EVALUATING WORK OF THE COMPETITION COUNCIL OF THE REPUBLIC OF LITHUANIA: DIRECT AND INDIRECT BENEFITS TO CONSUMERS

Introduction

1. The main function of the Competition Council of the Republic of Lithuania (Competition Council, CC) is enforcing the Law on Competition and implementing competition policy in Lithuania. While conducting its activities the Competition Council aims at ensuring consumer welfare and therefore creating direct financial benefits to consumers.

2. In order to evaluate the impact of the activities of the CC on consumers, the CC decided to publish estimated benefits that have been brought to consumers as a result of its work. This impact estimation is primarily concerned with the assessment of direct financial and economical benefits to consumers, however, references are also made to indirect benefits, such as fines collected and the benefits resulting from the deterrent effect of our work.

3. The estimation of the benefits was based on a methodology defined by other competition authorities around the globe, including the UK Office of Fair Trading (the OFT), the European Commission, the Netherlands Competition Authority, the US Federal Trade Commission and the US Department of Justice. The basis for the estimations, however, was the methodology used by the Office of Fair Trading of the UK[1], that, according to prof. Stephen Davies, who was the external expert reviewing the methodology, is well-founded and up-to date[2].

4. The objective of the following impact assessment is twofold. First, this document is a means of external accountability, which enables the state institutions, businesses and society at large to assess the activities of the CC and see the benefits brought by its work. Second, this methodology will be used as an integral part of CC's decision making process when an issue of whether to open an investigation arises. Having regard to the objective of the CC to prioritise its work and concentrate on intervening in cases where the expected benefits to consumers are the highest, prior estimation of possible benefits to consumers is of crucial importance.

Methodology of Impact Estimation

Scope and Assumptions

5. Benefits to consumers that arise as a result of the activities of the CC include the following elements:

   - Prevention of future damage that could have been caused if the CC had not intervened in the anti-competitive behaviour;
   - Termination of anticompetitive behaviour and imposition of fines on undertakings in order to suppress illegal conduct as well as to prevent it from being repeated;

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[1] In particular, as regards the assessment of anti-competitive agreements and cases of abuse of dominant position.

[2] According to prof. Stephen Davies, „*there is no other Competition Authority <...> worldwide which takes impact estimation more seriously than OFT.*" See: Davies, S., A Review of OFT's impact estimation methods, January 2010 http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1164.pdf, p. 4, para. 1.2-1.4.

- Deterrent effect of the uncovered infringements and imposed sanctions, precluding the initiation of new infringements by the undertakings;
- Increased awareness resulting from advocacy and guidance on competition law issues;
- Positive impact of increased competition on economic development and technological innovations.

6. This document only contains a description of the first three of the above elements. The impact assessment is mainly concerned with an estimation of direct financial benefits to consumers[3] that arise as a result of decisions adopted by the Competition Council[4]. These will be followed by data on indirect benefits: such as data on fines imposed on the undertakings for the infringement of Law on Competition as well as data on benefits resulting from the deterrent effect of the interventions by the Competition Council.

7. We currently estimate the impact of our work in the following areas:

- anti-competitive agreements;
- abuse of dominant position;
- merger control; and
- misleading and prohibited comparative advertising[5].

8. This does not comprise the full extent of the Competition Council's work. The estimations do not include:

- direct benefits to consumers that arise as a result of control and prosecution of unfair practices, including misleading and prohibited comparative advertising;
- benefits that arise as a result of intervention in cases when restriction of competition arises due to decisions of public authorities;
- supervision of compliance with the Law on Prohibition of Unfair Practices by Retailers[6] and other legal acts[7];
- advocacy efforts of the Competition Council both in relation to businesses and government bodies.

Due to such limited extent of the work of the Competition Council that is described in this impact assessment, the estimates of consumer benefits are considered to be conservative[8].

9. All of our general and case-specific assumptions are conservative. We do not claim that the estimates of our impact exactly capture consumer benefits. Rather, by using conservative assumptions that are supported by the available evidence, and/or academic literature, we ensure that it is unlikely that less than our estimates have been saved.

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[3] The estimates include decrease in price, however, monetarised improvements in quality, range or service or monetarised time savings as well as benefits that consumers gain from making better informed choices about what goods to purchase are not included in the current calculations, however we are working on the development of the methods that would allow us to include this information in our future estimates.

[4] We take as given that all the interventions by the Competition Council not overturned on appeal are warranted. Should an appeal result in an overturn of a Competition Council decision, the impact estimates will be accordingly reviewed during the subsequent publication. Such approach is in line with the international best practice. Moreover, even if the decision of the CC is subject to appeal, in most instances, the anti-competitive conduct, e.g. information sharing, is usually terminated following the decision of the CC without waiting for the final ruling of the court. For this reason only including cases once the court has provided its final ruling would result in disregarding the positive impact of the intervention from the moment of its occurrence.

[5] This is only included for the purposes of calculation of fines imposed during the assessment period.

[6] National Gazette, 2010-01-05, Nr. 1-31

[7] We continue to work to get a better understanding of our impact in these areas and formulate a methodology, which could be applied for future publishing of estimates in these areas.

[8] By "conservative" we mean cautious approach, which ensures that the estimates provided are lower bound estimates calculated using moderate rules.

10. To avoid any chance of prejudicing our fine-setting process, and also as the consumers receive no direct benefits from the fines, we do not include fines as part of our benefits. We provide information of the fines imposed separately.

11. Additionally, in order to avoid year to year fluctuations in the impact estimates which could arise due to the lumpiness of our work, we will be producing a three-year average impact estimates. These impact estimates include cases completed by the Competition Council in the previous three financial years (2008–2010).

12. It is, however, noteworthy, that during the years under consideration, the staff of the Competition Council has not been collecting any additional information for the purposes of impact assessment under the methodology provided for in this document. Therefore, the estimates provided are often based on conservative rules of thumb and assumptions.

13. It should also be noted, that we do not provide case-specific estimates or assumptions where there might be information that is confidential and needs to be protected.

14. The impact assessment methodology used by the OFT, which has been the basis for this document, has been reviewed by external expert economists. The calculations presented in this document have benefited from the input and consultations with the economists of the OFT and professors of economics and finance at Kaunas University of Technology (Kauno Technologijos Universitetas) Dr. Jurgita Bruneckienė and Dr. Rytis Krušinskas as well as received an approval from the Department of Public Governance of the Ministry of Home Affairs.

Impact assessment methodology

15. To estimate the likely impact of the interventions by the Competition Council in all cases (irrespective of whether the infringement decision included a finding of effect[9]) we rely primarily on case team knowledge and judgment as well as apply conservative rules of thumb based on academic research and international best practice.

16. We discount future consumer savings by 5,5 per cent Social Discount Rate[10].

17. Where the problem is in an upstream market and benefits arise in the first instance to business customers, we assume full pass-through of benefits to final consumers, unless strong evidence shows otherwise, as in the vast majority of cases it is disproportionately time consuming to determine the level of this pass-through. Thus, for example, an increase in manufacturer competition that results in lower wholesale prices is assumed in turn to result in lower retail prices and is treated as a direct benefit.

18. Most of our impact estimates are *ex ante* in the sense that the full impact of our actions is not observable. They are based on the best information available at the time of estimation – which is typically once the intervention has been completed and the final decision has been taken but the full impact from it is not observable. These *ex ante* impact estimates are updated (upwards or downwards) if we obtain better data in the process of monitoring.

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[9] The inclusion in these figures of consumer savings estimates for those cases where the decision was based solely on the anticompetitive object of the parties' conduct should not be treated as constituting or implying a formal finding as to the effect of the infringement.

[10] Social discount rate (SDR) reflects the social view on how future benefits and costs should be valued against present ones. For the period 2007-2013 the European Commission has suggested a benchmark discount rate of 5.5 per cent for the Cohesion countries that have not determined an official social discount rate for the country.
http://ec.europa.eu/regional_policy/sources/docgener/guides/cost/guide2008_en.pdf
http://www.esparama.lt/es_parama_pletra/failai/cpva/failai/Leidiniai/CPVA_metodinis_leidinys_1.pdf, p. 55.

Assessment of Intervention in Cartels and Abuse of Dominance Cases

19. In order to promote compliance with the Art. 5 of the Law on Competition, prohibiting anti-competitive agreements, the Competition Council takes enforcement action against such anti-competitive agreements on the market ensuring that consumers are presented with a wider choice of cheaper quality products. Competition Council pays particular attention to prosecuting cartel agreements, i.e. usually secret agreements between competing undertakings, whereby they coordinate their conduct in order to raise prices, limit output, divide markets or customers. Vertical agreements concluded between undertakings at a different level of trade that aim at setting resale price or restricting competition in another way are also subject to scrutiny of the Competition Council under Art. 5 of the Law on Competition.

20. Together with prosecution of anti-competitive agreements, under Art. 9 of the Law on Competition, the CC takes enforcement action against unilateral conduct by dominant undertakings that harm consumers by abusing such dominant position.

21. The methodology described in this chapter is applied to the decisions of the Competition Council where fines were imposed on the undertakings for infringing either Art. 5 (national equivalent of Art. 101 Treaty for the Functioning of the European Union (TFEU)) or Art. 9 (equivalent of Art. 102 TFEU) of the Law on Competition. Given the complexity of the assessment, cases where there were no fines imposed, subject to commitments by the undertakings, are not included in the estimation in order to preserve the conservative nature of the results.

22. Following the methodology applied by the OFT, the annual impact of a cartel or abuse of a dominant position on consumers (*a*) is calculated by multiplying the turnover (*t*), of the affected goods and services by the price increase (*p*) caused by agreement or the abuse of a dominant position.

$$a = t \cdot p$$

23. The Competition Council estimates future consumer savings (*f*) by multiplying the annual impact by the number of years we believe the cartel or the abuse of a dominant position may have remained operational, but for the CC's intervention (*c*), and adjusting to take account of the social discount rate of 5,5 per cent (*p*). Mathematically:

$$f = \sum_{s=1}^{c} a/(1+p)^s$$

24. Consumer savings in bid-rigging cases are mathematically calculated as follows:

$$A = p - p/(1+r)$$

where, ***A*** – consumer savings;
p – lowest price offer;
r – price increase due to bid-rigging.

Turnover

25. When calculating the turnover of the undertakings concerned, it is considered that the cartel only <u>affected the turnover of the parties' involved in the infringement in the relevant market for the affected goods and services.</u> It is likely that the price of goods or services competing with those offered by the colluding firms will also have increased, independent of who produces them. However, in the interest of conservatism, unless there is strong evidence otherwise we assume that only the goods or services of the colluding parties are affected by the cartel, and that the price of the goods or services of other firms in the market is unaffected.

26. Additionally, when calculating the impact of the cartel or abuse of a dominant position, where possible the Competition Council assesses <u>the turnover directly or indirectly related to the infringement.</u> Where such data is unavailable from the case material, the impact is calculated based on the total turnover of the undertakings, respectively reducing it where there is evidence that the activity under investigation is not its main economic activity.

Price rise

27. Where data is available, the price rise caused by the anti-competitive agreement has been identified during the investigation. Where this information has not been identified the Competition Council applies a default conservative <u>10 per cent price rise</u> rule of thumb.

28. The default price rise is chosen based on the international best practice as applied by the national competition authorities and the European Commission (see Table No 1).

Table 1 Price rise rule of thumb as applied by national competition authorities and the European Commission

Competition authority	Price rise
1. OFT[11]	15%
2. The Competition Authority of the Netherlands (NMa)[12]	10%
3. The European Commission[13]	10%
4. The US Department of Justice (DOJ) [14]	10%

29. It should be noted that the percentage of default price rise applied in this impact assessment is significantly smaller than the price effect revealed by the academic literature evaluating past cartels (see Table No 2). Therefore, applying the 10 per cent price increase presumption ensures the conservative nature of the impact assessment.

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[11] http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1250.pdf, p. 17

[12] NMa Working Papers „Outcome of NMa activities – A description of the calculation method", R. Kemp, M, Mulder, J. Van Sinderen, No. 1 October 2010, p. 21.

[13] http://ec.europa.eu/competition/publications/annual_management_plan/amp_2010_en.pdf, p. 21

[14] http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1164.pdf, p. 23

Table 2 Summary of six economic surveys on cartel overcharges[15]

Reference	Number of Cartels	Episodic overchange	
		Mean	Median
1. Cohen ir Scheffman (1989 m.)[16]	5-7	7,7-10,8	14
2. Werden (2003 m.)[17]	13	21	18
3. Posner (2001 m.)[18]	12	49	38
4. Levenstein ir Suslow (2002 m.)[19]	22	43	44,5
5. Griffin (1989 m.), tik privatūs karteliai[20]	38	53,2	38,9
6. EBPO (2003 m.)[21]	13	21,6	14
Paprastas vidurkis	103-105	30,7	28,1
Svertinis vidurkis	103-105	36,7	34,6
a) One overcharge in the OECD survey with missing affected sales (U.S. lysine) was converted to percentages using highly reliable, publicly available affected sales data. One overcharge reported to be "more than 13% was recorded as 14%. If a range, the midpint is used for averaging. Three percentages cited to be "as high as" were omitted because they are not likely to be representative of the overcharge rate for the whole episode. The OECD report states that the median is "between 15 and 20%".			

30. The CC also applies a 10 per cent price increase rule in case of bid-rigging[22].

31. The same rule applies to cases not directly related to price-fixing, market sharing or bid-rigging.

32. <u>In abuse of dominance cases</u>, the price increase resulting from the infringement is considered to be <u>10 per cent</u>, however, given the diversity of the cases, special attention is accorded to the data acquired during the investigation.

Duration

33. The duration of the infringement is determined based on the data collected during the investigation. In cases of anti-competitive agreements when the likely duration has not been assessed during the investigation, the Competition Council relies on the international best practice and academic sources and holds that absent the intervention, the anti-competitive agreement would have lasted for additional <u>six years</u>.

34. <u>In abuse of dominance cases</u>, based on the OFT methodology, the price effect is considered to last for <u>one year</u>, taking into account the data gathered during the investigation.

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[15] Connor, J. „Price Fixing Overcharges: revised Edition", Purdue University, July 2009. Cohen, M.A., Scheffman, D.T. "The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?". Journal of Criminal Law 27 (1989 m.).; Werden, G.J. "The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook". Working document Nr. EAG 03-2, US Department of Justice, January 2003.; Posner, R.A,."Antitrust Law". 2nd ed. University of Chicago Press, 2001.; Levenstein, M., Suslow, V. "What Determines Cartel Success? Working document 02 - 001. Michigan University School of Business, January 2002.; Griffin, J. "Previous Cartel Experience: Any Lesson for OPEC?, Economics in Theory and Practice: An Eclectic Approach", 1989; Summary of Cartel Cases Described by Invitees (CCNM/GF/COMP(2001)4). Paris, OECD, October 2001.

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[22] It should be noted, however, that e.g. the competition authority of Singapore claims that price increase in bid-rigging cases may reach as high as 35 per cent.

Assessing Merger Control

35. One of the objectives of merger control is to prevent mergers that could result in harm to consumers due to the reduced competition on the market. Potentially harmful mergers might harm consumers in several ways, including higher prices, lower quality, less choice and longer term effects such as reduced incentives for innovation. The most measurable is the price increase resulting from the merger, therefore, it is considered to be the indicator for assessing the impact of CC's merger control work.

36. The impact of the CCs' merger control work is estimated based on the cases where the merger was prohibited or where structural remedies, e.g. sale of part of a business, were imposed in order to prevent any significant impediment to effective competition.

37. For the moment, we are using the rules of thumb as amended by case-team information to assess the impact of CC's interventions in merger cases. Based on the rules applied by the US Department of Justice (6 per cent), competition authority of Portugal (5,7 per cent), European Commission (10 per cent[23]) and academic research[24], it is considered that price effect of a merger, that could result in a significant impediment of effective competition, <u>equals to 5 per cent</u>. In terms of duration, according to the international best practice and academic research, absent the intervention, the negative effect of a merger on a market would have lasted for additional <u>two years</u>.

38. There are other approaches used for the assessment of mergers that we are currently exploring. One of the methods allowing to assess consumer savings arising from merger control is merger simulation[25]. In the event where merger simulation is deemed to be inappropriate in capturing the competitive aspects of the market or there is insufficient data, consumer savings could be estimated by the following model:

$$CS_j = T_j \times \frac{\sum_{i=1}^{N} \frac{CS_i}{T_i}}{N}$$

where CS_j – consumer savings from unsimulated undertaking *j*;
T_j – turnover in relevant market in unsimulated undertaking *j*;
N – number of simulated undertakings;
CS_i – consumer savings from simulated undertaking *i*;
T_i – turnover in relevant market in simulated undertaking *i*.

Impact assessment

39. Based on the methods described above, direct financial benefits to consumers arising from the work of the Competition Council in tackling cartels and other anti-competitive agreements during the period 2008 – 2010 equal to **LTL 437,94 m**, i.e. on average **LTL 145,98 m** per year.

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[23] However, the duration is considered to be one year, instead of two years.

[24] E.g. prof. M. Weinberg has studied a sample of 13 markets from 15 Us mergers and reported a mean of 7,6 per cent (median (4,8 per cent). See. Weinberg M (2008), 'The Price Effects of Horizontal Mergers', Journal of Competition Law and Economics, 4. pp. 733–447.

[25] Merger simulations are conducted by applying economic models which use the data of the merger notification to analyse potential welfare costs, risks and benefits of a merger.

40. In cases of abuse of dominant position and merger control, direct financial benefits to consumers from the work of the CC during the period 2008-2010 equal to **LTL 26,33 m**, i.e. on average **LTL 8,78 m** per year.

41. Total amount of direct financial benefits to consumers created by the work of the CC equal to **LTL 464,27 m** i.e. **LTL 154,76 m** per year.

42. The above estimates are conservative, as they do not include significant deterrent effect arising from the effective enforcement of competition law. Additionally, the assumptions applied for the estimates are also considered to be conservative.

Indirect benefits to consumers arising from the work of the CC

43. The estimates described above show the direct financial benefits to consumers created as a result of the CC work. However, there are also indirect benefits to consumers — these are the amount of fines imposed and the deterrent effect of CC interventions.

Fines

44. The fines imposed for infringing the Law on Competition are paid into the account of the State Tax Inspectorate, therefore not creating any direct financial benefits to consumers. Nevertheless, disregarding indirect effect of competition enforcement would be unreasonable. First, the fines themselves act as a deterrent element and affect the decisions of the undertakings of whether to start / continue an infringement of competition law. Second, increased state budget ensures a possibility to invest into areas of high importance to consumers even if not directly related to the market where the infringement has been detected.

45. During the assessment period the Competition Council has imposed **LTL 19,69 m** fines on undertakings for breaching provisions prohibiting anti-competitive agreements, abuse of dominant position, closing mergers without obtaining a clearance from the CC, or misleading or prohibited comparative advertising.

Deterrent effect

46. Deterrent effect of competition law enforcement is the effect whereby an intervention by the competition authority results in undertakings abandoning or significantly amending their conduct and therefore preventing the creation of a cartel or any other infringement of competition law. Even though deterrent effect cannot be considered to be a direct financial benefit to consumers, it is widely accepted that deterrence is "perhaps the single most important ultimate outcome of the competition law enforcement"[26], therefore this impact assessment also includes estimates of the indirect benefits to consumers that have been a result of the deterrent effect of the competition law enforcement.

47. International audit company *Delloite* has conducted a survey, where legal and economic advisors of the companies and representatives of the companies replied to a questionnaire in order to assess the deterrent effect of the work of the OFT[27].

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[26] The deterrent effect of competition enforcement by the OFT, November 2007
http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf,
[27] Ibid.

48. The legal survey suggested that the deterrent ratio for competition enforcement was approximately from <u>4-7 to 1</u> depending on the type of infringement (so, for example, five cartels were abandoned for every cartel prohibition decision by the OFT). In cases of cartels or mergers significantly impeding effective competition, the ratio of agreements and initiatives abandoned or significantly amended to those which resulted in Law on Competition decisions according to the legal and economic advisors was <u>5 to 1</u>, while in abuse of dominance cases the ratio is <u>4 to 1</u>. Ratios are significantly larger for the company representatives' survey. For instance, in case of cartels, the ratio is 16 to one.

49. As this type of survey has not been conducted in Lithuania, there is no possibility to provide precise ratios of agreements and initiatives abandoned or significantly amended to those which resulted in CC's decisions. Therefore, the assessment of deterrent effect will be based on the conservative data of the OFT legal and economic advisors' survey.

50. Based on these ratios we estimate that our enforcement work in the area of anti-competitive agreements during the period 2008 – 2010 has led to consumer savings in the range of **LTL 145,98 m to LTL 875,88 m** per year. The range has been calculated as follows:

- Standard conservative estimate (**LTL 145,98 m**) using case specific conservative assumptions where case specific evidence exists or the default rules of thumb of 10 per cent price overcharge and six years expected future duration[28] (in the absence of case specific evidence);

- Estimate including deterrence (**LTL 875,88 m**) this is the standard conservative estimate plus an allowance for the deterrent effect of our enforcement in the assessed areas, calculated by multiplying the standard conservative estimate by the factor of 5, as provided in para. 49.

51. We estimate that our enforcement work in the area of abuse of dominant position and merger control during the period 2008-2010 has led to consumer savings in the range of **LTL 8,78 m to LTL 45,34 m** per yar. The range has been calculated as follows:

- Standard conservative estimate (**LTL 8,78 m**) using case specific conservative assumptions where case specific evidence exists or the default rules of thumb of five per cent price overcharge and two years expected future duration in case of mergers and ten per cent price overcharge and one year expected future duration in case of abuse of dominant position[29] (in the absence of case specific evidence);

- Estimate including deterrence (**LTL 45,34 m**) this is the standard conservative estimate plus an allowance for the deterrent effect of our enforcement in the assessed areas, calculated by multiplying the standard conservative estimate by the factor of 5 in case of mergers and factor 4 in case of abuse of dominant position, as provided in para. 49.

52. Total consumer savings by the work of the Competition Council during the period 2008-2010 range from **LTL 154,76 m to LTL 921,22 m** (including the deterrence).

Conclusions

53. This impact assessment document provides estimates of direct and indirect consumer benefits resulting from the work of the Competition Council during the period 2008-2010. The

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[28] *See* paras 27 and 33 of this document.
[29] *See* paras 32, 34 and 37 of this document.

estimates were made based on conservative assumptions and internationally acknowledged rules of thumbs. The results suggest that the work of the Competition Council during the assessment period has led to consumer savings in the range of **LTL 154,76 m** (when only the direct financial benefits are included) to **LTL 921,22 m** (including deterrence).

54. Comparing only the direct consumer savings with the annual budget of the Competition Council during the period 2008-2010 – **LTL 11,2 m**, i.e. on average **LTL 3,7 m** per year, the savings to budget ratio is **42 to 1.** So the consumer cost savings arising out of the work of the Competition Council are 42 times higher than the Competition Council costs to taxpayers.

55. If we estimate the savings to budget ratio by including the deterrent effect of competition enforcement, the ratio is nearly six times as high.

56. These estimates show that the work of the Competition Council brings about both direct and indirect benefits to consumers and the estimated savings calculated using conservative methods are significantly higher than the annual budget of the institution.

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