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Judicial Perspectives on Competition Law

-- Lithuania* --

Introduction

1. This report provides information from the Competition Council of the Republic of Lithuania (hereinafter also the CC) concerning judicial perspective on competition law.

2. For the purpose of this report we would like to note that the Lithuanian court system consists of the common courts (with the Supreme Court of Lithuania being the highest court), specialised administrative courts (with the Supreme Administrative Court of Lithuania being the highest court) and the Constitutional Court.

3. The CC's decisions are appealed to the administrative courts – Vilnius Regional Administrative Court (VRAC) as the first instance, and the Supreme Administrative Court of Lithuania (SACL) as the appelate instance. The administrative courts consider not only competition law cases, but all administrative cases.

4. The common courts deal with private ligitation in regard to competition law cases, as well as various other civil and criminal cases.

5. The Constitutional Court rules on constitutionality of legislative acts.

6. Lithuanian courts (and the CC itself) follow closely the practice of the Court of Justice of the European Union (hereinafter CJEU), thus its practice is relevant as well.

1. Evidentiary Matters in Competition Cases before Courts

1.1. Does lack of economic expertise on the part of judges create obstacles to the effective enforcement of competition law? If so, how can those obstacles be addressed? What mechanisms are there to ensure that economic matters are adequately taken into account in the context of the legal doctrines that courts must apply?

7. In its practice the SACL has recognized that the court's assessment of lawfulness and legitimacy of the CC's economic evaluation is limited. In such cases the court can usually assess whether certain procedural requirements and related rules have been met, whether proper arguments have been provided, whether there has been any manifest error of assessment, whether there has been an abuse of authority (misuse of power), and whether factual circumstances have not been distorted.

8. Certainly lack of economic expertise on the part of judges limits the scope of judicial review to some extent. This could potentially lead to obstacles of effective enforcement of competition law if the competition authority commits errors in its economic evaluation and the court does not have the expertise to spot and review them. However, at least in Lithuania, difficult economic evaluations are not conducted very often in the CC's decisions. Moreover, in practice it has been usually the case that when

* Report of the Competition Council of the Republic of Lithuania.

the CC conducts such economic evaluations, the appealing undertakings provide their own expert economic analyses of the relevant issues.

9. The adverserial nature of the process in the court provides an opportunity for the applicants to question the CC‘s conclusions.

10. We believe the judges, although usually not economic experts themselves, in general can evaluate if some important aspects of economic evaluation are lacking/not correct if so pointed out by the appealing undertaking.

11. For instance, although the SACL in the first AB „Orlen Lietuva“ v Konkurencijos taryba judgment stated that definition of the relevant market is a difficult assessment of economic nature and the court‘s assessment is limited, nevertheless the court went out to point particular shortcomings of the CC‘s assessment (according to the court, the CC did not adequately assess whether there are different competitive constraints on different supply chain (distribution) levels, how the structure of demand and supply of petroleum products (gasoline and diesel), marketing and pricing and the terms of contracts concretely differ, etc.), which resulted in CC‘s decision being annulled.

1.2. Are procedural or institutional solutions to the evidentiary difficulties faced by courts in place, and are these solutions adequate? For example: (i) do courts rely on rules (of thumb) which are easier to apply than detailed economic assessments? (ii) do the rules on burden and standard of proof provide an adequate mechanism to evaluate the aptness of economic assessments? (iii) what tools can be deployed to deal with conflicting sets of economic evidence (e.g. hot-tubing, court-appointed experts, specialised courts, etc.)?

(i) do courts rely on rules (of thumb) which are easier to apply than detailed economic assessments?

12. There are rules of thumb (legal presumptions and safe harbours) which are easier to apply than detailed economic assessment. For instance, it is an established practice that hard core cartels by object do not require assessment of restrictions by effect and in such cases it is not necessary to define the relevant market precisely.

13. A somewhat different example could be presumptions of dominance established in the Law on Competition. Article 3.2 states that:

14. Unless proved otherwise, an undertaking (except retailers) with the market share of not less than 40 per cent shall be considered to enjoy a dominant position within the relevant market. Unless proved otherwise, each of a group of three or a smaller number of undertakings (except for retailers) with the largest shares of the relevant market, jointly holding 70 per cent or more of the relevant market shall be considered to enjoy a dominant position. Unless proved otherwise, a retailer with the market share of not less than 30 per cent shall be considered to enjoy a dominant position within the relevant market. Unless proved otherwise, each of a group of three or a smaller number of retailers with the largest shares of the relevant market, jointly holding 55 per cent or more of the relevant market shall be considered to enjoy a dominant position.

15. Concerning these presumptions of dominance it should be noted that in practice usually neither the CC, nor the courts evaluate the fact of dominance only on this one criteria. Usually more aspects than only market shares have to be evaluated when considering whether dominance exists in a given market.. Thus sometimes existing rules

of thumb, although established, in practice might not fully substitute a more thorough evaluation.

16. For more information concerning legal presumptions and safe harbours that are applied in Lithuania, please see the note of the CC prepared for the 5 December 2017 roundtable on Safe Harbours and Legal Presumptions in Competition Law.

(ii) do the rules on burden and standard of proof provide an adequate mechanism to evaluate the aptness of economic assessments?

17. We believe that rules on burden and standard of proof overall provide an adequate mechanism to evaluate the aptness of economic assessments. The adverserial nature of the process in the court provides an opportunity for the applicants to question the CC‘s conclusions and point out possible shortcomings of the CC‘s investigation. The benefit of that doubt must be given to the undertakings accused of the infringement.

18. As a general rule, it is for the CC as a competition authority to prove the existence of the infringement to the requisite legal standard. Some cases might require more in-depth analysis of certain aspects than others. For instance, hard core cartels do not require analysis of effects of such restrictions. In contrast, investigations of possible competition restrictions by effects would usually require a more thorough assessment of the relevant market and to evaluate the effects of the alleged restrictions to the relevant market.

19. It is for the undertaking invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying such defence are satisfied.

20. The CJEU in its practice has stated that with the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas. That requirement does not conflict with the rule that it is for the Commission to prove the competition law infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. Essentially the same approach exists in Lithuania, and in its practice the SACL has stated that in the administrative cases a general rule applies, according to which the applicant is required to submit or to indicate to the court evidence capable of confirming the facts relevant to the case.

21. Some provisions of laws might explicitly establish a balance of burden of proof. For instance, Article 5 of the Law on Competition (an equivalent of Article 101 paras. 1 and 2 TFEU) prohibits competition-restricting agreements. However, Article 6 of the Law on Competition (an equivalent of Article 101(3) TFEU) establishes that Article 5 shall not apply where the agreement promotes technical or economic progress or improves the production or distribution of goods, and thereby creates conditions for consumers to receive additional benefit, also where: 1) the agreement does not result in restrictions on the activities of the parties thereto which are not necessary for the attainment of the objectives referred to in this Article; 2) the agreement does not afford the contracting parties the possibility to restrict competition in a large share of the relevant market. Article 6(2) of the Law on Competition states that the burden of proof concerning the mentioned exemption falls upon the party to the agreement benefiting from this exemption. The undertaking which claims the existence of this exemption is in the best position to have the necessary evidence so it is a proper balance on the burden of proof.

22. The courts assess carefully that the CC would sufficiently prove the facts of infringement. For instance, the SACL in its practice has stated that the Competition Council must provide sufficiently precise and consistent evidence that the violation has actually been committed. Moreover, in one of its judgments the court critised that it is not permissible to base an infringement solely on the explanations given during the trial, i.e. the Competition Council, when adopting the contested decision had to have gathered sufficient consistent evidence to justify an infringement of competition law for which the economic entity was punished.

23. On the other hand, the SACL, referring to the practice of the CJEU, stated that the principle of effectiveness requires that national provisions governing the assessment of evidence and the required standard of proof do not render impossible or excessively difficult the implementation of Union competition rules, in particular, do not undermine the effective application of Articles 101 and 102 TFEU. The fact that the specific, qualitative and quantitative nature of the evidence gathered at different times differed, considering their totality, ranking, and interconnection, does not invalidate the established violation.

(iii) what tools can be deployed to deal with conflicting sets of economic evidence (e.g. hot-tubing, court-appointed experts, specialised courts, etc.)?

24. We have not had any experience with hot-tubing. It is somewhat difficult to imagine such practice where the CC‘s decision is being challenged. Moreover, the undertakings usually challenge the conclusions of the investigation already at the stage of statement of objections (SO). It would seem that the SO provides an opportunity for the investigated undertakings to know the preliminary position concerning the alleged infringement and in turn by providing an opinion on the SO the undertaking allows the CC to know on which issues the undertaking does not agree. It would seem, that this is similar to some aspects of the hot-tubing procedure whereby the experts of the parties prepare their reports and exchange their views. Essentially the same happens when the CC adopts a decision which the undertaking appeals to the court. It would seem that an investigated undertaking‘s opinion on the SO would allow the CC to modify its views, perhaps even to terminate the investigation, or at least to conduct an additional one, taking into account shortcomings pointed out by the investigated undertaking (if if the opinion of the undertaking is well-founded). However, if the CC adopts a decision, then after it would be highly unlikely that the CC‘s own experts in courtswould diverge from the conclusions set in the CC‘s decision under appeal. Moreover, also the applicant must appeal the CC decision within 20 days of its publication and the grounds for the appeal should be clear. Such time constraints would seem to make it difficult to arrange meetings of experts of the parties and to draft a joint report where agreements and disagreements would be established. In any case, it would seem that the content of the appeal would suggest on what issues the parties to the proceedings agree and on which they do not. For instance, an applicant might clearly question only some aspects of the CC‘s definition of the relevant market and not all.

25. As it was mentioned before, the CC does not have experience with hot-tubbing and it is possible that such approach could perhaps contribute to more efficient proceedings, especially in private litigation. However, at least within the existing legal framework concerning the review of the CC‘s decision, at the present moment it would seem that some aspects of hot-tubbing could be difficult to implement in practice.

26. Court-appointed experts or specialisation of the courts to competition law cases would probably greatly help to deal with conflicting economic evidence. However, the prospective of having specialised competition courts or court-appointed experts is not very realistic in Lithuania, especially given the fact that the number of competition cases, as well as the number of experts with relevant knowledge, is rather limited.

1.3. Do standards of review of decisions by competition agencies vary depending on the level of expertise of courts? Should they?

27. We do not have information about different jurisdictions, but it would seem likely that expertise of courts among jurisdictions might vary, and thus standards of review would likely be different as well.

28. We can imagine that businesses want certainty and consistency in the application of rules and such interest is understandable. Different application of rules, to which different standards of review could contribute, could undermine such interests. On the other hand, it is not very likely that standards of review would become uniform among so many jurisdictions.

29. At least in the European Union this problem is mitigated by the fact that competition rules are harmonised among the Union‘s Member States, and Article 101 and 102 of the Treaty on the Functioning of the European Union (prohibiting respectively restrictive agreements and abuse of a dominant position) have direct effect, i.e. national competition authorities and national courts have the right to apply them. If there are uncertainties on the application of Articles 101 and 102 TFEU, national courts can request the Court of Justice of the European Union to adopt a preliminary ruling concerning application of Articles 101 and/or102 TFEU.

30. Moreover, Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU establish also cooperation between Member States’ courts and the European Commission. Regulation No 1/2003 recognizes the need for cooperation in recital 21:

> *(21) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States should also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82 of the Treaty. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.*

31. Article 15(3) of Regulation No 1/2003 establishes that where the coherent application of Article 81 or Article 82 [now Articles 101 and 102] of the Treaty so requires, the European Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

2. Interactions between Courts and Competition Authorities

2.1. Can you provide examples of occasions and projects when the competition authority sought to engage with the judiciary? Regarding which topics (e.g. the handling of competition evidence, confidential information, technical support, etc.) have these engagements taken place?

32. In May 2017 the CC organised a seminar for the representatives of the judiciary on fundamentals of the competition law. The seminar covered such topics as horizontal and vertical competition-restricting agreements, abuse of a dominant position, merger review, application of competition rules to decisions of public administration entities, and public and private enforcement of competition rules.

33. Moreover, it is planned that at the end of November this year the CC will meet representatives of the judiciary to discuss public and private enforcement, and in December the CC plans to organise a seminar for representatives of the judiciary on state aid.

2.2. Does the interaction between courts and competition agencies raise concerns regarding the separation of powers? What areas of tension are there in this respect? How can these tensions been softened?

34. The CC and the courts are aware of separation of powers. Overall, we cannot identify strong tensions.

2.3. Is cooperation between competition agencies and courts to improve competition law enforcement and awareness appropriate? If so, are there or should there be limits to this cooperation?

35. We do not believe that cooperation between competition agencies and courts to improve competition law enforcement and awareness could be recognised as inapropriate per se. However, it is also true that some limits to this cooperation exists. For instance, it would certainly not be appropriate to discuss with judges on-going cases concerning CC decisions which are under appeal.

2.4. Are there formal or informal mechanisms for interaction between competition agencies and the judiciary outside the scope of judicial cases (e.g. joint workshops, academic or professional conferences, etc.)?

36. There are opportunities for interaction between competition agencies and the judiciary outside the scope of judicial cases. For instance, the CC organises every third year the Baltic Competition Conference which is attended by public and private competition law professionals, judges included. In addition, also private law firms organise events on competition law issues, which might be attended by judges as well. Academia might also be a venue to interact with those judges that participate in it. However, we do not have information how much interaction takes place with judges at such events or in academia.

2.5. Does competition law play a role in the inital or on-going education and courses attended by judges in your jurisdiction? Have you conducted any previous work aimed at enhancing the capacity of judges in dealing with competition matters?

37. We do not have full information what education and courses on competition law the judges have attended (except those which have been organised by the CC – please see answer to question 2.1).

38. From publicly diseminated information it appears that there have been some seminars/other training opportunities for Lithuanian judges concerning competition law, e.g.:

- Academy of European Law (ERA) organised seminars for the Lithuanian judges on EU competition law (for instance, in 2005 and 2006 two seminars were organised,);
- The Lithuanian Association of Judges received a grant from the "Training for Judges" programme in 2010 for "The project for the national judges in Lithuania including academic seminars and international conferences in the field of EU competition law";
- In 2008 the Public Institution College of Social Sciences received a grant for the seminar "EC competition law and its enforcement in the national jurisdictions: policy issues, case law and compliance";
- The Lithuanian judges also participate regularly in international training programmes such as the OECD/GVH Regional Centre for Competition in Budapest and the EUI ENTRANCE programme in Florence;
- Judges from both the Supreme Administrative Court of Lithuania and the Supreme Court of Lithuania participate in the activities of the Association of European Competition Law Judges (AECLJ), including its annual conferences.

3. Experiences and Lessons Regarding the Use of Specialised and Generalist Courts

3.1. Do you have experience with generalised or specialised judicial bodies? Have there been developments in this regard in your jurisdiction? Can you provide examples of advantages and drawbacks from your current regime, and/or from past reforms affecting the specialisation of courts in competition matters?

39. The CC has experience with both generalised and (somewhat) specialised judicial bodies.

40. There has been a judicial reform in 1999 whereby the administrative courts have been established.

41. Advantage of the specialisation of courts to administrative cases allows them to narrow down the focus. On the other hand, overall the courts in Lithuania are "generalist" courts, dealing with variety of cases. Even the "specialised" administrative courts for the purposes of this paper perhaps could be considered to be "generalised" as they adjudicate not only competition law matters. Moreover, competition law cases are rather rare. These circumstances make it harder for judges to gain expertise in competition law cases. In addition, with separation of courts into different branches of the common courts (which deal with private enforcement) and the administrative courts (which deal with review of

the CC decisions) comes a risk that the practice concerning application of competition rules might diverge. This risk can be mitigated to some extent with the possibility for the CC or the European Commission to provide opinions in civil proceedings.

3.2. Have you considered the advantages and disadvantages of judicial specialisation in competition law? If there has been a judicial reform in this regard in your jurisdiction, what was your role in it? Do you have a view on the ideal level of specialisation of courts in competition law matters: (i) concerning the review of administrative decisions; and (ii) concerning private disputes involving competition law matters?

42. Because in general competition law cases are quite difficult, and competition law cases are not very frequent, in our opinion, judicial specialisation in competition law would be advantegous. Ideally, there would be a specialised court to deal with competition law cases (ideally it could deal with both public and private enforcement, and so could develop a uniform approach and gather experience faster). However, at least in small countries this is not very likely.

43. Some specialisation of the judges does exist already. For instance, of the 18 judges on the Supreme Administrative Court of Lithuania, six list competition as one of their specialised areas. From our experience in the courts, it would seem indeed that some judges specialise more in competition law than others (some judges are more frequently appointed to competition law cases).However, we understand that there are no judges that adjudicate only on competition law matters.

44. As it was mentioned above, in 1999 administrative courts have been established. The CC did not have a role in the reform.

3.3. Can the advantages of judicial specialisation be reduced by appeals' mechanisms to generalist courts? Or are such mechanisms beneficial?

45. We do not have experience concerning such issues.