

# **Personal liability of managers of undertakings for infringements of competition law in the Republic of Lithuania: the sanctions regime from the perspective of the principle of legal certainty**

by

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## ***Abstract***

This article focuses on the personal liability of managers of undertakings for breaches of competition law. This article starts with a review of the sanction regime for managers of undertakings according to the Competition law of the Republic of Lithuania. Reviewed are legal provisions and judicial practice of the Lithuanian

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courts starting from 2017, that is, when the first request to sanction a manager of an undertaking was submitted to the court by the Competition Council (CC). It is pointed out that in most cases the courts do not fully accept the requests of the CC with respect to the severity of the sanctions to be imposed on managers. The second part of the Article comprehensively analyses the case-law of administrative courts of the Republic of Lithuania, and presents key elements of the imposition of sanctions on company managers. Firstly, in exceptional circumstances, courts may impose a lower penalty than the one specified by competition law. Secondly, the courts may impose both, the main sanction as well as an additional one, or any of them. Thirdly, the level of sanctions should be determined the light of the fines imposed on undertakings for their infringements of competition law. The article concludes with a short summary.

### *Resumé*

Cet article se concentre sur la responsabilité personnelle des dirigeants d'entreprise pour les infractions au droit de la concurrence. Cet article commence par l'examen du régime de sanction des dirigeants d'entreprises selon la loi sur la concurrence de la République de Lituanie. Nous examinons les dispositions légales et la pratique judiciaire des tribunaux lituaniens à partir de 2017, date à laquelle la première demande de sanction à l'encontre d'un dirigeant d'entreprise a été déposée. Il est souligné que dans la plupart des cas, les tribunaux ne satisfont pas entièrement les demandes du Conseil de la concurrence en ce qui concerne la sévérité des sanctions imposées aux dirigeants. Dans la deuxième partie de l'article, nous analysons en détail la jurisprudence des tribunaux administratifs de la République de Lituanie et révélons les éléments clés pour l'imposition de sanctions aux dirigeants. Premièrement, dans des circonstances exceptionnelles, les tribunaux peuvent imposer une sanction inférieure à celle prévue par la loi. Deuxièmement, les tribunaux peuvent imposer à la fois des sanctions principales et des sanctions supplémentaires ou n'importe laquelle d'entre elles. Troisièmement, le niveau des sanctions doit être déterminé à la lumière des amendes imposées aux entreprises pour des infractions au droit de la concurrence. L'article se termine par un bref résumé.

**Key words:** personal liability; infringements of Competition Law; Competition Council; administrative courts; principle of legal certainty; sanctions.

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## **I. Introduction**

It is well known that the US and EU approaches regarding individual liability for competition law infringements differ: US antitrust enforcement

is known for its use of criminal sanctions against individuals (from fines to imprisonment); by contrast, EU competition law exclusively focuses on infringements of competition law by ‘undertakings’ (the Commission can only sanction undertakings)<sup>1</sup>. However, the divergence between the two major competition law systems is rapidly diminishing. In a number of EU countries, fines or even prison sentences might now be imposed on individuals for their participation in anti-competitive arrangements, irrespective of whether these arrangements were prohibited by national or EU competition law. Therefore, individual employees engaging in antitrust infringements within the EU face the risk of being severely sanctioned<sup>2</sup>. As noted by Andrea Coscelli, the chief executive of the UK’s competition enforcer (the Competition and Markets Authority), ‘individuals are far less likely to break the law if they know they may be held directly responsible for it. And the public rightly expects there to be personal responsibility for very serious wrongdoing in firms.’<sup>3</sup>

According to a survey conducted almost a decade ago, the liability of natural persons for infringements of competition law was already then established in the legislation of 25 EU Member States<sup>4</sup>. Nevertheless, the forms of liability differ: some of the Member States include imprisonment – the longest sentence, 8 years, is provided for in the Czech Republic, though fines are applied most often – with the largest capped at 1 million EUR in Germany<sup>5</sup>. Some Member States have also established certain other restrictions and prohibitions as a form of liability of natural persons for infringements of competition law: for instance, a restriction to hold a managerial position for a certain period of time (the longest period of such restriction, up to 15 years, exists in the UK) or a prohibition of natural persons to take part in public procurement procedures<sup>6</sup>.

The Law on Competition of the Republic of Lithuania was amended already back in 2011, recognizing that managers of undertakings might be held individually liable for the most serious infringements of the Law

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<sup>1</sup> Slotboom M., ‘Individual Liability for Cartel Infringements in the EU: An Increasingly Dangerous Minefield’ (*Kluwer Competition Law Blog*) <<http://competitionlawblog.kluwercompetitionlaw.com/2013/04/25/individual-liability-for-cartel-infringements-in-the-eu-an-increasingly-dangerous-minefield/>>

<sup>2</sup> Ibid.

<sup>3</sup> Holmes M. C., Mackenzie R., Weeden E., Adlakha A., Westrup M., Augusto A., Pittas D., ‘Personal liability and competition law around the world’ <<https://www.reedsmith.com/en/perspectives/2021/01/personal-liability-and-competition-law-around-the-world>>

<sup>4</sup> Bruneckienė J., Pekarskienė I., Guzavičius A., Palekienė O., Šovienė J., *The Impact of Cartels on National Economy and Competitiveness: A Lithuanian Case Study* (Springer, 2015, 123).

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

on Competition (conclusion of anti-competitive agreements and abuse of a dominant position). The new provision of the Law on Competition provided that for the contribution of an undertaking to a prohibited agreement concluded between competitors or to the abuse of a dominant position, the right of the manager of that undertaking to become the manager of a public and/or private legal entity, or a member of a collegial supervisory and/or governing body of a public and/or private legal entity, may be restricted for a period from three to five years. For the contribution of an undertaking to a prohibited agreement concluded between competitors or to an abuse of a dominant position, the manager of that undertaking may also receive a fine of up to 14481 EUR<sup>7</sup>.

The Explanatory Memorandum for the Amendment of the Law on Competition (hereinafter: Explanatory Memorandum), specified that the managers of undertakings are quite often able to avoid liability for cartels or abuse of dominance and do not experience any adverse effects because of the violation. Therefore, to ensure effective and efficient competition protection in a state governed by the rule of law, according to the national legislator, the law must establish the liability of a natural person – the manager of the undertaking concerned for violations of the rules of fair competition to which the manager contributed<sup>8</sup>.

Even though the said amendment of the Law on Competition was adopted already in 2011, the Competition Council of the Republic of Lithuania (hereinafter: the CC) has, for the first time, submitted a request<sup>9</sup> to the Vilnius Regional Court to impose sanctions on an individual manager of an undertaking only on 15 June 2017. Although the jurisprudence of administrative courts of the Republic of Lithuania regarding the application of personal liability of managers of undertakings for infringements of competition law is not yet extensive, the practice of applying liability of this kind is accelerating. Such ‘young’ legal institution, which regards the application of certain sanctions, raises questions on the predictability, clarity, and precision of the relevant regulations for those who might face them. Therefore, it is important to consider the sanctions’ regime applicable to managers of undertakings under competition law in the Republic of Lithuania from the perspective of the principle of legal certainty.

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<sup>7</sup> Originally the amount of the fine was set to 50 000 litas. Law on Competition of the Republic of Lithuania (version of 2021-04-29, No XIV-279), Article 40, paragraph 1. At <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.77016/asr> [2022-05-10].

<sup>8</sup> The Explanatory Memorandum of the Amendment of the Law on Competition, para 1, 3. Available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/TAIS.383107?jfwid=icq8nerem> [2022-05-10]

<sup>9</sup> Resolution No 1S-61 (2017) of the CC of 15 June 2017, para 23. Available at [https://kt.gov.lt/uploads/docs/docs/2954\\_c97c0ce821e74bcc247cf2fbc0591540.pdf](https://kt.gov.lt/uploads/docs/docs/2954_c97c0ce821e74bcc247cf2fbc0591540.pdf) [2022-05-10].

## II. Sanctions regime for managers of undertakings under competition law in the Republic of Lithuania: law and administrative practice

Any fining policy must be transparent, objective, guaranteeing that the sanctions imposed are proportionate, individualized and in accordance with principles of, *inter alia*, justice, reasonableness and fairness. The need to assess the rules on liability from the perspective of the principle of legal certainty (the principle which protects persons from arbitrary actions of the State and helps individuals stay away from breaking the law<sup>10</sup>) clearly is of the utmost importance. This is the cornerstone of a democratic society abiding by the rule of law and is recognized as a key principle of EU law.<sup>11</sup>

According to the Court of Justice of the European Union (hereinafter; CJEU), the principle of legal certainty requires that rules of law should be clear, precise, stable, certain and predictable<sup>12</sup>. Case law of the European Court of Human Rights (hereinafter; ECoHR) provides that the clarity of a law is assessed having regard not only to the wording of the relevant provision but also to the clarification provided by the published case law.<sup>13</sup> The fact that a law confers discretion to the competent authority is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference<sup>14</sup>.

Regarding sanctions imposed under Regulation No 1/2003 EU, the CJEU noted that although Article 23(2) of the Regulation grants discretion to the Commission, it still establishes objective criteria to which the Commission must adhere. Thus, first, the amount of the fine that may be imposed on an undertaking is subject to a quantifiable and absolute ceiling, so that the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance. Secondly, the exercise of that discretion is limited by the rules of conduct which the Commission imposed on itself in the Leniency

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<sup>10</sup> Bouzora, Y. 'Between Substance and Autonomy: Finding Legal Certainty in Google Shopping' (2022) 13(2) *Journal of European Competition Law & Practice* 144–153 <<https://doi.org/10.1093/jeclap/lpac009>>.

<sup>11</sup> See e.g. Lifante-Vidal, I., *Is legal certainty a formal value?* (2020) 11(3) *Jurisprudence* 456–467, 456, DOI: 10.1080/20403313.2020.1778289.

<sup>12</sup> See e. g. Van Meerbeeck, J. 'The principle of legal certainty in the case-law of the European Court of justice: From certainty to trust' (2016) 41 *European Law Review* 275–288, 275.

<sup>13</sup> See, to this effect, *G. v. France*, (ECtHR, 27 September 1995) § 25, Series A no. 325-B.

<sup>14</sup> *Margareta and Roger Andersson v. Sweden* (ECtHR, 25 February 1992) § 75, Series A no. 226-A.

Notice<sup>15</sup> and the Guidelines<sup>16</sup>. Furthermore, the Commission's well-known and accessible administrative practice is subject to unlimited review by the European Union judiciary. A prudent person, if need be, by taking legal advice, can thus foresee in a sufficiently precise manner the method of calculation and the order of magnitude of the fines which he incurs for a given line of conduct. The fact that the person cannot know in advance the precise level of fines, which the Commission will impose in each individual case, cannot constitute a breach of the principle whereby penalties must have a proper legal basis<sup>17</sup>.

In other words, these could be regarded as useful criteria, proposed by the CJEU, according to which it is worth assessing (*mutatis mutandis*) the legal institution of personal liability of managers for violations of competition law in Lithuania in the light of the principle of legal certainty.

The legal institution of personal liability of managers for infringements of competition law in the Republic of Lithuania is quite new. As already mentioned, the provision of the Law on Competition that enshrined personal liability of managers was introduced in 2011, but the practice of the CC, and the administrative courts in this field, started only in 2017. The analysis of national provisions and practice relevant for this legal institution reveals a sizable deficit of effective safeguards as regards the principle of legal certainty.

As already mentioned, paragraph 1 of the Article 40 of the Law on Competition provides that:

‘For a contribution of an undertaking to the prohibited agreement concluded between competitors or abuse of a dominant position, the right of the manager of the undertaking to be the manager of a public and/or private legal entity, or a member of the collegial supervisory and/or governing body of a public and/or private legal entity may be restricted for a period from three to five years. For the contribution of the undertaking to the prohibited agreement concluded between competitors or abuse of a dominant position, the manager of the undertaking may, apart from the restriction of the right specified in this paragraph, be also imposed a fine of up to EUR 14 481.’<sup>18</sup>

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<sup>15</sup> Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

<sup>16</sup> Commission notice entitled ‘Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65(5) [ECSC]’ (OJ 1998 C 9, p. 3).

<sup>17</sup> See case C-501/11 P *Schindler Holding Ltd and Others v European Commission* EU:C:2013:522, para 58. Also see Hasic, F. ‘The European Commission’s Fining Guidelines and their Legal Challenges’ (*A dissertation submitted to Ghent University in partial fulfilment of the requirements for the degree of Master of Laws*) (2020) 59 < [https://libstore.ugent.be/fulltxt/RUG01/002/835/942/RUG01-002835942\\_2020\\_0001\\_AC.pdf](https://libstore.ugent.be/fulltxt/RUG01/002/835/942/RUG01-002835942_2020_0001_AC.pdf) > [2022-06-17].

<sup>18</sup> Law on Competition of the Republic of Lithuania (version of 2021-04-29, No XIV-279), *supra* note 7.

It should be stressed that there is no specific law regarding the calculation of sanctions that are imposed on a manager of an undertaking under Article 40(1).

According to Article 4 1(5) of the Law on Competition, when imposing sanctions specified in Article 40(1) of this Law on the manager of an undertaking, the court shall act in compliance with the principles of justice, reasonableness and fairness and take into consideration the following: 1) the gravity of the infringement committed by the undertaking; 2) the duration of the infringement committed by the undertaking; 3) the nature of the involvement of the manager of the undertaking in the infringement committed by the undertaking; 4) the behaviour of the manager of the undertaking in the course of the investigation carried out by the Competition Council in relation to the infringement committed by the undertaking; 5) other relevant circumstances.<sup>19</sup>

The very first resolution of the CC to refer to the Vilnius Regional Administrative Court an application for the imposition of personal liability provided for in Article 40(1) on a manager of an undertaking was adopted on 15 June 2017. The CC requested the imposition of personal liability on the former manager of *Žagarės inžinerija*, for his direct involvement in the anti-competitive agreement between the undertaking he worked for and its competitor, by restricting his right to occupy managerial positions in the public or private sector for four years and by way of a fine of 9 000 EUR<sup>20</sup>. The CC's proposition was based on considerations that: i) *Žagarės inžinerija* committed a very grave violation of competition law (together with its competitor rigged their bids in the public procurement for the purchase of technical equipment and, thus, infringed the Law on Competition); ii) the violation lasted six months<sup>21</sup>; iii) the former manager of that undertaking directly contributed to that violation with his active actions; iv) the former manager did not obstruct the ongoing investigation, nevertheless, he did not take any actions that would have assisted the CC in its investigation<sup>22</sup>. It is clear that the circumstances that were considered important for the imposition of sanctions on the former manager of *Žagarės inžinerija*, literally reflected the wording of Article 41(5) of the Law on Competition. Nevertheless, the content of the short and concise

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<sup>19</sup> Ibid., Article 41 (5).

<sup>20</sup> Resolution No 1S-61 (2017) of the CC of 15 June 2017, para 23. Available at [https://kt.gov.lt/uploads/docs/docs/2954\\_c97c0ce821e74bcc247cf2fbc0591540.pdf](https://kt.gov.lt/uploads/docs/docs/2954_c97c0ce821e74bcc247cf2fbc0591540.pdf) [2022-05-10].

<sup>21</sup> Meaning not the actual duration of the infringement but the one which is considered to have been established for the purposes of calculating the fine under the para 12 of Rules on setting the fine. This provision sets: 'A period of less than six months shall be deemed to be half a year.'

<sup>22</sup> Resolution No 1S-61 (2017) of the CC of 15 June 2017, *supra* note 20, paras 22–23.

resolution of the CC (3.5 pages long) did not actually provide any tangible guidance on the methodology for calculating the sanction proposed on the former manager of that undertaking.

In the next resolution of the CC (which was adopted only a few months later than the *Žagarės inžinerija* case), the CC stated that the duration of the restriction of the right to occupy managerial positions in the public or private sector should be determined on the basis of the average of the minimum and maximum sanction provided for in Article 40(1), taking into account circumstances relevant to the imposition of that sanction<sup>23</sup>. However, in the light of the rather homogeneous circumstances this time, the CC proposed to restrict the right to occupy managerial positions in the public or private sector of the relevant managers for a period of four years with no additional fines<sup>24</sup>. In this case, three undertakings – *Baltic Transport Service*, *Convertus* and *Gedarta* – committed a very grave violation of competition law, which lasted for six months. The managers of those undertakings directly contributed to the infringement by their active actions. The managers did not obstruct the ongoing investigation, nevertheless, they did not take any actions that would have assisted the CC in its investigation.

Unfortunately, the subsequent resolutions of the CC on personal liability of managers for infringements of the Law on Competition have not been made public, so no reasonable conclusions can be drawn regarding the development of the ‘general formula’ for calculating sanctions or refining more specific criteria that may lead to an adjustment of the average of the sanction to one side or the other. And while it is true that some data from these resolutions is actually reflected in the subsequent administrative court decisions, it is too fragmented to allow any reasonable conclusions to be drawn in that matter. For instance, the judgment of the Vilnius County Administrative Court reveals that quite similar circumstances (very grave violation of competition law, which lasted for six months, to which the managers of those undertakings directly contributed by their active actions) led the CC to propose a restriction on the right to occupy managerial position in the public or private sector on the manager of *Nebūk briedis* – for a period of 5 years with an additional fine of 14000 EUR. In subsequent cases, the CC proposed to place a restriction on the managers of *Media medis* and *Ministerium* – for a period of 4 years and an additional fine of 8000 EUR; and on the manager of *TV Europa* – for a period of 3 years with additional fine

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<sup>23</sup> Resolution No 1S-112 (2017) of the CC of 31 October 2017, para 34. Available at [https://kt.gov.lt/uploads/docs/docs/3182\\_54758a5af21ab9a5fbb9f305e5e6e14e.pdf](https://kt.gov.lt/uploads/docs/docs/3182_54758a5af21ab9a5fbb9f305e5e6e14e.pdf) [2022-06-06].

<sup>24</sup> *Ibid.*, para 35.

of 7000 EUR<sup>25</sup>. It is apparent that the different regime of sanctions for all those managers was due, *inter alia*, to the varying degrees of intensity of their direct involvement in the infringements of competition law. Nevertheless, the judgment lacks far more detailed information to identify any elements that have had a decisive influence on CC's proposal to impose financial penalties overall, what the rationale was to propose the average (and more) of the range of the fine set out in Article 40(1), etc. It should be noted that this is not due to the issue of the quality of judicial reasoning – the judgment itself is critical of the lack of reasoning of the CC resolution, therefore, no wonder that the proposal of the CC was drastically modified<sup>26</sup>.

To sum up, legal norms applicable in the field of the liability of managers of undertakings in the Republic of Lithuania indicate only first, the possible limits of the sanctions and second, the non-exhaustive list of circumstances to be considered relevant when those sanctions are imposed; the resolutions adopted by the CC in this context are not public, and so there is no way to learn (even in very general terms) its methodology of calculating sanctions. As a result, it is only possible to form a vague idea on the basis of the rather fragmented information provided for in the case-law of the administrative courts.

In the light of the above-mentioned criteria enshrined in the jurisprudence of the CJEU, it is notable that the exercise of the discretion of the CC in this regard is actually not limited by any rules of conduct. The administrative practice of the CC cannot be regarded as familiar and accessible, hence it is not possible to estimate in a sufficiently precise manner the method of the calculation and the magnitude of the sanctions that are imposed on managers of undertakings under Article 40(1) of the Law on Competition. As a result, the criticism of the institution of personal liability of managers of undertakings under the Law on Competition must be taken as a fact. This is so considering the universal requirement of every fining policy to be transparent and objective, in order to guarantee that the sanctions imposed are proportionate, individualized and in accordance with principles of, *inter alia*, justice, reasonableness, and fairness, not to mention the principle of legal certainty.

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<sup>25</sup> See judgment of Vilnius County Administrative Court 26 April 2018, administrative case No eI-1194-815/2018 together with the order of the Supreme Administrative Court of the Republic of Lithuania of 18 December 2019, administrative case eA-2005-624/2019, para 3.

<sup>26</sup> The Court imposed fines of EUR 900 and EUR 920 on the managers of (respectively) *Ministerium* and *Media medis*; the case was terminated with respect to the managers of *Nebūk briedis* and *TV Europa* due to the missed deadline for submitting to the court the request to impose sanctions set for in Article 40(1).

### III. Sanctions regime for managers of undertakings under competition law in the Republic of Lithuania: the powers of the court

Turning back to the wording of the Article 40(1) of the Law on Competition, it is clear that according to this provision the manager of an undertaking may be subject to a restriction of her right to occupy managerial position in the public or private sector and, apart from that, also subject of a fine. Therefore, it seems appropriate to call these sanctions accordingly ‘the main’ and ‘the additional’ sanction (the restriction being ‘the main’ and the fine being ‘the additional’ sanction). It does not appear from the wording of this provision that the main and the additional sanctions should be considered as alternatives. Therefore, one can argue that an additional sanction (a fine) can be imposed only if the main one (a restriction of the right to occupy managerial position in the public or private sector) is imposed.

Such a position would also seem to be substantiated in the light of the intentions of the legislator. The Explanatory Memorandum provided that ‘[t]he draft proposes to supplement the Law on Competition with a new Article 44<sup>1</sup>, which stipulates that the manager (natural person) of an undertaking (legal entity) may be subject to a single and indivisible sanction for contributing to a prohibited agreement or abuse of a dominant position – restriction of the right to hold the position of the head of a public and/or private legal person, to be a member of the collegial supervisory and / or management body of a public and/or legal person. Restriction of this right can be applied for 3 to 5 years. This restriction may be accompanied by an additional sanction – a fine.’<sup>27</sup>

Therefore, it is particularly interesting to note that, following the jurisprudence of the Constitutional Court of the Republic of Lithuania, the administrative courts of the Republic of Lithuania have adopted quite a different approach, based on the constitutional principle of justice.

The very first judgment regarding the liability of managers of undertakings for the infringement of competition rules in the Republic of Lithuania was adopted on 30 March 2018 by the Vilnius County Administrative Court (hereinafter; the Court). Some important aspects of this judgment should be highlighted regarding the imposition of the sanctions.

In this case, the CC referred a request to the Court to impose a restriction of the right to occupy managerial position in the public or private sector on

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<sup>27</sup> The Explanatory Memorandum of the Amendment of the Law on Competition, *supra* note 8.

managers of three undertakings<sup>28</sup> for a period of 4 years. The Court referred to, *inter alia*, paragraphs 2, 4 and 5 of Article 41, which state that:

‘2. The resolution referred to in paragraph 1 of this Article shall contain the circumstances forming the basis for the application together with the supporting evidence attached thereto as well as a reasoned proposal in relation to the imposition of the sanctions provided for in Article 40(1) of this Law and their scope. In adopting a decision to impose sanctions, the court shall not be bound by the proposal of the Competition Council in relation to sanctions and their scope.  
<...>

4. Upon examining the application of the Competition Council, the court shall adopt one of the following decisions:

- 1) to apply the sanctions specified in Article 40(1) of this Law;
- 2) to reject the application.

5. When imposing the sanctions specified in Article 40(1) of this Law on the manager of an undertaking, the court shall act in compliance with the principles of justice, reasonableness and fairness and take into consideration the following:

- 1) the gravity of the infringement committed by the undertaking;
- 2) the duration of the infringement committed by the undertaking;
- 3) the nature of involvement of the manager of the undertaking in the infringement committed by the undertaking;
- 4) the behaviour of the manager of the undertaking in the course of investigation carried out by the Competition Council in relation to the infringement committed by the undertaking;
- 5) other relevant circumstances.<sup>29</sup>

In accordance with these provisions, the Court concluded that it may, but is not obliged to impose the sanctions requested by the CC on the relevant manager, and, after examining all the circumstances of the case, the Court may reject the request of the CC. In the Court’s view, it also follows that in the case of approval of the CC’s request, the Court is not bound by the CC’s proposal on the sanctions and their scope, and must impose sanctions in accordance with the principles of justice, reasonableness and fairness, also having regard to all the circumstances referred to in Article 41 (5) of the Law on Competition, an exhaustive list of which has not been provided by the legislator.

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<sup>28</sup> The undertakings were held liable for violating competition law by concluding anti-competitive agreements in the field of public procurement. The duration of the violation was half a year. Fines of 25 000 Lt and 20 800 Lt (approximately EUR 7246.37 and EUR 6029) were imposed on those two undertakings. See order of the Supreme Administrative Court of the Republic of Lithuania of 3 August 2017, administrative case No A-417-822/2017.

<sup>29</sup> Paragraphs 2, 4 and 5 of Article 41 of the Law on Competition, *supra* note 7.

In other words, the Court may impose the sanction requested by the CC or reduce it, it may also, after considering all the circumstances of the case, impose a higher sanction than that requested by the CC. In the Court's view, this provision follows directly from the constitutional powers and imperatives of the administration of justice of the court, under Article 109 of the Constitution of the Republic of Lithuania. This means that in each individual case, the court has a constitutional duty to properly individualize the sanctions imposed on individuals for legal violations, and to individualize any restrictions imposed on them by the law. However, it must do so in a reasoned manner and, in cases of this nature, it cannot disregard the 'Rules concerning the setting of the amount of a fine imposed for the infringement of the Law on Competition of the Republic of Lithuania.'<sup>30</sup>

The Court made a reference to the jurisprudence of the Constitutional Court of the Republic of Lithuania, where the latter stated that not only can the legislator not establish legal provisions that would restrict the court's ability to properly individualize restrictions of the rights of individuals; but also the court itself cannot fail to fulfil the obligation to properly individualize restrictions imposed in each case. Legal provisions must create legal preconditions for the court to examine all the circumstances relevant to a case and make a fair decision. Conversely, legal provisions cannot be such that a court is not allowed to make a fair decision and thus administer justice, while considering all relevant circumstances of a case, in accordance with the law and without violating the imperatives of justice and reasonableness arising from the Constitution. Otherwise, the powers of the court to administer justice arising from the Constitution would be violated, and this would deviate from the constitutional concept of the court as an institution administering justice on behalf of the Republic of Lithuania, as well as from the constitutional principle of the rule of law<sup>31</sup>.

Nevertheless, after taking into consideration the direct contribution of the managers to the infringements of competition law committed by their represented undertakings as well as the absence of mitigating circumstances relevant to the individualisation of the sanction, the Court completely accepted the request of the CC in this case<sup>32</sup>. This judgment wasn't appealed to the Supreme Administrative Court of the Republic of Lithuania (hereinafter: the Supreme Administrative Court) and became final.

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<sup>30</sup> Judgment of Vilnius County Administrative Court of March 30, 2018, administrative case No eI-767-1063/2018.

<sup>31</sup> Ruling of the Constitutional Court of the Republic of Lithuania of 14 April 2014, case No. 22/2011-28/2011.

<sup>32</sup> Judgment of Vilnius County Administrative Court of March 30, 2018, *supra note* 30.

The legal instrument of the individualisation of sanctions emphasized in this case has been employed and developed effectively by administrative courts in their subsequent case-law on the liability of managers under competition law. However, its influence is probably best seen in cases where the judiciary did not agree with the sanctions proposed by the CC. For instance, in its judgment of 28 April 2018, the Court not only significantly adjusted the sanctions proposed by the CC, but also did so by interpreting relevant norms of the Law on Competition in a quite unexpected way with regard to the intentions of the legislator.

In this case, the CC submitted to the Court a request to impose on the managers of two undertakings<sup>33</sup> a restriction of their right to occupy managerial position in the public or private sector for a period of 4 years and to impose fines of EUR 8 000 on each of them<sup>34</sup>. Firstly, the Court compared these sanctions with those provided for in the Criminal Code and in the Code of Administrative Offenses, which led to the conclusion that sanctions proposed by the CC serve a criminal rather than economic, compensatory and disciplinary function, as is the case with economic sanctions for infringements of competition law by undertakings<sup>35</sup>. Secondly, the Court elaborated that within the meaning of Article 41(5) of the Law on Competition, an infringement committed by an undertaking must be assessed not only formally, that is, that a cartel agreement is prohibited (formally the most serious infringement within the meaning of competition law). It is also necessary to assess the financial expression of the prohibited agreement, as well as the economic sanction for the infringement committed by the undertaking itself, since it indicates the seriousness of the infringement committed by the undertaking (if an undertaking's gross annual income is very small, according to the Court, the effect of such an undertaking on competition and the market, even in the case of a serious infringement of competition, is not particularly serious)<sup>36</sup>.

Then the Court stressed that, under Article 40(1) of the Law on Competition, the Court has the right to impose the following sanctions: first, to impose only a restriction of rights; second, to impose only a fine; third, to

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<sup>33</sup> The CC had requested to impose sanctions on more managers of other undertakings, but the Court terminated part of the case regarding the CC's request concerning those managers. As regards the liability of undertakings: they were held liable for violating competition law by concluding anti-competitive agreements in the field of public procurement. The duration of the violation was half a year (actually, only 8 days) and those two undertakings were fined EUR 4000 and EUR 4200. See order of the Supreme Administrative Court of the Republic of Lithuania of 15 September 2017, administrative case No eA-909-552/2017.

<sup>34</sup> Judgment of Vilnius County Administrative Court of 28 April 2018, administrative case No eI-1194-815/2018, para 1 of part II.

<sup>35</sup> *Ibid*, para 2.1. of part II.

<sup>36</sup> *Ibid*, para 3 of part II.

impose both sanctions together<sup>37</sup>. Actually, this argument of the Court was not accompanied by any further explanations and so it seemed at odds in the light of the wording of the Article 40(1) provision as well as the text of the Explanatory Memorandum.

The Court assessed the proposed sanctions through the prism of the possibility to fairly, righteously and reasonably differentiate such sanctions in the future. According to the Court, the imposition of the said sanctions would create the conditions and preconditions for the formation of inconsistent case-law, based on a formal understanding of the dangers of prohibited agreements. Therefore, the Court compared the fines imposed on the defendants' undertakings with those imposed on various other undertakings for violations of competition law and, accordingly, assessed that the degree of the gravity of an infringement that was committed by the undertakings that were managed by the defendants in this case, 'was not particularly grave'<sup>38</sup>. Arguably, this was the starting point for finding the right balance to assess the proportionality of the sanctions proposed by the CC.

The Court ruled that the defendants in this case could not be sanctioned by imposing the restriction proposed by the CC, as it would disproportionately restrict their rights in comparison with the gravity of the violation committed by the undertakings. Moreover, the Court noted that this would disproportionately restrict the rights of the defendants in choosing an employment activity. In the light of those arguments, the managers of both undertakings were sanctioned with fines of EUR 900 and EUR 920. The Court added that under Article 41(6) of the Law on Competition, the list of managers on whom the sanctions provided for in Article 40(1) of this law had been imposed by a final court ruling, is published on the website of the CC. In the Court's view, this will particularly deter defendants from committing future infringements of competition law<sup>39</sup>.

The CC brought an appeal to the Supreme Administrative Court claiming, *inter alia*, that according to the Law on Competition, the Court could not impose only additional sanctions (fines). However, the Supreme Administrative Court did not uphold this position. The Court referred to the jurisprudence of the Constitutional Court of the Republic of Lithuania, which had been followed in the aforementioned case-law of the Vilnius County Administrative Court. On this basis, the Supreme Administrative Court concluded that interpreting Article 40(1) of the Law on Competition so that a manager of an undertaking, who contributed to a prohibited agreement or abuse of a dominant position concluded by that undertaking, may be subject to the main sanction only

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<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid, para 5 of part II.

(a restriction of his right to occupy managerial positions in the public or private sector), with its lower and upper limits of 3 to 5 years – without the court having the discretion, when imposing sanctions in a given case, to take into account all the relevant circumstances and to impose a lower (main) sanction than that prescribed by the said provision or even, not to impose a sanction at all – would raise doubts as to the incompatibility of such legal provision with the rule of law<sup>40</sup>. Accordingly, the Supreme Administrative Court stated that Article 40(1) of the Law on Competition did not establish an imperative to impose both sanctions (the main and the additional one) and the court may decide not to impose a main sanction or an additional sanction or impose a less severe sanction than the main sanction and/or an additional sanction provided in the legal provisions etc.<sup>41</sup> On the other hand, the Supreme Administrative Court stressed that the imposition of a lesser basic sanction, than the one provided for in the law, is not a rule but an exception. As emphasized in constitutional doctrine regarding legal liability, the court may impose a lesser sentence than that prescribed by law only in the case of special mitigating circumstances, which must be taken into account because otherwise the imposition of a penalty as prescribed by law would be manifestly unfair. The court has a duty to apply the institution of a lesser sentence than that prescribed by law with the utmost care and diligence, so as not to harm the interests of the victim, the society and the state. In each individual case, the court's decision to impose a less severe sentence than that prescribed by law must be reasoned. An unjustified and/or unreasonable imposition of a lesser sanction than that prescribed by law would not result in justice; hence it would be in conflict with justice, a constitutional principle of the rule of law<sup>42</sup>.

An excellent example of the individualisation of a sentence, where the Court significantly reduced the sanction proposed by the CC (although not deviating from the lower limit of the sanction enshrined in the Article 40(1)) was set in the judgment of 3 July 2019 of the Vilnius County Administrative Court<sup>43</sup>. This case actually concerned the very first decision of the CC on the liability of the manager of an undertaking under Article 40(1), and,

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<sup>40</sup> Order of the Supreme Administrative Court of the Republic of Lithuania of 18 December 2019, administrative case No eA-2005-624/2019, para 33.

<sup>41</sup> Ibid, para 34.

<sup>42</sup> Ibid, para 35. Nonetheless, it should be noted that the Supreme Administrative Court reversed the judgment of the Vilnius County Administrative Court and imposed fines of EUR 2000 and EUR 4000 on those managers. Moreover, the right of both managers to occupy managerial positions in the public or private sector was lowered to six months.

<sup>43</sup> Judgment of Vilnius County Administrative Court of 3 July 2019, administrative case No eI-92-1063/2019.

incidentally, Court took this circumstance into account for the purpose of the individualisation of the sanction<sup>44</sup>.

In this case, the CC adopted a resolution to refer an application to the Court for the imposition of a sanction – a restriction of the right to occupy managerial positions in the public or private sector for a period of four years as well as a fine of EUR 9000 – on one manager of the undertaking<sup>45</sup>. According to the Court, such sanction was of a criminal nature rather than for deterrence, the purpose of which could have been the protection of the market from dishonest managers. The Court also took into account that, at the time of the violation, the defendant was a young manager without legal education, and he became historically the first manager to face a CC referral to the Court that requested the imposition of sanctions. Moreover, the practice of imposing such sanctions was not known, and could not be known, by the said manager. The Court was also persuaded, by the annual income declarations submitted by the defendant, that the imposition of a sanction would disproportionately damage that person's financial situation. Finally, Court stated that the duration of the violation (23 April 2014 – 15 July 2014) was also a significant factor deciding on the amount of the sanction: the said duration wasn't regarded as long in comparison with other cases dealt with by the CC<sup>46</sup>.

To sum up, in the light of such circumstances, the Court concluded that the proposed sanction was not proportionate and that its mitigation would be in accordance with the principles of justice, reasonableness and fairness (Article 41(5) of the Law on Competition). It is worth bearing in mind that, at that time, a case-law on sanctions on managers of undertakings under Article 40(1) of the Law on Competition was not yet in place. According to the Court, the application of the sanction proposed by the CC would prevent fair differentiation of sanctions imposed on managers whose infringements are incomparably more significant, and would create preconditions for the formation of erroneous case-law based on a formal understanding of the dangers of cartels. Overall, the Court imposed a restriction to hold a managerial position for three years and rejected the request of the CC to

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<sup>44</sup> The hearing of this case was postponed and, as is apparent from the information already presented in this paper, during that time the administrative courts of Lithuania had adopted several decisions on the liability of managers under Article 40 (1) of the Law on Competition.

<sup>45</sup> This undertaking was held liable together with one other for violating competition law by concluding anti-competitive agreements in the field of public procurement. The duration of the violation was half a year (actually, less than 3 months) and a fine of 33400 litas (approximately EUR 9681) was imposed on this undertaking. See judgment of the Vilnius County Administrative Court of 27 April 2017, administrative case No eI-1923-476/2017.

<sup>46</sup> Judgment of Vilnius County Administrative Court of 3 July 2019, *supra* note 43.

impose a fine of EUR 9000<sup>47</sup>. This judgment was fully upheld by the Supreme Administrative Court<sup>48</sup>.

One more relevant element for the evaluation of sanctions imposed on managers of undertakings was formulated and developed in the jurisprudence of administrative courts of Lithuania. In its judgment of 11 October 2019, the Vilnius County Administrative Court stated that it is the given undertakings that commit the most dangerous violations of competition law, by concluding prohibited agreements or committing an abuse of a dominant position. Under the provisions of the Law on Competition, managers commit their own infringement by contributing to the infringements of the undertakings. However, according to the Court, such infringements are less dangerous and cannot be sanctioned more severely than the primary infringements of the undertakings.<sup>49</sup>

Therefore, taking into account that three companies – *Elmis*, *Ledevila* and *Vortex Capital* – were fined respectively, EUR 1, EUR 2100 and EUR 12600 for violating competition law, the Court did not agree with the CC's proposal to impose, on every manager of those companies, a restriction of their right to occupy managerial position in the public or private sector for a period of 4 years and also a fine of EUR 6000. Instead, the Court ruled to impose the said restriction on the manager of *Elmis* (the undertaking, which was fined EUR 1) for a period of 6 months; on the manager of *Ledevila* (the undertaking, which was fined EUR 2100) for a period of 2 years; and on the manager of *Vortex Capital* (the undertaking, which was fined EUR 12600) for a period of 3 years. The manager of the latter undertaking was also fined EUR 1000.<sup>50</sup> Yet in another case, where the undertaking was sanctioned almost twice as much as the fine imposed on *Vortex Capital* (that is, EUR 26600; albeit the undertaking did not contest the CC's decision on its corporate sanctions for violating competition law, nor did its manager contested the CC's resolution to request the Court to pursue liability under Article 40(1)), the Court fully agreed with the proposal of the CC and imposed a restriction of the right to be a manager for 3 years<sup>51</sup>.

In another case, the Court agreed that, bearing in mind the fines imposed on the two relevant undertakings for violating competition law (EUR 3685 900

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<sup>47</sup> Ibid.

<sup>48</sup> Order of the Supreme Administrative Court of the Republic of Lithuania of 15 March 2021, administrative case No. eA-254-822/2021.

<sup>49</sup> Judgment of Vilnius County Administrative Court of 11 October 2019, administrative case No. eI-3264-815/2019, para 4.2. See also order of the Supreme Administrative Court of the Republic of Lithuania of 3 March 2021 in administrative case No eA-383-502/2021.

<sup>50</sup> Judgment of Vilnius County Administrative Court of 11 October 2019, *supra* note 49, paras 5.1, 5.2, 5.3.

<sup>51</sup> Judgment of Vilnius County Administrative Court of 26 October 2021, administrative case No. eI4-2766-463/2021.

on *Irdaiva*; EUR 8513500 on *Panevėžio statybos trestas*), the request of the CC was proportionate to impose sanctions on the managers of those undertakings (EUR 11000 in addition to 4 years of restriction on the manager of *Irdaiva*; EUR 14481 in addition to 5 years of restriction on the manager of *Panevėžio statybos trestas*)<sup>52</sup>. This ruling was upheld by the Supreme Administrative Court very recently. Assessing the proportionality and scope of sanctions imposed on managers of undertakings, the Supreme Administrative Court *inter alia* stressed that the undertakings which participated in the prohibited agreement were among the largest Lithuanian construction companies, they have committed a grave violation of competition law, and the sanctions imposed on those undertakings reached the maximum prescribed under the Law on Competition<sup>53</sup>. Accordingly, as it can be seen, the manager of *Panevėžio statybos trestas* was also sanctioned with a maximum penalty set out in Article 41(1) of the Law on Competition, and became the first manager to receive such a severe punishment.

In another case, the Court took into account that the investigated undertaking was fined EUR 209800 for violating competition law, that the relevant manager was in office for three years<sup>54</sup>, and although he did not obstruct the investigation and provided the required information, he did not take any active steps to assist the CC. Having regard, *inter alia*, to those circumstances, the Court ruled that the CC's proposal was proportionate to impose on the said manager a restriction of his right to be a manager for 5 years and a fine of EUR 3620<sup>55</sup>. Thus, the case-law of administrative courts of the Republic of Lithuania reveals three important elements in the context of imposing sanctions on the managers of undertakings for infringements of competition law: firstly, in exceptional circumstances, courts have jurisdiction to impose a lower penalty than the prescribed by law. Secondly, irrespective of the wording of Article 40(1) of the Law on Competition, that presupposes a regime of basic and additional sanctions to be imposed on the managers of undertakings, the courts may actually impose any of them (as well as both of them). Thirdly, the level of sanctions to be imposed on managers of undertakings under Article 40(1) of the Law on Competition should be determined in the light of the fines imposed on the relevant undertakings.

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<sup>52</sup> Judgment of Vilnius County Administrative Court of 22 December 2020, administrative case No eI4-4592-815/2020, para 5.

<sup>53</sup> Order of the Supreme Administrative Court of the Republic of Lithuania of 17 February 2022, administrative case No eA-105-822/2022, para 29.

<sup>54</sup> Though the violation of competition law, by way of concluding anti-competitive agreements in the field of public procurement concluded by the undertaking, lasted from 2012 to 2017.

<sup>55</sup> Judgment of Vilnius County Administrative Court of 1 March 2021, administrative case No. eI4-2037-815/2021, para 7.

All this can presumably serve as a defence strategy for managers of undertakings who are facing the enforcement of the sanctions regime under Article 40(1). The relationship of the level of sanctions imposed on managers and those on their undertakings, as introduced in the jurisprudence of administrative courts, sheds some light on the requirements under the principle of legal certainty. Sanctions under Article 40(1) are of criminal nature and are applied towards natural persons. For that reason, guarantees of the principle of legal certainty need more attention in legal practice.

#### **IV. Conclusions**

The legislation relevant to the liability of managers of undertakings for infringements of competition law, and the non-public nature of the administrative practise of the Competition Council of the Republic of Lithuania, makes it impossible to foresee in a sufficiently precise manner the method of calculating and the magnitude of potential sanctions. The case-law of administrative courts does not provide much clarity due to the fragmented nature of the information provided therein, which can hardly be related to the quality of the court's reasoning, but rather is caused by (likely) limited reasoning of the CC resolutions.

The court has the power to impose a smaller penalty than the one specified by law. It may also impose only a fine, irrespective of the wording of the Competition law and the intentions of the legislator, whereby a restriction of the right to occupy managerial positions in the public or private sector should be regarded as the main sanction for managers and a fine – as an additional one. According to the jurisprudence of administrative courts, the imposition of a smaller basic sanction than prescribed by law is not the rule, but an exception. Therefore, doing so can only take place in the light of special mitigating circumstances.

According to the jurisprudence of the administrative courts, the level of severity of sanctions imposed on managers of undertakings should be determined in the light of the fines imposed for the relevant infringements of competition law on the specific undertakings. This criterion sheds some light on the requirements of the principle of legal certainty. Nevertheless, there are so many elements unknown to the public in the methodology for calculating antitrust sanctions that one can argue that the regime of sanctions imposed on managers of undertakings for infringements of competition law in the Republic of Lithuania, is quite deficient with regard to the principle of legal certainty.

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