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**SANCTIONS IN ANTITRUST CASES**

**Contribution by Lithuania**

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## SANCTIONS IN ANTITRUST CASES

-- Lithuania --

### 1. Introduction

1. This paper deals with rules of setting fines for antitrust regulation infringements in the Republic of Lithuania, experience of the Competition Council of the Republic of Lithuania<sup>1</sup>, as well as relevant court findings on this issue.

### 2. Determination of the basic fine

2. For violations of antitrust rules undertakings and individuals can face sanctions which are of administrative nature. Criminal liability is not foreseen. In civil cases the plaintiff can pursue damages, but the court cannot impose sanctions on the defendant.

3. Article 36 of the Law on Competition of the Republic of Lithuania<sup>2</sup> establishes fines for undertakings. It states that a fine of up to 10 percent of the gross annual income in the preceding business year shall be imposed on undertakings for prohibited agreements, abuse of a dominant position, implementation of a notifiable concentration without permission of the Competition Council, continuation of concentration during the period of its suspension, also infringement of concentration conditions or mandatory obligations established by the Competition Council (Article 36(1) of the Law on Competition).

4. An individual (CEO) could also face liability for his/her company's antitrust infringements (Article 40 of the Law on Competition). However, in this case the Competition Council itself cannot fine the CEO. The Competition Council has to establish the CEO's role in the undertaking's antitrust infringement and then has to refer the case to the Vilnius Regional Administrative Court with a request to impose sanctions – a disqualification and (or)<sup>3</sup> a financial penalty – on the individual (Article 41(1) of the Law on Competition). In ruling on the case against an individual, the court is not bound by the proposal of the Competition Council in relation to sanctions and their scope (Article 41(2) of the Law on Competition). Decisions of the Competition Council to fine undertakings do not have to be approved by the courts to have effect. There have not been any cases yet concerning a CEO's liability for antitrust infringements.

5. Under Article 37(1) of the Law on Competition the amount of fines imposed on undertakings shall be differentiated taking into consideration:

- the gravity of the violation;
- the duration of the violation;

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<sup>1</sup> [www.kt.gov.lt](http://www.kt.gov.lt)

<sup>2</sup> The Law on Competition can be retrieved from [here](#).

<sup>3</sup> Financial penalty is supplementary to disqualification.

- the circumstances mitigating or aggravating liability of the undertaking;
- the influence of each undertaking in the commitment of the violation, where the violation has been committed by several undertakings;
- the value of the sold goods of the undertakings, which are directly and indirectly related to the infringement.

6. Amount of the fines is determined according to the Rules concerning the setting of the amount of a fine imposed for the infringements of the Law on Competition, which have been adopted by the Government<sup>4</sup>.

7. The proportionality principle for determining fines is explicitly stated in the Law on Competition [in Article 35(1)(3)]. The principle is respected in practice. For instance, there have been numerous decisions in 2010 (during the economic crisis) concerning anticompetitive agreements where the Competition Council reduced fines by taking into account the proportionality principle and on the ground that the whole global economy, including Lithuania, was experiencing difficulties<sup>5</sup>.

### 3. Adjustment of the basic fine

8. The circumstances considered as mitigating are as follows: voluntary prevention of the detrimental consequences of the violation after the commitment thereof by the undertakings, assistance to the Competition Council in the course of investigation, compensation for the losses, elimination of the damage caused, voluntary termination of the violation, non-implementation of restrictive practices, acknowledgement of the material circumstances established by the Competition Council in the course of investigation, also the fact that actions constituting the violation were determined by the actions of the public authorities as well as serious financial difficulties of the undertaking (Article 37(2) of the Law on Competition). Acknowledgement of the material circumstances established by the Competition Council in the course of investigation has been the most frequent mitigating circumstance<sup>6</sup>.

9. Concerning inability to pay, the Law on Competition foresees that serious financial difficulties of the undertaking can be considered as a mitigating circumstance (Article 37(2) of the Law on Competition). This provision may be applied in exceptional cases and upon request of an undertaking submitted before imposition of the fine. The request has to be based on objective data showing that the imposition of the fine would irretrievably jeopardise the economic viability of that undertaking<sup>7</sup>.

10. If there is a justified request of an undertaking, the Competition Council has the right to defer the payment of the fine or a part of it for a period up to six months if the undertaking is not able to pay the fine on time due to objective reasons (Article 39(4) of the Law on Competition).

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<sup>4</sup> Resolution of the Government of 18 January 2012, [No. 64](#). Before that, fine calculation rules established in resolution of the Government of 6 December 2004 [No. 1591](#) were applied.

<sup>5</sup> Competition Council's decision of 28 January 2010, [No. 2S-2](#); decision of 1 April 2010, [No. 2S-9](#); decision of 11 November 2010, [No. 2S-28](#), etc.

<sup>6</sup> Competition Council's decision of 11 June 2009, [No. 2S-14](#); decision of 28 January 2010, No. [No. 2S-2](#); decision of 11 November 2010, [No. 2S-28](#); decision of 22 November 2010, [No. 2S-29](#), etc.

<sup>7</sup> Judgment of 20 June 2016 of the Supreme Administrative Court of Lithuania, case [No. A-741-552/2016](#), *UAB "Maxima LT" and others v Competition Council*.

11. The circumstances considered as aggravating are as follows: obstruction of the investigation, concealment of the committed violation, failure to terminate the violation notwithstanding the obligation by the Competition Council to terminate illegal actions or repeated commitment of the violation within the period of seven years for which the undertakings were already imposed the sanctions provided for in the Law on Competition (Article 37(3) of the Law on Competition). In the last ten years, the most frequently established aggravating circumstance has been recidivism<sup>8</sup>. There have also been cases where undertakings obstructed the investigation (usually because undertakings did not submit requested information to the Competition Council)<sup>9</sup>.

12. In Lithuania it is possible to hold a parent company liable for antitrust violations committed by its subsidiaries in certain cases.

13. Antitrust enforcement in Lithuania follows EU rules and the Court of Justice of the European Union has made the following findings<sup>10</sup>. The Court of Justice ruled that the conduct of a subsidiary may be imputed to the parent company. This is so in particular where, although having a separate legal personality, the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities. In the case of a parent company having a 100 percent or virtually 100 percent shareholding in a subsidiary which has infringed EU rules on competition, there is a rebuttable presumption that the parent company does in fact exercise decisive influence over its subsidiary.

14. Parental liability could significantly increase the fine because in such a case the 10 percent turnover cap could be much higher by calculating the turnover of the entire group. Parental liability also increases the risk of recidivism which is considered as aggravating circumstance for which the fine might also be increased if there was a repeated infringement. In its practice, the Competition Council has had cases where parental liability was established<sup>11</sup>.

#### **4. Practical issues in determining the amount of fines**

15. Article 33 of the Law on Competition establishes the right to appeal decisions by which fines are imposed on competition law infringers. The filing of an appeal regarding a decision of the Competition Council, by which a fine is imposed on an undertaking, suspends the enforced recovery of the fine and interest until the court ruling becomes effective (binding) (Article 33(3) of the Law on Competition)<sup>12</sup>. Such a suspension is not foreseen in the Law on Competition in the case of an imposed fine on a CEO. However, Article 70 of the Law on Administrative Proceedings establishes a general rule that a person has the right to file a request for interim measures<sup>13</sup> to suspend the implementation of the appealed decision.

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<sup>8</sup> For instance, decision of the Competition Council of 16 December 2010, [No. 2S-31](#); decision of 23 December 2010, [No. 2S-33](#).

<sup>9</sup> For instance, decision of the Competition Council of 6 November 2008 [No. 2S-23](#); decision of 7 June 2012 [No. 2S-9](#).

<sup>10</sup> Judgment of the Court of Justice of 10 September 2009 in case [No. C-97/08 P](#), *Akzo Nobel NV and others v Commission*, 56-65 p.; judgment of the Court of Justice of 11 July 2013 in case [No. C-440/11 P](#), *Commission v Stichting Administratiekantor Portielje and others*, 36-44 p.

<sup>11</sup> Decision of the Competition Council of 8 December 2011 [No. 2S-25](#).

<sup>12</sup> However, the appeal does not suspend the calculation of interest, which starts three months after the publication of the Competition Council's decision (Article 39(1) and (2) of the Law on Competition).

<sup>13</sup> The court can grant interim measures also on its own initiative.

16. The national administrative courts (both the court of first instance and the court of appeal) have a wide jurisdiction regarding fining issues. The administrative courts have a right to recalculate the amount of the fine imposed. In the last ten years (from 2006 to 2016), the courts have reduced fines in 13 cases<sup>14</sup>.

17. The rationale for reduction has been different and dependent on the circumstances of the case. For instance, in one case the courts have reduced the fine because in the courts' opinion the investigation of the Competition Council took too long<sup>15</sup>. In some cases, the courts reduced the fine because of a serious financial difficulty of the undertaking<sup>16</sup>.

18. In some cases the courts disagreed with the Competition Council that certain violations (or aspects thereof) were committed. For instance, in the case concerning a cartel among undertakings operating in vehicle lease and acquisition sector to participate in bid rigging, the courts stated that there was no evidence that there was an overarching cartel and the bid rigging episodes should be treated as separate. In addition, the courts stated that there was no evidence that certain bid rigging episodes happened<sup>17</sup>. In a related case concerning the same cartel the court reduced a fine for one of the undertakings also on the grounds that its behaviour was passive<sup>18</sup>.

19. In another case<sup>19</sup>, the courts reduced fines because they calculated the duration of infringement differently than the Competition Council<sup>20</sup>. In addition, the court recalculated the fines because during the investigation the violators have provided wrong information about the value of sales directly or indirectly related to the infringement to the Competition Council<sup>21</sup>.

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<sup>14</sup> Cases where there is still no final decision or where the decision of the Competition Council has been overruled in full are not being counted.

<sup>15</sup> Judgment of 20 June 2016 of the Supreme Administrative Court of Lithuania, case [No. A-741-552/2016](#), *UAB "Maxima LT" and others v Competition Council*.

<sup>16</sup> Judgment of 11 July 2011 of the Supreme Administrative Court of Lithuania, case [No. A502-2256/2011](#), *UAB "Prof-T" v Competition Council*; judgment of 20 June 2016 of the Supreme Administrative Court of Lithuania, case [No. A-741-552/2016](#), *UAB "Maxima LT" and others v Competition Council*.

<sup>17</sup> Judgment of 18 April 2012 of the Supreme Administrative Court of Lithuania, case [No. A858-1704/2012](#), *AB "Autoūkis" and others v Competition Council*; judgment of 18 April 2012 of the Supreme Administrative Court of Lithuania, case [No. A858-293/2012](#), *UAB "Autodina" and others v Competition Council*.

<sup>18</sup> Judgment of 18 April 2012 of the Supreme Administrative Court of Lithuania, case [No. A858-290/2012](#), *UAB "Moller Auto" and others v Competition Council*.

<sup>19</sup> Judgment of 2 May 2016 of the Supreme Administrative Court of Lithuania, case No. [No. A-97-858/2016](#), *UAB "Eturas" and others v Competition Council*.

<sup>20</sup> This case was concerned with concerted practices by travel agents who coordinated their actions via an online travel booking system ("E-TURAS") by limiting a discount to a maximum of 3 percent for online bookings. One of the disputed circumstances was when should the violators have known about the restriction to make a bigger discount. Essentially the question was whether the fact that the online booking system automatically reduced the discount when it started and that at the same date a message concerning the restrictions was sent through the online booking system is enough to presume that users of this system were aware of the restriction. In this case, the court reduced fines for some undertakings by taking into account when the undertaking factually started to apply the restrictive discount and for how long (rather than from the date when the system went online and when the message was sent).

<sup>21</sup> Judgment of 2 May 2016 of the Supreme Administrative Court of Lithuania, case [No. A-97-858/2016](#), *UAB "Eturas" and others v Competition Council*.

20. In one case the court reduced the fines for all appellants additionally by 5 percent<sup>22</sup>, because a state agency was involved in a cartel (between manufacturers of orthopaedic goods)<sup>23</sup>. In court's opinion, on this ground the fine should have been reduced even more, because the undertakings could have been misled and might have held their actions to be legitimate.

21. As to the possibility for courts to increase the fine, the courts have stated that although they do not rule out their discretion to increase the imposed fine, at the same time they have doubts about such practice in the light of the general principle of *non reformatio in peius*<sup>24</sup>.

22. According to the provisions of the Law on Competition, as well as Leniency rules<sup>25</sup>, the leniency programme in Lithuania offers full immunity (or fine reduction in certain cases) to the first applicant, and reductions of fines for subsequent applicants (50-20 percent of the imposed fines).

23. In some cases, the first applicant can receive only a fine reduction, albeit quite significant. If the Competition Council has already initiated the investigation and the leniency application is received afterwards, the fine imposed upon the applicant can be reduced by 50-75 percent. Next, a fine calculated for an undertaking which was the initiator of the prohibited agreement or which coerced other undertakings to participate in the prohibited agreement, can be reduced by 50 percent. Subsequent leniency applicants do not have a right to apply for a full immunity from fines.

24. Leniency is also available for the CEO of the undertaking which infringed the Law on Competition of the Republic of Lithuania if the undertaking receives immunity from fines (Article 40(3)(1) of the Law on Competition). An application for leniency from the undertaking automatically covers the current CEO. Former CEO may not be covered, unless he/she applied for leniency himself/herself and termination of employment relations was caused not because of the CEO's involvement in the infringement. Former CEO can receive immunity from fines if he/she submits the necessary information to the Competition Council (the same requirements apply as in the case of leniency applications by undertakings: to be the first to submit the information, to co-operate with the Competition Council, etc.) (Article 40(3)(2) of the Law on Competition).

## 5. Alternatives to fines

25. In Lithuania the fine on an individual (CEO) is complementary to the sanction of disqualification (Article 40(1) of the Law on Competition). In addition, the biggest imposed fine on the CEO can be EUR 14 481 whereas the disqualification could last from three to five years and thus could result in a substantially greater prospective loss. Thus, in terms of deterrence perhaps the risk of disqualification would carry greater weight.

26. Private enforcement is not yet very common in Lithuania although in the last years there have already been several cases. Neither sanctions nor leniency prevent private damages actions.

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<sup>22</sup> The Competition Council in its decision of 20 January 2011 [No. 2S-2](#) already reduced the fine by 20 percent in its decision on the grounds that a state agency was involved.

<sup>23</sup> Judgment of 17 May 2012 of the Supreme Administrative Court of Lithuania, case [No. A520-1301/2012](#), *UAB "Ortobatas" and others v Competition Council*.

<sup>24</sup> Judgment of 7 April 2014 of the Supreme Administrative Court of Lithuania, case [No. A552-54/2014](#), *UAB "Amber Bay" and others v Competition Council*.

<sup>25</sup> Resolution of the Competition Council of 28 February 2008, [No. 1S-27](#).

27. In general, there is no difference between bid rigging cases and other forms of hard core cartels in terms of adopting sanctions. Article 33(2)(4) of the Law on Public Procurement establishes that infringement of Article 5 of the Law on Competition (which prohibits anticompetitive agreements) is regarded as professional misconduct where less than three years have passed from the entry into force of a decision imposing the economic sanction specified in the Law on Competition<sup>26</sup>. As a result, a contracting authority may establish in the contract documents that a request to participate or a tender by a supplier which committed an infringement of Article 5 of the Law on Competition shall be rejected.

28. It means that if an undertaking infringed Article 5 of the Law on Competition in any way (i.e. not necessarily by bid rigging actions), it could face a ban for public contracts. On the other hand, it should be noted that the contracting authority (the purchasing organisation) has a right, but not an obligation to reject the supplier's request to participate or the tender.

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<sup>26</sup> Article 33(2)(4) of the Law on Public Procurement also establishes that other violations of competition rules where sanctions were applied are regarded as professional misconduct where less than one year has passed from the entry into force of the decision.