

Question A: Abuse of a Dominant Position and Globalization

Is there any consistency between the recent approaches of the different jurisdictions to the notion of abuse?

Are there too many restrictions on legal rights and business opportunities?

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1. Introduction

Like most post-Soviet states, Lithuania, in changing its economic system to a market economy, had to create an accompanying legal system which took account of the new situation in the market and the challenges to free competition caused to undertakings and consumers. As early as 1992, only two years after Lithuania regained its independence, the first Law on Competition was adopted,¹ and a public authority, the Lithuanian Competition Council at the State Council for Prices and Competition, was entrusted with monitoring. Although the wording of the provision prohibiting abuse of a dominant position has been amended several times, and the 1992 Law had only few short definitions, the essence and goal of the provision has always been similar to the present one. In the same year the Competition Council took a decision enumerating 116 dominant undertakings in specific sectors and proposing that the Ministries responsible for the respective spheres of business should monitor the behaviour of those undertakings, their financial situation and prices on the market.² The first market research on dominance in the meat and dairy product markets and possible abuse was undertaken by the State Council for Prices and Competition.³

After the first amendment to the Law on Competition in 1999, Art. 1(3) referred to harmonisation of competition law with European Union law.⁴ Based on this provision, the Lithuanian Competition Council took a quite progressive approach towards the application of EU law principles even in purely national cases. It referred to arguments and principles contained in decisions of the European courts and the European Commission while deciding cases on abuse of dominance under the Lithuanian Law on Competition. The argumentation at this time was very brief and but little attention was devoted to legal reasoning. The grounds for reasoning on European practice by the Lithuanian Competition Council were more or less repeated in a pragmatic standardised way, whereas the Lithuanian courts, mostly upholding the decisions of the Competition Council, neither mentioned the EU law-related arguments of the Competition Council in their written reasoning, nor did they take these arguments into account.⁵ This has changed very much over the years, so that today's picture is quite different.

In Lithuania today, the central prohibition of anticompetitive unilateral conduct by undertakings is contained in Art. 7 of the Law on Competition.⁶ However, Art. 46 of the Lithuanian Constitution prohibits monopolization of production and markets and guarantees free competition.⁷

Article 7. Prohibition to Abuse a Dominant Position

It shall be prohibited to abuse a dominant position within a relevant market by performing any acts which restrict or may restrict competition, limit, without due cause, the possibilities of other economic entities to act in the market or violate the interests of consumers, including:

- 1) direct or indirect imposition of unfair prices or other conditions of purchase or sale;
- 2) restriction of trade, production or technical development to the prejudice of consumers;

¹ Law on Competition, Official Gazette 1992, No. 29-841.

² Decision No. 2a *Concerning the Definition of the List of Dominant Undertakings* of 29 December 1992.

³ Decision No. 2 *Concerning the Market Study on the Market for Meat and Dairy* of 29 December 1992.

⁴ Law on Competition, Official Gazette 1999, No.30-856.

⁵ E.g. Decision of the Lithuanian Competition Council No. 5/b in the case *Concerning actions of AB "Klaipėdos jūrų krovinių kompanija"* corresponding with the requirements of Article 9 Para. 3 of the Law on Competition of 11 April 2002, and corresponding decision of the Vilnius District Administrative Court No. 112-1028/2002 of 21 June.

⁶ Law on Competition, Official Gazette 2012, No. 42-2041 with its last amendments at the Registry for Legal Acts TAR 2014, No. 13567.

⁷ Constitution of the Republic of Lithuania, Official Gazette 1992, No. 33-1014.

3) application of dissimilar (discriminating) conditions to equivalent contracts with certain economic entities, thereby placing them at a competitive disadvantage;

4) the conclusion of a contract subject to acceptance by the other party of supplementary obligations which, according to their commercial nature or purpose, have no direct connection with the subject of such contract.

The Law on Competition forms the key legislation. It provides definitions of “undertakings” and “groups of undertakings”, “dominant position”, and “relevant market”. Examples of different conduct amounting to abuse are included in Art. 7 as an indicative list. The main aim of the Law on Competition is to protect economic interests. Art. 1 expressly provides that it aims to protect the freedom of fair competition in Lithuania. However, non-economic goals such as protection of consumer interests as well as those of small and medium sized enterprises are also aimed for. Apart from the Law on Competition, the Lithuanian Competition Council has issued legal acts on Explanations concerning Establishment of a Dominant Position⁸ and Explanations on the Definition of the Relevant Market⁹. Principles applicable to the imposition of fines and setting their amounts are provided in the Rules on the Establishment of the Amount of Fines Imposed for Infringements of the Law on Competition adopted by the Lithuanian Government.¹⁰

Besides these general applicable rules, some sector-specific regulation exists, e.g. in the field of retail and electronic communications, natural gas and electric energy.

In 2009, the Law on Prohibition of Unfair Practices by Retail Companies was adopted to respond to the behaviour of dominant retail undertakings in the market.¹¹ The Law aims to preserve the balance of interests between suppliers and retail chains in the food, beverage or tobacco retail markets having significant market power by possessing not less than 20 stores with at least 400 m² retail premises and an aggregate yearly turnover in Lithuania of at least EUR 115,848,008.¹² Thus, companies with significant market power, although not meeting the requirements for dominance as established in the Law on Competition, have to comply with the prohibitions and requirements established in the Law on the Prohibition of Unfair Acts of Retail Companies. According to Art. 14 of the Law, the Lithuanian Competition Council is obliged to provide annual monitoring reports assessing whether the goals of the Law were reached, on negative consequences and whether the Law needs to be amended or can be abolished.

The Law on Electronic Communications contains rules in its third chapter for undertakings possessing significant power in the electronic communications market and thus equating to dominant undertakings.¹³ Complementing the Law on Competition, the Law on Electronic Communications contains obligations for special transparency, non-discrimination, separation of accounting, obligations to provide access, obligations of price control and cost accounting, an obligation for functional separation and special obligations for the provision of services to end users in order to prevent abuse based upon their significant market power. Differently from other laws, it is not the Lithuanian Competition Council but the Lithuanian Communications Regulatory Authority that is responsible for monitoring application of the Law on Electronic Communications. Notwithstanding, the Competition Council decides upon cases connected with undertakings in the electronic communications sector that stem from Art. 7 of the Lithuanian Competition Law or corresponding EU law. Similar provisions are also included in the Laws on Natural Gas and Electric Energy, which provide for specific regulation and specific obligations for undertakings possessing significant market power in both sectors.¹⁴

⁸ Decision of the Lithuanian Competition Council on *Explanations concerning the Establishment of a Dominant Position*, Official Gazette 2000, No. 19-487 with amendments in the Official Gazette 2013, No. 37-1830.

⁹ Decision of the Lithuanian Competition Council on *Explanations concerning the Definition of the Relevant Market*, Official Gazette 2000, No. 24-363 with amendments in the Official Gazette 2005, No. 20-684 and 2013, No. 37-1834.

¹⁰ Decision of the Government of the Republic of Lithuania on *Rules on the Establishment of the Amount of Fines Imposed for Infringements of the Law on Competition*, Official Gazette 2012, No. 12-511.

¹¹ Law on Prohibition of Unfair Practices of Retail Companies, Official Gazette 2010, No. 1-31 with amendments at the Registry for Legal Acts TAR 2014, No. 14287.

¹² The Competition Council indicated in its annual monitoring report in March 2015 that four retail chains with significant market power are at present active in Lithuania. Annual Report on the Monitoring of the Law on Prohibition of Unfair Practices of Retail Companies in the Republic of Lithuania. http://kt.gov.lt/mp/pazymos/pazyma_2015-03-02.pdf. Accessed 1 May 2015.

¹³ Law on Electronic Communications, Official Gazette 2004, No. 69-2382 with its last amendments at the Registry for Legal Acts TAR 2014, No. 14859.

¹⁴ Law on Natural Gas of the Republic of Lithuania, Official Gazette 2010, No. 89-2743 with its last amendments at the Registry for Legal Acts TAR 2014, No. 21324; Law on Electric Energy of the Republic of Lithuania, Official Gazette 2010, No. 66-1984 with its last amendments at the Registry for Legal Acts TAR 2015, No. 7656.

Competence for monitoring here is shared between the National Commission for Energy Control and Prices and the Lithuanian Competition Council, in the same way as in the telecommunications sector.

2. Definition of 'Abuse'

In the same way as under EU law, solely holding a dominant position does not in itself amount to abuse under Lithuanian legislation. An undertaking has to commit some additional act by which it restricts or may restrict competition.

No separate definition of dominance is contained in the Law on Competition. However, Art. 7 defines abuse as performance by a dominant undertaking¹⁵ of any acts which restrict or may restrict competition, without due cause limit the possibilities of other undertakings to act in the market or violate the interests of consumers. An indicative list includes the following examples of abuse: direct or indirect unfair prices or purchase / sale conditions, restriction of trade, production or technical development to the prejudice of consumers, application of dissimilar discriminatory conditions to equivalent transactions thereby causing different conditions for competition, and making conclusion of an agreement dependent upon additional conditions which have no direct connection to the subject of the agreement.

Taking into regard the specific legislation on retailers,¹⁶ unfair acts are described as any acts contrary to fair business practices, whereby the operational risk of retailers with significant market power is transferred to suppliers or supplementary obligations are imposed upon them, or acts which limit the possibilities of suppliers to freely operate in the market and which are expressed as requirements for the supplier.¹⁷ A list follows, which contains fees for inclusion in a retailer's list of suppliers; compensation for a lower turnover than expected from products of the supplier; compensation of operational costs for renovation of old stores or equipment of new ones; obligations upon the supplier to acquire goods, services or property from third parties specified by the retailer; promises to apply lower prices than for other buyers; amending essential procedures for supply or specifications of products without notifying the supplier within the time limit specified in the agreement, which may not be shorter than 10 days; the obligation to take back unsold food products, except for non-perishable packaged food products if they are safe, high-quality and at least one-third of the time before their expiration date remains or they have no expiration date and there is prior agreement in relation to their return; the obligation to cover the costs of sales promotion carried out by the retailer, except for cases where there is a written agreement between the retailer and the supplier regarding the amount of costs to be paid and sales promotion activities to be applied; an obligation to compensate expenses caused by consumer complaints if these were not caused by justified complaints about the products of the supplier or exceed the actual expenses of the retailer; the obligation to pay for the arrangement of goods, except for cases where there is a written agreement to that effect between the retailer and the supplier.

Special cases were decided where undertakings abused their dominance in one market to receive competitive advantages in another. In 2007, the Lithuanian Competition Council was confronted with a situation where the Lithuanian postal service employed its monopoly position in one market to apply much lower prices than competitors were able to offer during a tender for services in another market because competitors had to purchase the services of the Lithuanian postal service for higher prices. The Competition Council decided that the Lithuanian postal service had abused its monopoly in one market for its benefit in another related market.¹⁸

3. Exploitative and Exclusionary Abuse

¹⁵ Art. 3 para. 2 of the Law on Competition defines dominance as a position in the market where no direct competition is faced or which allows unilateral decisive influence on the market by restricting competition. It is assumed that an undertaking with at least 40% market share is in a dominant position. It is further assumed that each undertaking in a group of three or fewer undertakings enjoys dominance if they collectively hold at least 70% of market share and have the largest shares in the market.

¹⁶ Notwithstanding the additional Law on Prohibition of Unfair Practices of Retail Companies, Art. 3 para.2 of the Law on Competition already applies a stricter assumption for dominance in the retail field, where undertakings with a market share of 30%, and each undertaking in a group of three or fewer undertakings with a collective market share of 55% are to be seen as in a dominant position.

¹⁷ Art. 3 of the Law on Prohibition of Unfair Practices of Retail Companies, Official Gazette 2010, No. 1-31 with amendments at the Registry for Legal Acts TAR 2014, No. 14287.

¹⁸ Decision of the Lithuanian Competition Council No. 2S-20, *Concerning actions of AB "Lietuvos Pastas" corresponding with the requirements of Article 9 of the Law on Competition of the Republic of Lithuania* of 27 August 2007. A similar situation had already been decided as abusive in 2002, when Lithuanian Telecom used its legal monopoly in the cable voice telephony market to refuse access to its facilities for internet voice telephony providers. Decision of the Lithuanian Competition Council No. 2/b, *Concerning actions of AB "Lietuvos Telekomas" corresponding with the requirements of Article 9 Para. 2 of the Law on Competition of the Republic of Lithuania* of 21 February 2002.

The concept of abuse under Lithuanian law includes both types of infringement. The Lithuanian Law on Competition does not distinguish expressly between exploitative and exclusionary abuse, nor does the Competition Council do so generally in its practice or case law. The indicative list of Art. 7 of the Law on Competition includes examples of both exploitative and exclusionary practices. Although in one of its decisions the Competition Council elaborated on the two different types of abuse and stated that imposing unfair prices upon other undertakings due to the market power inherent in a dominant position is a typical example of exploitative abuse,¹⁹ this is rather to be seen as an exception. Different cases have been decided on exclusionary actions by undertakings holding essential facilities, such as the airport or the telecommunications provider. Usually, in those cases access to essential facilities had been either totally refused or unfairly limited without objective reasons.²⁰ In 2003, the Lithuanian Competition Council decided that bundling, by offering one service only if other products are bought from the same undertaking, too, infringes consumer interests and amounts to abuse of a dominant position.²¹

4. Price-Based and Non-Price-Based Abuse

Price-based and non-price-based acts both form grounds for abuse of a dominant position. An express distinction between them is to be found neither in the laws nor in the practice of the Lithuanian Competition Council. The indicative list provides price-based as well as non-price-based examples and decisions based upon this prohibition contain both types of abuse without really making a distinction between them. Quite a number of cases have been initiated concerning price-based action. In 2000 a heat supplier and the most important gasoline and diesel fuel supplier in Lithuania were fined for applying discriminatory prices and conditions for establishing those prices.²² Two more recent decisions in this field were adopted in 2010. One decision again concerns a gasoline and diesel fuel supplier, which, *inter alia*, was fined for applying discriminatory prices and a non-transparent discount system.²³ The other decision of the Lithuanian Competition Council in the field of price discrimination/excessive pricing was adopted in a case where Vilnius Energy was fined for exploitative lease prices of communication tunnels.²⁴ The Competition Council tried to establish the excessiveness of and discrimination in the prices applied to different undertakings including the dominant undertaking itself. It experienced various difficulties because insufficient separate bookkeeping of the dominant undertaking existed, and it was not possible to compare the lease prices applied with prices for similar services of other undertakings. The Competition Council then tried to apply other methods to prove the excessiveness of prices basing its methods mainly on the *United Brands* and *British Leyland* cases of the European Court of Justice.²⁵ Nevertheless, the court found the argumentation of the Lithuanian Competition Council to be not objective and not sufficiently founded. As a consequence it annulled the decision.²⁶ Several other cases, e.g. in the telecommunications and transportation sectors, were initiated based upon the suspicion of competitors that

¹⁹ Decision of the Lithuanian Competition Council No. 2S-11, *Concerning actions of UAB "Vilniaus Energija" corresponding with the requirements of Article 9 of the Law on Competition of the Republic of Lithuania* of 6 May 2010.

²⁰ E.g. decision of the Lithuanian Competition Council No. 2S-1, *Concerning actions of the state company "International Vilnius Airport" corresponding with the requirements of Article 9 of the Law on Competition of the Republic of Lithuania and Art. 102 of the Treaty on the Functioning of the European Union* of 21 January 2010 and decision of the Lithuanian Competition Council No. 16/b *Concerning actions of AB "Lietuvos telekomas" corresponding with the requirements of Article 9 of the Law on Competition of the Republic of Lithuania* of 22 December 2000.

²¹ Decision of the Lithuanian Competition Council No. 2S-8, *Concerning actions of the service and trade company of A. Jankauskas corresponding with the requirements of Article 9 of the Law on Competition of the Republic of Lithuania* of 8 May 2003.

²² Decision of the Lithuanian Competition Council No. 8/b *Concerning violation of Article 9(1) of the Law on Competition of the Republic of Lithuania by SP AB "Utenos silumos tinklai"* of 15 June 2000 and decision of the Lithuanian Competition Council No. 11/b, *Concerning violation of Article 9(1(3)) of the Law on Competition of the Republic of Lithuania by AB "Mazeikiu nafta"* of 10 July 2000.

²³ Decision of the Lithuanian Competition Council No. 2S-31, *Concerning actions of AB "Orlen Lietuva" corresponding with the requirements of Article 9 of the Law on Competition of the Republic of Lithuania and Article 102 of the Treaty on the Functioning of the European Union* of 16 December 2010.

²⁴ Decision of the Lithuanian Competition Council No. 2S-11, *Concerning actions of UAB "Vilniaus energija" corresponding with the requirements of Article 9 of the Law on Competition of the Republic of Lithuania* of 6 May 2010.

²⁵ See for further reading on the case: Working Party No. 2 on Competition and Regulation. Excessive Prices. Lithuania 2011, p.3-5. http://kt.gov.lt/naujienos/docs_oecd/wp_2_2011_01.pdf. Accessed 1 May 2015. Accessed 20 May 2015; ECJ, case 27/76, *United Brands Company and United Brands Continental BV v Commission of the European Communities*, ECR 1978 207. ECJ, case 226/84, *British Leyland Public Limited Company v Commission of the European Communities*, ECR 1986 3263.

²⁶ Decision of the Vilnius Administrative District Court in case No. 1-3681-562/2011 of 24 October 2011 and decision of the Supreme Administrative Court in the case A858-1516/2012 of 13 August 2012.

dominant undertakings were engaging in predatory pricing. However, those cases often show that predatory pricing cannot be confirmed because of objective reasons for the low prices applied.²⁷

5. Enforcement

General competition law may be enforced either by the Lithuanian Competition Council or upon a claim by national courts. Although the Law on Commercial Arbitration included a prohibition on accepting cases on competition issues for arbitration,²⁸ in 2012 the Law was amended.²⁹ In the amended version a prohibition to arbitrate administrative law matters exists but an explicit prohibition for competition-related issues which could also be decided by the competent civil courts is no longer included in the text. Thus, in cases where the parties have agreed upon an arbitration clause, it should also be possible to bring civil law claims such as for compensation of damages based on abuse of a dominant position before an arbitration institution.

5.1 Decision-Making Practice

Comparing the decision-making in the years 2010-2015 it can be observed that decisions on abuse of dominance are rather rare compared with decisions in other antitrust matters. The Competition Council adopted only three decisions where infringements were determined. All three decisions were adopted in 2010. Usually decisions by the Competition Council are echoed by appeals to the competent administrative courts, which can be observed for all three decisions adopted. The Lithuanian courts upheld only one decision.³⁰ One decision was annulled due to insufficient grounds for its motivation.³¹ One decision was partly annulled and the fine was decreased.³² Within the last four years no abuse has been established. In the media sector one case ended with a commitment decision in 2011.³³ It is interesting to note that the Lithuanian Supreme Administrative Court (SAC), upon the arguments of a third party submitting an appeal against this decision, declared the 2011 decision annulled and ordered the Lithuanian Competition Council to reconsider the obligations undertaken by the abusing undertaking in relation to its infringements.³⁴ The court reasoned that when adopting a commitment decision the Competition Council in principle has to follow the same requirements that apply to the European Commission when taking a decision under Article 9 of Council Regulation 1/2003.³⁵ The SAC further stated that following the principles and provisions of Lithuanian legal acts regulating competition law, the Competition Council has to make sure that by adopting a decision the problem existing for free competition is solved. Thus, a commitment decision can only be adopted in cases where the Competition Council is convinced that this decision abolishes the infringement and creates conditions to avoid such an infringement in future. Although the Competition Council does not have to conduct a full examination in such a case, nevertheless it has to investigate the case as deeply as necessary to establish whether the commitments are sufficient and suitable for the problems to be solved. The court was not convinced that the existing problem for free competition was really solved by establishing an infringement in the market for multichannel pay-tv services and confirming commitments that would solve a possible infringement in the other, narrower, market of multichannel digital pay-tv services.³⁶ It especially criticised the missing explanation in the decision for interrelating both markets in the chosen way. As a result of the judgment, the Competition Council adopted a decision in 2014 to fully

²⁷ E.g. decision of the Lithuanian Competition Council No. 1S-30, *Concerning the termination of investigations based on actions of AB "LEO LT" during the provision of services in the field of cable telephony corresponding with the requirements of Article 9 of the Law on Competition of the Republic of Lithuania* of 1 March 2012 and decision of the Lithuanian Competition Council No. 1S-184, *Concerning the termination of investigations based on actions of AB "Lietuvos Gelezinkeliai" corresponding with the requirements of Article 9 of the Law on Competition of the Republic of Lithuania* of 5 September 2011.

²⁸ The Law on Commercial Arbitration of the Republic of Lithuania, Official Gazette 1996, No. 39-961.

²⁹ The Law on Commercial Arbitration of the Republic of Lithuania, Official Gazette 1996, No. 39-961 with its last amendments in the Official Gazette 2012, No. 76-3932.

³⁰ Decision of the Vilnius Administrative District Court in case No. I-1220-142/10 of 7 June 2010.

³¹ Decision of the Vilnius Administrative District Court in case No. 1-3681-562/2011 of 24 October 2011 and decision of the Supreme Administrative Court in case A858-1516/2012 of 13 August 2012.

³² Decision of the Supreme Administrative Court in case A502-801/2013 of 21 January 2013.

³³ Decision of the Lithuanian Competition Council No. 1S-233 *Concerning activities of VIASAT WORLD LIMITED AND VIASAT AS corresponding with the requirements of the Article 9 of the Law on Competition of the Republic of Lithuania and Article 102 of the Treaty on the Functioning of the European Union* of 22 November 2011.

³⁴ Decision of the Lithuanian Supreme Administrative Court in case No. A502-706/2013 of 5 March 2013.

³⁵ Council Regulation 1/2003 of 16 December 2002 on implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L 1, p. 1.

³⁶ Decision of the Lithuanian Supreme Administrative Court in case No. A502-706/2013 of 5 March 2013.

terminate the investigation because it did not conform to the enforcement priorities of the Competition Council as established in 2012. It argued that because of changes in customer percentages in the analogue and digital pay-tv markets, the price differences between services provided in both markets no longer had an effective influence on consumer welfare and did not have an influence on effective competition in the market.³⁷

Fifteen cases were terminated either because abuse was not evident or because undertakings undertook commitments to cease the infringement. Twelve decisions on termination were taken in the period 2010-2012. In a further 25 cases investigations were not opened, whereas 66 % of refusals were issued in the years 2010-2012.

It seems that developments in the field of prohibited agreements went vice versa. In the period 2010-2015 prohibited agreements or collusive practices were established in 18 decisions. Twenty cases were terminated and only in three cases did the Competition Council refuse to initiate investigations.

When either refusing to open a procedure or when terminating ongoing investigations, the Competition Council in several instances refers to its Enforcement Priorities, which were defined by the Competition Council in 2012.³⁸ Those Priorities contain discretion as to whether to start investigations by taking three factors into regard: the rational allocation of available resources of the Competition Council so as to achieve better protection of effective competition and thus more effective protection of consumer welfare and the strategic importance of a possible investigation.³⁹ In 2013 and 2014, for example, opening of investigations was refused against the Lithuanian Postal service⁴⁰ arguing that a claim with the same objectives had been submitted to the Commission for Dispute Settlement / the competent court, and that the expected results of an investigation by the Competition Council could be achieved in the same way by a decision of the Commission / the court. Thus, complying with the request for investigations would mean irrational usage of resources and would not have any strategic importance.⁴¹ This argumentation was fully upheld by the court.⁴² The same argumentation was used in a big case in 2012 against three of the main banks in Lithuania and a company providing security services. In the case on agreements concerning debt collection services, the Lithuanian Competition Council decided to finally examine the case only in the light of prohibited agreements, since an investigation of abuse of a dominant position would have the same result: the obligation to terminate infringing actions and imposition of a fine upon the undertaking and thus would not correspond to the defined enforcement priorities of the Competition Council.⁴³

Since the Law on the Prohibition of Unfair Practices of Retail Companies came into force, the retail sector has seen four decisions establishing infringements. So far, each of the four retail chains with significant market power in Lithuania has been covered by one decision.

Reviewing court practice over the last five years, the picture does not differ dramatically. It seems that overall approximately 20 decisions on abuse of a dominant position were adopted by the Lithuanian courts;⁴⁴ however, this includes appeals against decisions of the Lithuanian Competition Council. Only six decisions were reached where courts decided on Art. 9 of the Lithuanian Law on Competition, based upon private claims either for

³⁷ Decision of the Lithuanian Competition Council No. 1S-93/2014 *Concerning the termination of investigations on the activities of VIASAT WORLD LIMITED AND VIASAT AS corresponding with the requirements of the Article 9 of the Law on Competition of the Republic of Lithuania and Article 102 of the Treaty on the Functioning of the European Union* of 19 June 2014.

³⁸ Decision of the Lithuanian Competition Council No. 1S-89 *Concerning the Enforcement Priorities of the Competition Council of the Republic of Lithuania* of 2 July 2012.

³⁹ Points 5, 6 and 8 of the Decision of the Lithuanian Competition Council No. 1S-89 *Concerning the Enforcement Priorities of the Competition Council of the Republic of Lithuania* of 2 July 2012.

⁴⁰ Decision of the Lithuanian Competition Council No. 1S-99 *Concerning the refusal to open investigations based upon actions of AB "Lietuvos pastas" corresponding with the requirements of the Article 7 of the Law on Competition of the Republic of Lithuania* of 17 July 2013 and Decision of the Lithuanian Competition Council No. 1S-87/2014 *Concerning the refusal to open investigations based upon actions of AB "Lietuvos pastas" corresponding with the requirements of the Articles 7 and 15 of the Law on Competition of the Republic of Lithuania* of 5 June 2014.

⁴¹ Point 12 of the Decision of the Lithuanian Competition Council No. 1S-89 *Concerning the Enforcement Priorities of the Competition Council of the Republic of Lithuania* of 2 July 2012 foresees the right to evaluate the possibilities of other institutions to decide the case effectively and Point 14 refers to the rational use of resources in proportion to the expected results of the investigation.

⁴² Decision of the Vilnius Administrative District Court in case No. I-0926-189/2014 of 3 March 2014.

⁴³ Decision of the Lithuanian Competition Council No. 2S-15 *Concerning actions of AB "SEB bankas", AB "Swedbank", AB "DNB bankas", UAB "First data Lietuva" und UAB "G4S Lietuva" corresponding with the requirements of Article 5 of the Law on Competition of the Republic of Lithuania and Article 101 of the Treaty on the Functioning of the European Union as well as actions of UAB "G4S Lietuva" corresponding with the requirements of Article 7 of the Law on Competition of the Republic of Lithuania and Article 102 of the Treaty on the Functioning of the European Union* of 20 December 2012.

⁴⁴ Not including decisions on procedural issues.

compensation of damage or recognition of agreements or results of public tenders as not valid/void. Four cases were solely concerned with public tenders and infringements of the Law on Public Procurement. Among other arguments, parties alleged that undertakings, either participating with a very low price or not conforming to other conditions of the tender, had abused their dominant position. Parties mostly provided no motivation for their arguments and the courts usually paid only minor attention to competition law and decided the case under the Law on Public Procurement.⁴⁵ In one more interesting decision from 2014 the court, referring to the opinion of the Lithuanian Competition Council, stated that there was not enough proof to confirm a dominant position and that dominance could only be established by engaging in extensive market analysis.⁴⁶ The other interesting case, decided in 2010, contained a request to compensate damages in the amount of EUR 10,601,876 against a company that had been fined before by the Lithuanian Competition Council for abuse of a dominant position for applying discriminatory prices and conditions upon the claimant. The Supreme Court of Lithuania decided in the highest instance that evaluating the circumstances in the case a causal link could not be established between the damages asked for in the claim and actual abuse of a dominant position. An examination by the court showed that loss of profit and net turnover was not caused by price discrimination but by the financial situation and the administration of the company.⁴⁷

Comparing court practice on abuse of a dominant position with that on prohibited agreements and practices, no big difference exists. Overall, approximately 20 cases were decided during the last five years under the head of prohibited agreements,⁴⁸ although this included only five cases which were independent from appeals against decisions of the Lithuanian Competition Council.

As can be seen from the analysis, procedures and cases in the field of abuse of a dominant position have not been very successful in Lithuania, either at the administrative stage with the Lithuanian Competition Council or before the courts. Does this mean that there are no dominant undertakings active in the Lithuanian market? Or do all dominant undertakings behave so fairly and customer/competitor/consumer friendly that abuse does not exist? Probably not. The rather disillusioning result seems to be caused, on the one hand, by a necessity to engage in a highly difficult cost- and time-consuming analysis of dominance in the respective market and, on the other hand, parties that rely on the argument of abuse of dominance before the courts are either not prepared to submit sufficient evidence or are not even in a position to do so owing to not possessing such evidence.

Thus, should we, based on the above, draw the conclusion that claims and procedures in the field of abuse of a dominant position are generally not very promising in Lithuania? Although the temptation might be to say “Yes”, such a conclusion would likely not be objective. Even considering the tendency of the last five years and the number of refusals to start an investigation and also taking into account its enforcement priorities, it is difficult to predict the future position of the Lithuanian Competition Council towards procedures based on abuse of dominance. The overall policy of the Competition Council seems to show that other areas need more attention at the moment and of course resources are limited.⁴⁹ But this might change. In cases of choice between dominance and prohibited agreements and practices, the Competition Council has treated cases rather under prohibition of restrictive agreements.⁵⁰ From the perspective of competition law this of course grants the freedom to attribute responsibility for infringements committed to more than just the dominant undertaking. Relevant court practice on private enforcement in the last five years leaves the impression that parties simply try to use as many arguments as possible based on different legal grounds, among others the argument of abusing a dominant position. Of course, parties will always be confronted with the challenge of difficult evidence on dominance, the respective markets and concrete damage suffered. However, as court practice shows, courts are seriously considering arguments of the parties in enforcement cases and are not prejudiced against private enforcement, especially if based on a decision of the Competition Council. Thus, private enforcement based on

⁴⁵ E.g. decision of the Lithuanian Court of Appeal in case No. 2A-1019/2012 of 18 January 2012 and decision of the Lithuanian Court of Appeal in case No. 2-7488-302/2011 of 14 December 2011.

⁴⁶ Decision of the Lithuanian Supreme Court in case No. 3K-3-152/2014 of 12 March 2014.

⁴⁷ Decision of the Lithuanian Supreme Court in case No. 3K-3-207/2010 of 17 May 2010.

⁴⁸ Not including decisions on procedural issues and on declarations during public procurement procedures.

⁴⁹ During recent years one priority seems to be proceedings under Article 4 of the Law on Competition against entities in public administration adopting legal acts or decisions restricting free competition.

⁵⁰ E.g. Decision of the Lithuanian Competition Council No. 2S-15 *Concerning actions of AB “SEB bankas”, AB “Swedbank”, AB “DNB bankas”, UAB “First data Lietuva” und UAB “G4S Lietuva” corresponding with the requirements of Article 5 of the Law on Competition of the Republic of Lithuania and Article 101 of the Treaty on the Functioning of the European Union as well as actions of UAB “G4S Lietuva” corresponding with the requirements of Article 7 of the Law on Competition of the Republic of Lithuania and Article 102 of the Treaty on the Functioning of the European Union* of 20 December 2012.

abuse of dominance in Lithuania should not be connected with more difficulties than based on other grounds in competition law.

5.2 Competent Courts and Authorities

Competition law cases are decided either by general administrative courts or by general civil courts. Special courts or departments in courts do not exist. Under Lithuanian law, courts apply competition law on three occasions. Either decisions of the Lithuanian Competition Council are appealed,⁵¹ the Lithuanian Competition Council wants to impose sanctions upon the manager of an undertaking or applies for authorization of economic restrictions if sanctions are not complied with,⁵² or a party submits a claim either for compensation of damage or termination of infringements.⁵³

All appeals on decisions of the Lithuanian Competition Council, which prevent any further investigative process on infringements of the Law on Competition, have to be directed to the Vilnius District Administrative Court. Appeals can be brought by any person whose rights contained in the Law on Competition might be infringed by those decisions.⁵⁴ If not satisfied with decisions of the Vilnius District Administrative Court, parties might appeal further to the Lithuanian Supreme Administrative Court.⁵⁵ The Law on Competition includes the possibility to impose economic restrictions⁵⁶ in those cases where undertakings do not comply with sanctions imposed by the Competition Council. However, those restrictions have in each case first to be authorized by the Vilnius District Administrative Court. The 2012 amendments to the Law on Competition introduced the possibility to impose sanctions for infringements not solely upon the undertaking as a legal entity but also upon the manager of the undertaking if additional requirements are satisfied. These sanctions include a prohibition to act as manager or member of the board of a private company or a public body and imposition of an additional fine.⁵⁷ It is worth noting that these sanctions are administrative in their nature, since no criminal liability is foreseen under Lithuanian law. In cases where the Competition Council intends to apply personal sanctions, it has to submit a motivated application to the Vilnius District Administrative Court, which then decides whether to impose additional sanctions upon the manager. No decision has been adopted so far since 2012.

Economic entities, legal and natural persons may claim compensation for damage or termination of illegal practices against other persons and thus privately enforce competition law according to the general rules foreseen for such actions in civil law.⁵⁸ In the frame of those actions, general civil courts are competent to hear cases, except for claims including application of Art. 102 TFEU, which exclusively have to be submitted to the Vilnius District Court.⁵⁹

Due to the fact that criteria regarding a dominant position and abuse of it are themselves economic in nature, both the Lithuanian Competition Council and the Lithuanian courts use economic experts for those cases. It can be seen that cases decided during the years 1999 – 2004 often include a very poor motivation on the grounds of the decisions. This has improved in recent years. A tendency to include more extensive and more comprehensive arguments and explanations on economic grounds can be observed in practice.

⁵¹ Art. 33 of the Law on Competition, Official Gazette 2012, No. 42-2041 with its last amendments at the Registry for Legal Acts TAR 2014, No. 13567 and Art. 10 of the Law on Prohibition of Unfair Practices of Retail Companies, Official Gazette 2010, No. 1-31 with amendments at the Registry for Legal Acts TAR 2014, No. 14287.

⁵² Arts. 41 and 35 of the Law on Competition, Official Gazette 2012, No. 42-2041 with its last amendments at the Registry for Legal Acts TAR 2014, No. 13567.

⁵³ Arts. 43 and 47 of the Law on Competition, Official Gazette 2012, No. 42-2041 with its last amendments at the Registry for Legal Acts TAR 2014, No. 13567 and Art. 13 of the Law on the Prohibition of Unfair Practices of Retail Companies, Official Gazette 2010, No. 1-31 with amendments at the Registry for Legal Acts TAR 2014, No. 14287.

⁵⁴ Art. 33 of the Law on Competition, Official Gazette 2012, No. 42-2041 with its last amendments at the Registry for Legal Acts TAR 2014, No. 13567.

⁵⁵ Art. 20 of the Law on Administrative Court Proceedings in the Republic of Lithuania, Official Gazette 2000, No. 85-2566 with its last amendments at the Registry for Legal Acts TAR 2014, No. 19929.

⁵⁶ As to e.g. preliminary suspension of licences, interrupting imports or exports as well as bank operations.

⁵⁷ Art. 41 of the Law on Competition, Official Gazette 2012, No. 42-2041 with its last amendments at the Registry for Legal Acts TAR 2014, No. 13567.

⁵⁸ Art. 43 of the Law on Competition, Official Gazette 2012, No. 42-2041 with its last amendments at the Registry for Legal Acts TAR 2014, No. 13567 and Art. 13 of the Law on Prohibition of Unfair Practices of Retail Companies, Official Gazette 2010, No. 1-31 with amendments at the Registry for Legal Acts TAR 2014, No. 14287; decision of the Lithuanian Supreme Court in case No. 3K-3-207/2010 of 17 May 2010.

⁵⁹ Art. 47 of the Law on Competition, Official Gazette 2012, No. 42-2041 with its last amendments at the Registry for Legal Acts TAR 2014, No. 13567.

Besides the Competition Council and courts, several regulatory authorities are active in monitoring the competitiveness of the market. In specific sectors such as natural gas, electric energy and communications, the regulatory authorities possess the power to exercise *ex-ante* control and adopt *ex-ante* measures but partly also *ex-post* control measures in the sphere of competition law. A clear delimitation between the competences of those regulatory authorities and the Competition Council is not always apparent.

The National Commission for Energy Control and Prices operates in two markets: energy and natural gas. It is entrusted with monitoring competitiveness and the conditions in the Lithuanian market for natural gas resources and electrical energy and to create conditions so as to prevent abuse of significant power in the natural gas and electric energy markets. Additional conditions and requirements, such as to prove the costs on which prices are based and to introduce separate bookkeeping systems for separate products, might be imposed upon companies that have been characterized as having significant market power.⁶⁰ In order to fulfil its task the Commission has to undergo regular market research, to publish prices for natural gas and electric energy and to provide them to the Competition Council.⁶¹ In cases where it finds excessively high prices on the market because of non-existing effective competition, the Commission has to regulate the price for natural gas or to establish maximum prices for electrical energy.⁶² The Law on Natural Gas as well as the Law on Electric Energy further stipulate without additional elaboration that supervision and monitoring in the field of natural gas and electric energy under the Law on Competition lies in the responsibility of the Competition Council.⁶³ Such unclear delimitation in connection with non-possession of the right to regulate prices was criticized by the Competition Council in one of its Working Papers for the OECD especially in cases where it has to deal with excessive pricing since by applying *ex-post* remedies based upon excessive pricing the Competition Council would have to describe the level of non-excessive pricing.⁶⁴ This might be interpreted as price regulation. The Competition Council in its paper on excessive pricing further points to the difficulty of choosing the body being most suitable and effective to act but also avoiding double sanctions for the same infringement.

Difficulties in establishing the competent authority for a specific case, where parallel competences for regulatory authorities and the Competition Council are foreseen, are illustrated by two cases decided by the Supreme Administrative Court of Lithuania in 2009 and 2010 in the field of electronic communications.⁶⁵ As with the other laws mentioned above, the Law on Electronic Communications provides for the general competence of the Lithuanian Communications Regulatory Authority to ensure the competitiveness of the market as well as to establish conditions that prevent undertakings with significant power in the market from abusing their influence. Additionally, it establishes the competence of the Lithuanian Competition Council to enforce competition law in the field of electronic communications.⁶⁶ Moreover, Art. 12 of the Law states that the Lithuanian Competition Council exchanges necessary information with and consults the Communications Regulatory Authority in its task of monitoring the competitive situation in the market and it cooperates with the Regulatory Authority in cases where it does not itself monitor competition in the field of electronic communications. In 2008 and 2009, the Competition Council refused to open investigations on abuse of a dominant position against the biggest telecommunications company in Lithuania at the time, referring to Art. 25 of the Lithuanian Competition Law.⁶⁷ The Council argued that it is the Communications Regulatory Authority that is mainly competent to decide conflicts that arise between different parties in the telecommunications

⁶⁰ Arts. 11 and 9 of the Law on Natural Gas of the Republic of Lithuania, Official Gazette 2010, No. 89-2743 with its last amendments at the Registry for Legal Acts TAR 2014, No. 21324; Arts. 65 and 68 of the Law on Electric Energy of the Republic of Lithuania, Official Gazette 2010, No. 66-1984 with its last amendments at the Registry for Legal Acts TAR 2015, No. 7656.

⁶¹ Art. 7 of the Law on Natural Gas of the Republic of Lithuania, Official Gazette 2010, No. 89-2743 with its last amendments at the Registry for Legal Acts TAR 2014, No. 21324; Arts. 64 and 65 of the Law on Electric Energy of the Republic of Lithuania, Official Gazette 2010, No. 66-1984 with its last amendments at the Registry for Legal Acts TAR 2015, No. 7656.

⁶² Art. 9 of the Law on Natural Gas of the Republic of Lithuania, Official Gazette 2010, No. 89-2743 with its last amendments at the Registry for Legal Acts TAR 2014, No. 21324; Art. 68 of the Law on Electric Energy of the Republic of Lithuania, Official Gazette 2010, No. 66-1984 with its last amendments at the Registry for Legal Acts TAR 2015, No. 7656.

⁶³ Art. 10 of the Law on Natural Gas of the Republic of Lithuania, Official Gazette 2010, No. 89-2743 with its last amendments at the Registry for Legal Acts TAR 2014, No. 21324; Art. 65 para. 11 of the Law on Electric Energy of the Republic of Lithuania, Official Gazette 2010, No. 66-1984 with its last amendments at the Registry for Legal Acts TAR 2015, No. 7656.

⁶⁴ Working Party No. 2 on Competition and Regulation. Excessive Prices. Lithuania 2011, p.2-3. http://kt.gov.lt/naujienos/docs_oecd/wp_2_2011_01.pdf. Accessed 1 May 2015.

⁶⁵ Decision of the Lithuanian Supreme Administrative Court in case No. A⁸⁵⁸-1309/2010 of 10 November 2010.

⁶⁶ Arts. 8 and 14 of the Law on Electronic Communications, Official Gazette 2004, No. 69-2382 with its last amendments at the Registry for Legal Acts TAR 2014, No. 14859.

⁶⁷ Decision of the Lithuanian Competition Council No. 1S-14 *On the refusal to open investigations concerning activities of AB "TEO LT" connected with the provision of services in the field of cable telephony, corresponding with the requirements of Article 9 of the Law on Competition of the Republic of Lithuania* of 31 January 2008 and decision of the Lithuanian Competition Council No. 1S-51 *On the refusal to open investigations concerning activities of AB "TEO LT", corresponding with the requirements of Article 9 of the Law on Competition of the Republic of Lithuania* of 2 April 2009; Art. 25 para. 4 point 2 of the Law on Competition, Official Gazette 1999, No.30-856.

sector. It should be noted that in both cases the Communications Regulatory Authority had adopted decisions establishing special conditions for the company with significant market power. In addition, in the 2009 case the Competition Council referred to the fact that the Communications Regulatory Authority had issued a decision based on a request by the applicant itself. Supervision of implementation of the decision thus lies within the competence of the Communications Regulatory Authority. The Supreme Administrative Court pointed to the difference between *ex-ante* and *ex-post* measures in the competences of both institutions.⁶⁸ It also elaborated on the possibility that both institutions can act, e.g. in specific legal situations, where both laws are to be applied. The Court referred to the principle that before refusing to open investigations, the Competition Council has to examine whether the special legal regulation does eliminate all infringements of competition law and ensures compliance with the Law on Competition.⁶⁹ The Court further stated that it would not be appropriate if both laws were applied to the same case and the same facts. Otherwise a decision by the Competition Council might lead to *de facto* supervision of the Competition Council over measures taken by the Communications Regulatory Authority. The Competition Council, however, has not been granted any competences for such supervision.⁷⁰ According to the Law on Electronic Communications the Communications Regulatory Authority also has a right to impose economic sanctions upon an undertaking, which e.g. does not act according to the conditions of the Law on Electronic Communications or is not following the obligations of the Regulatory Authority.⁷¹ However, the maximum amount of fines is much less than the amount that could be imposed under the Law on Competition. The Communications Regulatory Authority also possesses a right to refuse to open investigations, either if a decision is not within its competence or if the Communications Regulatory Authority, a court or an arbitration institution has decided or is in the process of deciding upon the same matter between the same parties.⁷² Differently from proceedings before the Competition Council, parties have to pay a fee for conflict settlement procedures. The decisions of the Communications Regulatory Authority are binding upon the parties, if they are not appealed to the Vilnius District Court.⁷³

No other guidelines than the considerations referred to above exist for the enforcement or substantive interpretation of prohibition of abuse.

5.3 Approach Followed by Competent Courts and Authorities

Reviewing the decisional practice of the Competition Council and of the courts, no particular approach or standard towards harm or interpretation of abuse can be found. As repeatedly stated in cases and also in the enforcement priorities of the Competition Council,⁷⁴ prohibiting anticompetitive unilateral conduct should ensure effective and free competition and thus consumer welfare.⁷⁵

Since the case law on abuse of a dominant position in Lithuania is very limited, it is not possible to gauge whether the Commission's Guidance on enforcement priorities⁷⁶ might have had any effect on the approach of the Competition Council and courts in Lithuania and if so, what kind of effect.

Probably for the same reason of limited practice, publications and public reactions on decisions taken in the field of prohibiting abuse which could be referred to, are few to non-existent in Lithuania.

⁶⁸ Decision of the Lithuanian Supreme Administrative Court in case No. A⁸²²-538/2009 of 23 April 2009 and decision of the Lithuanian Supreme Administrative Court in case No. A⁸⁵⁸-1309/2010 of 10 November 2010.

⁶⁹ Decision of the Lithuanian Supreme Administrative Court in case No. A⁸²²-538/2009 of 23 April 2009.

⁷⁰ Decision of the Lithuanian Supreme Administrative Court in case No. A⁸⁵⁸-1309/2010 of 10 November 2010.

⁷¹ Arts. 72, 74, 75 of the Law on Electronic Communications, Official Gazette 2004, No. 69-2382 with its last amendments at the Registry for Legal Acts TAR 2014, No. 14859.

⁷² Art. 28 of the Law on Electronic Communications, Official Gazette 2004, No. 69-2382 with its last amendments at the Registry for Legal Acts TAR 2014, No. 14859.

⁷³ Art. 28 of the Law on Electronic Communications, Official Gazette 2004, No. 69-2382 with its last amendments at the Registry for Legal Acts TAR 2014, No. 14859.

⁷⁴ Decision of the Lithuanian Competition Council No. 1S-89 *Concerning the Enforcement Priorities of the Competition Council of the Republic of Lithuania* of 2 July 2012.

⁷⁵ See also Art. 1 of the Law on Competition, Official Gazette 2012, No. 42-2041 with its last amendments at the Registry for Legal Acts TAR 2014, No. 13567.

⁷⁶ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings of 24 February 2009, OJ 2009, C 45, p. 7.