

Competition Policy Developments in Lithuania in 2013

by

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I. Introduction

The most recent Amendment¹ to the Law on Competition of the Republic of Lithuania (hereafter, the Law on Competition²) were adopted by the Lithuanian Parliament on 23 December 2013 and came into force on 8 January 2014. The Amendment altered Lithuanian provisions on the payment of fines imposed by the Competition Commission by undertakings. Accordingly, the Law on Competition

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¹ Law of 23 December 2013 Amending Articles 33, 39 of the Law on Competition of the Republic of Lithuania (Register of Legal Acts 2014, item 2014-00064).

² Law of 23 March 1999 on Competition (Official Gazette 2012 No. 42-2041) .

gives now the fined undertakings the right not to pay their fine until the courts adopt a final ruling in their case. However, annual interest for period of the payment delay will be calculated and added to the original amount of the fine. The following review focuses on the adoption and effects of this Amendment.

II. Amendment of the Law on Competition

1. Former legal rules

Article 39(1) of the Law on Competition provides that undertakings shall pay their fines within 3 months after the publication of the resolution on the website of the Competition Council. Before the amendments, Article 33(3) of the Law on Competition provided that an appeal would not suspend the resolution of the Competition Council unless the court decided otherwise. Before the Amendment, Article 39(2) of the Law on Competition used to provide also that in the event of a justified request submitted by the economic entity at stake, the Council had the right to defer the payment of the fine, or its part, for a period of up to 6 months if that economic entity was not able to pay the fine on time for objective reasons. Moreover, the court had the right to suspend the validity of the resolution of the Competition Council applying the provisional measures procedure provided by Lithuanian Law on Administrative Proceedings³. However, Lithuanian administrative courts used to suspend the validity of the resolutions of the Competition Council only in very exceptional cases⁴. Usually, undertakings had to pay huge fines within 3 months of the original verdict, although courts have sometimes revised the resolutions of the Competition Council afterwards.

2. The aim of the Amendment and its adoption

The aim of the proposed Amendment⁵ of the Law on Competition was to protect legitimate interests of undertakings in cases where the courts have not

³ Law of 14 January 1999 on Administrative Proceedings (Official Gazette 2000 No. 85-2566).

⁴ Judgement no. AS-438-241/2013 dated 20 February 2013 of the Supreme Administrative Court of the Republic of Lithuania; judgement no. AS-602-223/2013 dated 21 February 2013 of the Supreme Administrative Court of the Republic of Lithuania; judgement no. AS-146-246/2013 dated 28 February 2013 of the Supreme Administrative Court of the Republic of Lithuania.

⁵ Explanatory Memoranda dated 25 April 2013 of the Law Amending Articles 33, 39 of the Law on Competition of the Republic of Lithuania.

yet adopted a final judgment and the payment of the imposed fine would have lead to unreasonable restraints of the activities of the fined undertakings. It was alleged in this context that fines imposed by the Competition Council were usually significantly reduced by the courts. For example, a number of cases exist where the Supreme Administrative Court of Lithuania has decided to reduce such fines by a considerable amount (from 27 to 65%)⁶. There are also cases where the courts annulled the resolutions of the Competition Council in their entirety⁷.

The initial proposal of the Amendment provided that undertakings shall be relieved from the payment of the fine imposed by the Competition Council until a final court judgment is delivered. However, the draft amendment did not contain any provisions regarding financial consequences where undertakings decided to challenge the resolution of the Competition Council. The draft only provided that the imposed fine would have to be paid within the period of 3 months after the adoption of the final judgment. The proposal was thus subject to major criticism from various entities, including the Competition Council. Listed as one of its main negative sides was the argument that the draft could increase the number of legal disputes. The Amendments would thus cause additional litigation costs as undertakings would take advantage of the possibility to postpone the payment of their fines even in the absence of an objective justification for an appeal.

Although the Parliament adopted the proposed Amendment, the President did not sign it using her right to veto. The President argued that the proposed rules would allow undertakings to appeal the resolutions of the Competition Council merely in order to postpone the payment of the fine. During subsequent court proceedings, undertakings could then terminate their anti-competitive activity and avoid the fine altogether. After re-consideration, the Parliament supplemented the Amendment with the obligation for the fined undertaking to pay annual interest for the period of time when the payment of the fine was suspended.

⁶ Judgement No. A⁸²²-3003/2012 of the Supreme Administrative Court of the Republic of Lithuania; judgement No. A⁵⁰²-323/2012 of the Supreme Administrative Court of the Republic of Lithuania; judgement No. A⁸⁵⁸-290/2012, No. A⁸⁵⁸-293/2012 and No. A⁸⁵⁸-290/2012 of the Supreme Administrative Court of the Republic of Lithuania.

⁷ Judgement No. A-502-892/2010 dated 2 September 2010 of the Supreme Administrative Court of the Republic of Lithuania; judgement No. A-520-2136-12 dated 21 June 2012 of the Supreme Administrative Court of the Republic of Lithuania.

3. Suspension of the enforced recovery of the fine and interest

The Law on Competition provides currently that if the undertaking appeals the resolution of the Competition Council, such appeal shall suspend the recovery of the fine and of the interest incurred. However, if the court upholds the resolution of the Competition Council, the fine will have to be paid to the State budget together with the accrued annual interest amounting to 6%. The interest shall be calculated for the entire duration of judicial proceedings, starting from the first day after the end of the 3 month period given to the undertakings in order to pay the fine. However, the total length of the period for which the interest is calculated should not exceed 180 days. Such legal rule should deter undertakings from appealing against resolutions of the Competition Council merely in order to postpone the payment of the fine.

Accordingly, even if the undertaking plans to appeal the resolution of the Competition Council, it is able to pay the fine within the initial 3 months in order to avoid any possible interest payments later on. In case the undertaking has paid the fine but the fine is subsequently reduced or annulled by the court, the fine should be refunded in accordance with the procedure provided under the Law on Tax Administration.

III. Case law

According to the statistics provided by the Lithuanian Competition Council, 20 cases were opened in total in 2013, 8 cases extended and 21 investigations closed. That year, Lithuanian courts upheld 10 resolutions adopted by the Competition Council and obligated the undertakings to pay their fines. Moreover, 26 other cases related to the resolutions of the Competition Council were under consideration of Lithuanian courts of various instances as well.

1. Obstructing an investigation

In 2012, the Competition Council carried out an investigation under Article 5 of the Law on Competition which prohibits competition restricting agreements. The Competition Council suspected bid rigging by UAB LitCon, UAB Rekreacinė statyba, UAB Meliovesta and TUB Virmalda in public procurement for building installation works⁸. During the inspection carried

⁸ Later on the Competition Council terminated the investigation because no proof of bid rigging has been identified.

out in the premises of UAB LitCon, a dispute emerged whether all of the requested information was duly submitted to the officers of the Competition Council. An employee of UAB LitCon allegedly left the premises with a document requested by the Competition Council's representatives returning to the premises only after a while. In the opinion of the Competition Councils, such behaviour created the risk that the requested document could have been damaged or amended and so its evidential value could have been lost. The Competition Council noted that obstructing an investigation is a procedural violation for which the undertaking is liable without evaluating whether the specific actions have caused any actual damage to the investigation.

On 17 July 2013, the Competition Council adopted a resolution fining UAB LitCon 615 000 LTL (178 116 EUR)⁹. This resolution is important because it is the largest fine imposed so far by the Competition Council for an obstruction of an investigation.

The resolution of the Competition Council was appealed to the Vilnius Regional Administrative Court. In the first instance the court upheld the resolution of the Competition Council. The court ruled that an employee's refusal to present a document of an evidential value by removing it from the inspected premises during an inspection shall be considered a serious procedural infringement. However, on 6 November 2014 the Supreme Administrative Court repealed decision of the Vilnius Regional Administrative Court and the resolution of the Competition Council¹⁰. The Supreme Administrative Court held that the Competition Council had the right to take only those documents that were directly related to the investigation. The Court thought that the Competition Council have not proved that the document under consideration had any evidential value. Moreover, the Court noted that since the document constituted personal notes of the employee, this document could not have been removed from the premises of the Company UAB LitCon.

2. Control of concentrations

On 18 April 2013¹¹, the Competition Council imposed a fine on UAB Lukoil Baltija (the largest crude oil and oil products trading company in Lithuania)

⁹ Resolution of 17 July 2013 no. 2S-10 of the Competition Council Concerning impediment of investigation by UAB LitCon.

¹⁰ Judgement No. A⁵⁰²-1693/2014 dated 6 November 2014 of the Supreme Administrative Court of the Republic of Lithuania.

¹¹ Resolution of 18 April 2013 no. 2S-4 of the Competition Council regarding compliance of actions of UAB Lukoil Baltija and UAB Luktarna with Article 8(1) and Article 9(2) of the Law on the Competition of the Republic of Lithuania.

for failing to notify a concentration in petroleum retail markets. The fine amounted to 1 177600 LTL (341 056 EUR). The Competition Council found that UAB Lukoil Baltija failed to notify a concentration by way of an acquisition of control over gas stations on the basis of joint venture agreements.

The Competition Council initiated an investigation in June 2012 with regard to a set of agreements concluded in 2004-2009 and changes implemented in relation to the management of several gas stations. The Competition Council discovered that after the conclusion of the joint venture agreements, gas station managers were changed and control over another economic entity acquired. According to the provisions of the Lithuanian Law on Competition, control could be acquired, *inter alia*, if the parties conclude agreements for the lease of a business and receive control over its management and resources. Acquisition of control might be implemented even without the transfer of property rights or shares of the company. The Competition Council held that even if a joint venture agreement is treated as a lease agreement, this does not prevent the acquisition of control. Moreover, in order to determine whether a contract confers control it is important to evaluate the factual circumstances of the case. The legal form of the contract is not as important.

The Competition Council also noted that in order to prove the existence of control it is not necessary to establish the existence of *de facto* control. It is sufficient to show the possibility to determine the strategic behaviour of the undertaking in question. In the case under consideration, UAB Lukoil Baltija had employed the relevant gas stations' staff, organized oil supplies, set prices of goods and services, applied discount schemes, etc. Therefore, the Competition Council concluded that UAB Lukoil Baltija acquired *de jure* and *de facto* control over the gas stations on the basis of the joint venture agreement. It was also held that UAB Lukoil Baltija have not followed the obligation to submit a prior notification of the intended concentration to the Competition Council.

3. Anti-competitive agreements

On 30 July 2012, the Competition Council started an investigation under Article 5 of the Law on Competition that prohibits agreements restricting competition. The Council suspected bid rigging by UAB Milsa and UAB Torita in the context of public procurements carried out by AB Lithuanian Railways. It was alleged that UAB Milsa and UAB Torita, acting in the market of gravel, have coordinated their tender offers.

The initial position of the Competition Council was that both companies UAB Milsa and UAB Torita acted as independent and competing undertakings

and concluded an anti-competitive agreement in the scrutinised public tender. However, it was noted during the investigation that UAB Milsa and UAB Torita have many common shareholders. Moreover, some of their administrative staff was closely related by family and cooperation relationship. UAB Milsa and UAB Torita managed to persuade the Competition Council that no anti-competitive agreement took place since both undertakings should be regarded as a single economic entity. Consequently, the Competition Council adopted a resolution on 23 December 2013 to terminate the investigation¹². Nevertheless, this is a very important case because it allowed the Competition Council to substantially develop the single economic entity doctrine in Lithuanian competition law.

AB Lithuanian Railways, as an interested party, decided to submit an appeal against the resolution of the Competition Council. The Vilnius Regional Administrative Court upheld, however, the original resolution. At the moment, the ruling of the Vilnius Regional Administrative Court is under appeal to the Supreme Administrative Court.

IV. Conclusions

Recent developments in Lithuanian antitrust legislation should be seen as an improvement of the national competition law system. The Amendment adopted in 2013 reflects both the interests of undertakings and the interests of the State as regards payments of fines imposed by the resolution of the Competition Council. The Amendment provides undertakings with more freedom to decide whether it would be reasonable to appeal a resolution adopted by the Competition Council. If the court refuses to satisfy an appeal, the fined undertaking will have to pay not only the fine itself but also the accrued annual interest in the amount of 6%. Such provisions are likely to deter undertakings from challenging resolution only in order to postpone the payment of the fine and yet simultaneously provide a more flexible and effective procedure for the payment of the imposed fines.

The enforcement practice of the Competition Council in 2013 is characterized by the imposition of record fines for the failure to notify a concentration and for obstructing an investigation. Moreover, the Competition Council has recognized in one of its cases on anti-competitive agreements that undertakings with closely related business activities and common shareholders

¹² Resolution of 23 December 2013 No. 2S-16 of the Competition Council regarding compliance of actions of the undertakings participating in public procurement to Article 5 of the Law on Competition of the Republic of Lithuania.

should be regarded as a single economic entity. The Competition Council has expressly stated in this context that undertakings that belong to a single economic entity cannot conclude an anti-competitive agreement. Such a progressive development of the resolutions of the Competition Council is highly welcome.