

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

**Implications of E-commerce for Competition Policy - Note by Lithuania**

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## Lithuania

1. The Lithuanian Competition Council has time and again dealt with the competition law issues related to trading online. The decisions in this regard were adopted in the areas of anti-competitive agreements and merger control. The competition authority has applied the same competition law tools for the analysis of suspected anti-competitive conduct or for merger control in an online environment as they are applied in an offline environment. Consumer protection issues related to e-commerce in Lithuania are dealt with by the State Consumer Rights Protection Authority.

2. According to the Eurostat information, in 2017, in Lithuania there were 49 percent of Internet users shopping online,<sup>1</sup> as compared with 44 percent in 2016 and in 2015 and 36 percent in 2014.<sup>2</sup>

3. Consumer protection issues related to e-commerce in Lithuania are dealt with by the State Consumer Rights Protection Authority.<sup>3</sup> The latter, for example, supports consumers by providing the information on how to identify and to avoid fake e-commerce platforms.<sup>4</sup> From the competition law point of view, the Competition Council of the Republic of Lithuania (hereinafter: the Competition Council) has dealt with the e-commerce issues in its practice. The decisions were adopted with regard to anti-competitive agreements and merger control. The competition authority has applied the same competition law tools for the analysis of suspected anti-competitive conduct or for merger control in an online environment as they are applied in an offline environment.

### 1. Anti-competitive agreements

4. The Competition Council dealt with the horizontal restraints in the *E-Turas* case.<sup>5</sup> The case was related to a concerted practice of a number of travel agencies via an online platform.

5. In its decision the Competition Council held that 30 travel agencies and Eturas coordinated their behaviour with regard to the discounts for online travel bookings through the E-TURAS system and thereby restricted competition by object and infringed Article 101(1) TFEU and Article 5(1) of the Law on Competition.<sup>6</sup> Fines were imposed on all undertakings, except for one,<sup>7</sup> which informed the Competition Council about the practice.

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<sup>1</sup> <http://ec.europa.eu/eurostat/web/digital-economy-and-society/statistics-illustrated>.

<sup>2</sup> *Ibid.*

<sup>3</sup> <http://www.vvtat.lt/en/about-authority.html>.

<sup>4</sup> See (in Lithuanian) [http://www.vvtat.lt/lt/naujienos\\_pranesimai\\_ziniasklaidai/pranesimai/5-taisykles-kaip-t9mc.html](http://www.vvtat.lt/lt/naujienos_pranesimai_ziniasklaidai/pranesimai/5-taisykles-kaip-t9mc.html).

<sup>5</sup> Decision of the Competition Council on the compliance of the actions of the undertakings providing sales of organized trips and other related services with the requirements of Article 5 of the Law on Competition of the Republic of Lithuania and Article 101 TFEU, 7 June 2012, No. 2S-9.

<sup>6</sup> *Ibid.*, paras 179-196.

<sup>7</sup> *Ibid.*, paras 253-258.

6. The information about the “capping” of the discount rates to the maximum of 3 percent was sent by the E-TURAS system to the travel agencies participating in its online platform in a form of an electronic message.<sup>8</sup> According to the Competition Council, when deciding whether the application of the maximum discount of 3 percent for online travel bookings amounted to an agreement or a concerted practice under the relevant legal provisions of the Law on Competition, it was of utmost importance to analyse whether there was a common will between the travel agencies and UAB Eturas.<sup>9</sup> Although, during the investigation, the competition authority did not find direct contracts or any other direct communication of the travel agencies, it was held that they used the same online platform E-TURAS and did not oppose to the “capping” of the rebate imposed by the aforementioned platform, so that the question was whether this fact allowed to conclude that the travel agencies disclosed to each other or in any other way created conditions for the anticipation of each other’s decisions related to the online travel bookings through the E-TURAS platform.<sup>10</sup> Due to the fact that the travel agencies used the same online platform, it was considered by the Competition Council that each travel agency, after the receiving of the message about the discount “cap”, could have assumed that also other travel agencies participating in the E-TURAS system would apply a discount not higher than 3 percent.<sup>11</sup> According to the competition authority, the arguments presented by some of the travel agencies during the investigation that they did not see or read the message, or the fact that the E-TURAS system did not provide any information to the travel agencies about other travel agencies participating in the platform, did not change this finding.<sup>12</sup> Accordingly, the Competition Council held that the undertakings, by having used the same online platform and having not opposed to the “capping” of the rebate, indirectly/implicitly expressed their common will as regards the application of the maximum of the 3 percent discount to online travel bookings through the E-TURAS system and thereby were participating in the concerted practice, which falls under Article 101 TFEU and Article 5 of the Law on Competition.<sup>13</sup> The role of Eturas, which was the administrator of the platform, was considered to have been as facilitator.<sup>14</sup>

7. This case reached the European Court of Justice (ECJ) on the basis of a request for a preliminary ruling submitted by the Supreme Administrative Court of Lithuania (hereinafter: the Supreme Administrative Court).<sup>15</sup> The latter sought guidance on the

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<sup>8</sup> *Ibid.*, para. 55.

<sup>9</sup> *Ibid.*, para. 146.

<sup>10</sup> *Ibid.*, para. 148.

<sup>11</sup> *Ibid.*, para. 157.

<sup>12</sup> *Ibid.*, paras 160, 162.

<sup>13</sup> *Ibid.*, paras 170-172.

<sup>14</sup> *Ibid.*, paras 173-177.

<sup>15</sup> ECJ, Case C-74/14, *"Eturas" UAB and Others v Lietuvos Respublikos konkurencijos taryba*, 21 January 2016, ECLI:EU:C:2016:42. The questions posed by the Supreme Administrative Court were: “(1) Should Article 101(1) TFEU be interpreted as meaning that, in a situation in which economic operators participate in a common computerised information system of the type described in this case and the Competition Council has proved that a system notice on the restriction of discounts and a technical restriction on discount rate entry were introduced into that system, it can be presumed that those economic operators were aware, or ought to have been aware, of the system notice introduced into the computerised information system and, by failing to

allocation of the burden of proof for the purposes of applying Article 101(1) TFEU.<sup>16</sup> The Supreme Administrative Court noted that “the principal piece of evidence supporting a finding of an infringement is a mere presumption that the travel agencies concerned read or should have read the message at issue in the main proceedings and should have understood all of the consequences arising from the decision concerning the restriction of the discount rates on bookings”.<sup>17</sup> It, thus, expressed doubts as regards finding the infringement on such a basis, in particular stressing the presumption of innocence.<sup>18</sup> Thus, specifically, the ECJ was asked whether “the mere sending of a message concerning a restriction of the discounts rate could constitute sufficient evidence to confirm or to raise a presumption that the economic operators participating in the E-TURAS booking system knew or ought to have known about that restriction”.<sup>19</sup> The ECJ held that:

*“The presumption of innocence precludes the referring court from inferring from the mere dispatch of the message at issue in the main proceedings that the travel agencies concerned ought to have been aware of the content of that message. However, the presumption of innocence does not preclude the referring court from considering that the dispatch of the message at issue in the main proceedings may, in the light of other objective and consistent indicia, justify the presumption that the travel agencies concerned were aware of the content of that message as from the date of its dispatch, provided that those agencies still have the opportunity to rebut it.”<sup>20</sup>*

8. With regard to the participation of the travel agencies in the concerted practice, the ECJ held that it was possible to find that the travel agencies, which were aware of the discount “cap”, participated in the anti-competitive behaviour or, even if they were not aware of it, they tacitly assented to it.<sup>21</sup> However, it was stressed that it should be possible for the travel agencies to rebut the presumption that they participated in the concerted practice by proving, for example, that the travel agency publicly distanced itself from that practice or reported such a practice to the administrative authorities or systemically applied a discount, which was higher than the “capped” one.<sup>22</sup>

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oppose the application of such a discount restriction, expressed their tacit approval of the price discount restriction and for that reason may be held liable for engaging in concerted practices under Article 101(1) TFEU? (2) If the first question is answered in the negative, what factors should be taken into account in the determination as to whether economic operators participating in a common computerised information system, in circumstances such as those in the main proceedings, have engaged in concerted practices within the meaning of Article 101(1) TFEU?.” (*Ibid.*, para. 25)

<sup>16</sup> *Ibid.*, para. 21.

<sup>17</sup> *Ibid.*, para. 22.

<sup>18</sup> *Ibid.*, para. 22.

<sup>19</sup> *Ibid.*, para. 24.

<sup>20</sup> *Ibid.*, paras 39-40.

<sup>21</sup> *Ibid.*, paras 42-45.

<sup>22</sup> *Ibid.*, paras 46-49.

9. Based on the guidance provided by the ECJ in the preliminary ruling, the Supreme Administrative Court issued the judgement on 2 May 2016.<sup>23</sup> The Court pointed out that in order to clarify whether the companies coordinated their behaviour in terms of Article 5(1) point 1 of the Law on Competition and Article 101(1) TFEU, three elements with regard to each company had to be determined: the concertation, the subsequent behaviour in the market and a causal link between the concertation and the subsequent behaviour in the market.<sup>24</sup>

10. As regards the first element, i.e. the concertation, it was stressed by the Court that it was important to analyse whether there was any direct or indirect contact among the travel agencies bearing in mind that their will could have been expressed also indirectly/tacitly. In this regard the Court noted that the situation when the undertakings received information about the “capped” discount and they were aware of it and also knew that the same restriction was applied to other undertakings, participating in the same online platform, and they did not object to it (i.e. tacitly assented to it) could be considered as concertation. However, the crucial fact to decide, according to the Court, was whether the competition authority had enough evidence to conclude that each of the travel agency, that was fined by the Competition Council, was aware about the discount “cap” and did not object to it.<sup>25</sup> After all, it was stressed that the finding of a concerted practice is closely related to the finding of the element of will.<sup>26</sup> Based on the national rules of procedure, the Court proceeded with the evaluation of evidence related to each of the travel agency assessing whether it was aware about the discount “cap” and did not object to it.<sup>27</sup> The Court agreed with the finding of the Competition Council that, due to the features of the E-TURAS system, the travel agencies understood that a number of other travel agencies use the same system based on the same conditions.<sup>28</sup> Yet, the circumstance alone that the message about the discount “cap” was sent to the travel agencies was not considered to be sufficient to conclude that the travel agencies read it and were aware about its content.<sup>29</sup> However, those undertakings, which before the “cap” applied a higher discount were considered to have been aware about it due to the fact that the discount factually applied after the “cap” was smaller and it was impossible for the travel agencies not to notice it. Besides, these travel agencies were considered to have understood that the same discount “cap” was applied also to other travel agencies participating in the E-TURAS online platform.<sup>30</sup>

11. As regards further two elements of the concerted practice (i.e. the subsequent behaviour in the market and the causal link between the concertation and the subsequent

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<sup>23</sup> Judgement of the Supreme Administrative Court of the Republic of Lithuania, 2 May 2016, Case No. A-97-858/2016.

<sup>24</sup> *Ibid.*, para. 353.

<sup>25</sup> *Ibid.*, paras 354-356.

<sup>26</sup> *Ibid.*, para. 362.

<sup>27</sup> *Ibid.*, paras 363-365 et seq.

<sup>28</sup> *Ibid.*, para. 371.

<sup>29</sup> *Ibid.*, para. 373.

<sup>30</sup> *Ibid.*, para. 376.

behaviour in the market), the Court proceeded with the question whether the travel agencies provided sufficient evidence to rebut the presumption of the participation in the concerted practice based on such a causal link.<sup>31</sup> Such evidence was said to be, for example, a systemic application of higher discounts – for online travel bookings through the E-Turas system (thus, not through other channels) - after the “capped” discount was introduced.<sup>32</sup>

12. On the basis of the legal analysis and the evaluation of evidence, the Court concluded that a number of travel agencies participated in the concerted practice,<sup>33</sup> whereas for other travel agencies fines were annulled.<sup>34</sup> With regard to Eturas, the Court upheld the findings of the Competition Council.<sup>35</sup>

## 2. Merger control

13. It could, first of all, be noted that, as regards the definition of the relevant market in the cases related to offline and online trade, in the retail merger *RIMI/PALINK* decision<sup>36</sup> the Competition Council defined the relevant product market as the retail market for the daily consumption products, predominantly foodstuff, in non-specialised shops.<sup>37</sup> The Competition Council did not include into the market the online channels of retail arguing that purchasing of the daily consumption products could just partially be substituted by purchasing online due to the reasons such as the necessity to wait for a delivery of the products, the minimum value of the purchase that is often applied when purchasing online etc.<sup>38</sup>

14. Furthermore, as regards online platforms, it is noteworthy that, on 6 May 2016, the Competition Council refused to grant a permission for the concentration of AS Eesti Meedia having acquired indirectly (through OÜ Classify) 100 percent of the shares (and, thereby, the sole control) of AllePAL OÜ.<sup>39</sup> The shares were acquired on 8 December 2014,<sup>40</sup> so that the Competition Council, suspecting that due to the concentration effective

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<sup>31</sup> *Ibid.*, paras 378 et seq.

<sup>32</sup> *Ibid.*, para. 379.

<sup>33</sup> *Ibid.*, para. 416.

<sup>34</sup> *Ibid.*, para. 474.

<sup>35</sup> *Ibid.*, paras 417-420.

<sup>36</sup> Decision of the Competition Council of the Republic of Lithuania on the clearance of the concentration of UAB Rimi Lietuva acquiring 100 percent of the shares and the sole control of UAB PALINK, 18 October 2017, No. 1S-108 (2017). This decision was a commitment decision.

<sup>37</sup> Decision of the Competition Council, *RIMI/PALINK*, para. 164. Such relevant product market was further segmented into the relevant market that can be accessed on foot and the same that can be accessed by car (*Ibid.*, para. 175).

<sup>38</sup> Decision of the Competition Council, *RIMI/PALINK*, paras 158-163, in particular, para. 162.

<sup>39</sup> Decision of the Competition Council of the Republic of Lithuania on the refusal to clear the concentration of AS Eesti Meedia having indirectly (through OÜ Classify) acquired 100 percent of the shares of AllePAL OÜ, 6 May 2016, No. 1S-59/2016.

<sup>40</sup> Decision of the Competition Council, *Eesti Meedia*, para. 2.

competition could have been significantly impeded, including the creation or strengthening of a dominant position, applied the procedure enshrined in Article 13 of the Law on Competition,<sup>41</sup> which enables the competition authority to oblige the companies to submit the *ex post* notification of the concentration.<sup>42</sup>

15. The Competition Council analysed the following business areas of the aforementioned undertakings and the companies related to them (such as UAB “Plius”, UAB “Diginet LT”, UAB “Vertikali medija”), i.e. the areas of classified ads on the Internet for real estate and for vehicles.<sup>43</sup> In this regard, the competition authority distinguished between classified ads and online advertisement due to factors such as the requirements as regards their contents, the extent of their presentation to the visitors of the websites and the different purpose of such visits in the case of the search of classified ads and online advertisement, the possibility to compare offers in the case of classified ads, different pricing of online advertisement and classified ads etc.<sup>44</sup> Furthermore, as regards classified ads, the Competition Council distinguished between classified ads online and offline (for example, in newspapers, journals etc.) arguing that the former can normally be accessed for free and at any time and such ads can be filtered, the search results can be compared etc.<sup>45</sup> Moreover, ads on Facebook were also excluded from the analysis.<sup>46</sup> The websites of real estate agents and professional vehicles’ sellers were not analysed due to, *inter alia*, a much narrower scope of ads available on these websites as compared with the online platforms of classified ads.<sup>47</sup> Finally, platforms such as Amazon and eBay were not included in the analysis.<sup>48</sup>

16. When defining the relevant product market, the Competition Council stressed that the object of the ads for real estate and for vehicles was different, so that such ads – from a buyers’ point of view – were considered as not interchangeable.<sup>49</sup> Supply substitutability was not taken into account.<sup>50</sup> Accordingly, the Competition Council

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<sup>41</sup> Article 13(1) of the Law on Competition stipulates: “The Competition Council can oblige the undertakings to submit a notification about the concentration and *mutatis mutandis* to apply the procedure of merger control, even in the cases when the turnover thresholds enshrined in Article 8(1) of the Law on Competition are not exceeded, if there is a likelihood that a dominant position can be created or strengthened after the concentration or that effective competition would be significantly impeded in the relevant market.” Article 13(2) of the Law on Competition stipulates that “The Competition Council can issue a decision to apply the procedure of merger control only in such cases when no more than 12 months have passed after the implementation of the concentration.”

<sup>42</sup> Decision of the Competition Council, *Eesti Meedia*, para. 3.

<sup>43</sup> Decision of the Competition Council, *Eesti Meedia*, paras 15, 128.

<sup>44</sup> Decision of the Competition Council, *Eesti Meedia*, paras 16-29, 143-147.

<sup>45</sup> Decision of the Competition Council, *Eesti Meedia*, para. 38.

<sup>46</sup> Decision of the Competition Council, *Eesti Meedia*, paras 39-50, 148-150.

<sup>47</sup> Decision of the Competition Council, *Eesti Meedia*, paras 51-54, 151-153.

<sup>48</sup> Decision of the Competition Council, *Eesti Meedia*, paras 55-63, 154.

<sup>49</sup> Decision of the Competition Council, *Eesti Meedia*, paras 130-133.

<sup>50</sup> Decision of the Competition Council, *Eesti Meedia*, paras 135-138.

delineated two relevant product markets, i.e. the market for classified ads on the Internet for real estate and the market for classified ads on the Internet for vehicles (including their parts).<sup>51</sup> The relevant geographic market was defined as national, i.e. spanning the territory of the Republic of Lithuania.<sup>52</sup>

17. According to Article 12(1) point 3 of the Law on Competition, the Competition Council refuses to clear a concentration if on the basis of such a concentration a dominant position may be created or strengthened or competition in the relevant market may be significantly impeded. The Competition Council analysed non-coordinated effects of the horizontal concentration in the aforementioned relevant markets, where before the concentration two companies related respectively to the acquiring company and the target were competing, i.e. UAB “Plius” related to AS Eesti Meedia and UAB “Diginet LT” related to AllePAL OÜ. In this regard, it was first of all high market shares of the aforementioned companies that were stressed.<sup>53</sup> Also, following circumstances were analysed: the fact that the companies were close competitors,<sup>54</sup> the fact that the persons uploading the ads had limited capabilities to effectively switch to other providers of such a type of the platform, including the popularity in terms of the visitors of the platform at hand,<sup>55</sup> a low likelihood that competitors could significantly increase the supply in the case of the increase of price on the side of the companies participating in the concentration,<sup>56</sup> the fact that the price after the implementation of the concentration was increased, but no new competitors emerged,<sup>57</sup> the risk that the expansion of competitors may be hindered,<sup>58</sup> the elimination of strong competitive power,<sup>59</sup> the lack of strong buyer power,<sup>60</sup> a low likelihood and limited possibilities of new entry.<sup>61</sup> On the basis of such an analysis, the Competition Council concluded that AS Eesti Meedia could be held to have acquired such a position in the Lithuanian markets for classified ads on the Internet for real estate and for vehicles which enabled it to exercise unilateral power while effectively restricting competition, so that the implementation of the concentration created a dominant position and significantly impeded competition in the aforementioned relevant markets.<sup>62</sup> The case is currently under the judicial review procedure.

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<sup>51</sup> Decision of the Competition Council, *Eesti Meedia*, paras 139, 141.

<sup>52</sup> Decision of the Competition Council, *Eesti Meedia*, paras 155-158.

<sup>53</sup> Decision of the Competition Council, *Eesti Meedia*, paras 161-171.

<sup>54</sup> Decision of the Competition Council, *Eesti Meedia*, paras 172-174.

<sup>55</sup> Decision of the Competition Council, *Eesti Meedia*, paras 175-181.

<sup>56</sup> Decision of the Competition Council, *Eesti Meedia*, paras 182-185.

<sup>57</sup> Decision of the Competition Council, *Eesti Meedia*, paras 186-193.

<sup>58</sup> Decision of the Competition Council, *Eesti Meedia*, paras 194-197.

<sup>59</sup> Decision of the Competition Council, *Eesti Meedia*, paras 198-200.

<sup>60</sup> Decision of the Competition Council, *Eesti Meedia*, paras 201-203.

<sup>61</sup> Decision of the Competition Council, *Eesti Meedia*, paras 204-216.

<sup>62</sup> Decision of the Competition Council, *Eesti Meedia*, para. 217.