

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

The standard of review by courts in competition cases – Note by Lithuania

4 June 2019

This document reproduces a written contribution from Lithuania submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

Please contact Ms. Despina Pachnou if you have any questions about this document.

Email: Despina.Pachnou@oecd.org

JT03447179

Lithuania

1. Introduction

1. Lithuania belongs to the system of administrative competition enforcement. Accordingly, the powers of public enforcement of competition law are vested in the national competition authority, the decisions of which can be judicially reviewed by the courts, i.e. Vilnius Regional Administrative Court acting as the court of first instance and the Supreme Administrative Court of Lithuania acting as the court of appeal.

2. Public enforcement of competition law in Lithuania

2. The Competition Council of the Republic of Lithuania (hereinafter: the Competition Council) has the powers of public enforcement of competition law. Its main functions are listed in the Law on Competition of the Republic of Lithuania¹ (hereinafter: Law on Competition). The procedure on how the Competition Council performs its functions is specified in the Regulations of the Competition Council.²

2.1. Powers of the Competition Council

3. According to Article 17(1) of the Law on Competition, the Competition Council is an autonomous public body, which is accountable to the Parliament of the Republic of Lithuania and which implements the state competition policy and supervises the compliance with the Law on Competition. This legal provision further says that the Competition Council, while exercising its powers, adopts its decisions autonomously and independently.

4. Article 18(1) of the Law on Competition provides a non-exhaustive list of the functions of the Competition Council, such as, for example, the supervision of how undertakings and bodies of public administration comply with the Law on Competition, sets the criteria and the order of how to define a relevant market and to assess whether there is a dominant position in the relevant market, defines a relevant market and calculates a market share of undertakings as well as their position in the relevant market, scrutinizes whether the legal acts adopted by the bodies of public administration, with the exception of the legal acts of the Government of the Republic of Lithuania, comply with the requirements of Article 4 of the Law on Competition, analyses notifications about concentrations, investigates the suspected infringements of the Law on Competition, the Law on the prohibition of unfair practices by retail undertakings as well as other laws, the

¹ Law on Competition of the Republic of Lithuania, 23 March 1999, No. VIII-1099, as lastly amended on 21 March 2019 (No. XIII-2011). Before that, the Law on Competition was amended on 14 March 2019 (No. XIII-1989) - these amendments will enter into force on 1 July 2019. This report is based on the amended version of the Law on Competition, including the legal provisions, which will enter into force on 1 July 2019.

² Decision of the Competition Council of the Republic of Lithuania on the confirmation of the regulations of the Competition Council of the Republic of Lithuania, 1 February 2018, No. 1S-10 (2018).

supervision of which is exercised by the Competition Council, and imposes on the infringers sanctions, foreseen in the aforementioned laws, refer to the court in order to protect the public interest safeguarded by the Law on Competition etc.

5. According to Article 22(1) of the Law on Competition, the Competition Council investigates:

1. the compliance of the legal acts of the bodies of public administration with the requirements of Article 4 of the Law on Competition,
 2. anti-competitive agreements,
 3. abuse of dominance,
 4. the implementation of concentrations without a prior notification or without a permission from the Competition Council or infringing the conditions of the implementation of a concentration or of the commitments, as well as for infringing a standstill obligation,
 5. the actions of unfair competition when the conditions of Article 16(4) of the Law on Competition are fulfilled,³
 6. the infringements in terms of the refusal to respond to the request for information or a response to it with a delay, the submission of an incomplete or incorrect information, obstructions of investigations.
6. Article 54(1) of the Law on Competition stipulates that the Competition Council is the institution, which is authorized to apply EU competition rules, the supervision of which is entrusted to national competition authorities under EU competition law.

2.2. Investigation and decision-making by the Competition Council

7. According to Article 42 of the Law on Competition, persons liable for the infringements of the Law on Competition are subject to administrative liability on the basis of the order set by the Law on Competition and the Code of Administrative Offences of the Republic of Lithuania.

8. The investigation can be started upon the request of the undertakings, the interests of which are affected, the bodies of public administration or the associations or unions, which represent the interests of undertakings and consumers (Article 23(1) of the Law on Competition). The Competition Council can start an investigation *ex officio* (Article 23(2) of the Law on Competition). The Competition Council may start an investigation on its own initiative also in the cases when consumers complain that their interests were affected by the acts prohibited by the Law on Competition (Article 23(3) of the Law on Competition).

9. The investigation is considered to be finished when the Competition Council confirms the findings of the investigation on a suspected infringement submitted by the empowered Competition Council's officials (Article 28(2) of the Law on Competition). However, pursuant to Article 28(3) of the Law on Competition, the investigation can be terminated when no infringement is found or when, during the investigation, circumstances

³ Article 16(4) of the Law on Competition stipulates that the Competition Council investigates the actions of unfair competition when such actions infringe the interests of a high number of undertakings or consumers.

listed in Article 24(4) of the Law on Competition are found or appear, i.e. the circumstances, which may form the ground for a refusal by the Competition Council to start an investigation. According to Article 28(4) of the Law on Competition, the Competition Council may adopt a decision to terminate the investigation also when the undertaking, which is suspected to have infringed the Law on Competition, submits in writing the commitments on the elimination of the infringement and the Competition Council confirms such commitments as binding by its decision.

10. Article 30(1) of the Law on Competition stipulates that the Competition Council, while finishing the investigation, may adopt:

1. a decision to impose sanctions, which are foreseen in the Law on Competition;
2. a decision to refuse to impose sanctions if there is no legal ground for it in the aforementioned law;
3. a decision to terminate the procedure on the suspected infringement of the Law on Competition when there is no such infringement;
4. a decision to conduct an additional investigation.

11. All these decisions, except for the last one (i.e. a decision to conduct an additional investigation) can be changed or annulled only by a court (Article 30(4) of the Law on Competition).

3. Judicial review of the Competition Council's decisions

12. The decisions adopted by the Competition Council may be judicially reviewed by administrative courts. The court of first instance reviewing such decisions is Vilnius Regional Administrative Court, whereas the Supreme Administrative Court of Lithuania reviews the appeals of the case. For example, as stated in the annual reports of the Competition Council, courts upheld 94 percent of the Competition Council's decisions in 2017,⁴ 85 percent - in 2016,⁵ 87 percent – in 2015.⁶

3.1. General principles of the judicial review of the Competition Council's decisions

13. In general, the Lithuanian judiciary system consists of the courts of general competence and the specialized courts (Article 12(2) of the Law on Courts of the Republic of Lithuania⁷ (hereinafter: Law on Courts)). Whereas the courts of general competence are the district courts, regional courts, the Court of Appeal of Lithuania and the Supreme Court of Lithuania (Article 12(3) of the Law on Courts), specialized courts are regional administrative courts and the Supreme Administrative Court of Lithuania (Article 12(4) of the Law on Courts). According to the latter legal norm, specialized courts solve cases in the disputes arising from the administrative legal relationship. According to Article 29(1)

⁴ http://kt.gov.lt/uploads/publications/docs/3472_7416ea58487f18126c0dd8d020b8042b.pdf.

⁵ http://kt.gov.lt/uploads/publications/docs/2982_c4ee36b83a02e0c723d2c7614852685d.pdf.

⁶ http://kt.gov.lt/uploads/publications/docs/2314_b17f05a10a5ffc3c2d23d94e4c3e9f3f.pdf.

⁷ Law on Courts of the Republic of Lithuania, 31 May 1994, No. I-480, as lastly amended on 11 December 2018.

of the Law on Courts, regional administrative courts are the courts of first instance for administrative cases falling under their competences by law. Pursuant to Article 31(1) point 2 of the Law on Courts, the Supreme Administrative Court of Lithuania is the appeal instance for the judgements of regional administrative courts.

14. The decisions of the Competition Council may be judicially reviewed. There are no specific competition law divisions or chambers in the Lithuanian courts devoted to solving competition law cases.

15. According to Article 33(1) of the Law on Competition, undertakings or other persons whose rights, protected by the Law on Competition, might have been infringed, have a right to lodge a complaint with the Vilnius Regional Administrative Court as regards the decisions of the Competition Council, by which a further continuation of the investigation on the infringement of the Law on Competition is hindered or by which the analysis of the notification of the concentration is finished. The same legal provision stipulates that, as regards the decisions of the Competition Council foreseen in Article 30 of the Law on Competition (except for the decision foreseen in Article 30(4) of the Law on Competition, i.e. the decision of the Competition Council to conduct an additional investigation), a complaint can be lodged by the participants of the case and other interested parties listed in Article 29(1) of the Law on Competition. The claim has to be lodged within 20 days from the submission of the decision of the Competition Council or, when such a decision has to be announced on the website of the Competition Council, from the day of such an announcement (Article 33(2) of the Law on Competition).

16. Pursuant to Article 34 of the Law on Competition, the court, after having analysed the complaint, may adopt one of the following decisions:

1. to reject the claim and to leave the Competition Council's decision unchanged;
2. to annul the Competition Council's decision or parts of it and to send the case back to the Competition Council for an additional investigation;
3. to annul the Competition Council's decision or the parts of it;
4. to change the Competition Council's decision on a concentration, sanctions or the application of interim measures.

17. The order, according to which cases in the disputes arising from the administrative legal relationship are solved, is specified in the Law on Administrative Proceedings of the Republic of Lithuania⁸ (hereinafter: the Law on Administrative Proceedings).⁹ According to Article 20(1) of the Law on Administrative Proceedings, a regional administrative court is the court of first instance for solving administrative cases listed in Article 17 of the aforementioned law (with some exceptions), whereas, pursuant to Article 21(1) point 1 of the Law on Administrative Proceedings, the Supreme Administrative Court of Lithuania is the appellate instance for the cases that were solved by the administrative courts acting as the courts of first instance.

18. Hence, the decisions of the Competition Council described above may be judicially reviewed by Vilnius Regional Administrative Court, which acts as the court of first

⁸ Law on Administrative Proceedings of the Republic of Lithuania, 14 January 1999, No. VIII-1029, as lastly amended on 20 December 2018.

⁹ Article 1(1) of the Law on Administrative Proceedings.

instance, whereas the judgement of the latter court may further be appealed to the Supreme Administrative Court of Lithuania.

19. According to Article 61(1) of the Law on Administrative Proceedings, if there are questions in the administrative case that require special knowledge of science, art, technology or craft, the court or the judge appoints an expert or asks an expert institution to conduct an expertise. The questions, on which the expert opinion is requested, can be submitted by the participants of the case, but the decision on final questions is made by the court or the judge (Article 61(2) of the Law on Administrative Proceedings). The expert opinion has to be provided in a written form (Article 61(3) of the Law on Administrative Proceedings). The court is not bound by the expert opinion; however, the court's disagreement with the expert opinion has to be grounded (Article 61(4) of the Law on Administrative Proceedings).

20. Article 78(1) of the Law on Administrative Proceedings stipulates that the court of first instance, while analyzing the case, has to investigate evidence present in the case.

21. Pursuant to Article 98(1) of the Law on Administrative Proceedings, the judgements of the courts of first instance become final after the term for their appeal has passed. If the judgement is appealed, it becomes final, if it is not annulled, after the case is solved in the appeal procedure (Article 98(2) of the Law on Administrative Proceedings). The judgement in the appeal procedure becomes final on the day when the new judgement is issued (Article 98(3) of the Law on Administrative Proceedings). The regional administrative courts' judgements, which were adopted by those courts acting as the courts of first instance, may be appealed to the Supreme Administrative Court of Lithuania within 30 calendar days from their announcement (Article 132(1) of the Law on Administrative Proceedings). The appeal can be lodged by all the participants of the case (Article 134(1) of the Law on Administrative Proceedings). Article 140(1) of the Law on Administrative Proceedings stipulates that the court, which analyses the case under the appeal procedure, reviews the soundness and the legitimacy of the judgement of the court of first instance without overstepping the boundaries of the claim.¹⁰ As a general rule, the appeal process consists of written proceedings, with oral proceedings being an exception rather than a rule (Article 141(1) of the Law on Administrative Proceedings). If the court considers it necessary, it may repeatedly or additionally investigate evidence, which was investigated by the court of first instance (Article 142(3) of the Law on Administrative Proceedings). The same legal provision states that the court may also investigate evidence, which the court of first instance refused to investigate; however, any new evidence can only be investigated if the court finds that there are grounded reasons why this was not done before or if the necessity of the submission of new evidence arose only later.

22. According to Article 144(1) of the Law on Administrative Proceedings, the court, which solves the case in the appeal, after having investigated the case, may issue one of the following judgements:

1. leave the judgement of the court of first instance unchanged and reject the appellate claim;
2. annul the judgement of the court of first instance and issue a new judgement;

¹⁰ Article 140(2) of the Law on Administrative Proceedings mentions circumstances when it might be possible to overstep the boundaries of the claim, for example, when there is a need to protect a public interest.

3. change the judgement of the court of first instance;
 4. annul – in whole or in part – the judgement of the court of first instance and send the case back to the court of first instance;
 5. annul the judgement of the court of first instance and close the case or leave the claim unsolved if there are circumstances listed in Articles 103 and 105 of the Law on Administrative Proceedings.
23. The judgement of the court of the appeal instance becomes final on the day it is issued and is not reviewed under the cassation procedure (Article 148(1) of the Law on Administrative Proceedings).

3.2. Case examples: the decisions on concerted practice, anti-competitive agreements and on the abuse of dominance in terms of unfair pricing

24. One of the examples where the Supreme Administrative Court of Lithuania partly changed the decision of the Competition Council due to the lack of a proper assessment of evidence for proving a concerted practice was the *E-Turas* case.¹¹ In that case, the question was whether travel agencies could have been held to have engaged in a concerted practice given the fact that they participated in the online travel booking system E-TURAS, the administrator of which at some point in time “capped” the discount, which was applied to the travel packages offered on its online platform, and sent a message to all the participating travel agencies to their accounts of that system. In its decision,¹² the Competition Council held that 30 travel agencies and UAB “Eturas” coordinated their behaviour with regard to the discounts for online travel bookings through the E-TURAS system and thereby restricted competition by object and infringed Article 101(1) TFEU and Article 5(1) of the Law on Competition.¹³ Fines were imposed on all undertakings, except for one,¹⁴ which informed the Competition Council about the practice. When the case reached the Supreme Administrative Court of Lithuania, it referred for a preliminary ruling to the European Court of Justice,¹⁵ and afterwards delivered the judgement in this case. The Supreme Administrative Court of Lithuania analysed whether each of the travel agencies that lodged an appeal could, in fact, be held to have participated in the aforementioned concerted practice. The Supreme Administrative Court of Lithuania, on the basis of a thorough analysis of the evidence in the case, found that it could not be established that all travel agencies could be held to have participated in the concerted practice. As a result, part of the decision of the Competition Council was annulled and a number of undertakings

¹¹ Judgement of the Supreme Administrative Court of Lithuania, 2 May 2016, Case No. A-97-858/2016.

¹² Decision of the Competition Council on the compliance of the actions of the undertakings providing sales of organized trips and other related services with the requirements of Article 5 of the Law on Competition of the Republic of Lithuania and Article 101 TFEU, 7 June 2012, No. 2S-9.

¹³ *Ibid.*, paras 179-196.

¹⁴ *Ibid.*, paras 253-258.

¹⁵ ECJ, Case C-74/14, “*Eturas*” *UAB and Others v Lietuvos Respublikos konkurencijos taryba*, 21 January 2016, ECLI:EU:C:2016:42.

previously found to have infringed Article 5(1) of the Law on Competition and Article 101(1) TFEU was reduced.¹⁶ The rest of the decision, with regard to a (reduced) number of travel agencies and UAB “Eturas” itself, was upheld.¹⁷

25. In another case, the decision of the Competition Council was annulled by Vilnius Regional Administrative Court, but, when the case reached the Supreme Administrative Court of Lithuania, the latter annulled the judgement of Vilnius Regional Administrative Court with the result that the findings of the Competition Council were considered to be valid. The Competition Council, in its decision,¹⁸ found that the Lithuanian association of the communication agencies and a number of undertakings providing advertising and media planning services infringed Article 5(1) point 1 of the Law on Competition by having agreed to set a fixed fee to be paid – by the competition organizers - to these undertakings for their participation in the competitions on the purchase of advertising services. During the investigation, the association and the undertakings explained that such a fee was rather meant as a compensation to the undertakings for their participation and the preparation for the participation in the competition; it was said that during the preparatory stage creative ideas are generated, so that during the competition stage the client basically already gets the created product. The companies argued that such a compensation was meant to serve as preventing merely fictitious competitions.¹⁹ According to the Competition Council, such an agreement between the competitors amounted to a restriction by object and infringed Article 5(1) point 1 of the Law on Competition.²⁰ The Competition Council’s decision was annulled by Vilnius Regional Administrative Court.²¹ The latter Court held that both the legal and the economic context of the agreements confirmed that their purpose was to avoid fictitious competitions, so that this circumstance, it was said, could not be considered as the restriction of competition. Furthermore, the Court noted that the Competition Council, having made incorrect conclusions on the goal of the agreement, i.e. to restrict competition, unjustifiably did not analyse what effects the agreement might have had on competition. When the case reached the Supreme Administrative Court of Lithuania,²² the latter annulled the judgement of Vilnius Regional Administrative Court. The Supreme Administrative Court of Lithuania explained that there are two kinds of the restrictions of competition under Article 5 of the Law on Competition, i.e. a restriction by object and a restriction by effect. It was said that, when the fixing of prices was found, it was to be considered as a restriction by object without it being necessary to analyse the effects of

¹⁶ Judgement of the Supreme Administrative Court of Lithuania, 2 May 2016, Case No. A-97-858/2016, para. 474.

¹⁷ *Ibid.*, paras 416-420.

¹⁸ Decision of the Competition Council of the Republic of Lithuania on the compliance of actions of the undertakings providing advertising and media planning services and of their association with the requirements of Article 5 of the Law on Competition of the Republic of Lithuania, 4 June 2009, No. 2S-13.

¹⁹ *Ibid.*, Part 3 of the defining part of the Decision.

²⁰ *Ibid.*, Part 2 of the part of the Decision finding the infringement.

²¹ Judgement of Vilnius Regional Administrative Court, 21 January 2010, Case No. I-515-602/2010.

²² Judgement of the Supreme Administrative Court of Lithuania, 28 March 2011, Case No. A525-2577/2011.

such an agreement on competition.²³ The Court agreed with the findings of the Competition Council that the association and the undertakings agreed on the fixed fee for the participation of these undertakings in the competitions on the purchase of their advertising services and that such an agreement was a restriction by object falling under Article 5(1) point 1 of the Law on Competition.²⁴

26. In terms of an abuse of dominance, the Supreme Administrative Court of Lithuania annulled the Competition Council's decision on unfair pricing. It was back in 2007 when the Competition Council found that UAB "Vilniaus energija" infringed Article 9(1) [now: Article 7(1)] of the Law on Competition in terms of imposing unfair prices in the markets for the rent of communication tunnels in the nine districts of the city of Vilnius.²⁵ According to the Competition Council, the tariffs, which were applied by UAB "Vilniaus energija", were disproportionate to the cross-sectional areas of the communications located in the communication tunnels and to the spaces used.²⁶ Vilnius Regional Administrative Court upheld the decision of the Competition Council.²⁷ However, when the case reached the Supreme Administrative Court of Lithuania,²⁸ the latter annulled the Competition Council's decision and sent the case back to the Competition Council for additional investigation. The Supreme Administrative Court of Lithuania pointed out that the Competition Council's decision lacked a thorough analysis of an economic value of the product and that it was important to distinguish between the assessment of profit and the assessment whether the imposed prices were unfair.²⁹ The Competition Council, after the case was sent back to it for additional investigation, adopted the decision³⁰ where it held that UAB "Vilniaus energija" infringed Article 9(1) [now: Article 7(1)] of the Law on Competition by imposing unfair prices. The Competition Council explained that the important fact of this case was that the profit margin of UAB "Vilniaus energija" for the rent of communication tunnels was set by the decision of Vilnius municipality, so that the company's profit from this activity was fixed (regulated) and that it could not unilaterally change it by increasing it. The Competition Council argued that due to this fact it, for the assessment whether the prices were unfair, chose the method of comparing the revenue and cost and evaluating whether the profit received was unfair *per se*. Accordingly, the Competition Council held that due to the fact that the company received an unjustifiably high profit, which significantly exceeded the profit norm set by Vilnius municipality, such

²³ *Ibid.*, Part VI of the judgement.

²⁴ *Ibid.*, Part VII-VIII of the judgement.

²⁵ Decision of the Competition Council of the Republic of Lithuania on the compliance of actions of UAB "Vilniaus energija" with the requirements of Article 9(1) of the Law on Competition of the Republic of Lithuania, 13 September 2007, No. 2S-18.

²⁶ *Ibid.*, Part 3 of the part of the Decision finding the infringement.

²⁷ Judgement of Vilnius Regional Administrative Court, 2 June 2008, Case No. I-2425-662/2008.

²⁸ Judgement of the Supreme Administrative Court of Lithuania, 27 March 2009, Case No. A-822-454/2009.

²⁹ *Ibid.*, Part IV of the judgement.

³⁰ Decision of the Competition Council of the Republic of Lithuania on the compliance of actions of UAB "Vilniaus energija" with the requirements of Article 9 of the Law on Competition of the Republic of Lithuania, 6 May 2010, No. 2S-11.

profit was unfair *per se* and thus the company was held to have imposed unfair prices.³¹ Further, the Competition Council stressed that it did not confine itself only to the aforementioned method and based its findings on unfair pricing also on comparing rental tariffs applied by UAB “Vilniaus energija” to different groups of tenants. The Competition Council found that UAB “Vilniaus energija” applied different tariffs to different groups of tenants, so that some of them – for the same service - had to pay much more than the others. According to the Competition Council, the latter circumstance also showed that the company imposed unfair pricing.³² During the judicial review, the Vilnius Regional Administrative Court annulled the Competition Council’s decision.³³ The Court said that, since the assessment of unfair pricing required a complex economic analysis, the analysis conducted by the Court was limited to the questions whether the Competition Council complied with procedural norms, based its findings on sound arguments, did not reinterpret factual circumstances, did not make any obvious mistake in their assessment and did not misuse their powers. The Court stressed that an abuse of a dominant position in terms of imposing unfair prices has to be proven on the basis of the fulfillment of two conditions: the difference between the cost and prices is too high and the imposed price is unfair *per se* or in comparison with the prices of competing products. The Court said that, although the Competition Council found unfair pricing, it did not analyse the structure of the price, so that it was not clear what tariffs were, in fact, applied. Furthermore, it was pointed out that, in their analysis, the Competition Council did not assess whether the services provided by the company were much more expensive than the services provided in other or related markets. It was explained that, in the framework of Article 9 [now: Article 7] of the Law on Competition, the focus of the assessment should be on the actions of a dominant undertaking and not on the question whether its tariffs complied with the decision of Vilnius municipality. So, according to the Court, the Competition Council’s refusal to assess prices in comparison to other prices was not grounded. The judgement of Vilnius Regional Administrative Court was upheld by the Supreme Administrative Court of Lithuania.³⁴ The Court, first of all, noted that, although it could only to a limited extent review the legality and soundness of the economic analysis done by the Competition Council in the case, it could evaluate whether the Competition Council complied with the procedure, whether it based its findings on sound arguments, whether it did not make any obvious mistake of the assessment or did not misuse its powers. According to the Court, bearing in mind that the tariffs were partly calculated on the basis of the decision of Vilnius municipality, it was essential in this case to analyse whether the company actually behaved independently by setting tariffs and whether it could have set them on the basis of its own decision and what tariffs were, in fact, applied. It was said that the Competition Council did not sufficiently analyse this circumstance. However, it was said that the latter circumstance was crucial when deciding whether there was an infringement of competition law. Accordingly, the Court held that this was sufficient grounds to question the legality and the soundness of the Competition Council’s decision, since the latter was adopted

³¹ *Ibid.*, Part 3.1. of the part of the Decision finding the infringement.

³² *Ibid.*, Part 3.2. of the part of the Decision finding the infringement.

³³ Judgement of Vilnius Regional Administrative Court, 24 October 2011, Case No. 1-3681-562/2011.

³⁴ Judgement of the Supreme Administrative Court of Lithuania, 13 August 2012, Case No. A858-1516/2012.

without having assessed all the circumstances and factors, which were relevant for the assessment of the infringement under Article 9(1) [now: Article 7(1)] of the Law on Competition. Yet, the Court said that even if it were found that the company acted independently, there was no ground for disagreeing with the findings of Vilnius Regional Administrative Court that the Competition Council's decision was based on the findings, which were insufficient for proving the infringement under Article 9(1) [now: Article 7(1)] of the Law on Competition.³⁵

3.3. Commitment decisions in cases on anti-competitive agreements and an abuse of dominance

27. According to Article 28(4) of the Law on Competition, the Competition Council, if it plans to set commitments on an undertaking to terminate an anti-competitive agreement or an abuse of a dominant position, has a right to adopt a decision to terminate the investigation, if the undertaking, which is suspected to have infringed the Law on Competition, offers in writing its commitments on the elimination of the suspected infringement and such commitments are made binding on the undertakings by a decision of the Competition Council.³⁶ According to this legal provision, the duration of such commitments is set by the decision of the Competition Council. Article 28(5) of the Law on Competition says that the commitments, which are offered pursuant to Article 28(4) of the Law on Competition and which are written into the decision of the Competition Council on closing the investigation, are binding on the undertaking. However, if any new circumstances appear, the Competition Council has a right to issue a decision on the renewal of the investigation, which was terminated (Article 28(6) of the Law on Competition). Pursuant to Article 28(7) of the Law on Competition, the decisions of the Competition Council, adopted on the basis of Article 28(4) of the Law on Competition, are announced on the Competition Council's website.

28. For example, in 2018, the Competition Council terminated the investigation on a suspected abuse of a dominant position by AB "Swedbank".³⁷ In this case, the Competition Council accepted the commitments offered by AB "Swedbank" and closed the case.³⁸ It was said in the decision that a complaint on this decision can be lodged with Vilnius Regional Administrative Court within 20 days from its announcement on the website of the Competition Council. However, no such complaint was lodged.

³⁵ *Ibid.*, Part IV of the judgement.

³⁶ It could be noted that, according to Article 28(3) point 2 of the Law on Competition – the legal provision, which is in force until 1 July 2019, the Competition Council terminates the investigation when the actions did not cause any significant damage to the interests safeguarded by the Law on Competition and the undertaking, which is suspected to have infringed the Law on Competition, in good will terminated the actions and submitted to the Competition Council in writing the commitment not to engage in these actions or to perform actions, which annul the suspected infringement or which provide conditions to avoid it in the future.

³⁷ Decision of the Competition Council on the termination of the investigation on the compliance of actions of AB "Swedbank" with the requirements of Article 7 of the Law on Competition of the Republic of Lithuania, 12 June 2018, No. 1S-79(2018).

³⁸ See also the press release in English by the Competition Council: <http://kt.gov.lt/en/news/competition-council-closes-investigation-into-swedbank-nbsp-actions>.

3.4. Merger remedies and commitment decisions in merger cases

29. Decisions of the Competition Council related to merger control, including the decisions on the failure to notify concentrations, may be judicially reviewed. For example, in the *Lukoil Baltija* case, where the Competition Council had found an infringement in terms of a failure of the companies to notify the concentration (in casu: the acquisition of a number of petrol stations by UAB “Lukoil Baltija”) and imposed fines,³⁹ the Supreme Administrative Court of Lithuania,⁴⁰ while reviewing the case under the appeal procedure, held that the Competition Council bears the burden of proof of a suspected infringement, so that the competition authority has to provide accurate and consistent evidence in order to prove it.⁴¹

30. Furthermore, commitments may be accepted in the cases of merger control. Article 12(1) of the Law on Competition stipulates that the Competition Council, after having analysed the notification about the concentration, adopts a decision, one of them being the decision to clear the concentration on the basis of the conditions and commitments applicable to the undertakings participating in the concentration or controlling persons with the goal that no dominant position is created or strengthened or competition be significantly impeded in the relevant market (Article 12(1) point 2 of the Law on Competition). Such commitments, before they become binding, are not reviewed by the courts, but, according to the Order on the submission of the notification about the concentration and their review (point 51),⁴² the Competition Council may, by its decision, make the non-confidential version of the proposed commitments public by announcing them on the Competition Council’s website thereby providing a possibility for third parties to get aware of the content of the commitments and to evaluate their capability to be implemented and their efficiency to solve the competition law problems.

31. For example, in 2018, the Competition Council prohibited the concentration between two retailers. In fact, the Competition Council adopted the commitment decision on 18 October 2017,⁴³ and on 17 April 2018 issued a decision declaring that the commitments were not fulfilled and the concentration thereby was prohibited.⁴⁴ In the latter decision, it was stated that a complaint with regard to this decision could be lodged with

³⁹ Decision of the Competition Council of the Republic of Lithuania on the compliance of actions of UAB “Lukoil Baltija” with the requirements of Articles 8(1) and 9(2) of the Law on Competition of the Republic of Lithuania, 12 May 2014, No. 2S-2/2014.

⁴⁰ Judgement of the Supreme Administrative Court of Lithuania, 18 April 2017, Case No. A-899-858/2017.

⁴¹ *Ibid.*, Part IV of the judgement.

⁴² Decision of the Competition Council of the Republic of Lithuania on the confirmation of the order on the submission of the notification about the concentration and their review, 11 August 2015, No. 1S-82/2015.

⁴³ Decision of the Competition Council of the Republic of Lithuania allowing the concentration of UAB “Rimi Lietuva” acquiring 100 percent of the shares and the sole control of UAB “PALINK”, 18 October 2017, No. 1S-108 (2017).

⁴⁴ Decision of the Competition Council of the Republic of Lithuania on purchase-sale contracts and commercial purchaser/purchasers candidacies submitted by UAB “Rimi Lietuva” with regard to the shops transferable by it and UAB “PALINK”, 17 April 2018, No. 1S-45 (2018).

Vilnius Regional Administrative Court within 20 days from the submission of this decision. However, no such complaint was lodged.

3.5. Complaints on the procedural and decision-making powers of the empowered Competition Council's officials

32. Undertakings and other persons, whose rights might have been infringed, have a right to lodge a complaint with the Competition Council as regards the actions or decisions of the empowered officials of the Competition Council which were conducted or made during the procedure of a suspected infringement of Competition Law; such a complaint has to be lodged within 10 days as from the date when these persons get aware of the actions or a decision (Article 32(1) of the Law on Competition). The same legal provision stipulates that the Competition Council has to adopt a decision on the complaint within 10 days from the receipt of such a complaint (Article 32(1) of the Competition Council). If the undertakings or other persons who had lodged the complaint do not agree with the decision of the Competition Council or if the Competition Council does not adopt any decision within the aforementioned 10 days, these persons may lodge a complaint with the Vilnius Regional Administrative Court; however, lodging a complaint does not suspend the procedure of a suspected infringement of the Law on Competition (Article 32(3) of the Law on Competition).

33. Lately, there were a number of complaints lodged on the basis of Article 32(1) of the Law on Competition. Some of them reached the Supreme Administrative Court of Lithuania by way of judicial review.

34. In three judgements issued in August 2018, the Supreme Administrative Court of Lithuania analysed the complaints lodged by the undertakings against the actions of the empowered officials of the Competition Council.⁴⁵ Basically, in all three complaints it was stated that the companies lodged their complaints with the Competition Council as regards the actions of their empowered officials related to the inspection in their buildings and to the amount of the information seized by the officials. Since the Competition Council rejected these complaints, the companies lodged their complaints with the Vilnius Regional Administrative Court. Yet, the latter court refused to accept the complaint, basically arguing that the part of the decision of the Competition Council, which was under the complaint, could not be a subject matter of a judicial procedure, since it was mainly an intermediary procedural act, which did not cause yet any final legal consequences.⁴⁶ When the companies appealed to the Supreme Administrative Court of Lithuania, the latter annulled the judgements of Vilnius Regional Administrative Court and referred the complaints back to Vilnius Regional Administrative Court for an examination. The Supreme Administrative Court of Lithuania explained that Article 32 of the Law on Competition provides a possibility for undertakings and other persons, whose rights might have been infringed, to lodge a complaint with the court as regards actions or decisions by the empowered officials of the Competition Council. It was said that any other interpretation of the aforementioned legal norm would run counter to the Law on

⁴⁵ Judgement of the Supreme Administrative Court of Lithuania, 14 August 2018, Case No. eAS-565-575/2018; Judgement of the Supreme Administrative Court of Lithuania, 14 August 2018, Case No. eAS-564-629/2018; Judgement of the Supreme Administrative Court of Lithuania, 28 August 2018, Case No. eAS-566-556/2018.

⁴⁶ *Ibid.*, Part II of the aforementioned judgements.

Competition. Furthermore, the Court said that such a legal framework ensures the implementation of the principles of justice, the equality of the parties of the case and other fundamental legal principles. The Court stressed that the Law on Competition, in Article 32, foresees a special procedure on how such complaints can be lodged – first of all, with the Competition Council, and then, with the court. The Court thus held that Vilnius Regional Administrative Court, by refusing to accept the complaints, did not take into account that a complaint on the decision of the Competition Council may be lodged with the court, that the Law on Competition foresees a special procedure for lodging such complaints and that Vilnius Regional Administrative Court thus unjustifiably refused to accept the claims. Thus, the Court referred the complaints to Vilnius Regional Administrative Court for an examination.⁴⁷

35. However, in another case,⁴⁸ the Supreme Administrative Court of Lithuania rejected the complaint of the undertaking and upheld the judgement of Vilnius Regional Administrative Court. In this case, the company complained with regard to the actions of the empowered officials of the Competition Council basically with regard to the amount of the information seized and the lack of the assessment of its relation to the subject matter of the investigation as well as the lack of information about and the proper implementation of their procedural rights and obligations.⁴⁹ When the company lodged a complaint with the Competition Council, the latter rejected the complaint. The company then lodged a complaint with Vilnius Regional Administrative Court, which dismissed the complaint, basically on the grounds that the decision of the Competition Council, which was under the complaint is an intermediary procedural decision, which does not yet cause any final legal effect.⁵⁰ The Supreme Administrative Court of Lithuania upheld the judgement of Vilnius Regional Administrative Court. The Court said that, whereas Article 32(1) and Article 32(3) of the Law on Competition foresee the right to lodge a complaint with regard to the actions and decisions of the empowered officials of the Competition Council, this does not mean that any actions and decisions can be a subject matter of such a complaint, including such which are merely intermediary decisions that do not yet cause any final legal effect. The Court stressed that the jurisdiction of the administrative courts covers administrative cases on the legitimacy of the legal acts adopted by the public administration bodies and actions (inaction), having impact on the rights of persons and the interests protected by the laws. According to the Court, when the act or the decision do not cause any obvious legal consequences, it cannot be a subject matter of a dispute in the administrative court. Furthermore, it was pointed out that, even if there were no ground to claim that an act (action, decision) did not cause any legal consequences, it had to be taken into account, when deciding whether such an act fell under the actions and decisions of the officials of the Competition Council which may be a subject matter of an administrative case pursuant to Article 32(1) and Article 32(3) of the Law on Competition, in what context such an act was adopted and also whether – in reality - the interests of a claimant could be protected. It was said that an answer to this question (i.e. on the initiation of such an independent procedure) had to be given in the context of all factual circumstances as well as the fact how the request submitted is related to the finished proceedings on the suspected

⁴⁷ *Ibid.*, Part IV of the aforementioned judgements.

⁴⁸ Judgement of the Supreme Administrative Court of Lithuania, 3 October 2018, Case No. eAS-663-624/2018.

⁴⁹ *Ibid.*, Part I of the judgement.

⁵⁰ *Ibid.*, Part II of the judgement.

infringement of the Law on Competition. On the other hand, it was stressed that account should be taken of that the claimant is not deprived of their right to a judicial review when lodging a complaint on the infringement of their rights and interests. The Court concluded that in the case at hand it was useless to start a separate judicial proceeding given that the actions and decisions of the empowered officials of the Competition Council could be evaluated in the dispute on the suspected infringement of the Law on Competition.

36. In another case,⁵¹ claimants were asking the courts to apply interim measures and to temporarily restrict the abilities of the Competition Council to access part of the information in the investigation materials. The claimants said that a portion of information that the Competition Council seized was information, which was not related to the started investigation, and that such information was confidential, since it included information based on which the activities of the claimants could be analysed, their strategic decisions and commercial actions could be evaluated. It was said that serious damage could be caused if such information were to get known by third parties.⁵² The Supreme Administrative Court of Lithuania rejected the claim by stating that the restriction of the abilities of the Competition Council, even if temporary, to access part of the investigation material would in fact mean the restriction of the actions of the Competition Council while doing the investigation. It was pointed out that, according to Article 25(1) point 8 of the Law on Competition, the Competition Council has a right to seize documents and objects with evidentiary value. Also, it was noted that Article 21(1) of the Law on Competition obliges the officials of the Competition Council not to disclose commercial and professional secrets and to use them only for the aims, for which they were collected. The Court concluded that the restrictions, requested in the claim, would disproportionately restrict the actions of the Competition Council, would distort the balance between the parties of the process and negatively affect the public interest.⁵³

4. Conclusion

37. In Lithuania, various decisions of the Competition Council, which is responsible for the public enforcement of competition law in Lithuania, can be judicially reviewed. In this regard, the court of first instance, which judicially reviews the decisions of the competition authority, is Vilnius Regional Administrative Court, whereas the Supreme Administrative Court of Lithuania is the appellate instance. The judgements of the latter cannot be reviewed in the cassation instance. The Supreme Administrative Court of Lithuania, while reviewing the judgements of the courts of first instance, checks the soundness and the legitimacy of the judgement of the court of first instance without overstepping the boundaries of the claim. In cases where some special knowledge is required, it is possible for the court to request an expert opinion, which is though not binding on the court. The standard of judicial review has evolved through the years and it will be seen how it will develop in the future.

⁵¹ Judgement of the Supreme Administrative Court of Lithuania, 6 February 2019, Case No. eAS-95-822/2019.

⁵² *Ibid.*, Part III of the judgement.

⁵³ *Ibid.*, Part IV of the judgement.