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

ROUNDTABLE ON "PRICE DISCRIMINATION"

-- Note by Lithuania --

29-30 November 2016

This document reproduces a written contribution from Lithuania submitted for Item 7 of the 126th OECD Competition committee on 29-30 November 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/price-discrimination.htm*

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LITHUANIA

1. Introduction

1. This paper is intended to provide information on relevant factors concerning price discrimination cases and experience of the Competition Council of the Republic of Lithuania¹.

2. Regulation

2. Article 7 of the Law on Competition² prohibits abuse of a dominant position. It states that it shall be prohibited to abuse a dominant position within a relevant market by performing any acts which restrict or may restrict competition, limit, without due cause, the possibilities of other undertakings to act in the market or violate the interests of consumers. Article 7(3) explicitly prohibits application of dissimilar (discriminating) conditions to equivalent contracts with certain undertakings, thereby placing them at a competitive disadvantage.

3. Because Lithuania is a Member State of the European Union, Article 102 of the Treaty on the Functioning of the European Union (hereinafter – TFEU), which prohibits abuse of a dominant position is applicable in Lithuania, as well³.

3. Assessment

4. The Competition Council's approach to investigations of abuse of a dominant position under Article 102 TFEU and Article 7 of the Law on Competition is largely the same.

5. Actions of abuse of a dominant position could be distinguished as exploitative or exclusionary. However, the Law on Competition and TFEU do not make any formal distinction between these categories. In practice the Competition Council has also not defined in its decisions within which category the abuse in question would fall. The Competition Council evaluates the impact of the restriction in question on a case-by-case basis. As some researchers pointed out, the test needed to assess the price discrimination practice in question could be different depending on the type of case⁴. This means that different cases might require different evidence and the standard of proof might not be the same.

¹ www.kt.gov.lt

² The Law on Competition can be retrieved from [here](#).

³ Article 102 TFEU states that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Article 102(c) prohibits applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

⁴ Damien Geradin and Nicolas Petit, *Price Discrimination under EC Competition Law* in Konkurrensverket Swedish Competition Authority, *The Pros and Cons of Price Discrimination*, 2005, page 21. It can be retrieved from [here](#).

4. Cases of the Competition Council

6. In the last 10 years the Competition Council has had several cases concerning price discrimination. In 2010 there was one infringement case (*Orlen*), and in two other cases (*LINAVA* and *Viasat*) the Competition Council closed the investigation by adopting commitments. However, *Viasat* decision was successfully appealed. After additional investigation, the Council later closed the case by applying prioritisation principles⁵. These cases are described in more detail below. There have also been cases where the Competition Council refused to open an investigation concerning alleged price discrimination cases. In some cases, the Competition Council held that the evidence available showed no possible infringement of competition⁶. In other cases, the same actions were already being investigated by other institutions⁷ or there were ongoing cases concerning the same actions in the courts⁸ and the Competition Council applied prioritisation principles.

4.1 Infringement decision concerning *AB Orlen Lietuva*⁹

7. In this case the Competition Council established that *AB Orlen Lietuva* (previously *AB Mažeikių Nafta*) abused its dominant position in the markets of sale of petrol and the sale of diesel fuel from its refinery. The anti-competitive conducts infringing national and EU competition law provisions were discriminative pricing policy of *AB Orlen Lietuva*, as well as other types of abuse¹⁰.

8. All Lithuanian wholesale fuel buyers according to the pricing strategy of *AB Orlen Lietuva* were divided into two categories. Buyers, who bought more than 70, 000 tons of petrol, or over 70, 000 tons of diesel fuel belonged to the group I. For them the price was determined by way of negotiations. Object of negotiations (price, discounts) was not known to customers who belonged to other groups. Groups II-V consisted of customers who bought for price, calculated in accordance with *AB Orlen Lietuva* protocol of oil product prices (hereinafter – POPP). POPP described *AB Orlen Lietuva* standard pricing policy.

9. Prices which *AB Orlen Lietuva* applied after direct negotiations were based on a price formula (it had among others quantity-related component). The price calculated according to that formula was compared to the import price of fuel which potential customers of *AB Orlen Lietuva* could pay when importing fuel to Lithuania instead of buying it from *AB Orlen Lietuva*. Then, the quantity-related component was adjusted in accordance with import parity of each group I customer of *AB Orlen Lietuva* and the minimum quantity of petrol and diesel that the customer committed to buy.

10. Petrol price formula usually was based on Western import parity and diesel fuel price was calculated according to the Eastern import parity, i.e. company's ability to import diesel from Belarus and Russia.

⁵ Articles 24(3)(8) and 28(3)(3) of the Law on Competition allow the Competition Council respectively to refuse to open and to close an investigation on the grounds that the investigation of the factual circumstances specified in the application does not correspond to the Competition Council's priorities.

⁶ E.g. decision of the Competition Council of 30 August 2013, [No. 1S-120](#).

⁷ Decision of the Competition Council of 17 July 2013, [No. 1S-99](#).

⁸ Decision of the Competition Council of 5 June 2014, No. [No. 1S-87/2014](#).

⁹ Decision of the Competition Council of of 16 December 2010, [No. 2S-31](#).

¹⁰ E.g. abuses concerning annual loyalty policy, imposition of noncompeting obligations, restrictions of parallel import.

11. The pricing policy established big discounts to undertakings which could potentially import fuel to Lithuania in comparison to other companies which did not have such possibilities. The gap between prices could be as large as 6 times when comparing negotiated prices and non-negotiated ones. *AB Orlen Lietuva* could not provide any evidence that would justify such differences.

12. The Competition Council established that the price (discount) applied by *AB Orlen Lietuva* was determined by way of negotiations based on import parity so that the customer would become loyal and would not buy a competitor's product (would not import fuel). It was concluded that the pricing policy of *AB Orlen Lietuva* was designed to restrict the entry of competitors into the Lithuanian market, i.e. to avoid competition from imported products: diesel fuel from the East, and petrol from the West.

13. *AB Orlen Lietuva* restricted competition and inflicted harm upon undertakings and consumers. Certain discounts granted to companies acquiring fuels were economically unjustified and the rebate system appeared to actually result in the discrimination of certain undertakings in respect of selected other undertakings which bought fuel from *AB Orlen Lietuva*.

14. The Competition Council fined *AB Orlen Lietuva* EUR 2 383 862 for the infringement and obliged *AB Orlen Lietuva* to terminate the infringement. Upon appeal the courts largely upheld the Competition Council's findings and decreased the fine by 5 percent to EUR 2 261 133¹¹.

4.2 Commitment decision concerning association LINAVAL¹²

15. This investigation was concerned with the prices of TIR Carnets sold by the Lithuanian National Road Carriers Association *LINAVAL* to the members and non-members (candidates) of the Association. The Competition Council suspected that *LINAVAL*, being the only body authorized to issue TIR Carnets, could have abused its dominant position by applying different prices of TIR Carnets sold to the members of *LINAVAL* and to the candidates to the Association. During the investigation, *LINAVAL* stated that costs of issuing TIR Carnets for candidates were bigger than for the members. However, *LINAVAL* could not substantiate such claims with objective evidence. The Competition Council established that all participants to the TIR Convention assume the same obligations and responsibilities (irrespective whether they are members or candidates) in respect of the TIR Carnet. To address the Council's concerns, *LINAVAL* submitted commitments to lower the prices of TIR carnets to the same prices that were applied to the members of *LINAVAL*. The commitments were proper to eliminate the suspected competition restriction, the investigation was closed by accepting commitments of *LINAVAL*.

4.3 Commitment decision concerning Viasat World Limited¹³

16. This investigation was concerned with allegations that the undertaking *Viasat World Limited* abused its dominant position in the wholesale TV distribution market by discriminating certain undertakings. The claimants *TEO LT*, *AB* and *UAB Kavamedia* (providers of multi-channel TV subscription services) stated that they were offered by *Viasat World Limited* to acquire TV channel *Viasat Sport Baltic* for distribution only together with *Viasat Golden Package*, although other providers of multi-channel digital television subscription services could acquire this channel for distribution separately from the *Viasat Golden Package*. Thus the application of such different rebroadcasting terms could potentially result in the restriction of competition among digital television service providers, constituting an abuse of the dominant position by *Viasat World Limited*. *Viasat World Limited* offered commitments not to apply

¹¹ Judgment of the Supreme Administrative Court of Lithuania of 21 January 2013, case [No. A502-801/2013](#).

¹² Competition Council decision of 18 April 2014, [No. 1S-58/2014](#).

¹³ Competition Council decision of 22 November 2011, [No. 1S-233](#).

different *Viasat Sport Baltic* channel distribution terms to the providers of multi-channel digital TV subscription services. The commitments were adopted for two years, but could end sooner if the *Viasat Sport Baltic* channel was terminated.

17. The commitment decision was successfully appealed on the grounds that commitments were adopted concerning competition problems in the multi-channel *digital* TV subscription services market, but competition problems were identified concerning multi-channel TV subscription services (i.e. encompassing analogue TV). The case was returned to the Competition Council for additional investigation. After conducting the additional investigation, the Competition Council established that gathered data showed that bigger prices for digital TV services providers than to analogue TV services providers do not constrain the possibilities of the former to effectively compete with the latter¹⁴. The Competition Council closed the investigation on the grounds that it does not correspond to the Council's priorities¹⁵.

18. The above-mentioned case-law shows, that in the later cases the Competition Council tried to solve the problems by applying commitments. This approach can be effective, as at least in the Competition Council's experience cases of price discrimination can use considerable time and human resources (in the *Orlen* case, the investigation was opened in 2004 and the final (second) court judgement which largely upheld the Council's second decision (i.e. of 2010) was adopted in 2013)¹⁶.

19. However, the Law on Competition states that commitment decisions can be adopted only when certain conditions are met. Under Article 28(3)(2) of the Law on Competition, the investigation can be closed if the actions did not cause a significant damage to the interests protected by the law and the undertaking suspected of the violation of the Law has voluntarily terminated the actions and submitted to the Competition Council a written obligation not to perform such actions or to perform actions eliminating the suspected violation or creating preconditions to avoid it in the future. Thus, *inter alia* there must be no significant damage done by the investigated actions. This condition was met in the above-mentioned *Viasat* and *LINAVA* cases, but it might not be so in every case.

5. Other notes

20. As Lithuania is a Member State of the European Union, the Competition Council can use as guidance the case law of the European Commission and the Court of Justice of the European Union, as well as take into account various relevant publications¹⁷.

21. The Competition Council has not conducted any ex-post assessment on the impact of investigations into exclusionary price discrimination cases.

¹⁴ The Competition Council established *inter alia* that only [0-5] per cent of viewers watched the channel *Viasat Sport Baltic* via analogue TV, and the data showed that the number of subscriptions to digital TV services as well as the number of viewers who watched *Viasat Sport Baltic* via digital TV was rising.

¹⁵ Articles 24(3)(8) and 28(3)(3) of the Law on Competition allow the Competition Council respectively to refuse to open and to close an investigation on the grounds that the investigation of the factual circumstances specified in the application does not correspond to the Competition Council's priorities.

¹⁶ The Competition Council adopted its first decision in 2005 (decision of 22 December 2005, [No. 2S-16](#)). However, the decision was successfully appealed and the case was returned to the Competition Council for an additional investigation.

¹⁷ For instance, in 2005 DG Competition of the European Commission issued a discussion paper on the application of Article 82 of the Treaty [now Article 102 of the Treaty on the Functioning of the European Union] to exclusionary abuses. It can be retrieved from [here](#).

22. In Lithuania, the Competition Council has been the agency to challenge price discrimination on economic grounds under competition law. We do not know about any cases where price discrimination would have been challenged under other policy grounds.

23. We are not aware of any developments of price discrimination in the digital economy in Lithuania and of any regulatory actions designed to pre-empt the risk of big data being used to improve the ability of firms to price discriminate.