

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

**Suspensory Effects of Merger Notifications and Gun Jumping - Note by Lithuania**

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## *Lithuania*

### 1. Introduction

1. Over the years, the Competition Council of the Republic of Lithuania (hereinafter: the Competition Council) has investigated several gun jumping cases. In the following, the relevant legal provisions are analysed followed by the illustration of some of the recent cases dealt with by the Competition Council.

### 2. The Law on Competition

2. According to Article 3(5) of the Law on Competition of the Republic of Lithuania<sup>1</sup> (hereinafter: Law on Competition), a concentration is defined as a merger or an acquisition of control.

3. Article 8(1) of the Law on Competition foresees an obligation of the undertakings to notify a planned concentration to the Competition Council and get its permission if the overall turnover received in Lithuania in the year preceding the concentration of the undertakings involved is more than EUR 20 million and the turnover received in Lithuania in the year preceding the concentration of each of at least two undertakings involved in the concentration is more than EUR 2 million. In addition, it is noteworthy that, on the basis of Article 13 of the Law on Competition, the Competition Council may apply the procedure of the control of concentrations on its own initiative, even if the turnover thresholds foreseen in Article 8(1) of the Law on Competition are not met, if it is likely that after the concentration a dominant position will be created or strengthened or competition in the relevant market will be significantly impeded. In such a case, the Competition Council may oblige the undertakings to notify the concentration. According to Article 13(2) of the Law on Competition, the Competition Council may adopt the decision to apply the aforementioned procedure only if no more than 12 months have passed after the implementation of the concentration.

4. Article 9(2) of the Law on Competition stipulates that the concentration must be notified to the Competition Council prior to its implementation. The notification has to be submitted after the offer to conclude the agreement or acquire shares, securities or assets, an instruction to conclude the agreement, the conclusion of the agreement, the acquisition of the ownership right or the right to dispose of certain assets. The notification of a concentration may also be submitted in the case of a clear intention to conclude the agreement or to make a public bid to buy shares.

5. Article 10 of the Law on Competition elaborates on the suspension of concentrations. According to Article 10(1) of the Law on Competition, undertakings or controlling persons participating in the concentration, which is subject to notification, shall have no right to implement the concentration until the decision of the Competition Council

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<sup>1</sup> Law on Competition of the Republic of Lithuania, 23 March 1999, Nr. VIII-1099, as lastly amended on 12 January 2017.

is issued in accordance with Article 12(1) point 1 or point 2,<sup>2</sup> except for the situations stipulated in Article 10(3) and Article 10(4) of the Law on Competition. Furthermore, Article 10(2) of the Law on Competition states that any contracts or actions of the undertakings or controlling persons related to the implementation of the concentration with regard to which the Competition Council issues a decision to refuse to clear the concentration (pursuant to Article 12(1) point 3 of the Law on Competition) will be considered invalid and will not trigger any legal consequences.

6. As mentioned, exceptions to Article 10(1) of the Law on Competition, which prohibits the implementation of the notified concentration, are foreseen in Article 10(3) and Article 10(4) of the Law on Competition.

7. According to Article 10(3) of the Law on Competition, on the basis of a motivated request submitted by the undertakings or controlling persons involved in the concentration and taking account of the potential consequences of the suspension of the concentration for the undertakings involved and the potential impact of the concentration on competition, the Competition Council may issue a decision permitting to perform individual actions of concentration. The same legal provision says that the aforementioned permission may be granted with conditions and commitments, which may be necessary for protecting effective competition. It is also stated that the person submitting the request has to pay a fee to the Competition Council for the investigation of the aforementioned request. If such a fee is not paid, the Competition Council does not investigate the request (Article 10(3) 4th sentence of the Law on Competition). The Competition Council's decision on the procedure of the submission and the investigation of the notification about the concentration<sup>3</sup> specifies that, pursuant to Article 10(3) of the Law on Competition, the undertaking submitting the notification may submit a motivated request to perform individual actions of the concentration until the Competition Council issues a final decision regarding the notified concentration. The request has to include arguments and circumstances, based on which the request is grounded, and the evidence confirming these circumstances, has to be attached.<sup>4</sup>

8. Article 10(4) of the Law on Competition stipulates that the undertakings and controlling persons involved in the concentration may – without a separate permission obtained from the Competition Council – make a public bid to buy shares and conclude contracts related to securities, involved in the trade of a regulated market, if such actions are notified to the Competition Council not later than in 7 days after their performance and the acquirer of the securities does not make use of the voting rights granted by the securities.

9. Article 22(1) point 4 of the Law on Competition stipulates that the Competition Council shall investigate the implementation of concentrations without prior notification or permission, or in violation of the established conditions or obligations of concentration implementation as well as the continuation of the concentration during the suspension

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<sup>2</sup> Article 12 of the Law on Competition states that the Competition Council, after it has analysed the notified concentration, shall issue one of the following decisions: a clearance decision (Article 12(1) point 1), a decision to allow the concentration subject to conditions (a commitment decision) (Article 12(1) point 2), or a decision to refuse to clear the concentration (Article 12(1) point 3).

<sup>3</sup> Decision of the Competition Council of the Republic of Lithuania on approving the procedure of the submission and the examination of the notification about the concentration, 11 August 2015, No. 1S-82/2015.

<sup>4</sup> *Ibid.*, para. 36.

period. According to Article 35(1) point 2 of the Law on Competition, if the Competition Council finds that an undertaking or a controlling person has implemented a concentration, which has resulted in the creation or strengthening of a dominant position or a significant impediment to effective competition in a relevant market without having notified the Competition Council or received its permission, the competition authority, pursuant to the principles of objectivity and proportionality, can oblige that undertaking to perform actions restoring the previous situation or eliminating the consequences of the concentration, such as the obligations to sell the enterprise or part thereof, the assets of the undertaking or part thereof, the shares or part thereof, to reorganize the enterprise and to terminate or amend contracts, and to set time limits and conditions for the implementation of the aforementioned conditions. Furthermore, according to Article 36(1) of the Law on Competition, the Competition Council may impose fines of up to 10 percent of the overall annual income in the preceding business year for an implementation of a notifiable concentration without the permission, the continuation of the concentration during the suspension period and the infringement of the conditions or obligations related to the implementation of the concentration and set by the Competition Council.

10. Moreover, pursuant to Article 37(1) of the Law on Competition, the amount of the fines that can be imposed on the undertakings shall be differentiated by taking into account the gravity of the violation, its duration, the circumstances mitigating or aggravating liability of the undertaking, the influence of each undertaking in committing the violation when the infringement was committed by several undertakings, and the sales' value of the goods directly or indirectly related to the infringement. Article 37(2) of the Law on Competition lists possible mitigating circumstances. These include the voluntary prevention of the detrimental consequences of the violation after the commitment thereof by the undertakings, assistance to the Competition Council in the course of investigation, compensation for the losses, elimination of the damage caused, voluntary termination of the violation, non-implementation of the restrictive practices, acknowledgement, during the investigation, of the violation and the estimated fine thereby creating conditions for a more effective investigation, acknowledgment of the material circumstances established by the Competition Council on the basis of finished investigation, the fact that actions constituting the violation were determined by the actions of the public authorities as well as serious financial difficulties of the undertaking. Article 37(3) of the Law on Competition indicates the aggravating circumstances. These include the obstruction of the investigation, the concealment of the committed violation, the continuation of the infringement notwithstanding the obligation imposed by the Competition Council to terminate it or, the repetition, within the period of seven years, of committing the infringement, for which the undertakings were already imposed sanctions provided for in the Law on Competition.

### 3. Relevant cases

11. The Competition Council has dealt with a number of cases related to gun jumping. In the following, some of the recent cases are described in more detail.

12. For example, on 1 August 2017 the Competition Council confirmed the infringement of Article 9(2) and Article 10(1) of the Law on Competition by UAB koncernas "Achemos grupė" where UAB koncernas "Achemos grupė" acquired the sole control of UAB "Jūros vartai" and AB "Klaipėdos laivų remontas" without having notified the concentration to the Competition Council, although the concentration had to be notified

following the requirements of the Law on Competition.<sup>5</sup> For the failure to notify the concentration, UAB koncernas “Achemos grupė” received a fine, which amounted to 1 percent of the turnover related to the infringement.<sup>6</sup> However, the fine was reduced by 20 percent,<sup>7</sup> since the fact that the undertaking notified the concentration after its implementation on its own initiative, informed the Competition Council about the committed violation and acknowledged the material circumstances found by the Competition Council during the investigation, was considered as the circumstance mitigating liability.<sup>8</sup> Also, it was taken into account that the party itself notified the Competition Council about the violation at the time when the latter did not have any information about the possible non-compliance with the Law on Competition.<sup>9</sup> The total fine amounted to EUR 54,700.<sup>10</sup>

13. Similarly, on 9 September 2015 the Competition Council found an infringement of Article 9(2) and Article 10(1) of the Law on Competition by UAB “Lindo” due the failure of the latter to notify the concentration of acquiring 100 percent of the shares (the sole control) of the UAB “Kauno skalbykla” and UAB “Aglaja” respectively.<sup>11</sup> The fact that the undertaking on its own initiative notified the Competition Council about the implemented concentration, informed the Competition Council about the committed violation and acknowledged the material circumstances found by the Competition Council during the investigation, was considered as a circumstance mitigating liability.<sup>12</sup> Therefore, the Competition Council imposed a fine of 1 percent of the turnover related to the infringement,<sup>13</sup> and taking into account that the party itself notified the Competition Council about the violation at the time when the latter did not have any information about the possible non-compliance with the Law on Competition, the fine was reduced by 20 percent<sup>14</sup> and, in total, the imposed fine was EUR 5,000.<sup>15</sup>

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<sup>5</sup> Decision of the Competition Council of the Republic of Lithuania on the compliance of actions of UAB koncernas “Achemos grupė” with the requirements of Articles 9(2) and 10(1) of the Law on Competition of the Republic of Lithuania, 1 August 2017, No. 2S-4 (2017).

<sup>6</sup> *Ibid.*, paras 87, 95.

<sup>7</sup> *Ibid.*, para. 105.

<sup>8</sup> *Ibid.*, para. 104.

<sup>9</sup> *Ibid.*, para. 105.

<sup>10</sup> *Ibid.*, para. 113.

<sup>11</sup> Decision of the Competition Council of the Republic of Lithuania on the compliance of actions of UAB “Lindo” with the requirements of Articles 9(2) and 10(1) of the Law on Competition of the Law on Competition of the Republic of Lithuania, 9 September 2015, No. 2S-11/2015.

<sup>12</sup> *Ibid.*, para. 91.

<sup>13</sup> *Ibid.*, paras 80, 85.

<sup>14</sup> *Ibid.*, para. 91.

<sup>15</sup> *Ibid.*, para. 96.

14. In *Kauno grūdai* (2017),<sup>16</sup> the Competition Council investigated whether the actions of AB “Kauno grūdai” were in conformity with Articles 9(2) and 10(1) of the Law on Competition. The investigation was opened following the judgement of the Court of Appeal of Lithuania.<sup>17</sup> In this judgement, it was stated that AB “Kauno grūdai” acquired 51 percent of the shares of AB “Vievio paukštynas”.<sup>18</sup> Thereby, the Competition Council had reasons to suspect that, in 2011, AB “Kauno grūdai” implemented a concentration without having notified it to and obtained a clearance from the Competition Council and, thus, started the investigation.<sup>19</sup> When analysing whether, on the basis of the acquisition of 51 percent shares, AB “Kauno grūdai” obtained a possibility to exercise control in AB “Vievio paukštynas”, the Competition Council found that AB “Kauno grūdai” had the right to appoint the majority of the board members of AB “Vievio paukštynas”, the ability to make strategic decisions regarding the economic activity of the aforementioned undertaking, the actions undertaken by the company’s governing bodies and the composition of the staff.<sup>20</sup> In addition, it was considered that AB “Kauno grūdai” retained the acquired control of AB “Vievio paukštynas” during the bankruptcy proceedings.<sup>21</sup> Hence, the Competition Council held that AB “Kauno grūdai” implemented a notifiable concentration without the Competition Council’s permission.<sup>22</sup> The Competition Council imposed a fine of 1 percent of the turnover related to the infringement,<sup>23</sup> and, in addition, increased the fine for deterrence effect.<sup>24</sup> Furthermore, the circumstance that AB “Kauno grūdai” hid the violation, i.e. the real acquirer of the shares (i.e. AB “Kauno grūdai”) was concealed (on the basis of a number of share acquisition agreements formally signed by other persons (in a form of sham contracts)) with a purpose of avoiding the concentration control proceedings as prescribed by the Law on Competition,<sup>25</sup> was considered as the circumstance aggravating liability with a result that the fine was increased by 10 percent<sup>26</sup> and the total fine imposed on AB “Kauno grūdai” was EUR 947 700.<sup>27</sup>

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<sup>16</sup> Decision of the Competition Council of the Republic of Lithuania on the compliance of actions of AB “Kauno grūdai” with the requirements of Articles 9(2) and 10(1) of the Law on Competition of the Republic of Lithuania, 9 June 2017, No. 2S-3 (2017).

<sup>17</sup> Judgement of the Court of Appeal of Lithuania, 15 October 2014, Case No. 2A-1295/2014.

<sup>18</sup> *Ibid.*, Part IV of the judgement.

<sup>19</sup> Decision of the Competition Council of the Republic of Lithuania on the compliance of actions of AB “Kauno grūdai” with the requirements of Articles 9(2) and 10(1) of the Law on Competition of the Republic of Lithuania, 9 June 2017, No. 2S-3 (2017), para 2.

<sup>20</sup> *Ibid.*, paras 90-94.

<sup>21</sup> *Ibid.*, para. 124.

<sup>22</sup> *Ibid.*, paras 125-131.

<sup>23</sup> *Ibid.*, paras 151, 160.

<sup>24</sup> *Ibid.*, paras 164-165.

<sup>25</sup> *Ibid.*, para. 169.

<sup>26</sup> *Ibid.*, paras 169 and 172.

<sup>27</sup> *Ibid.*, para. 173.

15. In *Lukoil Baltija* (2013),<sup>28</sup> the Competition Council analysed a number of a joint activity and other types of agreements entered into by UAB “Lukoil Baltija” and UAB “Luktarna” with a number of other undertakings in order to clarify whether the two aforementioned companies, by having obtained a right to control petrol stations, implemented the concentration, which had to be notified to the Competition Council.<sup>29</sup> The investigation of the Competition Council revealed that UAB “Lukoil Baltija”, by having entered into a joint activity agreements with UAB “Okseta”, acquired control of three petrol stations without having notified the Competition Council.<sup>30</sup> The Competition Council stressed that UAB “Lukoil Baltija”, on the basis of a joint activity agreement, obtained a right to use the petrol stations and to control them.<sup>31</sup> Furthermore, the Competition Council explained that UAB “Lukoil Baltija” obtained a right to exploit the petrol stations, which were owned by UAB “Okseta”<sup>32</sup> and that such petrol stations formed part of an independent unit of economic activity.<sup>33</sup> According to the Competition Council, there was a change of control of petrol stations,<sup>34</sup> particularly in terms of UAB “Lukoil Baltija” being able to exercise a decisive control on the activity of the petrol stations,<sup>35</sup> for example, by being able to make strategic decisions such as on setting prices, employing staff, organizing work, concluding petrol distribution agreements etc.<sup>36</sup> Such a change in control was said to be on a lasting basis.<sup>37</sup> The Competition Council thus concluded that UAB “Lukoil Baltija”, on the basis of the joint activity agreement with UAB “Okseta”, acquired the control of three petrol stations and implemented the concentration without having notified the Competition Council, although such a concentration was notifiable according to the requirements set by the Law on Competition.<sup>38</sup> Therefore, UAB “Lukoil Baltija” was imposed a fine of 1 percent of the turnover related to the infringement,<sup>39</sup> and increased the fines for deterrence effect.<sup>40</sup> The fines thus amounted to LTL 983 500 (approx. EUR 285 072) for the failure to notify the concentration with regard to two petrol stations and LTL 194 100 (approx.

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<sup>28</sup> Decision of the Competition Council of the Republic of Lithuania on the compliance of actions of UAB “Lukoil Baltija” and UAB “Luktarna” with the requirements of Articles 8(1) and 9(2) of the Law on Competition of the Republic of Lithuania, 18 April 2013, No. 2S-4.

<sup>29</sup> *Ibid.*, para. 5.

<sup>30</sup> *Ibid.*, paras 69-178.

<sup>31</sup> *Ibid.*, para. 82.

<sup>32</sup> *Ibid.*, para. 84.

<sup>33</sup> *Ibid.*, paras 85-104.

<sup>34</sup> *Ibid.*, paras 105-131.

<sup>35</sup> *Ibid.*, para. 115.

<sup>36</sup> *Ibid.*, para. 127.

<sup>37</sup> *Ibid.*, paras 132-149.

<sup>38</sup> *Ibid.*, para. 178.

<sup>39</sup> *Ibid.*, para. 196.

<sup>40</sup> *Ibid.*, paras 200-201.

EUR 56 261) for the failure to notify the concentration with regard to one petrol station.<sup>41</sup> The company was ordered to end the infringement.<sup>42</sup> The investigation with regard to other undertakings was terminated.<sup>43</sup> The decision of the Competition Council was upheld by the Supreme Administrative Court of Lithuania.<sup>44</sup> The concentration itself was cleared by the Competition Council's decision issued on 18 February 2014.<sup>45</sup>

16. In *Lukoil Baltija* (2014),<sup>46</sup> the Competition Council investigated whether UAB "Lukoil Baltija", by having entered into a joint activity and other types of agreements with AB "Baltic Petroleum" and by having acquired the right to control a number of petrol stations, implemented a concentration without having obtained a permission from the Competition Council.<sup>47</sup> The Competition Council found that UAB "Lukoil Baltija" violated the requirements enshrined in Articles 8(1) and 9(2) of the Law on Competition<sup>48</sup> and imposed a fine of respectively 1,1 and 1 percent of the turnover related to the infringement,<sup>49</sup> so that the fines amounted to LTL 11 386 300 (approx. EUR 3 300 377) for a failure to notify the concentration with regard to a number of petrol stations acquired in 2003 and LTL 431 400 (approx. EUR 125 043) for a failure to notify the concentration with regard to the petrol station acquired in 2008<sup>50</sup> (the latter fine was an increased fine (by 20 percent) for the deterrence effect<sup>51</sup>). The Competition Council also ordered to end the infringement.<sup>52</sup> When the case reached the Supreme Administrative Court of Lithuania,<sup>53</sup> UAB "Lukoil Baltija" argued that it did not have to notify the concentration, because the Competition Council granted a permission for the concentration in 2001, so it was not necessary to obtain a new authorization for the acquisition of the control over the petrol

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<sup>41</sup> *Ibid.*, para. 208; p. 30 point 2.

<sup>42</sup> *Ibid.*, p. 30 point 3.

<sup>43</sup> *Ibid.*, paras 209-212.

<sup>44</sup> Judgement of the Supreme Administrative Court of Lithuania, 17 December 2015, Case No. A-1699-822/2015.

<sup>45</sup> Decision of the Competition Council of the Republic of Lithuania, 18 February 2018, No. 1S-29/2014.

<sup>46</sup> Decision of the Competition Council of the Republic of Lithuania on the compliance of actions of UAB "Lukoil Baltija" with the requirements of Articles 8(1) and 9(2) of the Law on Competition of the Republic of Lithuania, 12 May 2014, No. 2S-2/2014.

<sup>47</sup> *Ibid.*, para. 5.

<sup>48</sup> *Ibid.*, paras 223-225.

<sup>49</sup> *Ibid.*, para. 269.

<sup>50</sup> *Ibid.*, para. 280; p. 45 point 2.

<sup>51</sup> *Ibid.*, para. 275.

<sup>52</sup> *Ibid.*, p. 46 point 3. The concentrations were cleared by the Competition Council's decisions issued on 18 September 2014 (decisions No. 1S-146/2014 and No. 1S-147/2014 respectively).

<sup>53</sup> Judgement of the Supreme Administrative Court of Lithuania, 18 April 2017, Case No. A-899-858/2017.

stations in 2003.<sup>54</sup> Specifically, the company argued that the permission granted by the Competition Council covered the concentration where UAB “Lukoil Baltija” acquired 37 percent of the voting rights of BAB “Lietuvos kuras”, and that this covered also the right to exploit a number of “Baltic Petroleum” petrol stations that were owned by BAB “Lietuvos kuras”. Yet, according to the Supreme Administrative Court of Lithuania, there are three conditions for liability to arise for the implementation of the concentration without the notification to the Competition Council: firstly, the specific actions of (an) undertaking(s) amounted to the implementation of the concentration, secondly, the total turnover of the undertakings involved in the concentration in the business year preceding the concentration exceeded the thresholds specified in the Law on Competition, and thirdly, the Competition Council was not notified about the concentration prior to its implementation.<sup>55</sup> According to the Court, the Competition Council bears the burden of proof of a suspected infringement, so that the competition authority has to provide accurate and consistent evidence in order to prove it.<sup>56</sup> The Court explained that, while answering the question whether the actions amounted to a concentration, it is the concepts of the control and exercising a decisive influence that are of utmost importance. The Court noted that the Competition Council issues a permission for a concentration on the basis of the notification, where the way the concentration will take place has to be described. So, it was said that the Competition Council assesses the concentration within the scope of a notified concentration. The Court said that, although the aforementioned permission covered the acquisition of the voting rights in the assembly of the creditors of BAB “Lietuvos kuras”, it did not cover the right of UAB “Lukoil Baltija” to acquire control of the assets of BAB “Lietuvos kuras” (thus, also of a number of petrol stations).<sup>57</sup> Furthermore, since UAB “Lukoil Baltija” claimed that the fine had to be calculated on the basis of the rules on setting fines that were in force at the time of the infringement, the Court noted that a failure to notify a concentration to the Competition Council is – by its nature – a continuous infringement, the beginning of which is the day of the conclusion of a respective agreement, so that each day since this moment forms part of the duration of the infringement of the Law on Competition. The end of such an infringement, i.e. the last day of the implementation of the concentration without the permission of the Competition Council, is, according to the Court, the day when the permission is issued by the Competition Council.<sup>58</sup> Bearing in mind that a failure to notify a notifiable concentration is a continuous infringement, the law that has to be applied was said to be the law that was valid at the time when the actions were finished or terminated.<sup>59</sup> Furthermore, since the company argued that the Competition Council, when setting the fine, infringed the principle of proportionality and objectivity, the Court explained that the implementation of the concentration in breach of Article 10(1) of the Law on Competition is an infringement,

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<sup>54</sup> *Ibid.*, Part IV of the judgement.

<sup>55</sup> *Ibid.*, Part IV of the judgement (with reference to the judgement of the Supreme Administrative Court of Lithuania, 1 March 2012, Case No. A<sup>502</sup>-1668/2012).

<sup>56</sup> *Ibid.*, Part IV of the judgement.

<sup>57</sup> *Ibid.*, Part IV of the judgement.

<sup>58</sup> *Ibid.*, Part IV of the judgement (with reference to the judgement of the Supreme Administrative Court of Lithuania, 1 March 2012, Case No. A<sup>502</sup>-1668/2012).

<sup>59</sup> *Ibid.*, Part IV of the judgement.

which cannot be evaluated as just a formal or a procedural infringement, since it may trigger essential changes in the conditions of competition. It was said that the implementation of the concentration without a notification to the Competition Council and without a permission of the latter may be considered as a serious infringement, and the circumstance that in such a case competition may have been restricted or damage may have been caused in any other way, could lead to the qualification of such an infringement as being even more serious.<sup>60</sup> Bearing in mind the gravity of the infringement, it was held that the Competition Council did not infringe the principles of proportionality and objectivity when having set the fine for this infringement. In conclusion, the Court upheld the judgement of Vilnius District Administrative Court, which had partly changed the Competition Council's decision with regard to the acquirement of one petrol station acquired in 2008,<sup>61</sup> but had upheld the rest of the Competition Council's decision (i.e. the acquirement of other petrol stations and the thereto related fine).

17. On 12 May 2016 the Competition Council adopted a decision on the termination of the investigation on the compliance of actions of AB "Akmenės cementas", HeidelbergCement Northern Europe AB and UAB "Gerdukas" with Articles 5, 9(2) and 10(1) of the Law on Competition and Article 101 TFEU.<sup>62</sup> The investigation of the Competition Council was started as it was suspected that HeidelbergCement Northern Europe AB (hereinafter: HeidelbergCement) implemented a concentration without having notified the Competition Council and having obtained the latter's permission.<sup>63</sup> In this regard, the Competition Council scrutinized the purchase-sale agreement of the shares of AB "Akmenės cementas" to HeidelbergCement and analysed whether HeidelbergCement, after having entered into a shareholders' agreement with AB "Akmenės cementas" and acquired veto rights, had a real possibility to exercise a decisive influence on AB "Akmenės cementas" regarding the production of cement and, in such a way, implemented the concentration, which had to be notified to the Competition Council.<sup>64</sup> In 2016 HeidelbergCement informed the Competition Council about the change of factual circumstances, such as, for example, the commitment of HeidelbergCement to make use of

<sup>60</sup> *Ibid.*, Part IV of the judgment (with further references to the judgement of the Supreme Administrative Court of Lithuania, 25 April 2013, Case No. A<sup>520</sup>-634/2013; the judgement of the Supreme Administrative Court of Lithuania, 17 December 2015, Case No. A-1699-822/2015).

<sup>61</sup> This was basically due to the fact that the Supreme Administrative Court of Lithuania agreed with the holding of the Vilnius District Administrative Court that this concentration did not have to be notified to the Competition Council in the first place, because the turnover thresholds were not met (Judgement of the Supreme Administrative Court of Lithuania, 18 April 2017, Case No. A-899-858/2017, Part II of the judgement). Therefore, the fine, which had been imposed by the Competition Council for the failure to notify this concentration, i.e. LTL 431 400 (approx., EUR 125 043), was annulled by Vilnius District Administrative Court. This was upheld by the Supreme Administrative Court of Lithuania.

<sup>62</sup> Decision of the Competition Council of the Republic of Lithuania to terminate the investigation on the compliance of actions of AB "Akmenės cementas", HeidelbergCement Northern Europe AB and UAB "Gerdukas" with the requirements of Articles 5, 9(2) and 10(1) of the Law on Competition of the Republic of Lithuania and Article 101 of the Treaty on the Functioning of the European Union, 12 May 2016, No. 1S-63/2016.

<sup>63</sup> *Ibid.*, paras 2-3.

<sup>64</sup> *Ibid.*, paras 4-14.

the veto rights only where the planned or actual capital investments exceed three million euros in any calendar year.<sup>65</sup> The Competition Council pointed out that, according to the Law on Competition (Article 28(3) point 3), it may terminate the investigation if the circumstances listed in Article 24(4) of the Law on Competition appear during the investigation.<sup>66</sup> Article 24(4) point 8 of the Law on Competition stipulates that the Competition Council may refuse to start investigation if the investigation of the factual circumstances does not comply with the Priority of the Competition Council. According to the Priority of the Activities of the Competition Council<sup>67</sup> (hereinafter: the Priority), the Competition Council, while deciding whether investigations comply with the Priority, takes account of the principles such as the impact on effective competition and consumer welfare, the strategic importance and the rationale use of resources.<sup>68</sup> In light of these circumstances and the commitments accepted by HeidelbergCement, the Competition Council terminated the investigation with regard to the implementation of the concentration, which was not notified to the Competition Council.<sup>69</sup> It is noteworthy that in *Akmenės cementas* the Competition Council also analysed whether the actions of AB “Akmenės cementas”, HeidelbergCement and UAB “Gerdukas” complied with Article 5 of the Law on Competition<sup>70</sup> and Article 101 TFEU.<sup>71</sup> The question was whether HeidelbergCement was coordinating its behaviour with AB “Akmenės cementas” and thereby creating the conditions for restricting competition between them. In particular, the Competition Council investigated whether – during the shareholders’ meeting - AB “Akmenės cementas” revealed sensitive strategic information and HeidelbergCement received and accepted it, and whether such actions of the undertakings could have amounted to an infringement of Article 5 of the Law on Competition and Article 101 TFEU.<sup>72</sup> Yet, in December 2015, the person appointed as a board member of AB “Akmenės cementas” was entrusted by the managing director of HeidelbergCement to ensure that commercially sensitive information of strategic nature will not be revealed to any company

<sup>65</sup> *Ibid.*, paras 15, 18.

<sup>66</sup> *Ibid.*, para. 20.

<sup>67</sup> The Resolution of the Competition Council of the Republic of Lithuania as of 2 July 2012 No. 1S-89 on the priority of the activities of the Competition Council while implementing the supervision of the Law on Competition.

<sup>68</sup> *Ibid.*, para. 8.

<sup>69</sup> Decision of the Competition Council of the Republic of Lithuania to terminate the investigation on the compliance of actions of AB “Akmenės cementas”, HeidelbergCement Northern Europe AB and UAB “Gerdukas” with the requirements of Articles 5, 9(2) and 10(1) of the Law on Competition of the Republic of Lithuania and Article 101 of the Treaty on the Functioning of the European Union, 12 May 2016, No. 1S-63/2016, paras 25-35.

<sup>70</sup> Article 5 of the Law on Competition is the national equivalent of Article 101 TFEU.

<sup>71</sup> Decision of the Competition Council of the Republic of Lithuania to terminate the investigation on the compliance of actions of AB “Akmenės cementas”, HeidelbergCement Northern Europe AB and UAB “Gerdukas” with the requirements of Articles 5, 9(2) and 10(1) of the Law on Competition of the Republic of Lithuania and Article 101 of the Treaty on the Functioning of the European Union, 12 May 2016, No. 1S-63/2016, para. 2.

<sup>72</sup> *Ibid.*, paras 4-14.

of HeidelbergCement group.<sup>73</sup> Also, in case HeidelbergCement would want to obtain information about AB “Akmenės cementas” business, the former undertook to hire professional advisers who would be under a duty not to disclose commercially sensitive information of strategic nature.<sup>74</sup> Therefore, the possibility for HeidelbergCement to obtain strategic information about AB “Akmenės cementas” activities was said to be limited.<sup>75</sup> In light of these circumstances and the fact that the Competition Council did not analyse in detail the specifics of the market and the question to what extent the two undertakings could have been considered as independent entities<sup>76</sup>, the Competition Council decided to terminate the investigation by stating that any further investigation would not have a significant impact on competition and consumer welfare and would not amount to a rational use of resources.<sup>77</sup>

18. A failure to notify a concentration as well as the performance of the acts related to the concentration during the time period when the concentration was notified to the Competition Council were analysed in the *Vitoma* case.<sup>78</sup> In this case, the Competition Council found that after signing an agreement of the sale and purchase of state-owned shares with VĮ “Valstybės turto fondas”, UAB “Vitoma” failed to notify the Competition Council about the concentration. Furthermore, after the concentration was notified to the Competition Council, UAB “Vitoma” asked for the Competition Council’s permission to implement certain acts related to the concentration, such as to appoint a representative to the board of AB “Antrimeta” and to pay LTL 1 900 000 (approx. EUR 550 725) to VĮ Valstybės turto fondas. The Competition Council did not issue a permission to do so on the basis that the concentration in question was related to a horizontal merger in the market for buying-in (processing) of ferrous scrap and could lead to a substantially higher degree of concentration in the market and the creation of a dominant position. Nevertheless, UAB “Vitoma” still paid the sum to VĮ “Valstybės turto fondas”, thus, disregarding the Competition Council’s decision and infringing the standstill obligation. The Competition Council imposed a fine for both infringements, i.e. the failure to notify the concentration and the performance of the acts related to the concentration and which were not allowed by the Competition Council.

19. Finally, in some cases, the Competition Council, although it started the investigation on the suspected failure to notify the notifiable concentration, terminated the investigation. The *Swedbank* case stands as an example where the Competition Council did not find that control was acquired.<sup>79</sup> The Competition Council analysed whether, on the

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<sup>73</sup> *Ibid.*, para. 39.

<sup>74</sup> *Ibid.*, para. 40.

<sup>75</sup> *Ibid.*, paras 39-40.

<sup>76</sup> *Ibid.*, para. 41.

<sup>77</sup> *Ibid.*, para. 42.

<sup>78</sup> Decision of the Competition Council of the Republic of Lithuania on the implementation of the concentration by UAB “Vitoma” by acquiring the shares of AB “Antrimeta”, UAB “Įkrova”, UAB “Metalo laužas”, UAB “Antriniai metalai”, 10 July 2000, No. 12/b.

<sup>79</sup> Decision of the Competition Council of the Republic of Lithuania on the termination of the investigation on the compliance of actions of AB “Swedbank” with the requirements of the Law on

basis of credit agreements, AB “Swedbank” (hereinafter: the Bank) acquired control of the (group of) undertaking(s), to which the credit was granted (i.e. whether the Bank had a possibility to exercise a decisive influence on the strategic decisions made by the (group of) undertaking(s)), and thereby implemented the concentration, which had to be notified to the Competition Council.<sup>80</sup> However, the Competition Council did not find that the Bank had acquired control of the (group of) undertaking(s) and thus terminated the investigation.<sup>81</sup> Furthermore, in *Fragrances International*,<sup>82</sup> the Competition Council terminated the investigation on the suspected failure to notify a notifiable concentration due to the fact that the suspected infringement possibly lasted for a short time and it was not entirely clear whether the acquisition of control, in fact, took place. Based on the Priority, the Competition Council concluded that any further investigation would not amount to a rationale use of the Competition Council’s resources.<sup>83</sup>

20. In conclusion, the cases described above illustrate that the Competition Council and the Lithuanian courts consider a failure to notify a notifiable concentration as a serious competition law infringement. Such violations are not regarded as merely procedural infringements of the competition law rules on the control of concentrations, but are, instead, treated as serious infringements, which may trigger the imposition of fines.

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Competition of the Republic of Lithuania while implementing concentration, 19 September 2013, No. 1S-128.

<sup>80</sup> *Ibid.*, paras 51, 53-81.

<sup>81</sup> *Ibid.*, paras 82-84.

<sup>82</sup> Decision of the Competition Council of the Republic of Lithuania on the termination of the investigation on the compliance of actions of UAB “Fragrances International” with the requirements of Articles 9(2) and 10(1) of the Law on Competition of the Republic of Lithuania, 30 January 2014, No. 1S-12/2014.

<sup>83</sup> *Ibid.*, paras 26-27.