fault (understood objectively and thus essentially presupposed by illegality); (iii) the presence of damages; and (iv) a causal link between the illegal conduct and the damage. The jurisprudence of the Lithuanian High Court confirms that all these four aspects need to be proven cumulatively for a successful damages claim (Case No. 3K-3-207/2010 *UAB Klevo lapas v. AB Orlen Lietuva*, 17 May 2010)[33].

Anti-competitive agreements give rise to liability and claims for damages also for those which are party to them. Articles 1.80 and 1.81 of the Civil Code state that contracts contrary to imperative rules of law and to public order are null and void and thus are considered to have never legally existed. In this context, competition law rules prohibiting anti-competitive agreements are considered imperative rules forming part of the public order. Accordingly, if a contract is considered to violate the rules of competition law, it would, for the purposes of contract law, be deemed to have never existed. Moreover, on the basis of tortious liability, any person, including entities party to the contested agreement, who suffered damages as a result of that agreement, would be able to bring a civil claim for damages against the responsible party[34].

Although the legal basis for antitrust damages claims in Lithuania is well established, very few such cases have emerged in practice. Nonetheless, it is expected that their number will increase. The Lithuanian Code of Civil Procedure has recently been amended introducing class actions. Moreover, Act No. I-1274 on Commercial Arbitration adopted on 2 April 1996, allows parties to transfer their dispute on the amount of damages to arbitration. While arbitration may not rule on the existence of the infringement itself, the parties may go to arbitration to decide the issue of damages compensation if the infringement has already been established.

---

[32] D. Ashton, D. Henry, *Competition Damages Actions in the EU: Law and Practice*, Cheltenham 2013, p. 27.

[33] *Ibid*, p. 27.

[34] *Ibid*, p. 28.

IV. Lithuanian judicial review and competition case law

1. Judicial review procedure

Undertakings party to a given proceeding (as well as others who believe that their rights, protected by competition law, have been violated) can appeal the administrative decision of the Lithuanian competition authority. Decisions of the NCA are reviewed by an independent judicial body – the Vilnius Regional Administrative Court. A written complaint can be lodged not later than within 20 days after the delivery of the resolution of the NCA or its publication on its website. In certain cases, only the parties to the proceedings have the right to appeal. The ruling of the Vilnius Regional Administrative Court may further be appealed to the Supreme Administrative Court of Lithuania, which adopts the final judgment in the case.

The PCA and LC stipulate that the court has the right to render a ruling *inter alia* to amend the decision of the NCA or even to revoke it (in part or in full). The Lithuanian judiciary can assess the decision of the Competition Council in full. However, because of the nature of competition law and its cases, for decisions largely based on economic reasoning and an economic assessment (e.g. the definition of the relevant market, establishment of a dominant position, etc.), the court may not be able to make a full revision, especially in complex cases. Judicial revision is thus basically limited to the legal assessment of the case reviewing issues such as: was the infringement properly qualified; were evidential and reasoning criteria met; have any violations of principal procedures occurred, especially concerning rules meant to ensure the objective evaluation of all circumstances. Meanwhile, economic assessment falls outside the scope of juridical revision, except for obvious errors in economic reasoning which might be detected by the court. Despite the fact that the court has the right to revoke the decisions of the NCA, it can be concluded nevertheless that the judiciary still grants some level of deference to the original decision with respect to issues related to the economic assessment of the given case.

2. Jurisprudence and case law

All competition cases examined by the Supreme Administrative Court of Lithuania – the final instance of public enforcement of competition law – were investigated for the purpose of this analysis covering the period between 1st May 2004, when Lithuania entered the EU, up to now.

18 cases[35] were identified on prohibited agreements (16 on horizontal and 2 on vertical agreements); 13 cases[36] on the abuse of a dominant position; 2 cases[37] on mergers, and 37 cases on an administrative abuse of competition law.

First of all, there is clear evidence that the Supreme Administrative Court of Lithuania strictly adheres to the rules of EU competition law (administrative courts of Lithuania rely on EU precedents even when only national competition law is being enforced). The Supreme Court declared very explicitly (in its judgments of 18.04.2012, No. A-858-290-12; of 01.06.2011, No. A-822-2240-11; of 28.03.2011, No. A-525-2577-11; of 11.05.2006, No. A-444-686-06) that: '*given the fact that the provisions of the Law on Competition (in this case the rules governing prohibited agreements) and their concepts are essentially identical to the provisions of Article 101 TFEU (...), in addition because the goal of the competition law of the Republic of Lithuania and that of the European Union competition law is matching (Article 1, paragraph 3 of the Lithuanian Competition Law), the ECJ interpretation of Article 101 TFEU is particularly relevant for the application of Article 5 of the Law on Competition. Therefore, it is important to rely on the ECJ practice in relation to Article 101 of the Treaty in examining this case, and in the interpretation of the Law on Competition, despite the fact that the Competition council hasn't found an infringement of Article 101 TFEU*'[38]. It has been found that the Supreme Court had not relied on EU jurisprudence or Commission guidelines in two cases only.

An identical position of the Supreme Court has been observed in cases concerning the abuse of a dominant position (judgment of 13.08.2012, No. A-858-1516-12; of 08.12.2008, No. A-442-715-08) and mergers (01.03.2012, No. A-502-1668-12).

---

[35] Judgments on prohibited agreements: of 26.11.2012, No. A-520-2995-12; of 21.06.2012, No. A-552-2016-12; of 21.06.2012, No. A-520-2136-12; of 17.05.2012, No. A-502-1301-12; of 20.04.2012, No. A-858-1245-12; of 18.04.2012, No. A-858-290-12; of 26.01.2012, No. A-858-269-12; of 21.07.2011, No. A-502-2256-11; of 23.06.2011, No. A-444-1433-11; of 1.06.2011, No. A-822-2240-11; of 27.05.2011, No. A-858-294-11; of 28.03.2011, No. A-525-2577-11; of 2.09.2010, No. A-525-2577-11; of 16.10.2009, No. A-502-34-09; of 25.11.2008, No. A-39-1939-08; of 22.05.2008, No. A-248-697-08; of 11.05.2006, No. A-444-686-06; of 3.06.2004, No. AP-05-82-04.

[36] Judgments on abuse of a dominant position: of 5.03.2013, No. A-502-706-13; of 21.01.2013, No. A-502-801-13; of 13.08.2012, No. A-858-1516-12; of 15.03.2010, No. A-822-337/2010; 2.04.2009, No. A-502-341-09; of 26.03.2009, No. A-822-441-09; of 8.12.2008, No. A-442-715-08; of 14.08.2008, No. A-39-1439-08; of 8.07.2008, No. A-261-959-08; of 22.12.2006, No. A-248-2207-06; of 13.06.2006, No. A-469-1065-06; of 10.02.2005, No. A-415-783-06; of 3.06.2004, No. P-05-82-04.

[37] Judgments on mergers: of 25.04.2013, No. A-520-634-13; of 1.03.2012, No. A-502-1668-12.

[38] Translated by the authors of the paper.

Speaking of the 'more economic approach', only one case on the abuse of a dominant position was identified (judgment of 21.01.2013, No. A-502-801-13) where the court stressed explicitly that competition cases shall be analysed on the basis of economic logic and relevant examples. In a case on prohibited agreements (judgment of 16.10.2009, No. A-502-34-09), the court applied the HHI index agreeing with the argument suggested by the NCA. In other judgements however, the Supreme Court declared that because of the nature of competition law and its cases, when such decisions are largely based on an economic reasoning and assessment (e.g. the definition of the relevant market, establishment of a dominant position, etc.), the court may not be able to make a full revision of the NCA's decisions, especially in complex cases. As mentioned, economic assessment falls outside the review of Lithuanian judiciary, except for some obvious errors in the economic reasoning which are easily detected by the court. The court may annul a decision of the NCA due to the lack of a proper economic justification and easily notice situations where the 'economic' reasoning of the Competition Council is obviously ill-founded.

Despite the fact that predatory pricing was considered in a number of cases[39], the NCA has only once actually found that the dominant undertaking has indeed engaged in predatory pricing (decision No. 1 of 28.01.1997 to fine UAB "AGA"). In decision No. 1S-85 of 12.07.2007, concerning the termination of the inquiry into the compliance of the actions of UAB "AGA" and UAB "Elme Messer Lit" with the requirements of Article 9 LC, the NCA has not mentioned any specific type of costs on the basis of which predatory pricing should be evaluated. In its analysis of price predation, it was simply mentioned that prices have to be lower than costs. In other similar decisions, the NCA was expressly referring to average variable cost tests and to the *AKZO* judgment of the Court of Justice. However, justifications provided by the Lithuanian competition authority have improved since 2011 and are becoming more convincing and detailed.

[39] Decision No. 1 of 28.01.1997 to fine UAB "AGA"; decision No. 1S-85 of 12.07.2007 concerning the termination of the inquiry into the compliance of the actions of UAB "AGA" and UAB "Elme Messer Lit" with the requirements of Article 9 LC; decision No. 2S-1 of 21.01.2010 concerning the compliance of the actions of the State Enterprise International Vilnius Airport to Article 9 LC and Article 102 TFEU; decision No. 1S-184 of 15.09.2011 on the termination of the inquiry concerning compliance of the actions of AB "Lietuvos geležinkeliai" to Article 9 LC; decision No. 1S-30 of 1.03.2012 on the termination of the inquiry concerning the compliance of the actions of TEO LT AB to Article 9 LC.

V. Conclusions

As administratively planned market activities and central allocation of resources gradually made way for free competition and trade, Lithuania not only had to build its competition laws from scratch but also create a competition culture.

Lithuania has solved this huge challenge mostly by copying EU competition rules into their own legal system, including Commission guidelines. This approach largely helped to address the problem of uniform application of EU competition rules in Lithuania and helped comply with the so-called convergence rule established in Article 3 Regulation 1/2003. According to the convergence rule, NCAs have not only the possibility, but also the obligation to apply Articles 101 & 102 TFEU together with their national competition rules in all cases where the EU trade is affected. In practice, this means that while applying Treaty competition rules, the NCAs have to follow the precedents and guidance provided by the Commission and the EU judiciary.

The competition law of Lithuania authorises its NCA to challenge anti-competitive measures introduced by public administration bodies. Lithuanian law provides that when carrying out their assigned tasks related to the regulation of economic activity, public administration bodies must ensure the freedom of fair competition. Article 4 LC prohibits the abuse of administrative powers by banning public administration from adopting and carrying out acts that grant privileges or discriminate that may give rise to differences in the conditions of competition. In this context, the NCA has the power to require such body to abolish or amend the contested measure in order for it to conform to competition rules. Most infringements of Article 4 LC concern violations the non-competitive manner of awarding procurement contracts by municipalities, and most of these illegal awards have now gone.

Although the legal basis for antitrust damages claims in Lithuania is well established, there have been very few cases so far seeking damages for breaches of competition law. Nonetheless, it is expected that the number of cases will increase, especially thanks to improvements made to the rules on class actions (introduced recently by an amendment of the Code of Civil Procedure).

An independent judicial body (Vilnius Regional Administrative Court) can review the decisions of the NCA upon appeal by the parties or other persons who believe that their rights, protected by the law on competition, have been violated. The decision of the Vilnius Regional Administrative Court may further be appealed to the Supreme Administrative Court of Lithuania, which adopts the final judgment in the case.

The Supreme Administrative Court of Lithuania strictly adheres to the rules of EU competition law and has just started to explore the use of the 'more economic approach'.

Literature

Alemani E. et al., *New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries. OECD Economics Department Working Papers, No. 1104*, Paris 2013.

Ashton D., Henry D., *Competition Damages Actions in the EU: Law and Practice*, Cheltenham 2013.

Cseres K., *Accession to the EU's competition law regime: a law and governance approach*, Amsterdam 2013.

Fox E., Healey D., "When the State Harms Competition – The Role for Competition Law" (2013) 11-13 *NYU Law and Economics Research Paper*.

Geradin D., Malamataris C., "Application of EU competition law in the postal sector: overview of recent cases", [in:] Crew M.A., Brennan T.J.J., *The Role of the Postal and Delivery Sector in a Digital Age*, Cheltenham 2014.

Gumbis J. et. al., *Competition Law in Lithuania*. Alphen aan den Rijn 2011.

Jones A., Sufrin B., *EU Competition Law: Text, Cases and Material*, Oxford 2014.

Kozak M., "The Main Changes and Dynamics of Competition Law Rules in Poland and Lithuania in the Period of 1990-2004", [in:] *International conference of PhD students and young researchers: The Interaction Of National Legal Systems: Convergence Or Divergence?*, Vilnius 2013.

Miniotas D., "EU Competition law – no place for national rules?" [in:] *International conference of PhD students and young researchers: The Interaction Of National Legal Systems: Convergence Or Divergence?*, Vilnius 2013.

Moisejevas R., Novosad A., "Some Thoughts Concerning The Main Goals Of Competition Law" (2013) 20(2) *Jurisprudence* 627–642.

Steenbergen J., *(Excessively) High Pricing: What's the role for Competition Authorities?*, Vilnius 2013.

Svetlicinii A., Lugenberg K., "Merger Remedies in a Small Market Economy: Empirical Evidence from the Baltic States" (2013) 6–1 *Baltic Journal of Law & Politics* 1–26.