This *Competition Review of Lithuania* was prepared by the OECD Secretariat to support the review of Lithuania undertaken by the OECD Competition Committee as part of the process for Lithuania’s accession to the OECD (see the Roadmap for the Accession of Lithuania to the OECD Convention [C(2015)92/FINAL]), which was launched in April 2015, when the OECD Council decided to open accession discussions with Lithuania. This process included a requirement to evaluate Lithuania’s willingness and ability to implement the substantive OECD legal instruments within the Competition Committee’s competence, and to assess Lithuania’s policies and practices in comparison to OECD best policies and practices in the field of competition policy.

The report that follows provides the results of this assessment. It finds that Lithuania’s competition law deals comprehensively with restrictive arrangements (including hard-core cartels and bid rigging), abuse of dominance and mergers. Lithuania’s competition authority (the Competition Commission) effectively uses the provisions in its enforcement efforts, including in cases against state-owned firms and other public bodies. Lithuania has a comprehensive system in place for the review of the impact of proposed legislation, and the Competition Commission is regularly involved in the review process to identify unnecessary restrictions of competition. The Competition Commission is co-operating effectively with competition authorities in other countries. However, it would be advisable for the government of Lithuania to consider the best possible trade-off, given the local circumstances, between independence and advocacy effectiveness; and to consider ways in which stronger budgetary independence could be provided to the Competition Commission.

Lithuania became an OECD Member on 5 July 2018. The report, prepared by Carolyn Galbreath, consultant to the OECD, was finalised in the course of the first half of 2017 and the information in this report is current up to that date.
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1. Introduction

On 9 April 2015, the OECD Council decided to open accession discussions with Lithuania. On 8 July 2015, the Council adopted a Roadmap for the Accession of Lithuania to the OECD Convention [(C(2015)92/FINAL)] (Accession Roadmap) which sets out the terms, conditions and process for its accession. The technical reviews and formal opinions adopted by the Committees cover two principal elements: i) an evaluation of the willingness and ability of Lithuania to implement any substantive OECD legal instruments with the committee’s competence; and ii) an evaluation of Lithuania’s policies and practices as compared to OECD best policies and practices, with reference to the corresponding Core Principles set out in the Appendix to the Accession Roadmap.

- The core principles of the Competition Committee to be taken into consideration in the competition accession review are:
  - Ensuring effective enforcement of competition laws through the establishment and operation of appropriate legal provisions, sanctions, procedures, policies and institutions.
  - Facilitating international co-operation in investigations and proceedings that involve application of competition laws.
  - Actively identifying, assessing and revising existing and proposed public policies whose objectives could be accomplished with less anti-competitive effect, and ensuring that persons or bodies with competition expertise are involved in the process of such competition assessment.

This report is submitted to assist the Competition Committee’s accession review of Lithuania. The report describes the context and foundations of competition policy, substantive law and enforcement experience, institutions, special exclusions and sectoral regulatory regimes, and the treatment of competition issues in regulatory and legislative processes. It examines Lithuania’s willingness and ability to implement OECD legal instruments in the field of competition as well as its policies and practices as compared to OECD best policies and practices in the field of competition law and policy.

This Review is divided into seven sections: Section 1 addresses the context and foundations of competition law, policy and practice in Lithuania; Section 2 addresses the structure and coverage of the competition law Lithuania; Section 3 addresses how the law is applied by the Competition Council and the courts; Section 4 addresses the priorities, programs and resources of the Competition Council; Section 5 addresses special competition regimes and the requirement of other government agencies to ensure adherence to competition principles and practices; Section 6 addresses the extraterritorial effects of Lithuanian competition practices and co-operation by the Competition Council with international competition agencies; Section 7 of the Review contains a discussion of Lithuania’s agreement with and progress implementing the 12 OECD Recommendations in the field of competition. The report highlights areas where additional steps might be taken to integrate the acquis into Lithuania’s competition policies, laws and practices.

Context and Foundations
1.1. Historical Context

In a little over 25 years since the restoration of its independence, the Republic of Lithuania (Lithuania) has changed from a managed economy to a market economy that in the past few years has been one of the fastest growing in Europe. Since the restoration of independence, Lithuania has rapidly become a part of the international community of nations. It joined the United Nations in September 1991 and in 2001 became a member of the World Trade Organization. It is a member of the International Monetary Fund. In 2004 Lithuania joined the NATO alliance.

In June 1995, Lithuania signed a Free Trade Agreement with the European Community, which came into effect on 1 February 1998. Article 37 of the Agreement provided for an approximation of Lithuanian competition law with the competition rules of the EC Treaty. In 2004 Lithuania became a Member State in the European Union and holds 11 seats in the European Parliament. It is a signatory to the Schengen Convention and in January 2015 adopted the EU common currency.

The political and economic context in which Lithuania’s competition law and policies are operating is that of a small, rapidly evolving country of fewer than three million people. Lithuania covers a total of 65,300 square kilometres, shares borders with Belarus, Latvia, Poland and Russia (Kaliningrad Oblast), and has 90 kilometres of coastline adjacent to the Baltic Sea. Its capital is Vilnius, which is the largest city. The official language is Lithuanian.

On 11 March 1990 Lithuania became the first country to declare independence from the Union of Soviet Socialist Republics. A national constitutional referendum established the Constitution, which entered into force on 2 November 1992. Lithuania’s democratic republic has a unicameral Parliament (Seimas). The President of Lithuania, the head of state, is directly elected by the populace for a term of five years (with the possibility of re-election to a second term). The Seimas consists of 141 members, 71 of whom are elected from single-seat constituencies and 70 of whom are elected in a national constituency by proportional representation. Members of the Seimas serve terms of four years. The Prime Minister is the head of government. The Council of Ministers of the government are nominated by the Prime Minister, appointed by the President and approved by the Seimas. The government has 14 ministries and a number of government agencies administered by the Chancellor.

The last national election was concluded on 23 October 2016. President Dalia Grybauskaite was re-elected for a second, five-year term. The new government was formed by a coalition between the Lithuanian Farmers and Greens Union (LFGU) and the Social Democratic Party of Lithuania. On 22 November 2016 the Prime Minister, Saulius Skvernelis, was appointed by Presidential decree (Decree No 1K–796).

Lithuania’s Constitution establishes territorial administrative units and provides the right of local self-government to 60 municipalities by municipal councils that are elected for terms of four years. Municipal councils maintain their own budgets, may enact taxes and organise other activities of local self-governance. Municipalities may petition directly to the courts regarding violations of their rights. The Constitution requires the government of Lithuania to supervise the observance by municipalities of the Constitution, the laws and execution of the decisions of the government.

The highest courts in Lithuania are the Supreme Court and the Constitutional Court. The constitutionality of legislative acts may be appealed to the Constitutional Court, which ensures the supremacy of the Constitution in the Lithuanian legal system. The Supreme Court is the court of final appeal from the civil and criminal courts of Lithuania. Both courts hear appeals from courts of appeals, district and local courts. There are also specialised administrative courts, which adjudicate disputes arising from administrative actions by government entities. The Vilnius Regional Administrative Court (VRAC) and the Supreme Administrative Court of Lithuania (SACL) are the two courts with principal responsibility for appeals from competition cases.
1.2. Economic Context

The OECD 2016 Market Survey of Lithuania describes the country as a small, open economy with an institutional environment that is “overall stable, transparent and market-friendly.”¹ The country has been one of the fastest growing economies in Europe in the past 15 years and from 2000 to 2007 experienced average annual growth of 7.5%. The 2009 financial crisis had severe effects on the economy. The economy recovered quickly and had an average annual growth of 3.5% between 2010 and 2014, which returned real GDP to its pre-crisis level. From a high of 9% in 2010, the fiscal deficit fell to below 1% of GDP in 2014, and unemployment, which had peaked at 18% in 2010, declined to 11% in 2014.

The Lithuanian economy has been volatile but also resilient to shocks.² Since 1991 the factors that have contributed to volatility in the economic markets are identified as: i) the transition from a central planning system to a market economy; ii) reforms of price liberalisation and small-scale privatisation; iii) establishment of a national currency followed by a domestic banking crisis in 1995; iv) declines of military goods as a share of overall production; v) diversification of supply chains and opening of the economy to foreign trade; vi) the effects of the Russian financial crisis in 1997-98; and more recently, vii) the 2008-9 financial crisis.

The adoption of the EU common currency in 2015, establishment of a non-partisan independent fiscal council and creation of a multi-annual budgetary framework are credited in the 2016 Market Study for strengthening Lithuania’s fiscal framework. Lithuania’s present fiscal position was achieved by significant consolidation in the aftermath of the financial crisis, two-thirds of which was achieved through cutting expenditures, including decreases in public wages, temporary cuts in pensions and reductions in selected social benefits.

The economic environment in Lithuania has steadily improved since the financial crisis. In 2015 the amount of investment was 15.4% greater than in the previous year. Income levels have risen steadily since independence and between 1995 and 2013 GDP per capita rose from one third to two thirds of the OECD average. The employment rate of almost 66% is seven percentage points above the rate observed in 2001 and is above the European average.

Educational attainment is one of the highest in the world, with half of the population having a tertiary level of education.³ In an OECD Survey of Adult Skills, adults in Lithuania show above-average proficiency in numeracy and average proficiency in literacy compared with adults in the OECD countries participating in the survey, and men and women demonstrated similar proficiency.⁴ Lithuania has one of the largest shares of workers who have higher literacy skills than those required for their jobs.

In 2016, Lithuania ranked twenty-first in the World Bank Ease of Doing Business Index. According to the Index, the cost to start a new business fell from 4% to 0.6% of income per capita between 2003 and 2015.

¹ OECD Economic Surveys – Lithuania, March 2016. www.oecd.org/eco/surveys/Lithuania. This is the first OECD Economic Survey of Lithuania and was prepared under the auspices of the Secretary-General of the OECD. Unless otherwise noted, all descriptions of the economic context of Lithuania are taken from the OECD Economic Survey.


During the same period the average time that it took to register a company fell from 26 days to 3.5 days. Among the reforms adopted were a "one-stop-shop" for online business registration and a new legal form of company, a small limited partnership, without minimum capital requirements. The burden of some product-market regulations, which protected incumbents and deterred market entry has fallen substantially. By 2013 the complexity of regulatory procedures was reported to be less stringent than the average OECD country.

An OECD industry analysis for the period 2006 to 2013 identifies those policy changes as contributing to productivity both within sectors and to shifting productivity by enabling increased entry of small firms that subsequently obtained market share at the expense of poorer-performing incumbents. The report also finds the exit rate for firms in Lithuania was around double the European Union average during the period. Lithuania’s substantial achievements and its strong overall fiscal position must be balanced with the continuing challenges it faces. The impressive economic gains by Lithuania since 1992 have not achieved full market-based liberalisation of the Lithuanian economy. The OECD Economic Survey provides two main messages: i) it is critical to boost productivity and accelerate the convergence process, strengthen institutional frameworks, and raise GDP to provide for more efficient allocation of resources; and ii) achieving more inclusiveness, by reducing inequality and poverty, and improving health and life expectancy will contribute to economic stability and progress.

Lithuania’s GDP remains very dependent on exports, which account for 81% of GDP. In 2015, counter-sanctions by Russia caused the value of exports to Russia to shrink by 40%. Productivity in Lithuania grew an average of 5% per year between 1995 and 2014, but it remains one-third below the OECD average. Investment as a share of GDP remains below pre-crisis levels. There is a large informal economy. Continued tax reforms are needed to address tax evasion. Under-collection (tax collection was estimated at 61% of tax capacity by the IMF in 2014) and a gap in VAT collections (64% of potential VAT) are sources of underfunding for government initiatives.

Structural unemployment is estimated at between 10% and 12%. Wage inequality and poverty rates are high and job satisfaction is low. Life expectancy is the lowest among the OECD countries. Like many OECD countries, Lithuania has an aging population and low fertility rate. The working-age population is declining. The declining population is exacerbated by average net rates of emigration at one of the highest levels in the European Union. Since 1990, 22% of the population has emigrated. The highest proportions of emigrants were young, female and well-educated. Most emigrants leave for economic reasons. On a brighter note, in 2014 the country had the lowest net emigration since 2002.

The OECD Economic Survey cites administrative burdens to hiring foreign workers (particularly non-EU nationals), weak management and innovation capacity by firms, low levels of research and development funds despite generous tax incentives and the fact that over 80% of small and medium business were characterised as having “low-absorptive capacity” as potential risks to continued economic growth. Innovation challenges were also highlighted by the 2016 International Monetary Fund Article 16 Consultation and Staff Report which found that, “Lithuania ranks poorly on innovation indicators, occupying the forth [sic] place from the bottom on the European Innovation Score Board.”

A December 2016 OECD Services Trade Restrictiveness Index (STRI) for Lithuania found that the country scores below average for 20 out of 22 sectors. Services account for 36% of gross exports but for 64% of value-added.
added items, which means that Lithuania’s exports of goods rely intensively on services inputs, according to the STRI Index.

The sectors with the highest scores relative to Lithuania’s average score were legal services, road transport and air transport services. The Index notes that “broadcasting, courier services and telecommunication are the three sectors with the lowest score relative to the average in Lithuania. In broadcasting services, three channels are owned by Lithuanian National Radio and Television. In courier services, a dominant services provider in letter post items is state-owned, services providers outside universal services has [sic] to apply specific quality standards, but the sector is otherwise subject to the general regulatory framework. In telecommunications, the State owns a major fixed-line telecommunication supplier.”

The Lithuanian government continues to have substantial ownership interests in enterprises within the state. The OECD 2016 Economic Survey highlights Lithuania’s State-owned enterprises (SOEs) as an area of particular concern and one that is highlighted by the OECD Product Market Regulation (PMR) indicators. The OECD 2016 Economic Survey found that many of the SOEs perform commercial functions poorly and attained only one half of the government’s targeted return on investment of 5%. The report also commented on the lack of clear separation between SOE boards and government ministries, which tend to high board representation which raises the potential for interference in business operations.

A 2015 OECD Review of Corporate Governance of State-Owned Enterprises Lithuania (SOE Review) confirms the level of state ownership in businesses. At the end of 2014, the state was the sole or majority owner in 131 SOEs. In 2016, the SOE Review was updated in the Corporate Governance Accession Review. The Review noted that as of the end of 2015, the state was the full or majority owner of 128 enterprises and 5 listed subsidiaries of directly-owned SOEs. The value of SOEs was USD 5.16 billion (United States dollars) and SOEs employed 41 700 individuals, which accounted for 3.2% of national employment in Lithuania. The largest SOE employers are the Lithuanian Railways, Lithuanian Energy and Lithuanian Post, which together employed 23 401 people. The Corporate Governance Accession Review notes that the level of national employment by SOEs in Lithuania is above the 2.4% average for all OECD countries and places Lithuania in the top 10% of OECD countries with the largest SOE sectors relative to national employment.

The OECD SOE Review describes the three legal forms of SOE ownership as: i) state enterprises, i.e. statutory SOEs which have no shares and may only be owned by the State (Statutory SOEs); ii) private limited companies that must have fewer than 250 shareholders and whose shares may not be traded publicly (limited liability SOEs); and, iii) public limited liability SOEs that are incorporated as limited liability, joint-stock companies, traded on exchanges and subject to general company law (private limited liability SOEs). The latter two forms of SOEs are referred to as “fully corporatised SOEs.” At the end of 2015, there were 79 statutory SOEs, 30 private limited liability SOEs and 19 public limited liability SOEs.

Of the 79 Statutory SOEs, which accounted for 39.32% of the total asset value of all SOEs, 18 were categorised by the Corporate Accession Review as large SOEs. Forty-eight of the Statutory SOEs had no

11 Ibid, page 41.
12 Ibid, page 42.
board of directors. Private limited liability SOEs accounted for 36.24% of the total asset value of all SOEs and two of them were categorised as large SOEs. Six of the 30 private limited liability companies had no board of directors. Public limited liability companies accounted for 24.45% of the asset value of all SOEs, and four of them were categorised as large SOEs. Four public limited liability companies did not have a board of directors. At present, Lietuvos energija, accounts for 70% of all dividends by SOEs in Lithuania.\(^\text{13}\)

As of the end of 2014, ownership of SOEs was held by 12 government ministries and five public institutions.\(^\text{14}\) The OECD SOE Review noted that under the legal framework there was no consistent separation between the state’s ownership and other functions that can influence SOEs. In some cases those government ministries simultaneously exercise sectoral regulation and ownership rights in SOEs, while in other cases the two functions are carried out by different departments within a ministry. Since 2010 Lithuania has undertaken a series of legislative reforms designed at increasing transparency in SOEs by establishing clearer standards for returns on investments, benchmarks and better governance practices, all of which are described in detail in the OECD SOE Review.

The more recent Corporate Governance Accession Review notes that Lithuania has made some progress in improving SOE’s operational autonomy: a great number of independent directors have been appointed and collaboration is being given to increase the requirement for independent directors from one third to one half and to remove "political" appointees (vice ministers) from the few boards, where they remain. However, in practice it remains limited by the predominance of ministerial representatives on boards and the apparent use in certain cases of “instructions” from ministries.\(^\text{15}\) The Review also notes that while Lithuanian SOEs are not formally exempt from the application of general laws, tax codes and regulations, in practices differences in the operational conditions between SOEs and private enterprises “can create distortions in the competitive landscape.”\(^\text{16}\)

“The Ministry of Economy has identified 67 state enterprises engaged in predominately economic activities and proposed their conversion to limited liability companies. Efforts are also underway to merge the 11 state-owned road maintenance enterprises and 42 forestry enterprises, with a view to improving corporate efficiency.”\(^\text{17}\)

Those changes which will require legal reforms have been presented to the Parliament for discussion.

Lithuania’s Law on Companies is applicable to all 49 fully corporatised SOEs. At the time of the Corporate Governance Accession Review, that law was under review. The Law on State and Municipal Enterprises is applicable to all 79 statutory SOEs. The Law on the Management, Use and Disposal of State and Municipal Assets applies to all securities held by the state and stipulates that responsibility for ownership and management of state assets resides with both the Seimas and Council of Ministers. The Law on the Manager of State Assets Managed on a Centralised Basis, which was passed in 2014, establishes the body entrusted to managing state-owned real estate assets and for carrying out privatisations of SOEs and implementation of the state’s governance policies.\(^\text{18}\)

\(^{13}\) Information supplied by Lietuvos energija.

\(^{14}\) OECD SOE Report, page 15. “As of end-2014, the Lithuanian government directly or indirectly held shares in seven listed SOEs or subsidiaries, as follows: two companies whose shares were held directly by ownership ministries (Klaipėda Oil and Lithuanian Shipping Company); two subsidiaries of wholly state-owned EPSO-G (Amber Grid and Litgrid); and three subsidiaries of wholly state-owned Lithuanian Energy (Lithuanian Energy Production, Lesto and Lithuanian Gas).”

\(^{15}\) Corporate Governance Accession Review, page 122.

\(^{16}\) Ibid.

\(^{17}\) Ibid.

\(^{18}\) Corporate Governance Accession Review, pages 44 to 47.
The Law on Enterprises and Facilities of Strategic Importance to National Security and Other Enterprises of Importance to Ensuring National Security specifies entities and facilities which must belong to the State by right of ownership and the conditions under which a portion of the capital of state-owned companies may be held by private national and foreign capital. The law is presently in the process of being reviewed and it is expected that a draft of amendments may be submitted to the Government in the near future.

Facilities of national strategic importance that fall within the right of State ownership include the three airports (Vilnius International Airport, Kaunas Airport, and Palanga International Airport and air navigation and flight control systems), Lithuania Post (Lietuvos pastas), the Ignalina Nuclear Power Plant, the Lithuanian Oil Products Agency, the Klaipeda State Seaport Authority, and national expressway, and Inland Waterway Authority.\textsuperscript{19}

The Law also identifies enterprises and facilities of strategic importance to national security, which include public limited liability companies whose capital may be shared provided that the state retains the power of decision. They include, the Lithuanian Railways, Lithuanian Radio and Television, Lithuanian Energy (Lietuvos energija), Klaipeda Oil, Lithuanian Energy, Litgrid, the Liquified Natural Gas operator and implementation company, Jonava Grains, Detonas and Lesto. A portion of the capital of these companies may be held by national and foreign persons, provided the power of decision is retained by the State. The third category, enterprises of importance to ensuring national security and for which laws set forth additional requirements for their operations are: the Lithuanian Natural Gas Company, TEO LT, ORLEN Lietuva (a Polish company) and Amber Grid, among others.\textsuperscript{20}

Additionally, many municipalities are owners of in-house businesses and services operations. In some cases municipalities interpret the laws to preclude market competition with their in-house businesses; in other cases they compete with private suppliers of goods and services.

Lithuania’s quarter-century of progress from a planned economy to a more liberalised market economy is overall an impressive record of achievement. It is a testament to the operation of the rule of law, to a willingness of to adapt economic and social structures to a market-based economy, to an appetite to meet the requirements for membership in international organisations and the increased challenges occasioned by those memberships. Competition policy, laws and practices are important contributors to open, market-based economies. They continue to be key drivers in Lithuania’s economic progress.

\textbf{1.3. Foundations of Competition Law and Policy}

The roots of Lithuania’s modern competition rules precede restoration of independence. In 1989 a draft law called the Lithuanian Soviet Socialist Republic Law on Restrictions of Monopolistic Actions and Unfair Competition was published. Following independence in 1990, competition principles became important features for reorganising the centrally planned economy into a market economy.

The foundations of competition in Lithuania are found in Article 46 of Lithuania’s Constitution which provides:\textsuperscript{21}

“The economy of Lithuania shall be based on the right of private ownership, freedom of individual economic activity, and economic initiative. The State shall support economic efforts and initiative that are useful to society. The State shall regulate economic activity so that it serves the general welfare of the

\textsuperscript{19} Ibid. page 47.


Nation. The law shall prohibit the monopolisation of production and the market, and shall protect freedom of fair competition. The State shall defend the interests of the consumer.”

Interpretation of Article 46 is the sole jurisdiction of the Constitutional Court, which determines whether laws enacted by the Seimas are in conflict with the Constitution and whether actions by the Lithuanian government or President abridge the Constitution. Other national and regional courts and the Competition Council do not directly interpret Article 46; rather they rely on the judgments of the Constitutional Court. The Constitutional Court is often required to balance Article 46 with other Articles of the Constitution to reach a judgment concerning the relationship of competition to other Constitutionally-mandated societal rights, obligations and values. (Judgments relating to competition are discussed in greater detail Section 2.2.1).

The first Law on Competition was passed in 1992 and created a bifurcated agency model of two institutions: the State Price and Competition Office (part of the Ministry of Economy), which carried out investigations, and the Competition Council, which adopted decisions. The Law covered abuses of dominance, anticompetitive agreements, acts of unfair competition and conduct by executive bodies of government. It also provided for merger control, consumer protection, monitoring of State Aids, and anti-dumping provisions. Competition cases were decided by a Competition Council comprised of members of the Competition and Consumer Protection Office and representatives of various interest groups. In addition to the Law on Competition, the Competition Council had statutory functions assigned to it by the Law on Prices and the Law on Advertising. The Law was supplemented by various regulatory provisions that set out Lithuania’s competition regime. The 1992 Law had insufficiently robust procedural rules and investigatory powers for the competition authority.

The structure of enforcement under the 1992 Law on Competition evolved during the 1990s. The State Competition and Consumer Protection Office took on responsibilities for consumer protection. In 1993, responsibility for enforcing the Law on Prices was assigned to the State Price and Competition Office, the predecessor of the Competition Council. The law required public administrative entities to co-ordinate the prices of products with the competition authority. On November 11, 2014 the Law on Prices was repealed, effective 1 May 2015.22 The Competition Council does not have responsibility for monitoring price levels, mark-ups and market level structural indicators such as concentrations and entry and exits rates of undertakings, nor is it aware of any agency in Lithuania that has responsibility for such comprehensive analyses. Price levels of agricultural food products are generally available from the State Enterprise Agricultural Information and Rural Business Centre.23

The 1995 Free Trade Agreement with the European Community provided the impetus for enactment of a new Law on Competition, which came into force in 1999. Under the terms of the Agreement, Lithuanian competition law was based upon Articles 85, 86 and 92 of the EC Treaty (now Articles 101, 102 and 107 of the Treaty on the Functioning of the European Union, TFEU). The 1999 Law on Competition reorganised the Competition and Consumer Protection Office into the Administration of the Competition Council. Previous responsibilities for consumer protection and antidumping were transferred to other government institutions.

The 1999 Law on Competition (as amended) (LOC), establishes the Competition Council (Council) as an integrated agency responsible for both investigations and decisions concerning infringements. The Council consists of an administrative arm and a college of five Council members, led by a chairperson, who adopt decisions. The Council is financed from the Lithuanian state budget. Since early 2017, amendments to the

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LOC (Article 9.6) now provide additional financing to the Competition Council from merger filing fees. The LOC was amended on 1 May 2004 to incorporate the EU modernisation programme and Council Regulation (EC) No 1/2003 and the EU Merger Regulation Council Regulation (EC) No. 139/2004 into the Law. On 3 May 2011, the Law was amended to permit sanctions for infringements to be imposed on managers.

Although the 1999 LOC expanded procedural and investigative powers for the Competition Council, the Council remained accountable the Seimas and the Cabinet of Ministers. In 2010 the National Audit Office conducted an audit and published a report entitled, “Protection of Freedom of Competition” which concluded that: “1) neither independence, nor accountability of the Competition Council were sufficiently regulated; 2) the Competition Council could not prioritise its activities and was essentially required to investigate all complaints if they met certain formal requirements; 3) the Competition Council had no independent (free of governmental influence) financing and the financing it had was not sufficient.”

The Seimas addressed some of these findings by revising the LOC in 2012 and the Law on Advertising in 2013. The 2012 amendments explicitly state that the Competition Council is free and independent in its decision making when preforming its statutory functions and changing the Council’s accountability to the Seimas. The Council continues to be required to submit annual reports to the Seimas. The 2012 amendments also provide authority for the Council to prioritise its work and the investigation and prosecution of cases and to make more productive use of limited resources [Articles 24(4) (8) and 28(3) (3)]. The Council prioritises its work based upon publicly-announced Prioritisation Principles which permit it to allocate resources and act more independently when deciding whether to open investigations into alleged infringements. The Prioritization Principles were adopted by a resolution of the Council in 2012.

Item three of the 2010 National Audit Report, regarding the lack of independent and sufficient sources of funding, was not addressed in the 2012 legislation. On 12 January 2017 the Seimas passed legislation which provides that merger filing fees will be available to the Competition Council specifically to fund its merger enforcement activities under the LOC. This provision became effective on 1 February 2017.

1.3.1. Present Context of Competition Law in Lithuania

The Ministry of Economy establishes competition policy for the Republic of Lithuania. It drafts legislation and is responsible for ensuring that proposed economic legislation and regulations conform to the Constitution, EU Treaty and LOC. The Competition Council is designated as the main authority implementing competition policy and is responsible for supervising compliance with the LOC. It reviews legislation and provides comments to the drafter concerning compliance with the LOC. The Council also

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27 Resolution of the Competition Council of 2 July 2012 No. 1S-89. (They are not available in English.) See also DAF/COMP/WD(2014)136.

28 The draft law of 13 December 2016 can be retrieved from here (in Lithuanian): https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/bec527a0a0c111111e682539852a4b72dd4?jfwid= -wd7e85bbd. The amended Law on Competition, which came into force 1 February 2017, can be retrieved from here (in Lithuanian): https://www.e-tar.lt/portal/lt/legalAct/TAR_B8B6AFC2BFF1/qqjSwVVuUG.
enforces infringements of the LOC by private undertakings, public undertakings and entities of public administration.

Other sector responsibilities of the Ministry of Economy include: investment, innovation, exports, tourism, EU support, state-owned enterprises and public procurement policy. The Ministry is responsible for trade, company law, small and medium-sized businesses, reform of business supervisory institutions and better regulation, in addition to competition policy. The Council maintains an on-going dialogue with the Ministry of Economy concerning competition policy matters.

Although the Competition Council is independent in its operations and has decision-making autonomy, it is accountable to the Seimas. The Chairman of the Council has regular meetings with the President and Prime Minister to inform them about the Competition Council’s activities.29 The Law on Competition gives the Council chairman the right to participate in meetings of the Lithuanian government in a deliberative capacity and to voice his comments should the decisions proposed for adoption contradict the LOC.

The LOC covers the three main areas of antitrust and competition: 1) prohibition of anti-competitive agreements; 2) prohibition of abuse of a dominant position; and, 3) control of mergers and acquisitions. The Competition Council is also responsible for enforcing the EU Treaty provisions dealing with competition, Articles 101 and 102 on the Treaty for Functioning of the European Union (TFEU). Article 55 designates the Competition Council as the institution in Lithuania to co-ordinate matters of State Aid according to the European Commission rules.

Article 15 of the LOC covers acts of “unfair competition.” Undertakings are prohibited from performing “any actions contrary to fair business practices and good usages if such actions may be detrimental to the competitive potential of another undertaking.” Article 15 contains a non-exhaustive list of the most common forms of unfair competition infringements (including use of misleading and unlawful comparative advertising, the use, transfer or, disclosure of information representing a commercial secret of another undertaking without its consent, and imitating the product or product packaging of another undertaking without its permission, among other provisions).


The Competition Council shares competency for enforcement of the Law on Advertising with the State Consumer Rights Protection Authority and other designated state agencies. It is designated as the regulator for enforcement of the prohibition to use misleading and unlawful comparative advertising (Article 19(2) under the Law on the Prohibition of Unfair Business-to-Consumer Practices.30 Additionally, under Article 19.1.2 of the Law on Advertising the Competition Council enforces the prohibitions against misleading advertising (Article 5) and unlawful comparative advertising (Article 6).31


31 In addition, the Article 5.6 of Law of Advertising states that in all circumstances misleading advertising shall be recognised and advertising which contains the attributes of misleading commercial practice established in Article 7.1-21 of the Law on the Prohibition of Unfair Business-to-Consumer Commercial
The Council also supervises compliance with the Law on the Prohibition of Unfair Practices of Retailers (LPUPR). The Law was adopted in 2009 to limit the use of market power by retailers having “significant market power” and balancing the commercial interests of those retailer with that of their suppliers. The LPUPR prohibits abuses of superior bargaining position by large retail food chains towards food and beverage suppliers. Retailers are prohibited from taking actions contrary to fair business practices that: i) transfer their operational risks to suppliers; ii) impose supplementary obligations; or iii) limit the possibilities of suppliers to freely operate in the market. (Article 3). The prohibited actions are enumerated in the law. On 1 May 2016, the Law was amended with procedural changes designed to encourage its use by suppliers.32

Until recently the Competition Council was assigned regulatory duties for the railway transport market. In 2009, amendments to the Law on Railway Transport Reform assigned limited regulatory functions on a temporary basis to the Competition Council. In 2011, full regulatory responsibility was assigned permanently to the Competition Council under the Railway Transport Code. Those regulatory responsibilities included monitoring the railway transport sector, regulating relations between the public infrastructure manager and railway undertakings (carriers), examining disputes and supervising negotiations. In June 2016 the Railway Transport Code was amended and regulatory responsibility for Lithuania’s railroads was transferred to the Communications Regulatory Authority, effective 1 November 2016.33

In 2016, the Law on Competition and the Law on Self-Government of Municipalities was amended to impose sanctions on public administration entities that do not comply with the Law on Competition and to require that when a municipality establishes new economic activity it must obtain prior approval from the Competition Council. (See Section 2.4.2). The changes will come into effect on 1 July 2017. Since 1 January 2017, the Competition Council may impose monetary sanctions on public administration entities that do not comply with the Law on Competition, whereas previously the Council could only oblige an entity to terminate an infringement of the LOC.

The laws provide the Council with substantial authority and strong powers to address market-constraining activities by both private parties and government entities. SOEs present on-going challenges to full market liberalisation. Concentrations within private industry, often by legacy companies with entrenched market power, provide additional challenges to entry and innovation in Lithuanian markets.

The Competition Council vigorously uses the tools at its disposal to challenge anticompetitive behaviour and has achieved notable results that have been upheld by the Lithuanian courts. It is viewed as a very effective institution which has improved its operations and increased its effectiveness substantially in recent years. It is highly regarded by Lithuanian competition law practitioners and stakeholders and also by ministries and agencies of government. It has received recognition from international organisations, including International Competition Network (ICN) and the World Bank for its activities to promote competition. Nonetheless, the Competition Council faces challenges that are typical to young competition agencies, some of which are the result of budgetary constraints and staff turnover. None of these challenges, however, substantially detract from the strong record of achievement and effectiveness of the Competition Council.

32 The Law on the Prohibition of Unfair Practices of Retailers can be retrieved from here: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/47f691f2ce2cb11e68259852a4b72dd4?jfwid=16j6tpd5tb%20
2. Coverage of Competition Law

2.1. Policy Statements

Competition is recognised in Lithuania as a “universal value” and a key to achieving a high-functioning market economy. The Ministry of Economy states the policy objectives of competition are to protect and ensure fair and effective competition for the benefit of consumers and to improve business conditions to promote and sustain economic growth. (See, Guidelines on the Application of Competition Policy Provisions.) The Ministry has primary responsibility for ensuring that decisions passed by the government do not infringe the principles and the rules regarding competition and that the government “avoid[s] incorporating in legal acts any unjustified restrictions of competition, or any conditions that are discriminating or granting privileges.” The government actively assesses the impact of proposed legislation and its decisions on competition.

2.2. Scope of the Competition Law

The primary purpose of the Law on Competition is “to protect freedom of fair competition in Lithuania.” The LOC implements Council Regulation EC No. 1/2003, and other Council regulations with the aim of harmonising EU and Lithuanian competition law. In January 2017, the LOC was amended to implement the EU Damages Directive, 2014/104 EC. Those amendments became effective on 1 February 2017.

The Law includes within it coverage all competitive activity within the Republic. It covers activities of undertakings outside the territory of the Republic of Lithuania if those activities restrict competition in the domestic market of Lithuania and is consistent with the EU requirements. The Competition Council has opened investigations and taken actions against foreign companies operating in Lithuania. In one recent, highly-publicised case, the Council found that Gazprom, a Russian supplier of natural gas had infringed a previous merger commitment whereby it had agreed to negotiate the terms of future sales in Lithuania (the case is discussed below, in Section 3.5.4, Box 9). Conversely, when calculating fines in infringement cases concerning foreign undertakings, the Council takes into account only domestic sales by the companies. Only laws adopted by the Seimas may provide for exemptions to the Law on Competition. At the moment there are no explicit exclusions or exemptions from the general competition law in the national law. While Lithuanian law allows for both public and private undertakings, both are subject to similar treatment as regards competition law. Undertakings are prohibited from performing acts which restrict or may restrict competition, “regardless of their economic activity, except in cases where this Law or the laws governing individual areas of economic activity provide for exemptions.” (Article 2.1). Since there are no exemptions,

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35 Ibid.
36 Ibid.
government economic activities and those of SOEs are subject to the Law on Competition. Article 4 of the LOC (Duty of Public Administration Entities to Ensure Freedom of Fair Competition) reinforces the principles of Article 46 of the Constitution as they apply to acts of the state and provides:

*Article 4 – Law on Competition*

1. In carrying out the assigned tasks related to regulation of economic activities within the Republic of Lithuania, public administration entities must ensure freedom of fair competition.

2. Public administration entities shall be prohibited from adopting legal acts or other decisions which grant privileges to or discriminate against any individual undertakings or their groups and which give or may give rise to differences in the conditions of competition for undertakings competing in a relevant market, except where the differences in the conditions of competition may not be avoided when meeting the requirements of the laws of the Republic of Lithuania."

Municipalities and sector regulators are not exempted from the Law on Competition. A regulatory regime established by a national Ministry or agency or by a municipality that potentially restricts competition is subject to enforcement by the Competition Council under Article 4 LOC. The Competition Council reports that: “There are areas governed by laws (e.g. such sectors as energy and communications) where usual competition might not work as in fully liberalised markets.” Nevertheless, regulatory regimes are subject to the Law on Competition.

The Competition Council “control(s) compliance by undertakings and public administration authorities with the requirements of the Law.” (Article 18.1). It examines the acts of public administration entities and when they do not conform to Article 4 shall request the entity to repeal or amend the infringing section of the law or activity. In the event of non-compliance, the Council may file petitions in the Courts seeking enforcement of its decision. As noted above, (paragraph 57), since 1 January 2017, the Competition Council may impose fines on public administration entities that infringe the LOC of up to 0.5% of their annual budget, not to exceed EUR 60,000.40

The Council has a mandate to ensure that legislation does not contradict or abridge the LOC. It shall examine draft laws and other legal acts and submit its conclusions and proposals to amend laws and legal acts limiting competition (Article 18.1.7 and Article 18.1.8). Once legislation is passed the Council shall “perform the surveillance of competition effectiveness on the markets and provide conclusions and proposals to the Seimas or Government on the measures to ensure effective competition.” (Article 18.1.9). The Council may investigate and enforce infringements of the LOC against public administration entities (Article 18.1.3 and 18.1.5). Decisions taken by the Cabinet of Ministers are not covered by the law, but the Council may evaluate whether their decisions restrict competition and submit suggestions to mitigate restrictions. All government entities below the Cabinet of Ministers (i.e. ministries, agencies of government, etc.) are subject to Competition Council enforcement under Article 4.

The far-reaching coverage of Article 4 implicates both the decisions of government ministries that interpret laws and regulations, as well as the activities of municipalities. Municipalities are supervised by the government but enjoy a certain measure of autonomy. Nonetheless, they are clearly bound by Article 4. (As discussed in Section 2.4.2, below, the LOC and the law on Local Self-Government have recently been

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39 Questionnaire Response, Item 6.B.

40 Article 36.7. Additionally, if a public administration entity fails to amend or repeal the legal acts within the period specified by the Competition Council, a fine of up to EUR 600 for each day of failure to comply could be calculated (Article 36.6). The Competition Council would no longer need to launch a new investigation to establish the inactivity of the public administration (Articles 18.1.3 and 22.1.6).
amended to give further effect to Article 4 and more tools for the Competition Council to enforce compliance with Article 4.)

2.2.1. Constitutional Court Judgments Interpreting Article 46

The activities of government ministries and municipalities may also intersect with the requirements of Article 46 of the Constitution. The Constitutional Court is required to balance the requirements of Article 46 with other Articles of the Constitution that establish other rights of citizens and obligations of the government. The Court has recognised that public interest is dynamic and may require the state to expand, narrow or otherwise correct the regulation of economic activity accordingly.41

The Constitutional Court has issued more than fifty judgments balancing Article 46 with other Articles of the Constitution. Two judgments, one in 1997 concerning legislative restrictions on alcohol advertising,42 and a case from 2013 concerning health care services both illustrate the balancing factors used by the Constitutional Court.43 In the advertising case the Court held that Article 46 does not impose a duty on the state to decisively support all economic activities and that when regulating economic activity to serve the general welfare of the nation, the state may take into account welfare beyond material (financial) welfare. On that basis the Constitutional Court held that the state could restrict advertising of alcohol and tobacco. In the health insurance case the Court held that state-mandated compulsory health insurance must be regulated so that it serves the general welfare and in doing so must not deny the principle of fair competition. Although the state may regulate economic activity “in a differentiated manner… it may not deny the fundamentals of Lithuania’s economy, which are consolidated in the Constitution.”

In a 2015 case involving waste management (discussed below at Section 2.3.1), the Constitutional Court continued to define the scope and balancing required when applying Article 46. (A list of cases from 2012 to 2017 in which the Constitutional Court has balanced Article 46 with other Articles of the Constitution is attached as Annex A).

2.3. Article 4

Article 46 of the Constitution and Article 4 of the Law on Competition are of considerable significance on the practice of competition and market liberalisation in Lithuania. The scope of Article 4 enforcement by the Competition Council and the judgments of the courts illustrate the importance of Article 4. It has been used to enforce competition in markets that traditionally have been the subject of state-ownership and applies to both the activities of the national government and those of municipalities.

2.3.1. Application of Article 4 to Legislation and Acts of Government

The Competition Council ruled on an Article 4 case that involved fishing rights in the Baltic Sea. In another case, involving municipal waste management contracts, the Constitutional Court explained the balance of Article 46 with other Articles of the Constitution and application of Article 4 of the LOC. The judgment

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of the Constitutional Court was applied by the SACL in a subsequent Article 4 case involving waste management services in the municipality of Kaisiadorys. Each of those cases is discussed, below.

**Box 1. Baltic Fisheries case**

On 16 July 2014 the Competition Council issued a determination that Ministry’s Agriculture Rules setting and distributing quotas for fishing in the Baltic Sea (specifically points 9, 18, 19 and 22) failed to comply with Article 4 LOC. The Council’s investigation arose from a complaint by the Lithuanian Fisheries Producers Association that alleged discriminatory practices by the Ministry in awarding fishing quotas. The Council found discrimination based on three practices contained in the regulation and in 2014 the Ministry of Agriculture eliminated two of the discriminatory practices. It did not eliminate two other practices which the Council found abridged the LOC and ordered be eliminated. The VRAC affirmed the Council’s decision

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2.3.2. Application of Article 4 to Activities by Municipalities

The Competition Council regularly applies Article 4 to the activities of municipalities. The tensions surrounding municipal ownership and operation of services goes to the heart of effective liberalisation markets and the ability of private companies to compete. Many of them concern whether public procurement and licensing decisions by municipalities grant discriminatory conditions for competition, sometimes among private companies, but often between municipally-owned and operated companies and their private sector competitors. Municipal services involving waste collection, energy and water have been areas of particular focus by the Council and the courts.

In 2015 the Constitutional Court issued two rulings involving municipal services, one involving the provision of energy services and the other involving waste management services, *On Competition in the Sphere of Waste Management*. The municipal waste services judgment by the Constitutional Court was subsequently applied by the SACL to another municipal waste case. Those two judgments demonstrate the reasoned manner in which issues of municipal authority and exclusivity are applied by the Lithuanian courts.

The Constitution Court ruled that when municipalities are involved in assigning a mandatory municipal task, such as waste collection, they are required to assess the impact of their decisions on competition and must avoid taking decisions that grant privileges, create different conditions or otherwise discriminate against individual economic entities or groups of entities. The Court noted that from the standpoint of EU law and regulations, when waste management is designated by the Member State as a service of general economic interest it may limit competition only in cases where restrictions of competition are necessary to ensure provision of services under economically acceptable conditions, which would be obstructed by competition. Exceptions to the principles of competition must be strictly construed. The Constitutional Court also noted that EU law does not preclude its member States from “establishing more stringent rules from the point of view of competition law to ensure greater protection from actions contrary to competition.”

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44 Recently another dispute concerning allocation of fishing quotas on appeal to the SACL, was referred to the CJEU for a preliminary ruling concerning whether EU regulations prohibited the Ministry from choosing a method of allocating fishing quotas which leads to dissimilar conditions of competition. 1. The CJEU has not yet issued a decision concerning the referral. See, [http://www.ipv.lt/en/news/the-sacl-has-rr4v.html](http://www.ipv.lt/en/news/the-sacl-has-rr4v.html) for the SACL’s description of the case and CJEU referral. For the text of the CJEU referral, see [http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d6e5f659a06e714153992ed12f583291eb.e34Kax1Lc3eQc40LaxqMbhN4PaheQe0?docid=186621&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=163131](http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d6e5f659a06e714153992ed12f583291eb.e34Kax1Lc3eQc40LaxqMbhN4PaheQe0?docid=186621&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=163131).

Box 2. Application by the SACL of the Constitutional Court’s Waste Management Judgment

In March 2016, the SACL ruled on an appeal by the Municipality of Kaisiadorys from a decision of the Competition Council concerning a contract for waste management services awarded for an unlimited period of time to a single company, Kaišiadorių paslaugos. The procurement was executed in accordance with the Lithuania’s Law on Public Procurement governing in-house contracts. The municipality awarded the contract, seemingly in perpetuity, to its municipally-owned waste management company. The Council determined that the municipality concluded a contract without competitive procedures and that the municipality had not established conditions justifying the lack of competition or grant of exclusivity. It concluded the contract breached Article 4 and ordered the municipality to terminate the contract with Kaišiadorių paslaugos.

On appeal to the SACL the municipality argued that its contract was undertaken in compliance with the Law on Public Procurement and that its decision to award the contract was within its autonomous authority, as established by the Law on Local Self-Government. The SACL applied the principles stated by the Constitutional Court and held that an exemption is warranted only when “the public administration entity does not have the discretion to choose a certain model of behaviour, and simply implements the imperative that is set in the law.” The conditions for exemption from competition contained in Article 4.2 will not apply when the entity may exercise discretion. The SACL found that the municipality had not met that criterion for applying Article 4.2. The SACL also ruled that in-house contracts, which are permitted under the Law on Public Procurement (Article 10.5), do not abrogate the requirements of Article 4 LOC. The Court found that the municipality had failed to meet the standard set out by the Constitutional Court and that its contract with Kaišiadorių paslaugos was not objectively necessary to avoid a threat to the continuity, quality and availability of municipal waste services.

2.3.3. Cases finding no breach of Article 4

The Council does not apply a formulaic approach to evaluating Article 4 allegations. In some cases it has evaluated complaints and concluded that government activities did not infringe Article 4. The Council has recently reviewed a case involving a regulation promulgated by the Ministry of Energy that was thereafter adopted and established by the Council of Ministers. The Council found the Government’s regulation did not discriminate in applying the criteria for services of general interest. The Council also found that there is a distinction at law between energy produced by an entity for its own consumption, which is not “economic activity” versus supplying energy production to the market. The Council decision did, however, express doubts as to whether the Government’s programme complies with EU rules concerning State Aid and recommended a review under those rules. That decision was appealed to the VRAC which upheld the Council’s decision. The case presently is on appeal to the SACL.

The Council announced that it had opened an investigation of whether the Cabinet of Ministers’, 7 October 2015 decision No. 1083 concerning electricity generation and private suppliers complies with Article 4 LOC. More recently, the investigation was terminated, but the Competition Council suggested ways how

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48 Retrieved from: https://www.e-tar.lt/portal/lt/legalAct/1082e300762c11e5b7eb10a9b5a9c5f.
to reduce competition restrictions. Amendments to the Law on Competition effective in 2016 (Article 18.1.3) now preclude the Council from investigating actions by the Council of Ministers and limit the Council’s role to analysing whether actions by the Cabinet of Ministers impinge on competition and to present proposals for amendments that would eliminate competition concerns. After conducting such an analysis, on 6 April 2017 the Competition Council provided proposals to the Government to address competitive concerns.49

2.3.4. Investigations and Enforcement of Article 4

The Council also has been required to assess contracts for municipal services and discrimination by municipalities in favour of in-house entities. Each of these Article 4 cases from 2015 and 2016 involved limitations by municipalities on market competition. The unlawful restrictions were applied to taxi services50, bus lines, transportation services,51 waste management,52 municipally-supplied heating,53 and cemetery services.54

In light of the number of cases involving breaches of Article 4 by municipalities, beginning in 2014 the Competition Council undertook targeted advocacy programme designed to engage municipalities in training and discussion concerning the Law on Competition and the requirements of Article 4. Its outreach and advocacy with municipalities continues. These initiatives are discussed more fully in Section 4.7.

The Competition Council’s Article 4 investigations and enforcement activities are summarised in the chart, below. It covers the Council’s review of both actions infringements both by national ministries and agencies and those owned by municipalities, i.e. Public Administration Entities found to have violated Article 4.

49 The Competition Council recommended the Cabinet of Ministers: 1. to clarify electricity system reserve service definition and requirements thereof; 2. to order the Ministry of Economy to organise a competitive procedure for the selection of the electricity system reserve services provider; 3. to amend the legal acts concerning the assignment the mentioned services to Lietuvos elektrinė (a division of AB "Lietuvos energijos gamyba") so that competition would not be restricted.


Table 1. Article 4 Enforcement in respect of National and Municipal Public Administration Entities

<table>
<thead>
<tr>
<th>Year</th>
<th>2016</th>
<th>2015</th>
<th>2014</th>
<th>2013</th>
<th>2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public administration entities found to have violated Article 4</td>
<td>2 (Municipal – 2 National – 0)</td>
<td>5 (Municipal – 5 National – 0)</td>
<td>5 (Municipal – 4 National – 1)</td>
<td>2 (Municipal – 2 National – 0)</td>
<td>4 (Municipal – 3 National – 1)</td>
</tr>
<tr>
<td>Infringement Actions</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Decisions establishing non-compliance</td>
<td>4 (Municipal – 4 National – 0)</td>
<td>1 (Municipal – 1 National – 0)</td>
<td>0</td>
<td>0</td>
<td>1 (Municipal – 1 National – 0)</td>
</tr>
<tr>
<td>Initiated Investigations</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. Article 4 infringement</td>
<td>i. 2 (Municipal – 1 National – 1)</td>
<td>i. 0 (Municipal – 7 National – 0)</td>
<td>i. 4 (Municipal – 3 National – 1)</td>
<td>i. 5 (Municipal – 3 National – 2)</td>
<td>i. 1 (Municipal – 1 National – 0)</td>
</tr>
<tr>
<td>ii. non-compliance</td>
<td>ii. 4 (Municipal – 4 National – 0)</td>
<td>ii. 0 (Municipal – 4 National – 1)</td>
<td>ii. 1 (Municipal – 2 National – 1)</td>
<td>ii. 0 (Municipal – 4 National – 0)</td>
<td>ii. 0 (Municipal – 4 National – 0)</td>
</tr>
<tr>
<td>Refusals to Initiate Investigations</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. Article 4 infringement</td>
<td>i. 1 (Municipal – 0 National – 1)</td>
<td>i. 2 (Municipal – 1 National – 1)</td>
<td>i. 5 (Municipal – 2 National – 1)</td>
<td>i. 4 (Municipal – 2 National – 2)</td>
<td>i. 14 (Municipal – 3 National – 11)</td>
</tr>
<tr>
<td>ii. non-compliance</td>
<td>ii. 0</td>
<td>ii. 0</td>
<td>ii. 0</td>
<td>ii. 0</td>
<td>ii. 0</td>
</tr>
<tr>
<td>Cases Closed</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. Article 4 infringement</td>
<td>i. 0 (Municipal – 0 National – 1)</td>
<td>i. 1 (Municipal – 1 National – 1)</td>
<td>i. 0 (Municipal – 1 National – 1)</td>
<td>i. 1 (Municipal – 1 National – 1)</td>
<td>i. 0 (Municipal – 1 National – 0)</td>
</tr>
<tr>
<td>ii. non-compliance</td>
<td>ii. 0 (Municipal – 0 National – 1)</td>
<td>ii. 0 (Municipal – 1 National – 1)</td>
<td>ii. 0 (Municipal – 1 National – 1)</td>
<td>ii. 0 (Municipal – 1 National – 1)</td>
<td>ii. 0 (Municipal – 1 National – 0)</td>
</tr>
</tbody>
</table>

2.3.5. Activities of State-owned enterprises

As discussed above, the activities of State-owned enterprises (SOEs) are not, strictly speaking, the activities of “public administration entities” under Article 4. Under the definition of “undertakings” in Article 3.22 of the Law on Competition, “Public administration entities of the Republic of Lithuania shall be considered to be undertakings if they are engaged in economic activities.” Generally, SOEs are not entities of public administration, but rather are undertakings that are fully covered by the Law on Competition. SOEs have been found to infringe Articles 5, 7 and 8. Cases involving application of those sections of the Law on Competition to SOEs are discussed in Section 3. Activities of SOEs may also abridge other provisions of the Law on Competition (for example, Articles 15, concerning unfair competition).

2.4. Recent Amendments to the Laws Concerning Application of Article 4

2.4.1. Recent Amendments to the Law on Competition

In November 2016, the Law on Competition was amended to give the Competition Council more tools to ensure compliance with Article 4 by entities of public administration. Prior to the amendment the Council’s ability to effectively eliminate distortions of competition caused by public institutions and to ensure that those institutions would not engage in similar activities in the future was very limited. If the Competition Council found that a public administration entity was infringing the competition law it could only order the entity to amend or repeal the illegal acts or other decisions restricting competition. In practice the Competition Council’s orders were often ignored.

If the public entity did not comply, the Council was required to launch a separate investigation to verify non-compliance with its order. It could only appeal non-compliance by the public entity to courts after a
separate investigation and order. Cases involving non-compliance by government ministries were appealed directly to the SAC; while non-compliance by municipal entities and other public administration entities were appealed to the VRAC or other administrative courts of first instance (depending on jurisdiction) for the first level of review. Enforcement litigation for non-compliance was time-consuming and until a final decision was reached by the court, public entities often continued their infringements.

Amendments to the LOC that went into force on 1 January 2017 enable the Council to apply interim measures and oblige public administrative bodies to terminate illegal actions without a second investigation and order.\(^{55}\) They give immediate effect to Council decisions and allow the Council to impose fines on public administration entities of up to 0.5% of the public administration’s annual budget in the current year or not more than EUR 60,000 for failure to terminate infringements. If a public administration entity fails to amend or repeal the illegal acts within the period specified by the Competition Council, a fine of up to EUR 600 for each day of failure to comply may be imposed. The amendments will also enable the Council to apply to the VRAC to enforce its decisions.\(^{56}\)

The Competition Council expects that its ability to impose fines on public undertakings will have a deterrent effect and will lead to more efficient compliance with the Competition Council’s decisions and that together with the powers to impose fines, should encourage public administrative bodies to eliminate competition restricting decisions and deter them from adopting such decisions in the future.

### 2.4.2. Recent Amendments to the Law on Local Self-Government

In November 2016, Article 9 of the Law on Local Self-Government were amended (and new Article 9\(^{1}\) was introduced to the Law on Local Self-Government) to clarify the authority of municipalities to engage in new economic activities by establishing new municipally-owned companies. The amendments to the laws were initially proposed by the President of the Republic to address the competition practices of municipalities. Although the law was passed in November 2016 and initially was to come into effect in January 2017, the effective date of the entry into force of the law has been postponed to 1 July 2017. The amendments do not apply to public administration entities of the national government or interfere with the central government’s powers to establish public companies.

Article 9\(^{1}\) of the Law on Local Self-Government will permit a municipality to establish new municipal undertakings to provide public services if three criteria are met: 1) the performed economic activity is essential to satisfy the general interests of the municipal community; 2) based on their own commercial interests, other undertakings would not perform such activities or would not perform them in the manner necessary to meet the common interests of the municipal community; and, 3) the municipality does not grant special privileges to undertakings it owns and no individual undertakings or groups of undertakings will be discriminated against. Likewise, new municipal economic activities may only be assigned to an existing municipally-owned entity if the requirements of Article 9\(^{1}\) of the Law on Local Self-Government are fulfilled.\(^{57}\) In both circumstances, the municipality must obtain prior permission from the Competition Council to engage in new economic activity.\(^{58}\)

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\(^{55}\) At the date of the submission, only Lithuanian version is available: [www.e-tar.lt/portal/lt/legalAct/7eaa2980abda11e6b8444f0f29024f5ac](www.e-tar.lt/portal/lt/legalAct/7eaa2980abda11e6b8444f0f29024f5ac).

\(^{56}\) Questionnaire Response at Section 1.H. as supplemented by the Council. New Article 39.7 LOC.

\(^{57}\) Article 3.16 of the Law on Competition states, “Economic activity shall mean any type of manufacturing, commercial, financial or professional activities associated with the purchase or sale of goods, except for acquisitions by natural persons intended for personal and household need.”

\(^{58}\) Article 9\(^{1}\)2 states: “If the engagement in an economic activity is necessary in order to serve the common interest of the local community and the conditions referred to in paragraph 1 of this Article are not violated,
In order to receive permission from the Competition Council, the municipality will be required to provide
evidence to the Council that it has implemented a proper competitive procedure. (The results of the
competitive procedure must show that there are no undertakings operating in the market or potential
undertakings that could, having regard to their own commercial interests, ensure proper performance of
the necessary activity.) (New Articles 91.3 to 91.7 of the Law on Local Self-Government).

On 29 December 2016, the Competition Council adopted a Resolution Regarding the Approval of the
Description of the Procedure for Submission and Examination of Applications for Assessment of
Economic Activities Performed by Municipalities, (29 December 2016 No. IS-139 (2016) (Description).
Article 5 of the Description states: “The Application may be submitted only if the results of the competitive
procedure objectively indicate that an undertaking, which would perform activities necessary for common
interests of the community under publicly announced conditions, has not emerged or an undertaking(s)
has/have emerged that would not perform such activities in full.” The Description prohibits municipalities
from assigning activities to an existing or a newly created municipal entity without a competitive procedure
and lists the requirements the competitive procedure must meet. (Description, Articles 14 to 16). The
Council will announce the Applications it receives and its decisions concerning them on its website.
(Description, Articles 17 and 19). An annex to the Description contains the Standard Form of the
Application to be used by municipalities seeking Council review.

The Competition Council expects that implementing these amendments to the Law on Local Self-
Government, at least initially, will require expenditure of additional resources and time. The Council views
the amendments as generally positive in light of the many cases where municipalities have infringed Article
4 of the Law on Competition. It believes that the new amendments should quite effectively solve the
problem and in the long run has the potential to reduce the Council’s resources and time spent on Article
4 enforcement. The amendments have not been well-received by local governments and by some members
of the Bar. Some commentators suggested that some municipalities presently are establishing new
economic activities and entities so as to avoid the effects of having to apply to the Competition Council
for permission to undertake new economic activity, which will become effective on 1 July 2017.

The opposition to the amendments expressed by some commentators appears to be based, in some
instances, on reports by municipalities that after initial competition from new entrants and opening of
markets to private utility suppliers, the newcomers exited the markets allegedly because they had not
adequately accounted for long-term costs. If these reports reflect wide-spread activity, there is
understandable concern from municipalities that have universal services obligations to their residents and
where there might be disruptions in the supply of inputs.

On the other hand, other commentators attribute the reluctance by municipalities to embrace competition
(and lower input costs) to be due to the fact that they are using their municipally-owned production capacity
to cross-subsidise their networks (some of which are also outmoded and inefficient) and other municipal
services. Some competition practitioners have expressed concerns that because the amendments only apply
to municipalities they will not be adequate to completely eliminate anticompetitive practices by
government ministries.

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the municipality may establish a **new legal person** with the purpose of engaging in such economic activity **or
entrusting the engagement of a new economic activity to the existing legal persons** managed by the
municipality, only upon the receipt of a prior consent of the Competition Council of the Republic of Lithuania
(hereinafter: ‘the Competition Council’).” (Emphasis supplied). See generally, [https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/e1074a00d8cfc1e69c5d8175b5879c31?fjwid=-wd7z7m3ix](https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/e1074a00d8cfc1e69c5d8175b5879c31?fjwid=-wd7z7m3ix).
3. Application of Competition Law

In addition, to traditional areas of antitrust enforcement (anticompetitive agreements, abuses of dominance and concentrations) the Law on Competition contains sections dealing with “unfair competition.” It also designates the Council as co-ordinating institution in matters related to EU state aid rules (Article 55 LOC). The Council also enforces portions of the Law on Advertising,59 the Law on the Prohibition of Unfair Business-to-Consumer Practices,60 and the Law on the Prohibition of Unfair Practices of Retailers.61 The Competition Council’s enforcement of each of these laws and judgments of the courts interpreting them is discussed in this section. The range of sanctions available to the Competition Council and the courts for breaches of the laws is also addressed.

3.1. Coverage of the Law on Competition

The Law on Competition (LOC) covers anticompetitive agreements, abuses of dominant position and controls of concentrations (merger enforcement) in provisions that largely mirror and incorporate the Articles 101 and 102 TFEU, Regulation EC 1/2003 and the EU Merger Notification. The Law also includes specific prohibitions against unfair competition (Article 15) and provisions concerning State Aid (Article 55, previously Article 45). It adopts and incorporates the TFEU, European Commission practices and the judgments of the Court of Justice for the European Union (CJEU). The Council is designated as the single national competition authority authorised to apply the EU competition rules and supervise compliance with them in Lithuania. The LOC provides jurisdiction before the Lithuanian courts to enforce Council decisions. It gives individuals the right to file complaints before the Competition Council and to maintain private causes of action for damages resulting from infringements of the LOC.

The practices of the Competition Council are in the mainstream of the European Union, the OECD and international best enforcement practices. With the exception of the frequent necessity to apply these provisions to infringements by public administration entities, municipalities and undertakings in which the government maintains some degree of ownership interests, there is nothing unusual about the Council’s enforcement powers or its use of them. The Competition Council’s enforcement of each of the sections of the LOC is discussed below.

3.2. Anticompetitive Horizontal Agreements

Article 5 of the Law on Competition essentially mirrors the provisions of Article 101 TFEU. It provides that all agreements “which have the purpose of restricting competition or which restrict or may restrict competition” are prohibited and void. Four types of agreements, price fixing, territorial allocation, agreements concerning restrictions of production, sales, technical development or investment, and applying dissimilar terms to equivalent contracts are considered, “in all cases” to restrict competition and


are presumptively illegal. Agreements requiring supplementary obligations with no direct connection to the subject of the contract are also prohibited.

Prohibitions against anticompetitive agreements apply to undertakings, including combinations of enterprises (associations, amalgamations, and consortiums), institutions, organisations or other natural and legal persons. Liability for infringements and sanctions apply to both undertakings and managers. Infringements of Article 5 are not criminalised in Lithuania and the Competition Council does not believe criminal sanctions are necessary for robust, effective enforcement. The fine levels and sanctions are considered adequate and presently there are no initiatives by the Competition Council to expand or increase sanctions.

As with Article 101 TFEU, the list of agreements prohibited by Article 5 is not exhaustive and the Competition Council in each case looks at the context of the agreement from a legal perspective and evaluates the market characteristics and the economic context in which the agreement is applied. The Competition Council evaluates whether the agreement is restrictive by its “object” or based upon its “effect” on competition.

The lack of a checklist of prohibited agreements or black and white examples has been the subject of criticism, including at times by public entities, who express the desire for a more prescriptive approach to defining anticompetitive agreements and infringements. The Competition Council has not adopted more detailed rules specifically addressing the scope of prohibited and permissible activities among competitors and relies upon the CJEU case law and the European Commission’s guidelines and notices, including Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements (2011/C 011/01). The Competition Council’s website contains a detailed list of the documents on which the Council relies when assessing conformity of an agreement to Article 5 of the Law on Competition.

The LOC gives the Council authority to establish rules concerning minor infringements which due to their small influence cannot substantially restrict competition. The rules concerning minor infringements under Article 5.3 are set out in the Competition Council’s Resolution No 1S-84 (2016) of 22 July 2016, on requirements and conditions in respect of agreements of minor importance which are not considered infringing competition. Resolution No 1S-84 (2016) clarifies the requirements for agreements to be considered of “minor importance” and better aligns Lithuania’s rules with the European Commission Notice (2014/C 291/01) (EU De Minimis Notice). There currently are no fundamental differences between the Resolution and the EU De Minimis Notice.

Agreements that promote technical or economic progress may qualify for exemption under Article 6 LOC, which mirrors Article 101.3 TFEU. The burden of proving an exemption falls to the party claiming the exemption and agreements that by their object would otherwise infringe the competition rules are unlikely to qualify for an exemption. For example, alleged consumer welfare benefits will not be sufficient to override other prohibited motivations for restricting competition. A recent example is found in a case involving the Lithuanian Guild of Breweries, whose members entered into an agreement not to produce beer over a certain alcohol content based allegedly on concerns for the health of their customers, when in reality their self-imposed ban was to protect the members from lesser profits from sales of the so-called “strong beer”. The Competition Council found the agreement by the Guild and its members infringed both

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62 Questionnaire Response, Item 10.

63 Version valid from 1 November 2016: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/dfc60ef0543411e688d29c6e5e00dee?jfwid=-wd7z8djuh. At the date of submission, only Lithuanian version is available.
Article 5 LOC and Article 101 TFEU and the Guild agreed to terminate its agreement. The Council also prepared a Notice for Associations concerning the Law on Competition and prohibited agreements.

The LOC permits the Competition Council issue so-called “block exemptions” for certain types of agreements (Article 6.3). On 15 July 2010 the Competition Council adopted a resolution making its rules the same as those adopted by the European Commission. The resolution establishes that all EU regulations on block exemptions apply to agreements within Lithuanian territory and reduce EU annual turnover thresholds by a factor of 10. The Competition Council publishes the list of the block exemptions on its website. No special consultations with the market participants concerning the application of block exemptions are required by an undertaking prior to using a block exemption. The Council notes that most of its recent infringement cases have concerned anticompetitive agreements that restricted competition by object (and therefore could not be justified by the parties through the use of a block exemption). Consequently the Council’s consideration of the applicability of block exemptions has been rare. To date, the Competition Council has not applied Article 6.4 to revoke the use of a block exemption.

3.2.1. Article 38 Statutory Exemptions from Fines – Leniency

Infringements involving anticompetitive agreements are an enforcement priority by the Competition Council and substantial resources are devoted to horizontal infringement cases. Among the enforcement tools available to the Council is a statutory leniency (Article 38) for infringements of Article 5(1) that involve horizontal agreements between competitors and resale price maintenance (RPM). The statutory exemptions are explained by Council Rules, on immunity from fines and reduction of fines for parties to prohibited agreements, Resolution No. 1S-27, enacted in 2008. Lithuania’s leniency statute and implementing rules are in line with international best practices.

Immunity from fines is available to the first party that submits information concerning “direct or indirect price setting (fixing) as specified in Article 5.1,” as well as other anticompetitive agreements between horizontal competitors and RPM, if the information is submitted prior to the Council having initiated an investigation, the party was not the initiator of the infringement, and it submits complete evidence and provides full co-operation to the Council. The undertaking must admit its infringement and provide full co-operation. Exemption from fines and sanctions may be extended to the manager (CEO) of an undertaking (Article 40.3) which qualifies for immunity and where the manager has co-operated as required by the law. In 2012, Article 38 extended leniency to parties “to a prohibited agreement between non-competitors for direct or indirect price setting” under Article 5.1.1. Leniency for non-competitors has not been applied in practice.

Leniency applications may only be disclosed to undertakings that are the subjects of the immunity applicant’s allegations, for purposes of defence and as required by the courts (Articles 21.8-9 LOC).

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65 (No. 1S-140 Concerning the agreements that shall be deemed to be in accordance with Article 6.1.) The resolution, as amended (11 April 2013) can be retrieved from here: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.378593/gcf1RrzRAN.

66 Questionnaire Response, Item 3.B.ii.


Disclosure of the leniency information by those undertakings to other persons is forbidden and copies, transcripts and extracts of the information may not be made. Leniency applications may not be used as evidence in civil cases (Art. 53.5 LOC.).

Five leniency applications have been received by the Council; each has involved horizontal price fixing agreements. Even though the Competition Council has seen increased interest in leniency by undertakings, the programme still has not attracted considerable numbers of applications. Some legal counsel attribute the lack of wide-spread use of leniency as resulting from their clients’ decisions to deal with cartel behaviour internally rather than self-reporting their illegal agreements and seeking leniency. Their motivations are attributed to the small size of markets in Lithuania and a lack of enthusiasm for calling out the activities of competitors to the authorities.

Immunity from fines is not available if the Council has already initiated an investigation, but a reduction of fines of between 50% and 75% may be available to the first party who provides significant evidence to prove the infringement that the Council does not possess and meets the other conditions for immunity. The leniency rules provide reduction of fines for second-in co-operation and fines levels may be reduced by up to 50%. No immunity or reduction of fines is available if during the investigation it is established that the applicant destroyed, falsified or concealed evidence or disclosed the evidence to others, with the exception of other competition authorities and/or the European Commission. Prior to applying for leniency, undertakings may make an anonymous inquiry to the Council to determine if leniency is available. The Council’s Rules set out a marker system and provide a brief period of time (usually around 15 days) for a full application to be filed with the Council. Since the adoption of the Leniency Rules in 2008, the Council has granted very few markers.

The Competition Council is in the process of internal discussions concerning updating the existing leniency rules, which could encourage undertakings to co-operate more actively and use the leniency option more often. Changes are being considered to address and clarify procedural uncertainties and ensure greater predictability and transparency of the programme. Proposals to prohibit disclosure of leniency documents to third parties could in return ensure the predictability of the programme and enhance the Council’s credibility. Following a period for public consultation, the Council expects the new Leniency Guidelines to be published in 2017.

The Competition Council advertises the leniency programme in seminars for the public and trade associations. It encourages whistleblowing by the public and industry insiders. The Competition Council website has a link to its manual on “How to report a cartel?” In 2015, the Competition Council granted immunity to two cinema operators who entered into two illegal price fixing agreements with a third cinema operator and film distributor not to apply consumer discounts to blockbuster movies in the first two weeks of a screening. The Council also granted immunity in a cartel involving an agreement by two independent companies to apply a certain margin level to internal sales from a third company that was jointly owned by the employees of both companies. The cases illustrate that significant undertakings are aware of and are using the leniency and immunity options in Lithuania.

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69 On 18 December 2015, the Competition Council issued a decision fining three cinema operators, Forum Cinema, Multikino Lietuva and Cinamon Operations for fixing the prices of cinema tickets as part of two separate cartel agreements. Multikino Lietuva and Cinamon Operations filed leniency applications and took responsibility for their infringements. Forum Cinemas, the biggest cinema operator and film distributor in Lithuania, denied its participation in the cartels. Both Multikino and Cinamon received exemption from fines because their agreements with Forum concerned two different agreements and infringements. Forum Cinemas appealed the Competition Council’s decision, which was upheld by the VRAC on 16 June 2016.

70 Based upon a whistle-blower complaint, the Competition Council investigated allegations that two competitors, Lukrida and Manfula had participated in a cartel lasting two and a half years involving pricing
3.2.2. Enforcement of Article 5

The Council has applied Article 5 sanctions and high fines to price fixing involving both individual undertakings and associations of undertakings. The E-TURAS case involved agreed practices by the company (E-TURAS) and 29 travel agencies using its on-line booking services. On 7 June 2012, the Competition Council found that the travel agencies had used the E-TURAS on-line booking platform to limit the size of discounts (to 3%) on travel packages. The Council imposed fines totalling EUR 1.5 million on the parties for infringing Article 5 LOC and Article 101 TFEU. Following an appeal to the VRAC, the companies appealed to the SACL.

On 17 January 2014, the SACL made a referral to the CJEU seeking a preliminary ruling on the question of the validity of the Council’s decision and whether using the third-party E-TURAS system and other activities constituted “concerted practices” by the travel agencies (see Box 3). On 21 January 2016, the CJEU (Fifth Chamber) issued its judgment, which clarified and generally affirmed the Council’s position.71

Box 3. Judgment of European Court in E-TURAS

“Article 101(1) TFEU must be interpreted as meaning that, where the administrator of an information system, intended to enable travel agencies to sell travel packages on their websites using a uniform booking method, sends to those economic operators, via a personal electronic mailbox, a message informing them that the discounts on products sold through that system will henceforth be capped and, following the dissemination of that message, the system in question undergoes the technical modifications necessary to implement that measure, those economic operators may — if they were aware of that message — be presumed to have participated in a concerted practice within the meaning of that provision, unless they publicly distanced themselves from that practice, reported it to the administrative authorities or adduce other evidence to rebut that presumption, such as evidence of a systematic application of a discount exceeding the cap in question.”

“It is for the referring court to examine — on the basis of the national rules governing the assessment of evidence and the standard of proof — whether, in view of all the circumstances before it, the dispatch of a message, such as that at issue in the main proceedings, may constitute sufficient evidence to establish that the addressees of that message were aware of its content. The presumption of innocence precludes the referring court from considering that the mere dispatch of that message constitutes sufficient evidence to establish that its addressees ought to have been aware of its content.”

Based upon the judgment of the CJEU, the SACL evaluated the level of knowledge and participation by each of the travel agencies and E-TURAS UAB, owner of the online system. The SACL ruled that for those agencies that did not know of the restriction or which had opposed it, the Competition Council had not met for internal sales of internal combustion engines. The companies made purchases from a third company, Envia, which was owned by the employees of Lukrida and Manfula. The two companies then agreed on a minimum margin of 10% be applied to sales of internal combustion engines by Envia to their two companies. The investigation found that the two companies had participated in the shareholder’s meetings of Envia, had exchanged information and had agreed the minimum margins on purchases from Envia. On 11 February 2015, the Competition Council found that the companies had breached Article 5.1 LOC and Article 101(1) TFEU. It fined Manfula EUR 333 900 and Envia EUR 303 600. The whistleblower Lukrida, received immunity from fines of EUR 656 000. On 7 July 2015 VRAC largely affirmed the Competition Council’s conclusions and only lowered the fine for Envia from EUR 303 600 to EUR 218 695.61 so that it would not exceed the 10% turnover ceiling (Envia provided later updated information to the court that its gross annual turnover was lower in 2014 than the earlier data that was provided to the Competition Council showed and on which the CC’s calculations were based). Recently, on 18 April 2017, SACL affirmed the decision of VRAC. 71

71 European Court of Justice, Fifth Chamber, Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba, C-74/14, (16 January 2016.)
its burden of proof to establish concerted practices. The SAČL fined E-TURAS and those travel agencies that had engaged in anti-competitive practices in accordance with the fines level imposed by the VRAC.

**Box 4. Article 5 Enforcement involving Associations**

The Council has issued three notable decisions concerning Article 5 (and Article 101 TFEU) infringements by associations of competitors and their members. Each of the decisions was affirmed by the SAČL. In the first case the Council found that the Lithuanian Shipbrokers and Agents Association have established and maintained a decade-long cartel setting minimum tariff prices\(^{72}\). The decision was upheld by the SAČL although it reduced the level of fines on some individual association members.\(^{73}\) The second case involved the Association of Providers of Orthopaedic and Rehabilitation Services, which, along with its members entered into illegal agreements concerning the pricing and production level for their orthopaedic products. The illegal agreements were done with the knowledge and tacit accent of the Lithuanian government agency charged with regulating and monitoring expenditures for orthopaedic products. The case illustrates the application of both Articles 4 and 5 LOC to collusive agreements by an association and the Ministry that should have been regulating the anticompetitive activity\(^{74}\).

On 17 May 2012, the SAČL upheld the Council’s decision\(^ {75}\).

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\(^{72}\) In a decision issued on 8 December 2011, the Council ruled that the Lithuanian Shipbrokers and Agents Association and its members, 32 shipping companies, had established and maintained a decade-long cartel agreement to set minimum tariffs for agency services. The Council found evidence that after agreeing on and setting prices, the cartel participants announced them in leaflets and on the Association’s website. Additionally, the Association’s Code of Ethics introduced sanctions on members who applied discounts from the recommended tariffs. The Competition Council ruled that the Association and its members had breached Article 5 LOC and Article 101 TFEU. 30 of the 32 contactors appealed the decision. Following a decision by the VRAC upholding the Council’s decision, the parties appealed to the SAČL, which upheld its decision. The SAČL affirmed that the agreement concerning minimum agency tariffs had as its object establishing higher shipping agency costs, thereby restricting competition in the territory of national seaport of Klaipėda. It also ruled the infringements breached Article 101 TFEU. However the Court substantially reduced the level of fines on the individual members of the association.

\(^{73}\) Competition Council Press release, 7 April 2014.

\(^{74}\) In January 2011, Council imposed fines of 3 million LTL on 11 producers of orthopaedic products and the Association of Providers of Orthopaedic and Rehabilitation Services for concluding and carrying out prohibited agreements for technical orthopaedic products from 2006 to 2011. The undertakings had concluded agreements concerning prices of orthopaedic products and quantities of production. The agreement by the Association and its members was made with the knowledge and participation of the Lithuanian national Compulsory Health Insurance Fund (CHIF), which compensates insured customers for expenditures related to the acquisition of orthopaedic products. The Council ruled that the activities of the CHIF constituted a breach of Article 4.1 LOC and obliged the National Health Insurance Fund (NHIF) to terminate the scheme. A Working Group was formed, which included a Council representative, to prepare the necessary drafts of legal acts to ensure that orthopaedic technical articles would in the future be purchased in a competitive manner. The Council ruled that the agreements of the Association and it members were very serious infringements of Article 5 LOC and Article 101 TFEU. The Council imposed fines on the Association of Providers of Orthopaedic and Rehabilitation Services and the individual producers of orthopaedic products.

A third case involved the Lithuanian Association of Communication Agencies (KOMAA) and its members who entered into an illegal agreement to apply a uniform, agreed upon “tender fee” to their clients for the providing bids on prospective work. The Council imposed fines of LTL 3.4 million (~ EUR 1 million) on KOMAA and its members and required them to cease any continued illegal activity. Following an appeal to the VRAC, the SAACL ruled the agreement objectively restricted competition under Article 5.1 and that it was not necessary to prove anticompetitive effects.

### 3.2.3. Bid Rigging

Cases involving bid rigging in general, and more specifically on public procurements, are a priority for the Competition Council. Better public procurement and reforms to the Law on Public Procurements are an announced priority of the new Government of Lithuania. Those initiatives are discussed in Section 5. There is widespread support by practitioners and within government ministries for bid rigging on public procurements to receive greater attention and increased enforcement. Two recent cases illustrate bid rigging uncovered and prosecuted by the Council. The first case involved complementary bidding involving three companies on a public tender to provide municipal waste collection and transportation services. The Council imposed fines on the company that engineered the cartel, the company that agreed to submit the complementary bid and a third bidder that was aware of the cartel and had agreed to submit a joint (low) bid with the company that arranged the cartel. The Council fined the three companies over EUR 700 000. The second case decided in December 2016 was uncovered based upon an analysis of bidding information provided by the National Pay Agency of the Ministry of Agriculture concerning bids for the purchase of wood chipping machines. Using that information the Council conducted an investigation and found that two bidders had agreed on pricing for the procurement in violation of Article 5 LOC. Both decisions are presently before the VRAC on appeal.

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78 Municipal Waste Case - A very recent case, decided by the Competition Council on 8 December 2016, involved agreements to rig bids and provide complementary bids on a public tender for the collection of municipal waste and transportation services. In 2015, three companies, UAB Ekoaplinka, UAB Ecoservice and UAB Marijampolės švara concluded a collusive bidding agreement concerning a tender organised by UAB MAATC. The Council found evidence that a representative of UAB Ecoservice, acting with the assent and knowledge of UAB Marijampolės švara, prepared a (cover) bid to be submitted by UAB Ekoaplinka. The complementary bid included pricing and supporting data for UBA Ekoaplinka’s bid, which it submitted to UAB MAATC with no modifications. Both UAB Marijampolės švara and UAB Ecoservice consulted and agreed with UAB Ekoaplinka concerning its complementary bid prior its submission. The Competition Council fined UAB Ekoaplinka EUR 4 100, UAB Ecoservice EUR 601 700 and UAB Marijampolės švara – EUR 48 500.


80 On 5 December 2016, the Council concluded an investigation concerning a public procurement from 2014. The investigation was initiated following an analysis of bidding information provided by the National Paying...
Bid rigging in public procurement appears to be a fertile area for concentrating resources, particularly in light of past cases involving co-operation and participation in the collusion on the part of government entities and officials. The Public Procurement Office has entered into co-operation agreements with the Competition Council concerning public procurements. One of the initiatives is a screening project whereby data from the Public Procurement Office is supplied to the Council to allow it to screen procurements to try to uncover bid rigging. The Council also has informal working agreements to address bid rigging in public procurements with two section agencies, the Special Investigation Service (SIS) and Financial Crime Investigation Service (FCIS), that deal with corruption, to address the full range of illegal activities involving public procurements. (In February 2017 the working agreement between the Competition Council and SIS was made more formal, as discussed below at Section 5.2.) The challenges to obtaining strong evidence of bid rigging in the face of possible corruption or complicity by public officials may be aided by using alternative methods, such as screening tenders to uncover bid rigging and by engaging in joint co-operative efforts with other law enforcement agencies. Those efforts and their importance to the overall enforcement of Article 5 by the Competition Council are discussed more fully in Section 5.

3.3. Vertical Agreements and Infringements

Vertical agreements that restrict competition by object or effect are also prohibited by Article 5 LOC. The Council applies European Commission Regulation No 330/2010 of 20 April 2010. On the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Regulation No 330/2010) (OJ 2010 L 102/1), the European Commission Guidelines on Vertical Restraints (2010/C 130/01), and the case law of the Court of Justice of the European Union.

Council Resolution No 1S-84 (2016) contains a de Minimis threshold for vertical agreements among undertakings and provides that: if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement, and the parties are not actual or potential competitors on any of those markets, the agreement may be exempt from the application of competition law rules. (Point 3.1) The exemption does not apply to agreements between competitors or to agreements containing at least one serious restriction of EU legislation under Article 101 (3) TFEU.

The Law on Competition makes no exception for resale price agreements, which are considered a serious infringement of Article 5. Although EU Regulation No. 330/2010 provides the possibility of an exemption to Article 101(3) TFEU for vertical agreements concerning resale prices, such possibility does not appear to have been extended to Article 5 resale price maintenance cases. In certain cases “recommended prices”

Agency of the Ministry of Agriculture. The public procurement was organised by UAB Fontas LT to purchase wood chipping machines. Based upon the information from the Ministry of Agriculture and the Council’s investigation, it found evidence that in 2014 UAB Žagarės inžinerija and UAB Rovalta agreed in advance on their bids for the tender. Written correspondence between the two companies stated their agreement that Rovalta would submit the low bid in the amount designated and agreed to by its competitor, UAB Zagares. The Competition Council fined UAB Rovalta EUR 70 400, and UAB Žagarės inžinerija EUR 33 400.


81 https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/49e68d00103711e5b0d3e1beb7dd5516?jfwid=q8i88mfo0v.
83 According to Lithuania’s de Minimis resolution, vertical agreements that directly or indirectly restrict: the buyer’s ability to fix its sale price. This provision does not prohibit the supplier from fixing a maximum or
by a supplier to which a seller/distributor then agrees with the supplier to maintain have also been recognised as the minimum resale pricing.\textsuperscript{84} Resale price maintenance cases represent the greatest number of infringement decisions by the Competition Council. The Council’s website contains a brief description of how agreements between suppliers and distributors/sellers, including agreements concerning resale prices, are assessed by the Competition Council. The Council website also references and incorporates European Commission Block Exemption and its Guidelines on Vertical Restraints.\textsuperscript{85} A widely-publicised recent infringement case, Maxima LT and UAB Mantinga, involved price setting and anticompetitive agreements by between one of the largest retailers in Lithuania (Maxima LT) and one of its suppliers of bread and baked goods UAB Mantinga (see Box 5).

### Box 5. Maxima LT and UAB Mantinga

Under the terms of a decade-long agreement Maxima LT agreed not to sell bakery goods supplied by UAB Mantinga below an agreed base price and agreed to maintain a minimum “shelf price” below which the retail price would not fall.

In December 2014 the Competition Council issued a decision finding that Maxima LT and UAB Mantinga had infringed Article 5.1 LOC and Article 101 (1) TFEU by engaging in illegal market allocation and resale price maintenance. The Council imposed fines on Maxima LT of EUR 13 666 216 and on UAB Mantinga of EUR 2 151 417. The fines imposed by the Council took into account only sales within Lithuania and did not take into account any of Mantinga’s activities outside of Lithuania. The parties appealed to the VRAC, which upheld the Competition Council’s decision in May 2015. On 20 June 2016, the SACL affirmed the VRAC’s decision.

Another recent case involves a somewhat novel application of the Article 5 prohibitions on vertical price agreements between a municipal heating supplier UAB Vilniaus Energija and a biofuel supplier UAB Bionovus (see Box 6).\textsuperscript{86}

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\textsuperscript{84} See, e.g. Judgment of the Supreme Administrative Court of Lithuania of 23 July 2011, case No. A444-1433/2011, Forum Cinemas Home Entertainment and others v the Competition Council.

\textsuperscript{85} The Competition Council also follows the Commission Regulation No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Regulation No 330/2010) (OJ 2010 L 102/1), the Commission Guidelines on Vertical Restraints (2010/C 130/01), and the case law of the Court of Justice of the European Union.

\textsuperscript{86} Later renamed as First Opportunity OÜ, which is registered in the Republic of Estonia.
Box 6. UAB Vilniaus Energija and UAB Bionovus

The Council found that the vertical supply agreement between the two companies obligated UAB Vilniaus Energija to purchase all of its biofuel requirements exclusively from UAB Bionovus at agreed prices that were 15% higher than the prices paid for biofuel by other heating producers. The non-compete agreement pricing was then incorporated into heating prices by UAB Vilnius Energija. The Vilnius Energija case highlights competition enforcement challenges involving public procurement and need for scrutiny of public procurements. Although there was a supposedly competitive tender on the procurement, under the tender requirements set out by UAB Vilniaus Energija only UAB Bionovus that qualified to supply biofuel. The case is on appeal.

Another case involved restrictive vertical agreements between a supplier of bank cash-in-transit services and four banks (see Box 7).

Box 7. UAB G4S Lietuva

The Council found that the supplier of cash-in-transit services effectively foreclosed the four banks from using alternative services from other suppliers based on sanctions for doing so contained in their agreements. The SACL upheld the finding of an anticompetitive agreement, but annulled the fines imposed on the banks. The court held that each bank could not have foreseen the cumulative effect of their individual agreement with UAB G4S. The case was returned to the Council for additional investigation concerning assessment of whether the investigation against UAB G4S Lietuva might have been terminated by adopting commitments. After conducting further inquiry, the Council adopted a decision declined to accept commitments from UAB G4S Lietuva and again fined the company EUR 9 437 800. The case is on appeal.

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87 The two companies entered into a vertical agreement, in the form of a long-term exclusive supply contract to UAB Bionovus to be the sole supplier of biofuel to UAB Vilniaus Energija. In December 2015 the Competition Council adopted a decision which found that the prices agreed to and paid by UAB Vilniaus exceeded the prices paid for fuel by other heating producers by 15%. The Council fined UAB Vilniaus EUR 19 004 000 and fined UAB Bionovus, (which presently is registered in Estonia under the new name First Opportunity) EUR 3 529 000. On 18 October 2016 the VRAC upheld the Council’s infringement decision but reduced the fines by 10%. The case is presently on appeal to the SACL.


89 In 2014 the SACL upheld a decision by the Competition Council concerning restrictive agreements between UAB G4S Lietuva, one of the principal providers of bank security services and three banks: AB SEB bank (SEB), Swedbank, AB (Swedbank) and AB DNB bank (DNB). The Council ruled that UAB G4S restricted competition within the cash handling market and limited the possibilities of bank clients to choose the provider of cash-in-transit services. Although the agreements between UAB G4S and the banks did not contain an explicit purchasing clause, the Council found that exclusivity effectively was the result of UAB G4S’s agreement and allowed it to apply stiff sanctions to banks that purchased part of their cash-handling services from other providers. The Competition Council ruled the banks were in practice foreclosed from using other suppliers of cash handling services and the cumulative effect of the G4S’s agreements with the three banks, who together constituted more than 85% of all the relevant purchases of cash handling services by all banks in Lithuania, made G4S the dominant provider of such services.


3.4. Abuses of a Dominant Position

Abuses of dominant position have serious negative effect in all economies, but those consequences may be exacerbated in economies where legacy companies with market power have maintained their power despite liberalisation and where new competitors have been unable to effectively challenge that power and increase their market shares. Abuse of dominance cases have not been an area of concentration by the Council in the last number of years. From 2012 to 2016 the Council has issued no abuses of dominance decisions, although it has investigated possible infringements. In the five years prior to 2012, abuse of dominance decisions were issued by the Council. Comparatively often, according to the Council, those decisions were overturned. The paucity of abuse of dominant position cases is noted by both the Bar and some ministries of government. Presently the Council has three ongoing investigations where it is investigating allegations of abuse of dominance against Lietuvos pastas, the Lithuanian postal service; Orlen Lietuva, main fuel supplier in Lithuania; and Swedbank, one of the biggest banks in Lithuania.

In two recent abuses of dominance investigations the Council decided not to bring charges or issue infringement decisions when the companies ceased their alleged infringements. According to the Council, in one instance it accepted commitments from a party (LINAVA) to eliminate allegedly excessive pricing. In the second instance the Council terminated the investigation when the undertaking terminated allegedly restrictive practices.92

Prior to 2012, the Council issued infringement decisions placed more of a priority on abuse of dominance cases. In the past the Council evaluated cases of alleged predation by a dominant undertaking, allegations of discrimination and refusals to deal, refusals to allow access to so-called “essential facilities” and discrimination by a dominant firm based upon rebates and royalty arrangements. The Council found abuses of dominance both by private undertakings and by SOEs, including the Vilnius International Airport and the Lithuanian postal service. The cases involving statutory SOEs are discussed in Section 3.4.3, below.

Article 7 of the Law on Competition prohibits the abuse of a dominant position and follows Article 102 TFEU. The LOC defines dominant position as “the position of one or more undertakings in a relevant market directly facing no competition or enabling [them] to exert a unilateral decisive influence in a relevant market by effectively restricting competition.” In 2000, the Competition Council adopted a Resolution setting out the criteria for defining dominance, based upon EU competition case law93 (Resolution No. 52, On the Explanations of the Competition Council Concerning the Establishment of a Dominant Position, 17 May 2000, as amended by Decision No. 1S-15, 12 February 2005). The use of market shares is only one tool in the complex economic assessment of whether an undertaking or group of undertakings have dominant market power.

Dominant position, as defined by Article 3.2 LOC covers both actions of a single undertaking (holding not less than a 40% share) and actions of several undertakings (of which a group of three or fewer jointly hold a 70% or greater share) of the relevant market. The statute does not preclude a finding of dominance for market shares below the thresholds in specific circumstances, nor do market shares alone conclusively establish

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92 According to the Council: “In two recent investigations the Council closed investigations after the undertakings, suspected of possible abuse of dominant position, ceased their allegedly abusive practices and (or) submitted commitments. One of the investigations was concerned with alleged unfair (excessive) pricing. With regard to the doubts raised by the Council and with the intention to eliminate the suspected infringement, the allegedly dominant undertaking addressed the Council with a request to terminate the ongoing investigation and obliged to unify the relevant prices (LINAVA case). The other investigation was terminated after an allegedly dominant undertaking had ceased its allegedly restricting practices (Vakaru laivu gamykla case).”

dominance if other circumstances establish the undertaking is still facing effective competition in the market and is not capable of unilaterally exercising decisive influence.

Those thresholds specifically exclude retailers. A dominant position by a retailer may be presumed if a single retailer holds not less than 30% of the relevant market or to a group of three or fewer retailers who jointly hold 55% or greater of the relevant market.\(^4\) Additionally, the Competition Council supervises and enforces compliance with the Law on the Prohibition of Unfair Practices of Retailers, which applies criteria for “significant market power” thresholds specifically set out in that law, rather than applying the LOC thresholds.\(^5\) (See discussion in Section 3.6).

### 3.4.1. Guidance Concerning Market Definition and its Application to Cases

Defining the relevant product market and geographic market is the first step in assessing market shares and the relative competitive positions of undertakings. The Law on Competition contains definitions and methodologies for defining relevant market that follow those used by the European Commission. Groups of associated undertakings are defined as two or more undertakings, which “due to their mutual control or interdependence and possible concerted actions are considered as one undertaking when calculating joint income and maker share.” (Article 3.18 contains four criteria for undertakings that are considered to be associated undertakings.) If reliable data on sales or purchases is not available, other objective information may be used to determine market shares. The LOC defines “control” (Article 3.9), “controlling person” (Article 3.10) and of “decisive influence” (Article 3.11), which are used to evaluate whether an undertaking is autonomous or subject to control of a parent entity that might be held liable for the infringement. To date the Competition Council has not used these sections of the LOC in abuse of dominance cases.\(^6\)

The Council has also issued guidance on defining relevant markets. (Resolution No. 17, Concerning Explanations of the Competition Council on the Definition of Relevant Market, 24 February 2000, as supplemented effective 1 January 2016 by Council publication, “Concerning Comments of the Competition Council on definition of the relevant market.”).\(^7\) Resolution 17 was drafted on the basis of the European Commission notice on the definition of the relevant markets for the purposes of community competition law (97/C 372 /03). It also relies on qualitative data (e.g. answers by competitors and customers to questionnaires). Because of the paucity of abuse of dominance cases, Resolution No. 17 on

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\(^4\) Amendment to the Law, 24 September 2009 established the lower thresholds for retailers. It became effective on 1 January 2010.

\(^5\) Law on the Prohibition of Unfair Practices of Retailers, 22 December 2009, No. XI-626, (as amended 17 December 2015, No. XII-2204). Article 4 of the Law establishes the Competition Council’s jurisdiction and supervisory responsibilities. [https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/47f691f2c2cb11e682539852a4b72dd4?jfwid=-9dzqmu3v6](https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/47f691f2c2cb11e682539852a4b72dd4?jfwid=-9dzqmu3v6). The LPUPR, Article 2. Definitions, states: “1. 'Retailer having significant market power' (hereinafter: a 'retailer') means an undertaking engaged in retail trade in non-specialised stores with food, beverages and tobacco products predominating which alone or together with associated undertakings engaged in the same activity meets all of the following requirements: 1) the sales area of at least 20 stores from all the stores under its/their management in the Republic of Lithuania is not less than 400 sq. m.; 2) its/their aggregate income in the last financial year is not less than EUR 116 million. Where a retailer is a foreign undertaking, the aggregate income shall be calculated as the total amount of income received in the Republic of Lithuania.

\(^6\) Questionnaire Response, Section 12. B.

\(^7\) [Concerning explanations of the Competition Council on the definition of the relevant market](https://www.e-tar.lt/portal/lt/legalAct/c4004ca040f411e58568edf613eb39a73).
market definition is most frequently used in merger analysis. See Box 8 for a representative abuse of dominance case.

### Box 8. AB Orlen Lietuva

AB Orlen Lietuva is a Polish company that operates the only oil refinery in the Baltic States, the Mažeikių oil refinery and oil-processing plant in Lithuania. It is an undertaking which is identified as being of importance to Lithuanian national security, and for which additional requirements of operation may apply, even though it is not majority-owned by the Lithuanian state or municipal government. Prior abuse of dominance cases against the company involved price discrimination, loyalty incentives, non-compete obligations. The most recent case involved restrictions on parallel imports and discriminatory application of volume discounts by AB Orlen Lietuva which the Council found had two levels of volume pricing which it did not apply in a consistent or non-discriminatory manner. The case involved multiple levels of appeal to the VRAC and SACL, and application of the EU law concerning fidelity rebates. It also resulted in the company filing charges against the Competition Council, which were not upheld by the SACL.

### 3.4.2. Recent investigations finding no abuse of a dominant position

The Council has also concluded investigations concerning Orlen Lietuva with finding of no abuse of a dominant position. Following the SACL’s decision concerning AB Orlen Lietuva, the Competition Council

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98 For a full explanation of the Council’s approaches to geographic market definition, please refer to the OECD Roundtable on Geographic Market Definition, DAF/COMP/WP3/WD(2016)53

99 OECD Corporate Governance Accession Review at page 47.

100 In two early cases involving AB Orlen Lietuva, the dominant oil refinery in Lithuania which at the time was AB Mažeikių nafta. In AB Mazeikių nafta I, 10 July 2000, Resolution No. 11/b of the Competition Council on violation of Article 9(1)(3) of the Law on Competition by AB Mažeikių nafta; In AB Mazeikių II, 22 December 2005, Resolution of the Competition Council on compliance of actions of AB Mažeikių nafta with Articles 5 and 9 of the Law on Competition and Article 82 of EC Treaty.

101 The Council found that Orlen Lietuva established two categories of volume prices but that it had not applied them consistently or in a non-discriminatory manner. It also found that purchasers were obliged to acquire 80% of their requirements from Orlen in order to meet rebate targets and receive the contractual benefits from Orlen Lietuva. The Council applied EU law concerning fidelity rebates and found that the practices constituted an infringement of Article 7 LOC. On appeal the SACL upheld the Council’s decision that Orlen Lietuva had abused its dominant position, but reduced the fine by 5%, from EUR 2 383 862 to EUR 2 261 133. See also, Lithuania’s submission to the OECD Roundtable on Price Discrimination, DAF/COMP/WD(2016)79


103 The 16 December 2010 Resolution No. 2S-31 of the Competition Council on compliance of actions of Orlen Lietuva with Article 9 of the Law on Competition and Article 102 TFEU.

104 During further investigation following a remand of the case by the SACL, the Competition Council’s opinion on the definition of the market evolved and changed. In its 2005 decision the CC stated that the relevant market encompassed Lithuania, Latvia and Estonia. After the additional investigation, the CC defined the relevant market more narrowly as encompassing the territory of Lithuania. On appeal the parties argued the changes to the market definition were evidence of improper procedures by the Council which should be sanctioned by the Court. The SACL disagreed and held that the changes alone were not evidence of improper procedures, nor were they “objectively unreasonable.” The SACL ruled it would be illogical and unreasonable to restrict the powers of the Competition Council to change its position during a period of additional
received a complaint from the Association of Lithuanian Oil Product Trade Enterprises alleging abuse of a dominant position by Orlen Lietuva in the market for marked fuel (i.e. fuel that is used in off-road applications for industrial and farm equipment). The Council conducted a preliminary assessment of the market for marked fuel and found that: i) there were nine other companies in the market for sales of marked fuel; ii) in 2013 the sales and volume of marked fuel had increased; and, iii) some competitors of AB Orlen had greater sales of marked fuel in 2013. In October 2014 the Council declined to open an investigation. On appeal the court ruled against the Council and required it to conduct an investigation into the allegations contained in the complaint. That investigation presently is on-going. In another investigation involving two companies supplying liquefied natural gas (LNG) the Council investigated allegations of abuse of a dominant position by several municipalities to whom the companies supplied LNG but concluded they had not infringed the LOC.105

3.4.3. Application of Article 7 to State-owned enterprises

The Council has investigated the activities of Statutory SOEs (SOEs owned wholly by the state in which there are no shares) and whether their activities constituted abuses of a dominant position under Article 7 LOC. Those cases involved the Vilnius International Airport and Lietuvos pastas, Lithuania’s state-owned postal service. Both entities are owned by the Ministry of Transport and Communications. The activity of these enterprises as monopoly providers of services has been challenged by the Competition Council in a number of cases listed in the chart, below. 106 There have been no Council cases involving statutory SOEs from 2012 to 2017, although the Council is presently investigating new allegations against the Lithuanian Post.

investigation, because there would otherwise be no reason to engage in the extra activity. The court found damages against the Council (pursuant to Article 43 LOC) were not warranted.

105 AB Suskystintos dujos and UAB Saurida – The Competition Council received complaints from several municipalities concerning the price increases by the two suppliers of central liquefied gas (supplied by municipalities to customers). The Council evaluated the price increase on 1 February 2013 by AB Suskystinos and found that the company had sustained losses in 2011 through 2012 and that the price increase was projected to produce 10% profit for the firm. The Council evaluated the gas prices to customers from 1 December 2012 and compared average monthly bills of UAB Saurida customers to those of AB Suskystinos, finding that the former were 20% higher. The Council considered evidence of the different expenses of the two companies and found that UAB Saurida’s legacy equipment and repair costs to its equipment, in addition projected renovation costs justified the price difference between the two companies. The evidence did not support a finding that the price increases were unfair or excessive under the Law on Competition.

The legacy cases against the Lithuanian Post involved cases of pure discrimination in setting prices for its own services and pricing allowed by competitors for postal services, which the Lithuanian Post regulates. The cases involving the Vilnius International Airport had to do with application of the “essential facilities” doctrine and its application, allegations of predatory pricing, and whether its dominant position in the upstream market was impermissibly permitting it to discriminate in downstream markets where it was competing with private suppliers of services.

### 3.5. Anticompetitive Mergers and Concentrations

Merger enforcement in Lithuania requires notification and *ex ante* review of mergers above certain monetary thresholds. (Articles 8 to 14 LOC). The Council applies its rules on market definition and explanations concerning dominant position to review mergers for potential anticompetitive effects.107 During the assessment of relevant merger, the Competition Council also refers to the EC Merger Regulation and other European Commission guidance on mergers.108

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The Council may take into account the well-grounded explanations of the undertakings concerning the efficiencies if they provide evidence of verifiable benefits to consumers that are integral to the merger. There are no provisions in the Law on Competition regarding claims of “failing firm/exiting assets.” The Council has the authority, however, to evaluate such arguments during the merger review in accordance with the LOC and the EU Merger Regulation.

Notifications of mergers of banks or credit institutions require a conclusion by the Bank of Lithuania, which must be submitted with the notification documents. The Bank of Lithuania’s determination considers the merger from the perspective of the regulatory acts of the Bank and in parallel with the competition assessment by the Competition Council. There have been no cases where the Bank and the Competition Council have reached different conclusions regarding a merger, and they co-operate and consult one another when questions of issues arise. If during the merger review the Council needs sector expertise, it may request sector regulators to provide specific information to aid its assessment.

The Council in the past 5 years has reviewed around 30 merger notifications annually, with the exception of 2014, when it reviewed over 50. The Council has also completed investigations into non-notified mergers, which it had not done prior to 2012. Mergers are reviewed by the Dominant Undertakings and Mergers Supervision Division which has a staff of 12 who deal with both merger review and investigations regarding the abuse of dominant position. Prior to 2012 there was a separate mergers division. Merger review procedure takes around 70% of the Division’s time. There is no division of Council staff based upon sector expertise.

3.5.1. Merger Rules and Guidance by the Competition Council

Undertakings who meet income thresholds set out in Article 8.1 LOC are required to file a merger notification. Concentrations must be notified to the Council and prior permission must be obtained for a merger where the combined aggregate income of the undertakings in the business year preceding the concentration is more than EUR 14 500 000 and the aggregate income of each of at least two undertakings concerned in the business year preceding the concentration is more than EUR 1 450 000. The merger notification shall be filed jointly by all controlling persons in a concentration, along with required documentation. (Article 9 LOC). In 2015, the Competition Council provided more detailed requirements for notification of concentration and published new rules in a Merger notification and examination procedure and an Annex that contains standard forms for notification of a concentration. They became effective in January 2016.\(^\text{109}\) (New Merger Procedure).

The feedback and opinions of undertakings about the New Merger Procedure have been generally quite positive. One legal practitioner found fault with the new transparency practices of issuing a press release summarising the merger prior to adopting a decision as having the potential to adversely affect the merging parties. Other commenters noted that there is only limited opportunity to consult with Council staff during the merger process and even though the new procedures permit informal discussions prior to filing a merger notification. According to the Competition Council, although the New Merger Procedure is more abbreviated than the European Commission’s Jurisdictional Notice, it is fully harmonised with the Notice.\(^\text{111}\) In addition, the Competition Council in its New Merger Procedure added the requirement for parties a short summary description of the concentration which can be publicly available in the Competition


\(^{110}\) (Resolution No. 1S-82/2015 (11 August 2015.)

Council’s website. In August 2016, the Competition Council adopted additional amendments to clarify the definition of “concerned” undertakings and the calculation of their turnover, which became effective in January 2017.\footnote{Competition Council publication, On the approval of merger notification and examination procedure (valid since 1 January 2016) (Available in Lithuanian). \url{https://kt.gov.lt/en/legislation}.}

Merger review must be completed within four months from filing of the notification of concentration. The first phase review must be completed within one month from filing of the notification. If the merger raises competitive concerns a second phase of review must be completed within three months, at which time the merger must be cleared, authorised subject to conditions or prohibited. Although the merger review period may be extended for one month to consider commitments (but only at the request of the merging parties), the Council notes that if commitments are not considered before the end of the review period, the additional month may be insufficient time in which to solve the competitive concerns, to finalise the commitment terms, provide for public comment and if necessary make adjustments based upon the comments. If divestitures are complex or trustees need to be found this may also delay the process and may preclude resolving a merger with commitments.

The table contains the statistics for the past five years concerning the number of merger notifications, the number of merger reviews that went beyond the first month and the average number of days taken to clear non-problematic and problematic mergers.

### Table 3. Merger Notifications, Proportion involving Second-level Review and Average Length of Time between Notifications and Decisions by the Council

<table>
<thead>
<tr>
<th>Year</th>
<th>Merger notifications in total</th>
<th>Proportion of notified mergers that are the object of further investigation or enforcement proceedings</th>
<th>Length of time taken between initial notification and completion of the review process and decision (average length in days)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Non-problematic mergers</td>
</tr>
<tr>
<td>2012</td>
<td>31</td>
<td>7 of 31</td>
<td>29</td>
</tr>
<tr>
<td>2013</td>
<td>31</td>
<td>5 of 31</td>
<td>27</td>
</tr>
<tr>
<td>2014</td>
<td>52</td>
<td>13 of 52</td>
<td>36</td>
</tr>
<tr>
<td>2015</td>
<td>38</td>
<td>7 of 38</td>
<td>27</td>
</tr>
<tr>
<td>2016</td>
<td>39</td>
<td>9 of 39</td>
<td>28</td>
</tr>
</tbody>
</table>

This table lists the number of merger notifications that were filed in each of the last five years and their outcomes.

### Table 4. Merger Notifications and Reviews – 2012 to 2016

<table>
<thead>
<tr>
<th>Year</th>
<th>Merger Notifications And Reviews</th>
<th>Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>No objection</td>
</tr>
<tr>
<td>2012</td>
<td>31</td>
<td>29</td>
</tr>
<tr>
<td>2013</td>
<td>31</td>
<td>29</td>
</tr>
<tr>
<td>2014</td>
<td>52</td>
<td>49</td>
</tr>
<tr>
<td>2015</td>
<td>38</td>
<td>36</td>
</tr>
<tr>
<td>2016</td>
<td>39</td>
<td>37</td>
</tr>
</tbody>
</table>
3.5.2. Review of mergers falling below notification thresholds

The Council may also review mergers that fall below the statutory notification thresholds if not more than 12 months have passed from the implementation of the merger in question.113 (Article 13 LOC). The Council has reviewed two non-notified mergers. In 2013, the Council self-initiated review of a merger falling below the statutory threshold in which UAB Nemuno būsto priežiūra acquired 100% of shares in UAB Žirmūnų būstas, the largest undertaking providing administrative services for blocks of flats in Vilnius. The Council obligated UAB Nemuno būsto priežiūra to submit a notification of concentration, but cleared the merger finding that it had not resulted in anticompetitive restrictions in the market.114

In another case the Council required a notification of the completed merger and retroactively prohibited the merger.115 In 2014, AS Eesti Meedia had acquired 100% of the shares of AllePAL OÜ.116 The Council found that the 2014 merger eliminated effective competition in the market for classified ads websites and increased prices of classified ads for real estate and vehicles. It retroactively prohibited the merger and required AS Eesti Meedia to restore the situation prevailing prior to the implementation of the concentration or to eliminate identified competition problems in the identified relevant markets within three months after the publication of the decision. AS Eesti Meedia has appealed the Council’s decision. VRAC adopted a decision in Eesti Meedia case, whereby the court annulled the decision of the Council, and returned the case to the Council for additional investigation. The Council appealed the VRAC decision to the SACL, where it is presently pending.

3.5.3. Fines for Completing Mergers without Approvals and Defective Notifications

The Competition Council may investigate firms for failing to file a notification and obtaining prior approvals for a merger. It may also investigate and sanction undertakings that proceed with a merger that is under review by the Council. (Article 22). The Council may require firms that have breached the concentration rules to restore the status quo before the merger. A fine of up to 10% of the gross annual income in the preceding business year shall be imposed on undertakings for implementing a notifiable concentration without clearance (Article 36.1). Completing a notified merger without Council permission or activities that effectively do so (so-called “gun jumping”) is prohibited and subject to fines and unwinding of the merger. In two recent cases involving the petrol company Lukoil Baltija, the Council investigated both its failure to file merger notifications and failure to obtain prior clearance for acquisitions of petrol stations.117


The Competition Council has also fined a single company, UAB Lukoil Baltija on two separate cases for failure to file a merger notification.\footnote{In 2013, the Competition Council established that UAB Lukoil Baltija had implemented non-notified mergers by gaining control of three petrol stations without submitting a merger notification concerning the transactions. The Council imposed a fine of EUR 341 057 on UAB Lukoil and obligated the company to unwind the merger. UAB Lukoil Baltija appealed the decision. On 17 December 2015 a five-member panel of the SACL affirmed the decision of the Competition Council and found the Council did not abuse its discretion by imposing fines of LTL 983 500 and LTL 194 100 based upon the separate petrol station purchases. For more information see the website of the Supreme Administrative Court of Lithuania www.lvat.lt Case No. A-1699-822-2015, which is the source of the information, contained in paragraphs 160 to 163, above. In a second case where UAB Lukoil Baltija failed to notify a merger in 2014, the Council in 2014 imposed a fine of EUR 3 422 642 on the company for implementing a concentration that gave it control of 16 petrol stations without obtaining prior clearance. In 2016, the VRAC affirmed the Council’s finding that UAB Lukoil Baltija violated the law, but it reduced the fine to EUR 3 297 700, excluding the value of the VAT. On 18 April 2017 SACL affirmed the decision of the VRAC. In a third merger case involving Lukoil, on 22 July 2016, the Council cleared the acquisition of 73 petrol stations by from Lukoil by UAB Luktarna (through a long-term lease of five years with a potential of extension). UAB Luktarna withdrew its intention to lease three additional stations which avoided possible restrictions of competition in three markets and the Council cleared the merger.}

The Council has also fined a company for failure to supply complete and accurate information concerning a merger. In July 2016 the Competition Council found that UAB Concretus Materials together with UAB Vilniaus Betonas and UAB GG Investment had failed to provide complete and accurate information for the examination of a merger whereby UAB Concretus Materials intended to acquire up to 51% of AB Akmenės cementas shares.\footnote{According to the Council’s preliminary assessment, the companies did not identify certain undertakings related to AB Akmenės cementas. The evidence suggested they provided false information about the income of the merging parties in the business year preceding the merger. The Competition Council concluded those actions constituted material breaches of the merger rules and told the parties that it intended to impose a fine for the procedural infringement of up to 1% of the gross annual income in the preceding year. The Council also indicated it had reached a preliminary conclusion that the intended merger might negatively affect competition in the relevant markets. On 23 April 2013, UAB Concretus Materials abandoned its intention to acquire the AB Akmenės cementas shares. The Council did not impose separate penalties for providing materially false and incomplete information.}

The failure to file merger notifications highlights the need for the strong sanctions to deter merger non-compliance. The need to use sanctions on more than one occasion within a short period of time with the same recidivist company suggests the need to reinforce merger training with companies.

### 3.5.4. Recent Significant Cases involving Mergers

Unquestionably the most significant merger case of 2016 and perhaps the most significant case of the year for the Competition Council was the SACL’s recent Gazprom decision.
Box 9. GAZPROM

In December 2016 the SACL affirmed the Council’s imposition fines against Gazprom which will require Gazprom to pay fines of EUR 35,651,268.54, with interest. In 2004 the Council cleared a merger involving Gazprom subject to the conditions, which obligated Gazprom to refrain in the future from creating obstacles to Lithuanian buyers to purchase natural gas from other suppliers. The Council found that Gazprom’s recent refusal to negotiate the natural gas swap agreement deprived AB Lietuvos energijos gamyba of an opportunity to purchase natural gas from an alternative supplier at a lower price, which may have resulted in a higher price for electricity and heat production by AB Lietuvos energijos gamyba. Gazprom appealed the Council’s decision which was upheld on appeal by both the VRAC and SACL.

3.5.5. Mergers Cleared Subject to Conditions

The Competition Council may impose conditions on the parties in order to approve a merger. They may involve either structural or behavioural commitments to remove anticompetitive concerns. In 2014 the Council cleared two mergers subject to structural conditions which required divestitures. The first case involving a merger between two major insurance companies, Lietuvos draudimas and PZU, the Council required divestiture by PZU of certain business divisions to an unrelated firm. In a second case, the Council cleared the acquisition of up to 100% of Įmonių grupė Alita shares by Mineraliniai vandenys subject to the divestiture by Mineraliniai vandenys of the business activities of Įmonių grupė Alita related to the sales and production of vodka and bitters in Lithuania.

3.5.6. Mergers for which Approvals were denied

The Council has declined to grant clearance in only two merger cases in the past five years.

Table 5. Mergers for which the Competition Council Declined Approvals 2012 to 2017

<table>
<thead>
<tr>
<th>Year</th>
<th>Firms to be merged (Resolution No.)</th>
<th>Appealed? / Outcome of Appeal</th>
<th>Economic Sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2013</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2014</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>
| 2015 | Viking Malt Oy/ UAB “MALTOSA”  
(Resolution 1S-110/2015, date of 15.10.2015) | Appealed. No outcome of Appeal yet. | Beer malt sector |
| 2016 | ASEesti Meedia/ AllePAL OÜ  
(Resolution No. 1S-59/2016, date of 06.05.2016) | Appealed. No outcome of Appeal yet. | Online classified ads sector |

The second case, AS Eesti Meedia was discussed, above in paragraph 149. In Viking Malt OY and UAB Maltosa, the Council declined to approve a merger of two Pilsen malt producers in Lithuania. The parties contended that the Council’s geographic market definition, which included only Lithuania, was erroneous and contrary to the evidence that the market for Pilsen malt should include production in at least three other Member States. The parties have appealed the Council’s decision. The VRAC affirmed the Council’s decision. The case has been appealed to the SACL where it is presently pending review.

The Competition Council’s merger review record indicates it is using the full array of legal and analytical tools at its disposal to uncover potentially anticompetitive merger concentrations. The Council is available for consultations concerning potential problems in mergers and is generally helpful and co-operative. At times the lack of experience of Council staff is perceived by practitioners as the reason for unfounded concerns or for unnecessarily extending merger review of non-problematic mergers beyond the intial 30-day period. Inexperienced staff is sometimes viewed by legal counsel as lacking the confidence to clear unproblematic mergers within the first month and as applying the merger rules formulaically. Some
sentiment is expressed for having higher level management and more experienced staff available for early consultations with the parties so that competitive concerns may be identified in time to allow the parties to propose remedies and commitments.

3.6. Unfair Competition and Consumer Protection

Competition policy and consumer policy share the common goal of enhancing consumer welfare. Despite conflicting pressures that may arise in specific cases, the two policies generally are mutually reinforcing. Well-informed consumers who exercise buying choices effectively also serve to promote competition in markets. The Competition Council practices endorse and actively enforce measures that ensure a high level of protection for consumers by prohibiting unfair practices (without unduly restricting competition).

There is no single law that consolidates all the prohibitions against unfair competition. Article 15 of the Law on Competition prohibits specifically enumerated acts of “unfair competition,” which are not an exhaustive list of prohibitions. The Competition Council also has principal responsibility for enforcing all prohibitions of unfair competition in Lithuania contained in the Law on the Prohibition of Unfair Practices of Retailers (Article 3), the Law on Advertising (Articles 5 and 6) and the Law on the Prohibition of Unfair-Business-to-Consumer Practices (Articles 5.6 and 7). Other sections of those laws are enforced by other government agencies. There are additional laws on consumer protection which are enforced by other government agencies.

The Council is designated by Article 19.1 of the Law on Advertising, to enforce sections of the law which prohibit misleading (Article 5) and unlawful comparative (Article 6) advertising. Enforcement of the remainder of the Law on Advertising is the principal responsibility of the State Consumer Rights Protection Authority, along with the State Food and Veterinary Service, the Department of Cultural Heritage Protection of the Ministry of Culture and municipal executive authorities. Certain Articles of the Law on the Prohibition of Unfair-Business-to-Consumer Practices are enforced by the Competition Council, while other sections are enforced by the State Consumer Rights Protection Authority. In addition to those laws, Lithuania has implemented EU Directives concerning unfair competition and consumer protection, including the Unfair Commercial Practices Directive \(^{120}\) and the Directive concerning misleading and comparative advertising. \(^{121}\) The Law on Prohibition of Unfair Practices of Retailers is enforced by the Competition Council.

As illustrated by the Brewers Guild and Shipbrokers cases (discussed above in section 3.2 and Box 4 respectively), the designation of “unfair competition” may be a guise to constrain and monitor robust competition that otherwise would or should be occurring. The use of so-called “private regulations” by trade associations to monitor unfair competition may in actuality be designed to limit market competition. When “unfair competition” is nothing more than a euphemism for infringements of Articles 5 or 7 LOC, the Council will pursue those cases as antitrust infringements. In the Shipbrokers case the association had couched its illegal agreement under the guise of an association “ethics code” which prohibited “unfair competition” among members and established disciplinary procedures for participating “unfair competition”, i.e. for establishing shipping tariffs below the “ethical” minimum and thereby, engaging in


actual competition. The Competition Council found that the “unfair competition ethics code” constituted prohibited price fixing and infringed Article 5 of the Law on Competition and Article 101 of the TFEU.

3.6.1. Unfair Competition under Article 15 of the Law on Competition

Article 15 of the Law on Competition prohibits specifically enumerated acts of “unfair competition.” The Article operates independently from other sections of Law on Competition covering typical antitrust enforcement (prohibited agreements, abuse of a dominant position, and merger control). The prohibitions contained in Article 15 are separate infringements of the Law on Competition. They are subject to different sanctions, including fines of up to 3% of the gross annual income in the preceding business year. The Council is not required to establish and estimate actual harm caused by the unfair competition.

Individuals whose interests are violated by unfair competition may bring a claim in court seeking damages, termination of the unfair acts and other penalties (Article 16.1). On the other hand, the Competition Council “shall investigate acts of unfair competition only in cases where these acts violate the interests of the majority of undertakings and consumers.” (Article 16.4). According to the Council, the translation of “majority” does not literally mean over 50% and a more accurate translation would be “many”. Article 15 is enforced by the Council infrequently, primarily because to do so it must find that a majority of interests are affected, whereas there is no such requirement on individuals who might bring private causes of action under Article 15.

Article 15 prohibits undertakings “from performing any actions contrary to fair business practices and good usages if such actions shall be detrimental to the competitive potential of another undertaking.” It lists seven illustrative examples of the most common forms of unfair competition. They include unauthorised use of commercial marks and trade references, imitating products or packaging, abridging commercial secrets, and poaching employees of a competitor. The enumerated acts of “unfair competition” (e.g. trademarks, intellectual property, commercial secrets), are governed and elaborated by other laws. Commercial secrets are defined in the Civil Code of the Republic of Lithuania. Trademark and intellectual property issues are governed by the Law on Trademark, and the Law on Design. Article 15.1.3, does not define “commercial and trade secrets” which are found in Lithuanian Civil Code.

SOEs are not exempted from the Article 15 prohibitions against unfair competition rules or other prohibitions for unfair competition. For example, the Competition Council fined SOE AB Lietuvos radijo ir televizijos centras in 2011 and 2013 under Article 5 of the Law on Advertising for its misleading advertising of internet services EUR 2,896 and EUR 5,792 respectively.

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124 Retrieved from: https://eseimas.lrs.lt/portal/legalAct/lt/TAD/8637177f0c36c11e5ac22dab8705b325?jfwid=1anskbw00e.
3.6.2. The Law on Advertising

The Law on Advertising (LOA)\textsuperscript{128} is enforced by a number of government entities, including the Competition Council. The primary focus of the Law is on consumer protection and as a result this is one area where the Council has limited consumer protection responsibilities. Under Article 19.1.2 LOA the Competition Council enforces the prohibitions against misleading advertising (Article 5 LOA) and unlawful comparative advertising (Article 6 LOA).\textsuperscript{129} Enforcement of other sections of the Law on Advertising is delegated to the State Consumer Rights Protection Authority, the State Food and Veterinary Service, the Ministry of Culture and municipal authorities.\textsuperscript{130} The Law on the Prohibition of Unfair Business-to-Consumer Commercial Practices, which covers all unfair commercial practices, establishes the division of jurisdiction among the various government entities, including the Competition Council, to enforce the Law on Advertising.\textsuperscript{131} Since 1 February 2008, (when the Law on the Prohibition of Unfair Business-to-Consumer Commercial Practices was adopted) the SACL considered appeals in of more than 40 decisions adopted by the State Consumer Rights Protection Authority involving other infringements contained in the Law on Advertising and the Law on the Prohibition of Unfair Business-to-Consumer Commercial Practices.

In contrast to the threshold considerations for a Council investigation contained in Articles 15 and 16 LOC, there are no levels of public interest or harm to consumers or undertakings that must be established for the Council to launch an investigation under the LOA. Under Article 5.6 of Law of Advertising, misleading advertising shall be established if the advertisement contains [any of] the attributes of misleading commercial practice established in Article 7.1-21 of the Law on the Prohibition of Unfair Business-to-Consumer Commercial Practices. Article 7 establishes the so-called "blacklist" of unfair commercial practices which are presumed to be misleading.\textsuperscript{132} Additionally, the advertising must be truthful, must not omit crucial information and must not present the information in a manner that is misleading. Both the Law on Advertising and the Law on the Prohibition of Unfair Business-to-Consumer Commercial Practices implement EU directives, and the Competition Council applies the case law of the CJEU to reached its decisions.\textsuperscript{133}

\textsuperscript{128} The Law on Advertising can be retrieved from: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/dd69e1e2a5871e59010bea026dbd259?jfwid=18117lhvYf.

\textsuperscript{129} In addition, the Article 5.6 of Law of Advertising states that in all circumstances misleading advertising shall be recognised and advertising which contains the attributes of misleading commercial practice established in Article 7.1-21 of the Law on the Prohibition of Unfair Business-to-Consumer Commercial Practices. Retrieved from: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/dd69e1e2a5871e59010bea026dbd259?jfwid=18117lhvYf.

\textsuperscript{130} The Law on Advertising can be retrieved from here: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/dd69e1e2a5871e59010bea026dbd259?jfwid=18117lhvYf.

\textsuperscript{131} Article 9, Control of institutions of Unfair Commercial Practices, of the Law on the Prohibition of Unfair Business to Commercial Practices.

\textsuperscript{132} Article 5.6 of the Law on Advertising states that advertising shall be regarded as misleading under any circumstances if it contains features of misleading commercial practices stipulated in Article 7(1) to (21) of the Law on the Prohibition of Unfair Business-to-consumer Commercial Practices.

In 2013, the Council issued *Guidelines on Assessment of Misleading and Unlawful Comparative Advertising*, which summarise the most common examples of misleading and unlawful comparative advertising. The Guidelines reference several judgments of the SACL concerning misleading advertising and the blacklist of unfair commercial practices. The Council also published a short reference guide on the prohibitions of misleading advertising and of comparative advertising. In July 2016, the Council published its *Recommendations on Price Advertising* that advises companies on how to appropriately determine and use reference prices in advertising so as not to mislead consumers. The Council has done outreach and conducted seminars on misleading and unlawful comparative advertising. In addition to relying upon complaints to detect instances of misleading advertising, the Council monitors the public media and devotes special attention to the review of advertising in sectors or involving goods or services where there have been past problems with misleading advertisements. Although the Council’s responsibilities under the Law on Advertising are limited, these activities illustrate that they play an important part in the Council’s activities.

**Sanctions and Warnings for Infringements of the Law on Advertising**

The Council may impose fines for violations of Article 5 or 6 of the Law on Advertising from EUR 289 to EUR 8 688. In the event of a second infringement within one year from the imposition of the fine, a fine of up to EUR 34 754 may be imposed. (Article 21.1). The Council believes the level of fines is sufficient. It is noteworthy, however, that 2013 amendments to the Law on Advertising reduced the significance of aggravating circumstances other than recidivism.

As an alternative to undertaking an investigation that might result in fines, the Council may issue a warning to advertisers to correct misleading or unlawful comparative advertisements and to comply with other requirements set by the Council (Article 25.5.6.) If the Council decides a formal investigation is warranted, the provisions of Article 21.2.1 LOA apply and require the entity to admit or refute the alleged infringement of the LOA. When considering whether to issue a warning (a notification) or launch a full investigation, the Council applies its September 2013 Resolution, “Explanation about the Minor Significance in the Cases of the Law on Advertising.” It lists criteria used to assess if the infringement is of “minor significance” (which includes advertising of limited scope or short duration or that otherwise made an insignificant impact on consumers’ economic behaviour or was the result of a technical mistake). Where the misleading advertisement is of “minor significance” the Council issues a warning with a suggestion for the operator of advertising activity to change the advertisement or to terminate it. The Council’s warning sets out a time limit for compliance.

In the vast majority of cases of misleading advertising, the Competition Council issues a warning to the advertiser, which is accompanied by voluntary termination of the advertisement and correction of the breach. In 2015, the Council examined 427 instances of allegedly misleading advertising and sent out 159 letters encouraging companies to amend potentially misleading advertisements. In 2016 the Competition Council sent 158 notifications requesting companies to change potentially misleading and unlawful

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135 Footnotes 3, 4 and 15 in the 2013 Guidelines.


comparative advertising. Following the warning the Council generally monitors the advertisers’ new advertisements to make certain there has not been any recidivism or new infringements.

Shared Competency for Enforcement of the Law on Advertising

The Council notes that shared competency among agencies for enforcing different sections of the Law on Advertising requires co-operation and exchanges of expertise based on constitutional principles and of Article 3 of the Law on Public Administration.\(^\text{139}\) If an authority is not competent to investigate matters arising in a case, it must make a referral to the appropriate entity to address the matter.\(^\text{140}\) Assistance from another institutional with expertise also may be requested. The Competition Council does not undertake joint investigations with the other entities which enforce the Law on Advertising. Each agency has authority to investigate separate types of infringements of the LOA and to apply different investigation procedures. Fines and sanctions for infringements of other sections of the Law on Advertising are different than those available for Article 5 and 6 LOA infringements. If an advertisement may infringe more than section of the Law on Advertising, each agency carries out a separate investigation and will adopt a separate decision concerning the infringement over which it has competence.

Neither the Council nor representatives of the State Consumer Rights Protection Authority (SCRPA) who were interviewed expressed enthusiasm for the concept of undertaking joint investigations, nor does it appear there would necessarily be any regulatory efficiencies achieved from such practices. Questions arise as to whether the fragmented enforcement of the LOA should be addressed by divesting the Council from authority over misleading and unlawful comparative advertising. The Council believes there are pros and cons to its continued enforcement of the LOA. While the SCRPA could hypothetically also be given enforcement responsibility for Articles 5 and 6 LOA, the Council notes that advertising investigations are relatively straightforward, do not take undue staff resources and provide continuous opportunities to raise public awareness of the work it does and of the overall benefits for free and fair competition. The Council expressed no desire to be divested of its enforcement responsibility for the Law on Advertising. The low level of fines that are available under the LOA confirm the Council’s approach to issue warnings and terminate infringements rather than investing scarce resources to investigate infringements that even if egregious would attract seemingly minor penalties that might not be viewed as a disincentive. Gaining a commitment to stop misleading advertising and admit the customers might have been misled by advertising claims is a much more immediate and effective solution in most cases.

The Council has tried to better allocate investigative resources devoted to enforcing the Law on Advertising. Those changes are apparent when the number of formal decisions concerning breaches of the LOA from 2009 to 2011, are compared to the period from 2012 to 2016. In 2009 the Council adopted 19

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\(^{139}\) The English version of the Law on Public Administration (with amendments until 12 June 2014 can be retrieved from here: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/09ebba107b9311e49386e711974443f?fwi d=riwzvypvg The Lithuanian version of the Law on Public Administration with the latest amendments can be retrieved from here: https://www.e-tar.lt/portal/lt/legalAct/TAR.0BDFFD850A66/OCQvcNCBEt.

\(^{140}\) Article 23.4 states that if an entity of public administration does not have the powers to adopt a decision on administrative procedure concerning the issue referred to in the complaint, it shall, within five working days, transfer the complaint to an entity of public administration that has the required powers and shall inform the person about it.
decisions;\textsuperscript{141} in 2010 it adopted 18 decisions;\textsuperscript{142} and, in 2011 it adopted 11 decisions\textsuperscript{143} concerning advertising infringements. From 2012 to 2016, the Council has annually adopted only four to seven such decisions. On the other hand, the Council now also tries to issue warnings (notifications) that an advertisement might infringe the Law on Advertising, so that possible violations can be terminated more quickly than by launching a full investigation. Recent Council cases that involved a full investigation of misleading advertising, illustrate the relatively modest nature of available monetary sanctions in comparison to the enforcement efforts necessary to achieve them.

### 3.6.3. The Law on Prohibition of Unfair Practices of Retailers

In 2013 the Competition Council noted in a contribution to an OECD Roundtable that: “In Lithuania four major retail chains operate in the food retail sector. Market shares of these retailers have been gradually increasing during recent years and currently cover about 75\% of the market. This market structure and participants (four major retail chains) of the food retail sector has not changed for the last fifteen years (1997-2013).”\textsuperscript{144} To combat the growing buyer power of these large retail chains, in 2009 the Seimas enacted the Law on the Prohibition of Unfair Practices of Retailers (LPUPR).\textsuperscript{145} It was updated in 2015 and 2016.

The LPUPR’s stated purpose is to constrain the use of market power by retailers having “significant market power and to ensure the balance of interests between suppliers and retailers.” (Article 1.1). It addresses abuses of superior bargaining position by large food retail chains towards food and beverage suppliers. The law prohibits them from engaging in unfair business practices whereby the operational risk of the retailers is transferred to suppliers or supplementary obligations are imposed that limit the possibilities of suppliers to freely operate in the market. The LPUPR contains a detailed list of prohibited retail practices. Fines of up to EUR 120 000 may be imposed on retailers who abridge the law. It also provides fines of up to EUR 10 000 for failure to provide information to the Competition Council and for daily fines of EUR 300 for either failure to provide information required by the Council in a timely manner or for failure to terminate the unfair practices.

The LPUPR applies only to retailers having significant market power (as defined by Article 1 LPUPR). Retailers who are small and medium enterprises (SMEs) do not fall within the scope of the Law. Rather, the LPUPR specifically seeks to protect SMEs who are suppliers to large retailers. The LPUPR does not apply to transactions between retailers having significant market power and suppliers whose aggregate income during the preceding financial year exceeds EUR 40 million. Where actions by a retailer with significant market power (as defined by the LPUPR) are infringements of both the Law on Competition (Article 7, Abuse of Dominant Position) and the LPUPR (Article 3, unfair practices which impermissibly transfer risks to

\textsuperscript{141} 2009 Annual report of the Competition Council, page 5. Retrieved from: http://kt.gov.lt/uploads/publications/docs/2056_d7ae5ace0a300afce7b4484e41c8b2.pdf.


suppliers), the retailer “shall be held liable in accordance with procedures set forth in the Law on Competition.” (Article 1.2 LPUPR).

According to the Competition Council, in a submission to an OECD Roundtable, Changes in Institutional Design of Competition Agencies, at the time: “The enforcement of the Law on the Prohibition of Unfair Practices of Retailers is one of the biggest challenges. After it came into force on 1 April 2010 it required resources for the above-mentioned monitoring function and there were no signals from suppliers that either the law had much positive impact, or that it was being violated. Since 2012 the Competition Council has established some violations of this law and some suppliers noted improved bargaining position. However, the benefit and effect of this law are still questioned from time to time.”

Taking into account the paucity of complaints and believing that it was perhaps because suppliers were afraid to file complaints against such strong counterparties, the Competition Council suggested allowing for anonymous complaints of breaches of the LPUPR. An amendment permitting anonymous complaints was added to the LPUPR in 2016, but the Council reports that to date there has not been an increase in the number of complaints filed under the LPUPR, which remained at zero in 2016. It is worth noting that, when a complaint is filed under the LPUPR, the Council is obliged to investigate because the statute does not allow for the Council to select its priorities regarding the enforcement of the LPUPR.

Amendments to the LPUPR that came into effect on 1 May 2016 specifically prohibit certain practices concerning rebates and so-called “most favoured nation clauses” to be demanded by retailers with significant market power. The amendments modestly increased the level of fines. They permit the Competition Council to extend the period of time for investigations for a total of nine months, which is designed to benefit retailers who complained that the prior four month limit for investigations did not permit them sufficient time to establish evidence that could rebut the allegations and to defend themselves against charges by the Council.

The Council’s administrative monitoring reports on the LPUPR are now due biennially, rather than annually and will be submitted to the Ministry of Justice. As a consequence: “For instance, now in accordance with Article 15 the Competition Council must prepare a report on monitoring of the implementation of the law every two years and thus administrative burden could be lessened as now it is likely that the Council will not request every year as much information as before.”

Neither of the Competition Council’s monitoring reports in 2015 and 2016 found indications from food and beverages suppliers that the LPUPR was being violated (there were no complaints); nor could it be concluded that the LPUPR had much positive impact (suppliers indicated that their status –i.e. bargaining power - after implementation of the LPUPR had not changed). Nonetheless, some of the suppliers who were questioned indicated a positive impact from the LPUPR (suppliers noticed that contracts with retailers have become more transparent, suppliers and retailers liabilities have become

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146 Lithuania’s submission to the OECD Competition Committee held a Roundtable Discussion on Changes in Institutional Design of Competition Authorities. DAF/COMP/WDA(2014)136 (paragraph 18).

147 This resolution was appealed and its legitimacy still pending before a court.

148 Response to Follow-up Questions, 1 January 2017, Policy Objectives, Comment 12.


clearer, and retailers during negotiation take into account interests of suppliers). Some legal practitioners question the effectiveness of the LPUPR given the lack of cases and there is some scepticism as to whether companies are not merely finding ways to circumvent the LPUPR rather than complying with it.

3.6.4. Statistics Concerning Unfair Competition, Advertising and Activities by Retailers

The following chart contains the statistics for enforcement of the three laws: the Law on Advertising, the Law on Unfair Business-to-Consumer Practices, and the Law on Prohibition of Unfair Practices by Retailers. It should be noted that the statistics for the Law on Business-to-Consumer Practices includes statistics and fines for other enforcers in addition to the Competition Council.


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<td>52 131</td>
<td>24 675</td>
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<td>1⁸</td>
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Notes:
*¹ Here we use our gathered statistics which are published as open data on the webpage of the CC: http://kt.gov.lt/lit/atviri-duomenys/2013-2015-m-vykdytos-rt-5-6-str-ki-15-str-reikalavimu-prieziuros-met u-zauku-pranešimu-skundu-skaicius-paseal-paneiskiaja-galimo-pazeidimo-teisini-pagrindu. By using open data we differentiate between cases of Law and Advertising possible violations and possible infringements of the Law on Unfair Business-to-Consumer Commercial Practices. However, this distinction might not be entirely precise, as a case might fall within the scope of both Laws. Thus, "number of complaints" in regard to the Law on Unfair Business-to-Consumer Commercial Practices shows the number of complaints concerning the Law and Advertising and/or the Law on Unfair Business-to-Consumer Commercial Practices.
*² The Competition Council cannot provide the statistics of 2012 because only in 2013 the Competition Council started to accumulate such statistics.
*³ One investigation was closed without establishing an infringement.
*⁴ One investigation was closed without establishing an infringement.
*⁵ Fines in the table are provided in EUR.

¹⁵¹ In 2015, sixteen of 82 suppliers who responded to a Council questionnaire cited positive impacts from the Law. In a similar questionnaire in 2016 positive impacts from the Law was noted by 13 of the 80 suppliers who responded.
According to the Law on Unfair Business-to-Consumer Commercial Practices the Competition Council does not control the compliance with the provisions of this Law. The Competition Council supervises if advertising is not misleading or unlawful comparative in accordance with the requirements stipulated in the Law on Advertising. However, Article 5.6 of the Law on Advertising states that in all circumstances misleading advertising shall be recognised and advertising which contains the features of misleading commercial practices stipulated in Article 7.1-21 of the Law on the Prohibition of Unfair Business-to-Consumer Commercial Practices. So the Competition Council provides statistics about cases where advertising which had the features of misleading commercial practices stipulated in Article 7.1-21 of the Law on the Prohibition of Unfair Business-to-Consumer Commercial Practices have been evaluated.

These investigations are included in the numbers of investigations of the Law on Advertising, because the Council establishes whether the Law on Advertising was infringed (as described in the footnote above). In addition, please note that in some cases several advertisements (or aspects thereof) might be examined in one decision whereby some aspects might fall within the requirements of the Law on Advertising (e.g. Article 5.2) and some aspects can be examined both under the Law on Advertising (Article 5.6) and the Law on Unfair Business-to-Consumer Commercial Practices (Article 7.1-21). For instance, in the decision of 12 June 2014 No. 2S-4/2014 (concerning Cherry Media LT) the Council established that reference prices of products in an online shop were misleading, because they were not true (thus infringing Article 5.2.1 of the Law on Advertising), and also that the online shop showed an untrue period of sale (only 24 hours and less, but the sale was extended). The Council established that this latter practice had features of Article 7.7 of the Law on Unfair Business-to-Consumer Commercial Practices and violated Article 5.6 of the Law on Advertising. 2014 short annual report of the Competition Council, p. 6. Retrieved from: http://kt.gov.lt/uploads/publications/docs/2046_c7e4aa4d6c2405045c222449817c171b.pdf.

The investigation was closed without establishing an infringement.

3.7. Article 55 of the Law on Competition – State Aid

Article 55 (former Article 45) of the Law on Competition designates the Competition Council as the coordinating institution in matters relating to State Aid (Article 107-109 TFEU) under the EU State Aid Rules. The Council is responsible for annual reports to the European Commission on granted State Aid and for SGEI reports that are sent to the Commission bi-annually.152

In Lithuania no single agency of government is responsible for oversight of grants of State Aid. Granting authority resides in and is exercised by individual ministries and agencies of government and in some instances may be exercised by municipal authorities as well. Each Ministry has different manuals and procedures it uses to apply the EU State Aid rules. There are no national rules regarding State Aid recovery in Lithuania and when State Aid is solely granted from funds from the national or municipal budget, there are no special procedures for the recovery of such State Aid. The Ministry of Finance has prepared rules for recovery of illegal State Aid from EU structural funds. It appears that there is very uneven review and application of the State Aid rules. There is no government-wide co-ordination on State Aid, and each Ministry submits a separate report to the Council on an annual basis concerning the State Aid that is has granted. There appears to be little enthusiasm within the government for designating a single, independent agency with granting authority over State Aid.

Likewise, there is virtually no litigation concerning illegal State Aid in Lithuania. To date, Lithuania has not had any cases of recovery of State Aid from either the European Commission or the national courts. In the absence of a centrally designated authority responsible for policies concerning State Aid, there is no designated entity responsible for establishing procedures to facilitate prompt and effective recovery of illegal State Aid. The lack of litigation also may be due to the fact that companies do not wish to complain about a practice that they may benefit from in the future as well as a general reticence to complain against ones competitors. There are many grants of State Aid in the energy sector; but it is not the only sector where there have been substantial grants of State Aid.

The Council consults with granting authorities, involved organisations and beneficiaries on the concept of State Aid and application of the State Aid Rules. It attends ad hoc meetings with granting authorities to discuss the applicability of the State Aid rules in specific cases. Article 55 requires that the Council perform a review of the State Aid projects and to submit conclusions and recommendations to each grantor of State Aid and to collect information on State Aid granted to undertakings in Lithuania. In addition, the Council maintains the register of State Aids, including de Minimis aid that is provided by granting authorities. Five Council employees are presently assigned to work on State Aid matters, and one of them works solely on maintaining the State Aid and de Minimis aid Register.153

Since 2016, granting authorities have been required to obtain ex ante compatibility opinions from the Competition Council advising them on the compatibility of their project with the State Aid Rules. The Council’s opinions are not, however, legally binding upon the granting authorities. The 2016 amendments do not require, however, that municipalities and local authorities obtain an ex ante compatibility opinion, although they may voluntarily do so.

Each week the Council examines activities and legal acts that are under consideration by the government and if necessary provides commentary to responsible institutions on the possible presence of State Aid in them and whether changes are required to make the aid compatible with the State Aid Rules. The Council also examines information received from other sources, including from the media. The Competition Council may also carry out the examination of funding measures on its own initiative. After receiving the Council’s compatibility opinion, the granting authority may also choose to provide a revised State Aid or de Minimis aid grant for re-examination by the Council in order to receive a confirmation that the revisions are in line with State Aid requirements.

The 2016 amendments did not result in the need for additional resources or guidance to the national government and local authorities. Ex ante compatibility opinions were provided by the Competition Council before the new legislation when granting authorities would ask for them. The changes to the legislation did not require the Council to establish additional internal procedures to its now mandatory ex ante compatibility opinions. The Council is responsible for communications with the European Commission regarding State Aid matters.

The Council supervises the submission of information to the Lithuanian State Aid and de Minimis aid Register. The Council also informs beneficiaries on the amount of de Minimis aid they have received during the three-fiscal-year period. The State Aid and de Minimis Register was developed in 2005 and mainly is used to ensure that aid granted to a single undertaking does not exceed the appropriate de Minimis ceiling (based on the sector in which the undertaking is active). In 2015, Lithuania’s State Aid and de Minimis Aid Register was revised to allow data to be entered into the Register on each individual award of State Aid. A legal framework was also established that obliges all State Aid grantors to register information on each individual aid award within five working days after granting the aid (i.e. adopting a legal decision to grant aid to the beneficiary) regardless of the amount granted. This means that even the smallest amounts of State Aid must be registered in the State Aid and de Minimis aid Register.

The data entered into the State Aid and de Minimis Aid Register is approved by the Competition Council (who is the administrator of the Register). If the Competition Council establishes that data entered by the granting authority is incorrect (usually the legal base for the aid granted) it rejects the submitted data and the granting authority must correct the inaccuracies and submit the data again for the approval by the Council.

The Competition Council provides State Aid training to granting authorities, involved organisations, (for example agencies that administer State Aid) and to beneficiaries upon the request of a grantor. In 2016 the Council provided thirteen training sessions on State Aid to granting authorities and agencies. In addition, the

Council has prepared a training plan that targets municipalities and will be fully implemented by the end of 2018. It will involve a training tour throughout Lithuania, and will mainly be targeted to municipalities. Private companies and their employees will be involved to increase the overall awareness of State Aid issues. The first of the municipal training sessions took place during December 2016 in Kaunas.

In 2014 the Competition Council created two questionnaires for use by granting authorities and their beneficiaries. The questionnaires are straightforward training tools designed to allow users to test their knowledge and self-evaluate whether a sample project constitutes State Aid. The first questionnaire consists of five simple questions that correspond with Article 107(1) of TFEU. It is designed to remind granting authorities about the criteria used to identify State Aid and encourage them to contact the Competition Council for more information about compatibility of their project with the criteria and evaluations they should undertake prior to awarding the grant of aid. The questionnaire also seeks to help beneficiaries identify whether the support they applied for could be considered State Aid and assist them in avoiding illegal State Aid.

The second questionnaire is meant to help beneficiaries and granting authorities identify “single undertakings” (as described in Commission Regulation No. 1407 (2013). The questionnaire consists of four questions that correspond with Article 2.2 of the Commission Regulation. Both questionnaires are available on the Council’s website. Additionally, in 2016 Competition Council created a Memo on the Application of Altmark Criteria, which is available on the Council website and explains the proper use and understanding of each of the four so-called “Altmark criteria” when evaluating grants of aid.

3.7.1. Recommendations by the Council Concerning State Aid

It appears that granting authorities are more likely to follow Council recommendations concerning State Aid if the grant involves EU structural funds. However, even so there have been instances of notable resistance to adopting the Council’s recommendations on State Aid. A recent set of interactions between the Council and the Ministry of Communications and Transportation illustrates the issue.

In 2012 the European Commission adopted a decision regarding State Aid to the Port of Klaipeda which found the port to be in competition with Member State ports so that State financing for the Port of Klaipeda could directly affect inter-community trade. In 2016 the Ministry sent an evaluation to the Council concerning a project to improve traffic conditions for vessels at the port, by constructing piers and performing other improvements to the port infrastructure, funded by EU structural funds. After considering all of the factors, including the 2012 EU decision concerning the Port of Klaipeda, the Council advised the Ministry that the project involved State Aid. Subsequently, the Ministry again sent the project to the Competition Council for a second opinion, but did not provide any new information that would be the basis to alter the Council’s earlier opinion. The Council issued a second opinion, which the Ministry did not adopt. According to the Council, at present, financing for the project has not yet been adopted and there has not been a notification to the European Commission. The Ministry of Communications and Transportation has started an informal consultation with the European Commission.

A second project in 2016 involving the Port of Klaipeda, to increase accessibility to the Port, was also reviewed by the Council. The Council concluded that the project would have resulted in a grant of State Aid and provided its opinion to the Ministry. Notwithstanding the Council’s recommendation, the Ministry did not apply the State Aid rules.

The chart, below provides an overview of total national State Aid in Lithuania for the preceding five years. Additional State Aid data is found in Annex B to this report.
3.8. Sanctions and Penalties for Infringements of the Law on Competition

Sanctions for infringements of the Law on Competition have been addressed throughout this report. As a general matter, the Competition Council considers the level of fines and other sanctions are adequate to both address the harm from infringements and to deter future infractions of the Law. Lithuania does not impose criminal fines for violations of the Law on Competition. The Council is unaware of any proposals and debates on criminal sanctions in Seimas. At present, the Council is not of the opinion that criminal sanctions would significantly enhance enforcement against hard-core cartels.

The levels of fines imposed by the Council are considered high by the standards of other enforcement agencies and fine levels available to other enforcement agencies in Lithuania, and it appears that the Council is robustly using the tools available to it. The Law on Competition establishes heavy sanctions both for offending undertakings and for managers (CEOs) of undertakings. In some instances, the sanctions available for infringements of the Law on Competition are superior to sanctions available to other enforcement entities. This section recaps the array of sanctions and penalties that may be imposed for violations of the Law on Competition.

Infringements of the LOC may be sanctioned by fines against undertakings and public administration entities (Article 35) and managers of undertakings (Article 40). The Council may issue orders requiring undertakings to terminate illegal activities and in the case of illegal mergers to restore competition to the previously existing state of affairs. The Council may adopt interim measures. The Council may enforce its orders and impose sanctions for non-compliance. Non-payment of a fine within three months of the publication on the Competition Council’s website will result in interest being applied. (Article 39.2).155

Individual managers who commit infringements may be disqualified from serving on governing boards for a period of three to five years. Imposition of individual disqualification and fines will be imposed by the VRAC upon a petition by the Council to impose the sanctions it has determined.156 To date, no petitions

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154 Information from 2016 was not available prior to the meeting of the Competition Committee on 21 June 2017. The obligation to report to the European Commission on granted state aid for 2016 is set for 30 June 2017, through SARI system (a system created and controlled by the European Commission).


156 Article 40.1 LOC provides that the manager of an infringing undertaken may be debarred management or the governing body of a public or private legal entity for a period of three to five years and may be fined up the EUR 14 481 for involvement in the infringement. Sanctions may not be imposed upon the manager of an undertaking that qualifies for leniency (exemption from fines, Article 38 LOC.) Article 40.4 LOC states: “This provision on non-imposition of sanctions shall be omitted if the undertaking has terminated the employment relations with the manager of the undertaking due to his involvement in the commitment of a violation and has applied to the Competition Council for an exemption from the fine.” Article 40.5 provides: “Termination of employment relations between the manager of the undertaking and the undertaking which committed a violation or termination of the powers of the mangers of such an undertaking before the adoption by the
for individual sanctions have been filed by the Council. Individual damages are quite circumscribed in the law and may be imposed only on managers who are “in charge of a legal person and [are] its single-person management body.” (Article 3.24 LOC). A manager may be held culpable and subject to disqualification and fines if: i) they were directly involved in the violation; ii) although not directly involved in the violation, they had grounds for suspecting the undertaking they were in charge of was committing a violation and failed to take actions to prevent the violation; and, iii) where they were “not aware of the fact, although they had to be aware of the fact that the undertaking they were in charge of committed or is in the process of committing a violation.” (Article 40.2)

Subpart 3 appears to suggest a level of managerial negligence or wilful failure to inquire about suspicious circumstances or activities of the undertaking. Managers whose employment is terminated by the undertaking due to their involvement in the violation and whose former employer (undertaking) has applied for immunity under Article 38(1) may be exempted from the operation of Article 40. Termination of employment of a manager by an undertaking before the Council has adopted a Resolution concerning a violation shall not release the manager from culpability or application of Article 40.

Since the adoption of personal liability for CEOs, the Council has had one case where a CEO’s involvement in the infringement was evaluated. The final decision is on appeal. The Council attributes the lack of individual liability for three reasons. “First, the CEO’s liability could be applied only if the manager contributed to the conclusion of an agreement between competitors or abuse of a dominant position. Second, the particular level of the CEO’s involvement in the infringement must be established. Third, the liability can only be enforced once the decision becomes final (after all court appeals), which prolongs the time between the adoption of the initial decision against the undertaking and the later decision against the CEO.” Nevertheless, the Council views the overall scope of law and operation of this section to be sufficient. The possibility to use Article 40 to impose liability on other high-level managers has not been analysed by the Council. In the Council’s view, at the moment, there is no reason to believe that sanctions for individuals under Article 40 are too lenient.

Regarding sanctions against undertakings, fine levels are in line with European Commission fines. Fines for prohibited agreements, abuses of a dominant position and implementation of a notifiable concentration without Council approval or for continuation of a concentration during a period of suspension of a concentration are subject to fines of up to 10% of the gross annual income in the preceding business year. Unfair competition infringements (Article 15) shall be subject to fines of up to 3% of the gross annual income of the undertaking in the preceding year. A fine of up to 1% of the gross annual income of the undertaking in the preceding business year may be imposed for failure to provide information required during a Council investigation, for providing information that is incorrect or incomplete, for hindering officials from entering and carrying out an inspection, for concealing or damaging evidence or for damaging or breaking a seal affixed on objects or evidence by the Council during the course of its investigation. Undertakings that continue illegal activity that the Council has ordered to be terminated may be fined up to 5% of the average gross daily income in the preceding business year for each day during which the illegal activity is continued by the undertaking.

Fines for parent companies are possible under the Law on Competition and the Council reports of at least one instance where the turnover of the parent company was used to calculate the fine levels. The Council notes that it follows the European Commission rulings and CJEU judgements concerning parent company liability for infringements by their wholly-owned subsidiaries and EU methodologies for attributing turnover.

Competition Council of a resolution on the violation of this Law shall not release the manager of the undertaking from responsibility under this Article.”

Sanctions and fines may be applied to associations of undertakings. (See Section 3.3.3 above). The Competition Council has the authority to impose a fine on an association of undertakings participating in the infringement. The fine on the association is imposed with respect to the turnover of the association in its own right. Undertakings who are members of the association and who took part in the infringement may be and have been subjected to separate fines. The basis of the fine imposed on each undertaking is determined according to their respective income.

In 2012, the Fining Policy of the Lithuanian Competition Council was changed and aligned with the 2006 European Commission Guidelines on the method of setting fines. The Council takes into account a variety of factors when setting fine levels, including the gravity of the violation, its duration, aggravating or mitigating circumstances and the part that each undertaking played in the infringement. Sanctions applied for competition infringements are viewed as being quite high relative to sanctions for other administrative infringements in Lithuania. It appears that that the Council is appropriately applying the fining policies and robustly using the tools available to it.

Sanctions must be imposed by the Council within five years of the date of the commitment of the violation. Fines are paid to the Lithuania state budget. Payment of fines (with interest) is suspended during the period of an appeal from a Council decision until “the court ruling becomes effective.” (Article 33.3).

The Law also permits mitigation of fines if the parties acknowledge the facts and admit they constitute infringements. The courts have held that acknowledgment must be explicit, unambiguous and unconditional and must encompass both the facts and legal basis for finding the infringement. The Council previously might reduce fines in mitigation penalties up to 19% of the maximum applicable penalty. With recent changes to the LOC involving mitigation of penalties, the percentage reduction it will apply to the maximum applicable fine is now 15%. The Council believes that higher percentages of fee reduction in mitigation might undermine earlier detection of infringements available through its leniency programme. The sanctions for competition infringements are summarised on an annual basis, in the chart, below.

<table>
<thead>
<tr>
<th>Year</th>
<th>2016</th>
<th>2015</th>
<th>2014</th>
<th>2013</th>
<th>2012</th>
</tr>
</thead>
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<tr>
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<td>7</td>
<td>10</td>
<td>9</td>
<td>2</td>
<td>36</td>
</tr>
<tr>
<td>Total Amount of Fines in EUR</td>
<td>794 100</td>
<td>24 594 500</td>
<td>63 121 811</td>
<td>519 172</td>
<td>18 150 889</td>
</tr>
</tbody>
</table>


4. Institutional Setting for Enforcement of the Competition Laws

Although the Competition Council is the single state institution in Lithuania designated to enforce and supervise compliance with the Law on Competition (Article 17.1), it is not the only guardian promoting and defending competition within Lithuania. Within the institutional framework of the LOC, individual complainants, undertakings and third parties have substantial and important rights. The courts of Lithuania are the final arbiters of actions taken by the Competition Council. The Ministry of Economy and the Parliament establish competition policies and laws and provide the authority and tools for the Competition Council to carry out its investigations. Each of these groups has an important role in expanding effective market-based competition and the culture of competition within Lithuania.

This section addresses the powers and functions of each of these groups. Section 4.1 deals with the structure of the Competition Council. Section 4.2 reviews the resources of the Competition Council and how it prioritises its statutory responsibilities. Section 4.3 addresses the enforcement powers, investigatory tools and methods for resolving infringements available to the Competition Council and how they are used. Section 4.4 deals with the rights of third parties that are provided by the LOC and Council procedures. Section 4.5 addresses judicial review of Council decisions. Section 4.6 considers the activities of the Competition Council, in conjunction with the lead policy-making functions of the Ministry of Economy and the Seimas, to review proposed and existing legislation for infringements of the LOC and to provide the framework for effective competition in Lithuania. Section 4.7 discusses the Council’s recent market studies and their outcomes. Section 4.8 addresses competition advocacy activities of the Council.

4.1. Competition Council Powers and Organisation

The Council is an independent institution. Although it is not a part of the government, the Council takes part in deliberations of the government and directly provides it views to government ministries. It has important responsibilities to provide a competition assessment of all proposed legislation. It ensures that ministries and agencies do not apply existing legislation in a manner contrary to the LOC. At the same time the Council is funded from the state budget and is ultimately responsible to the Seimas. The role and priority of competition policy is determined by the government, principally by the Ministry of Economy.\(^{160}\)

The Law on Competition provides the Council with the full array of tools to investigate and enforce the law. Importantly, the Council has both authority and autonomy to establish programmatic goals, prioritise its activities, marshal and expend its resources to carry out its mission and statutory responsibilities. Many of the Council’s statutory powers have already been discussed and highlighted in Section 3 of this report.\(^{161}\)

The Council’s most relevant powers are to: (i) enforce compliance with the Law by undertakings, individuals and public persons and impose sanctions; (ii) investigate anticompetitive practices by entities of public administration and compel their compliance with Article 4 of the Law; (iii) review concentrations; (iv) submit proposals to government to ensure effective competition; (v) review legislation and monitor its effects on effective competition; and (vi) petition to the courts to enforce the laws and the public interest. The Council has the power to adopt legal acts, identify and publish priorities of its activities on its website, establish advisory committees, and organise working groups, and engage the services of experts.


\(^{161}\) The structure and powers of the Council are contained Chapter IV, Articles 17 to 21 of the Law on Competition.
The Council is composed of a chairperson and four members who are appointed for six-year terms by the President of the Republic following a recommendation from the Prime Minister. Members of the Competition Council may be appointed for no more than two consecutive terms. They must be Lithuanian citizens of good repute with a university degree at least the equivalent of a Master’s degree in either law or economics. At present the Competition Council is composed of five individuals who are lawyers. The chairperson directs the work of the Competition Council. The chairperson represents the Council domestically and outside the country, may employ and dismiss administrative staff, submits annual reports of the Council to the Seimas and the government, signs resolutions of the Council, participates in the meetings of government in a deliberative capacity and may voice comments should the decisions proposed for adoption contradict the Law on Competition.

The activities and functions of the Competition Council are carried out by administrative staff, under the day-to-day supervision of the Executive Director. The five members of the Competition Council are designated in an advisory capacity to one or more of the administrative operating divisions of the Council. The Council is also assisted by a Chief Legal Advisor and a Chief Economist. An organisational chart is below.

**Figure 1. Organisational chart of the Competition Council**

4.2. **Competition Council Resources, Priorities and Assessments of Effectiveness**

The Competition Council’s mission is to safeguard effective competition for the welfare of consumers.\(^{162}\) To fulfill its mission the Competition Council sets priorities and establishes strategic plans and programmes containing benchmarks to assess its progress. Prior to 2012, the Competition Council did not have full authority to prioritise its activities and was required to investigate all complaints and address all matters placed before it. The Council was frequently forced to allocate a large part of its resources to investigating complaints that were not necessarily dealing with the most strategically important issues. The 2012 amendments to the Law on Competition provided the authority with greater autonomy in conducting its statutory functions and have allowed it to better prioritise its activities.

The 2012 amendments permit the Council to open or close investigations based on its enforcement priorities. In July 2012, following the effective date of amendments, the Council declared maximising

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consumer welfare as its sole enforcement priority and published Prioritisation Principles. The Prioritisation Principles require the Council to assess three factors when deciding whether to initiate an investigation: i) the potential impact of an investigation on effective competition and consumer welfare; ii) the strategic importance of such an investigation; and iii) the rational usage of resources. Those changes have permitted the Council to better order its activities to implement its strategic goals and objectives in order to achieve its mission of providing for effective competition and consumer welfare.

Similar amendments in 2013 to the Law on Advertising have improved the Council’s flexibility in enforcing that law. (Articles Article 21.2.3 and 25.7 of the Law on Advertising). The Law on the Prohibition of Unfair Practices of Retailer (LPUPR) provides no such discretion to Competition Council to prioritise enforcement. However, the Council notes that because there are very few LPUPR cases, in practical terms it has not been a problem.

The Council prioritises its activities and establishes goals in a strategic plan (currently covering the period of 2016 to 2020). It monitors its implementation of its strategic plan through a variety of activities, including its Annual Report to the Seimas. In its strategic plan the Council identifies and prioritises its key activities.

For the first time in 2011, following international best practices, the Competition Council carried out the impact assessment of its activity on consumers and published the results of that impact assessment. The assessment is now carried out annually, according to the OECD guidelines (OECD, Guide for helping competition authorities assess the expected impact of their activities, April 2014).

The methodology used to assess the direct benefit brought to consumers is based on the OECD Guide. In addition to antitrust enforcement (anticompetitive agreements, abuse of dominant position and merger cases) the Council estimates the direct benefits from some misleading advertising cases. The objective


164 The Law on Advertising can be retrieved from here: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/dd69e1e2a58711e59010bea026dbd259?jfwid=18117lhyv7e.


168 The Impact Assessment includes an annual quantification of the direct benefit to consumers from the Competition Council’s investigation and enforcement activities. Direct benefit quantification methodology is an assessment of the damage which would occur without Competition Council’s intervention (e.g. anticompetitive actions and their detrimental effects would continue which would likely result in higher prices for consumers or a misleading advertising would not be terminated and would continue to mislead consumers). To calculate the present value of the direct benefit the Council uses a discount rate of 5.5%. Additionally, in order to avoid year-to-year fluctuations in the impact estimates which arise due to the varying duration of investigations, the Council uses a three-year average impact estimate. The indicator is ratio between average direct benefit (for three years) brought by the Competition Council and the Council’s average budget (for three years). The Council has established a direct benefit target of ratio 5:1 for up to 2019. The Impact Assessment also seeks to capture the effective deterrent resulting from Council interventions. The Council considers the deterrence effect of competition law enforcement to be the effect of an intervention by the Council that results in undertakings not involved in the investigation abandoning or significantly amending their conduct and


164 The Law on Advertising can be retrieved from here: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/dd69e1e2a58711e59010bea026dbd259?jfwid=18117lhyv7e.


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of the Impact Assessment is twofold. Firstly, it serves as a means of external accountability enabling society to assess the activities of the Competition Council and to directly observe the benefits achieved from its work. To that end the Council widely publicises its direct benefits to consumers in its annual reports. Secondly, it is an internal tool for Council members and administrative staff to guide annual work plans, flexibly manage workloads and review performance goals.

Using those analytical protocols, the Competition Council calculated that the direct benefit of its overall activities in 2014 to consumers was EUR 9.31 million.\textsuperscript{169} In 2015 the Council calculated that the ratio of direct benefit to Competition Council’s annual budget to be EUR 1:9. According to recent calculations by the Council, the average ratio of direct benefit for the period 2014 to 2016 was EURO 1:7.8.\textsuperscript{170}

**4.2.1. Competition Council Priorities and Strategic Plan**

The Competition Council’s strategic goals are to maximise consumer welfare, to strengthen Lithuania’s competition culture and to strengthen the Competition Council’s capacity to identify and stop infringements. In 2016 the key strategic enforcement activities of the Competition Council gave special attention to competition restrictions in energy, waste management and pharmaceutical sectors. They also focused on restrictions in public procurements and anticompetitive conduct by municipalities and ministries. The Council’s key activities strategic goals for 2017 essentially mirror those for 2016.

With regard to specific investigation priorities, investigations of Article 5 anticompetitive agreements remain a top priority. For investigations of possible abuses of a dominant position, the Council has not changed its priorities. Lately, the Competition Council has tried to solve competition concerns arising from possible abuse of a dominant position by adopting commitment decisions.

Advocacy is a key strategic priority. The Council now has a separate Communications Division (presently staffed by four people). The Council currently devotes substantial resources to preventative advocacy designed to discourage and deter infringements from occurring. Producing written guidelines and other explanatory materials for the public on how to avoid infringements, and publication of its decisions on its new website are key preventative advocacy initiatives. Recent efforts include publication of the 2013 *Guidelines on Assessment of Misleading and Unlawful Comparative Advertising*, which summarise the most common examples of misleading and unlawful comparative advertising.\textsuperscript{171} The Council also has published a short reference guide to requirements for the prohibition of misleading advertising and of therefore preventing the creation or continuation of a cartel or any other infringement of competition law. The deterrent effect is considered to be an indirect benefit to consumers. Since the Council has not conducted a survey to assess the deterrent effect of antitrust enforcement, the assessment of the deterrent effect is based on the conservative data used by the OFT’s (now The UK Competition and Markets Authority) legal and economic advisors. The ratio of agreements and initiatives abandoned or significantly amended to those which resulted from enforcement of the LOC is considered to be 5:1 in anticompetitive agreement cases, while in abuse of dominance cases the ratio is 4:1. In order to evaluate deterrent effect of misleading advertising cases the Council conducted a survey of major advertising agencies. The survey suggests that one decision on misleading advertising by the Council results in deterrence of three similar advertisements.


comparative advertising,\textsuperscript{172} and Recommendations on Price Advertising,\textsuperscript{173} and Guidelines for the Competition Impact Assessment of Draft Decisions.\textsuperscript{174} The Council’s advocacy efforts are discussed in Section 4.7, below.

The Council conducted a PEST evaluation of the four categories of issues and identified activities in each category that may affect its ability to achieve its strategic goals. They are: i) political and legal factors; ii) economic and technical factors; iii) co-operation; and iv) internal factors.\textsuperscript{175} The key political factors identified by the Council are the lack of sufficient funding, and independent sources of operating funds. Updated information technology and tools of economic analysis, including improvements to existing systems and software along with the need for more robust analytical tools are viewed as key factors affecting the Council’s ability to maintain effective operations. Successful co-operation among the Competition Council, the Public Procurement Office, and the Special Investigation Service will seek to reduce anticompetitive behaviour in public procurements. The wide spectrum of statutes it must enforce and the scope of Council functions are identified as internal factors that may affect its strategic goals. New duties resulting from new statutory responsibilities, including prior approvals for new economic activity by municipalities may necessitate additional staff.

\textbf{4.2.2. Competition Council Resources}

The Competition Council’s budget is principally financed from the Lithuanian state budget (and since 1 February 2017 also from merger fees). Following the global financial crisis, the Council’s budget was reduced. In 2014 the Council’s budget was increased to finance several key IT projects, including the development of the State Aid Register and the purchase of forensic software. Over the past five years the Council’s budget has increased slightly. Even so, the Council notes that its total budget is small when compared with the budgets of other state regulators and agencies, some of whom have functions that are complementary to the competition enforcement functions of the Council.\textsuperscript{176}

The present Council personnel level is approximately 70 full-time employees, which is expected to remain at that level. In recent years the actual number of staff at the Council has varied as much as 20%. In 2015 the Council lost nearly 20% of its staff to turnover. The Council notes that the loss of experienced staff and institutional knowledge is a particular problem. Lower compensation levels offered by the Council than by law firms and private undertakings may result in the level of experience of new staff being typically less than that of the staff members whom they are replacing. The present designation of salaries of public servants in Lithuania is determined by rules common to all institutions and it is not possible for the Council to pay more than the ceiling set by the laws governing public servants. Despite its independent status, the Council does not have independence over setting the level of compensation for its staff members. The


\textsuperscript{175} Questionnaire Response, Section 1.D.

\textsuperscript{176} Questionnaire Response, Item 18, footnote 4. “For instance, in comparison to other enforcement or regulatory institutions in Lithuania, the CC’s budget is quite small. Presentation of the 2015 Competition Council’s 2015 activities (in Lithuanian), slide 10. In the slide it can be seen the amount of the budget (in million EUR) and amount of money per person (in thousand EUR) of institutions: RRT (Communications Regulatory Authority) – EUR 7.39 million (EUR ~47 400 per person), VKEKK (National Commission for Energy Control and Prices) – EUR 2.81 million (EUR ~31 600 per person), VPT (Public Procurement Office) – EUR 2.53 million (EUR ~29 400 per person), KT (the Competition Council) – EUR 1.68 million (EUR ~24 700 per person).” Retrieved from: \url{http://kt.gov.lt/uploads/documents/files/KT%20ataskaitos%20apistatymas_08-11(2).pdf}. 
members of the Competition Council note that salaries of its members have recently been changed, albeit temporarily until the end of 2017, to permit the salaries of Council members to be tied to and the equivalent of the level of the highest paid public servants.

The institutional costs to the Council from high levels of turnover are increased time spent on staff training, supervising and assisting new staff. The Council reports that the reduced experience of staff members has adversely affected the capacity of the Council to operate proactively and has constrained it from initiating greater numbers of complex investigations. It reports that these outcomes have been noticed and commented upon widely by users of the Council’s services (representatives of undertakings appearing before the Council), as well as by representatives of government ministries and other entities that interact with the Council and its staff.

The Competition Council administrative staff has only four economists, and none of the present members are economists. The Council’s economists spend most of their time on merger analysis, and in addition investigate a handful of abuse of dominance cases, economically complex vertical agreements cases (i.e. restrictions by effect) and participate in one annual market study.

Merger review has become more advanced and, accordingly, has required more staff time and resources. During the last five years the Competition Council has adopted two decisions blocking mergers (both decisions currently are under appeal), and three decisions where mergers were cleared subject to remedies, including structural remedies and divestitures. In addition, during the last five years the Competition Council has also had a number of investigations and cases concerning merger rules violations, whereas previously there were no such cases. The imposition of structural remedies has required hiring experts and monitoring the progress and conclusion of those divestitures.

The lack of qualified economists is a concern among competition practitioners in Lithuania. No university in Lithuania presently offers courses or advanced degrees in industrial economics. Economists from outside the country are difficult to recruit because of language barriers and Lithuanians with high-level economic skills who have been trained elsewhere would be required to take significantly lower compensation for their skills. Commentators note the problem affects not only the Competition Council, but also government ministries and private industry where economics skills are needed but in short supply.

The views of the embers of the Competition Council concerning the inadequacy of its budget is echoed by legal practitioners, colleagues in government ministries, and the judiciary. There is almost universal praise for the level practice, integrity and effectiveness of the Competition Council. It is highly regarded for the professionalism with which it carries out its mission. The Council, and in particular the Chairman, are praised for raising the profile of Council and its standard of practice over the past five years.

On 12 January 2017 the Seimas voted for an increase in the budget of the Council by approving the designation of merger filing fees to be used by the Council expressly for the purposes of prospective merger enforcement. The filing fees are available to the Council from 1 February 2017. Based upon historic averages, the filing fees are anticipated to add approximately EUR 100,000 to the Council coffers annually. While the new funding is both welcome and necessary, the additional funds from filing fees will not be sufficiently high to make up the total shortfall in the Council’s optimum budget according to the Chairman. It has advocated a number of methods by which the shortfall could be addressed, including assessing an amount on the budgets of each Ministry and agency of government to contribute to the Council’s budget,

177 For more information about the Councils merger decisions to prohibit a merger or to clear a merger subject to remedies is contained in the Note by Lithuania submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016. Retrieved from: DAF/COMP/WP3/WD(2016)76.

and requiring contributions from private undertakings. Many of the measures have been opposed by the sources (entities and undertakings) proposed to supply those additional funds and to date the Seimas has not enacted the Council’s suggestions. None of the proposals to supply “independent” sources of funding appear to have wide-ranging support.

Current resources levels through the end of 2016 are reflected in the chart, below.

<table>
<thead>
<tr>
<th>Year</th>
<th>Person years</th>
<th>Budget Expenditure</th>
</tr>
</thead>
<tbody>
<tr>
<td>2017</td>
<td>63</td>
<td>2 143 000</td>
</tr>
<tr>
<td>2016</td>
<td>63</td>
<td>1 696 000</td>
</tr>
<tr>
<td>2015</td>
<td>74</td>
<td>1 688 927</td>
</tr>
<tr>
<td>2014</td>
<td>72</td>
<td>1 690 998</td>
</tr>
<tr>
<td>2013</td>
<td>67</td>
<td>1 290 547</td>
</tr>
<tr>
<td>2012</td>
<td>60</td>
<td>1 276 935</td>
</tr>
</tbody>
</table>

**4.3. Competition Council’s Enforcement Power**

*4.3.1. Competition Council Powers to Investigate and Terminate Infringements under the Law on Competition*

The scope and application by Competition Council investigative powers have been addressed in Section 3 and above, in this section of the report. The Council has the necessary powers and authority to effectively carry out investigations and uncover infringements. It may initiate investigations of infringements of the Law on Competition based upon complaints or at its own initiative. The Council’s resolution to initiate an investigation may remain confidential until a threat to the investigative process ceases to exist. The Council may compel documents and evidence from complainants and require evidence from leniency applicants as a condition of granting leniency.

The Council may be authorised by the VRAC to conduct inspections of premises. The VRAC likewise may issue authorisations for inspections by the European Commission and require assistance by the police for the purpose of carrying out investigations and inspections. The Court may also authorise the Council to compel production of electronic data and communications from third parties. The Council may require documents from third parties, including documents containing commercial secrets, which it is required to protect. It may obtain oral and written explanations during the course of an investigation. On its own initiative the Council may seek police assistance with an inspection. If necessary for the purpose of an inspection, authorised by the VRAC, the Council may seal the premises of an undertaking for a period of no longer than three calendar days. The Council may compel undertakings to terminate illegal activities and may institute interim measures.

Undertakings that do not provide information required during an investigation, that provide incorrect or incomplete information, that hinder officials of the Competition Council from entering a premise or carrying out an inspection or from seizing documents and articles of evidence shall be subject to fines of

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179 Article 25.1 states: In carrying out the investigation the authorised officials of the Competition Council shall have the right: 4) to seal the premises used by the undertaking wherein documents are held (irrespective of the medium on which they are stored) for the time period and to the extent necessary to carry out inspections, performed upon receiving the court authorisation, however, for no longer than three calendar days.
up to 1% of the gross annual income of the undertaking in the preceding business year. Challenges to Council inspections and obstruction of investigations are rare.

In January 2016 the Council adopted a decision to fine UAB Elmelit for obstruction of a Council inspection at the company premises by the manager of the undertaking.\(^{180}\) The Council found that the manager had obstructed authorised officials of the Council from conducting a court-authorised inspection and had hindered Council officials from receiving, in a timely manner, information concerning the company’s structure, personnel, and their functions, which were required for effective inspection. The Council imposed a fine of EUR 19 500 on UAB Elmelit. The company did not appeal the decision.

The Council does not have any formal procedural rules for obtaining written and oral statements. It adheres to the requirements of the Constitution and laws of Lithuania and to judgments of the EU courts concerning self-incrimination. In a 2008 judgment concerning the rights of auditors against self-incrimination, the SACL ruled that an investigated undertaking cannot refuse to provide information on the grounds that it is incriminating and may be used to establish an infringement.\(^{181}\) The Council may not force the investigated undertaking to admit its activities were an infringement of the LOC. The Council follows rules on attorney-client privilege established by the Lithuania Law on the Bar, which prohibits the use of attorney-client materials.\(^{182}\) During inspections the Council does not take privileged communications between attorneys and clients.

### 4.3.2. Infringement Determinations by the Competition Council

From January 2004 to December 2016, the Competition Council issued 62 infringement decisions in antitrust cases.\(^{183}\) Forty-two of the decisions involved anticompetitive agreements, and the remaining 20 infringement decisions involved abuse of a dominant position. Eight of the 62 decisions were concluded with commitments and 2 of them involved vertical agreements,\(^{184}\) the remainder involved abuses of a dominant position. No specific sector of the economy has been more frequently subject to commitment decisions than others sectors. The length of investigations involving infringement decisions versus those where commitments have been adopted does not appear to involve great time savings.\(^{185}\)


\(^{183}\) In some instances several decisions address the same case because after appeal the courts returned the case to the Competition Council to conduct additional investigation.

\(^{184}\) Competition Council decisions of 24 December 2009, No 1S-200 and of 21 July 2011, No 1S 137. For links to cases please see references below.

\(^{185}\) Lithuania’s contribution to OECD Competition Committee, Commitment Decisions in Antitrust Cases, DAF/COMP/WD(2016)30 (23 May 2016). “Because investigations have been evolving toward more sophisticated analysis, for comparison we provide data from the last 12 years in the case of investigations of abuses of dominant position and the last 10 years in the case of anticompetitive agreements. The selected period in each case encompasses all commitment decisions and a big part of infringement decisions. In some cases, infringement decisions were overruled and returned to the Competition Council for additional investigation. In these instances, total investigation duration is counted (time period of court proceedings is not included).”
4.3.3. Commitment Procedures

The Council may accept commitments to end an investigation if three cumulative conditions are met: i) the actions did not cause significant damage to the interests protected by the law; ii) the undertaking suspected of the violation has voluntarily terminated the actions; and iii) the undertaking suspected of the violation has submitted to the Competition Council a written obligation not to perform such actions or to perform actions eliminating the suspected violation or to create preconditions to avoid it in the future.\(^{186}\)

The SACL has affirmed that a commitment decision does not require a finding by the Competition Council that the undertaking infringed the Law on Competition, nor does it require a precise definition of the relevant market.\(^{187}\) The Council has wide discretion about whether to accept a commitment. Commitments must be designed to restore effective competition. The Council follows European Commission rules and practices concerning commitments.\(^{188}\) Commitments do not have to be time delimited. The Council typically requires that the undertaking provide evidence of its compliance within a prescribed time period. Questions concerning commitments and the Council’s discretion, specifically whether there are certain circumstances in which the Law on Competition establishes an obligation on the Council to adopt commitment decisions, are presently the subject of judicial review in the courts.

Undertakings cannot compel the Council to adopt commitment decisions where there have been infringements involving significant damage, and in numerous instances the Council has refused to accept commitments. Although the Council is not required to market-test commitments, in recent cases it has publicly announced proposed commitments and received comments before adopting its final decision. The Council’s discretion is not absolute, however, and the courts have not limited themselves to a purely formal review of the Council’s commitment decisions.\(^{189}\) (Section 4.4 discusses judicial review of Council decisions).

In the two most recent examples of the commitment decisions, the Council accepted behavioural commitments. In the LINAVA case the association agreed to sell TAR carnet cards at the same rate to members and non-members. In the Viasat case the company offered commitments not to apply different terms for the Viasat Sport Baltic channel distribution terms to the providers of multi-channel digital TV subscription services. Its commitments were adopted for two years.\(^{190}\)

\(^{186}\) Article 28.3 provides: The Competition Council shall adopt a resolution to close the investigation if: “2) the actions did not cause significant damage to the interests protected by the law and the undertaking suspected of the violation 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.”


\(^{189}\) Each of the Council’s commitment decisions is discussed in its contribution to the OECD Competition Council, DAF/COMP/WD (2016)30.

\(^{190}\) Please note that the commitment decision was appealed by several undertakings and it resulted in two court proceedings. One case ended when the Supreme Administrative Court of Lithuania dismissed the claimants’ action because they had no material interest in the case (judgment of 27 July 2012, case No. A552-2705/2012. Retrieved from: http://kt.gov.lt/lt/dokumentai/teismo-sprendimas/id.278). In the second case the Supreme Administrative Court of Lithuania upheld the claimants’ arguments and returned the case to the Competition
Failure to comply with commitments are subject to fines of up to 5% of average gross daily income in the preceding business year for each day an undertaking fails to meet its commitments. In one instance the Council started a formal investigation into an alleged breach by UAB Forum Cinemas of commitments it had agreed to in 2010 for refusing to provide copies of premiere movies to its clients. The Council investigated the allegations but did not find sufficient evidence of an infringement. On appeal the VRAC upheld the Council’s determination.191

In European Commission cases and those of a number of Member States, the possibility for undertakings to acknowledge their participation in a cartel and their liability prior to the authority issuing a statement of objections may be taken into account in the reduction of fines.192 Procedures similar to those contained in the European Commission Notice on settlement procedures were not included in Lithuanian law until the most recent amendments to the Law on Competition.

4.3.4. Council Investigations and Enforcement under the Law on Advertising

The Law on Advertising contains different procedural requirements for Council investigations and complaints. The Council uses those specific sections of the Law on Advertising when evaluating alleged infringements. The Council’s authority to enforce the Articles 5 and 6 of the Law on Advertising is based upon specific enforcement powers contained in the LOA, including authority to: i) commence an investigation; ii) request operators of advertising activities and others responsible for the advertising to appear and provide oral or written explanations; iii) in extraordinary circumstances (that otherwise would result in damage to other economic entities or the public interest or would lead to irreparable consequences) to impose a temporary measure to suspend the advertising; iv) require advertisers to terminate misleading advertising; and, v) inform operators that their advertising may infringe Article 5 or 6 and propose they voluntarily change the advertisement.

Investigations of alleged infringements of the Law on Advertising may be self-initiated by the Council. They may be based upon allegations by applicants that include: persons whose interests have been violated, state and municipal institutions and administrative bodies and associations representing interests of individuals. The Council may reject complaints that do not fall within its remit under the Law on Advertising and may transfer the complaint to another agency with shared competency to enforce the LOA. The Council may decline to open a case where neither the Competition Council or another entity with enforcement powers under the LOA has jurisdiction over the allegations (e.g. where it does not state an offense under the law), where the Council concludes the complaint is otherwise deficient, where more than a year has elapsed since the alleged infringement or where the allegations are of minor significance.

The Council may also refuse to commence an investigation if the complaint does not fit the priorities established by the Council. (LOA Article 25.7). The Council’s priorities are to conduct investigations or to take other actions concerning advertising that could “significantly contribute to the effective protection of consumer rights.”193 One such factor would be whether the advertiser has previously been fined or


warned by the Council. Investigation and enforcement procedures are provided to the Council by the Law on the Prohibition of Unfair Practices of Retailers which are similar to those in the LOC and the LOA.

4.4. Third Party Rights

4.4.1. Rights of Complainants

Undertakings whose interests have been violated due to an infringement of the Law on Competition, including public administration entities and associations, or unions (representing the interests of undertakings and consumers) have the right to demand the Council open an investigation of the alleged violation. (Article 23.1). Consumers whose rights have been violated have the right to ask the Council to open an investigation. (Article 23.3). The Council reports that annually the number of complaints is within the following ranges (Table 10).

<table>
<thead>
<tr>
<th>Article Infringed</th>
<th>Annual Number of Complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 4</td>
<td>30 to 60</td>
</tr>
<tr>
<td>Article 5</td>
<td>60 to 90</td>
</tr>
<tr>
<td>Article 7</td>
<td>10 to 40</td>
</tr>
<tr>
<td>Merger Rules Violations</td>
<td>0-10</td>
</tr>
<tr>
<td>Article 15</td>
<td>10 to 40</td>
</tr>
<tr>
<td>State Aid</td>
<td>0-10</td>
</tr>
<tr>
<td>Law on Advertising</td>
<td>200 to 400</td>
</tr>
<tr>
<td>Law on Unfair Business to Consumer Retail Practices</td>
<td>10 to 60</td>
</tr>
<tr>
<td>Law on Prohibition of Unfair Retail Practices</td>
<td>0</td>
</tr>
</tbody>
</table>

Complaints are the basis for the majority of the Council’s investigation activities. The Council does not collect data on how many infringement cases have been brought as a result of complaints, but reports that it would be a significant portion of all the cases. The Council does not maintain a complaints hotline. In practice, however, it receives complaints via e-mail or telephone. Inquiries which do not satisfy the requirements for a formal complaint may be pursued by the Council on its own initiative.

The Council is not obligated to accept or investigate anonymous complaints. Decisions not to open an investigation must be memorialised in writing when the requirements to submit a complaint are met, but do not require a full-fledged decision by the Commission. In practice, the heads of divisions adopt decisions in many cases not to take further action because complaints do not meet the specified requirements.

The Council does not have a programme of monetary rewards for third-parties who provide evidence of infringements. Such an initiative is currently being analysed, but the Council notes its problem with adequate resources to fund such a programme. Accordingly, it is not a top priority.

4.4.2. Appeals against Actions and Decisions of the Competition Council Officials and Employees

Undertakings and individuals who believe that actions by the Council or its employees have violated their rights may seek redress for those actions (Article 32 LOC). Article 32 is not limited to the Council’s activities pursuant to the Law on Competition and allows for complaints for any alleged illegal decision or action of the Competition Council’s officials, so long as these decisions are related to the performance of
their official functions. To date, most of the cases have related to the application of the Law on Competition, although several cases have been related to the application of the Law on Advertising.

Since 2010 there have been 21 appeals to the courts alleging Council actions or decisions violated the appellant’s rights. Article 32 appeals have related to access to case file material (seven cases), time limits on submitting responses to the Council’s statement of objections (four cases), decisions not to open an investigation (four cases), Council requests for information in merger cases (three cases) and refusals to accept commitments, to extend an investigation, to treat information as a commercial secret, and to provide e-mail translations in the Lithuanian language. One appeal was successful; in another case the appeal was partially successful. The Council is unable to quantify the amount of resources it devotes to Article 32 cases. A full list of Article 32 cases is found in Annex C.

4.4.3. Private Causes of Action

Effective 1 February 2017, the LOC was amended to transpose the EU Damages Directive. The new amendments create a new chapter VI to the LOC, “The Features of Civil Liability” (Articles 43 to 53) and are addressed below at section 4.4.3. The text of the amendments and new chapter have not yet been translated and provided to the OECD. Accordingly, the following discussion reflects the state of the LOC and private damages enforcement prior to 1 February 2017. The recent changes to the LOC are briefly addressed in Section 4.3.4., below.

Article 43 LOC provided for private damages actions and the award of monetary compensation caused by undertakings or “other natural or legal persons” or by illegal actions by the Competition Council or its officials. Additionally, Article 16 LOC specifically provided for damages actions by undertakings “whose legitimate interests are violated by actions of unfair competition.” Articles 43 and (new Article 44) specify that any person who has suffered harm from unlawful actions in contravention of Articles 5 or 7 LOC and Articles 101 or 102 TFEU has the right to demand full compensation of damages. The person also has the right to demand that the illegal actions be terminated. (Article 51.2.2). Such actions concerning Articles 5 or 7 and Article 101 or 102 TFEU can be brought to the Vilnius Regional Court seeking termination of the actions and compensation for recovery of damages.

An action for damages may be brought irrespective of whether the Council has investigated or taken action on a case. Under Article 47.1, a claimant could seek to have the court require the offender to terminate the illegal actions, and to award it monetary damages. Parties may also use arbitration proceedings to settle damages actions. There is no single repository or reporting mechanism to track all damages cases that have been filed. Legal practitioners note that because of agreements by parties concerning confidentiality there is no accurate information about the number of private damages actions that have been concerning the Law on Competition.

Damage actions are subject to general civil law and rules of civil procedure. In order to recover damages the claimant must prove illegal anti-competitive actions, damages, a causal link between the illegal actions and damages, and fault. Taking into account the complexity of competition law infringements and difficulties of proving them, civil private damages cases have been rare and to the knowledge of the Competition Council there have only been a few. Damages actions are not limited to certain groups of potential litigants and may be brought by persons (natural or legal) if they demonstrate that their legitimate interests have been infringed by alleged unlawful actions according to rules of civil liability. The Civil Code (Article 6.251) establishes the principle of full compensation (but no punitive damages) and there are no exceptions related to the antitrust claims.

The Civil Code set a three-year period of limitations for damages claims, which begins to run on the day the claimant became aware or should have become aware of the violation. There is no tolling provision and consequently private follow-on cases from final Competition Council decisions would generally be precluded by the statute of limitations. In rare circumstances where private litigation following a final
Competition Council decision was not barred by the period of limitations, the Council’s opinion would be given *prima facie* effect by the Courts. (Article 197 (2), Code of Civil Procedure.) If a decision of the Competition Council has been appealed, the final decision of the court could be treated as *res judicata*.

The Council had not established rules or practices related to the disclosure of its case materials in relation to private enforcement prior to the adoption of chapter VI of the LOC in February 2017. The plaintiff would have a right to request information from the Council that was non-privileged (containing no commercial secrets). In the absence of other restrictions, documents could be disclosed by the Council. Article 38.3 limits disclosure of leniency documents and effectively precludes disclosure of leniency information in private enforcement cases. In a small number of cases courts or attorneys have sought to obtain documents and evidence from the Council. Those cases were not private damages actions, but stand-alone cases where the Council’s investigation file and work product were requested. The Council provided the requested information to the court but declined to provide confidential information and commercial secrets of the undertakings. To date, the Council has not been required to establish conditions for disclosure and procedures it would follow should a court require it to provide confidential information.

Private damages actions under (prior) Articles 43 and 47 did not require the Council to be joined to the litigation, but do not specifically preclude participation if ordered by the court. The court was required to notify the Council and European Commission of private enforcement relating to Articles 101 and 102 TFEU (Article 47.2-.3). Although this obligation to notify the Council applied only to cases alleging violations of the TFEU, it did not limit the court upon its own initiative or at the request of the party to invite public authorities to participate and provide opinions on relevant matters of the case (Article 49 of the Code of Civil Procedure). The Council could also request to intervene and participate in a case.

**Damages Actions against the Competition Council under Article 43.2**

One claim for damages against the Council pursuant to (then) Article 43.2 has been filed in conjunction with an infringement case, but the court declined to award damages. In 2008, the SACL overruled a decision by the Competition Council that AB Orlen Lietuva had abused its dominant position and referred the case back to the Council for further deliberations. (Discussed at Section 3.4.2). Following further consideration the Council issued a second decision that again ruled that AB Orlen Lietuva had abused its dominant position. The company appealed the Council’s second decision and also sought an award of damages against the Council under Article 43.2 LOC. The SACL rejected the application of AB Orlen Lietuva on the grounds that the Council had not performed any unlawful actions notwithstanding its decision to overrule the Council’s second decision.

**Private Causes of Action against SOEs**

Under then Article 47 LOC, parties could challenge the alleged anticompetitive actions of SOEs that violate the LOC and seek monetary damages from them. On 28 September 2016 the Vilnius Regional Court adopted a decision concerning a claim against AB Litgrid (the Lithuanian electricity transmission

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194 The information requests were made pursuant to the Civil Procedure Code, the Law on access to information from state and municipal institutions and bodies or Law on the Bar.


system operator controlled by the Ministry of Energy) by UAB Energijos kodas alleging that AB Litgrid had abused its dominant position concerning energy transmission agreements.\(^{197}\)

The Court rejected the claims. It concluded that the agreement and rules were in line with European Commission Regulation 714/2009 on conditions for access to the network for cross-border exchanges in electricity and were a “compromised version” implemented in order to protect the system of electricity from the overload, not in order to restrict competition. The Court in its opinion also ruled that AB Litgrid was not an undertaking when in entered into the agreement among electricity transmission system operators of the Baltic States, but rather implemented administrative/regulatory functions, which were prescribed by the laws, that the agreement would meet the criteria of Article 101 (3) TFEU and AB Litgrid did not abuse its dominant position because its behaviour was not aimed to exclude competitors. The decision was not appealed.

**Private Damages Cases Based on Alleged Infringements of the TFEU**

There are a handful of cases where the courts have entertained claims seeking damages based upon alleged infringements of Articles 101 and 102 TFEU (see discussion above). The Council has not participated in those cases. They illustrate the wide array of issues facing the non-specialised civil courts in damages cases involving competition infringements and the challenges that may arise from more damages actions under the transposed EU Damages Directive. The cases and their results point at the need for substantial education for courts and the Bar concerning competition law. The Competition Council may find it is required to devote additional time and resources to advocacy and outreach when the EU Damages Directive comes into effect.\(^{198}\)

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197 The claimant, UAB Energijos kodas (an independent electricity supplier) alleged that AB Litgrid abused its dominant position and concluded anticompetitive agreements concerning electricity transmission between the Baltic States that gave priority for the electricity transmitted from Estonia and Latvia to Lithuania, thereby restricting imports of electricity from other countries (e.g. Russia and Belarus). According to the claimant, due to these actions the price of electricity in Lithuania increased significantly and it incurred losses because it had to provide electricity at price levels which were established by the discriminatory contracts. UAB Energijos kodas also claimed by limiting its access to essential facilities for electricity from the other countries AB Litgrid abused its dominant position in the electricity transmission market.

198 One example of a private damages case is TEO LT, AB v. Lithuanian Regional Park Service Agency (Aukštadvario regioninio parko direkcija). TEO sought a ruling and order against against the Park Service concerning an agreement between the Park Service and VĮ Inforstruktūra, the State-owned secure data communication network used by state authorities, on the grounds that the Minister of Interior improperly granted exclusive rights to VĮ Inforstruktūra. TEO LT claimed that secure data communication services networks are available from private undertakings (including TEO LT) and that there are no technological or other reasons why secure data communication services to State authorities could not be provided by private undertakings. TEO alleged the exclusive contract to VĮ Inforstruktūra created an illegal monopoly for VĮ Inforstruktūra and breached Articles 106(1) and 102 TFEU. On 19 May 2016 the Vilnius Regional Court issued a ruling that rejected TEO LT’s claim. TEO LT appealed and on 15 September 2016, the Court of Appeal upheld the decision of the Vilnius County Court. The Court reasoned that the order of the Minister of Interior of the Republic of Lithuania to grant exclusive rights to VĮ Inforstruktūra had not been declared unlawful (in any separate legal proceeding) and there existed no grounds to terminate secure state data communication network service agreement between the Regional Park Service and VĮ Inforstruktūra. Accordingly, the appeal court ruled that TEO LT had not established a violation of Article 102 TFEU. The decision of the Court of Appeal of Lithuania has been appealed to the Supreme Court of Lithuania. (Questionnaire Response, Item 22. D. In another private damages case involving the TFEU, the Vilnius County Court awarded damages of over EU 16 million in 2016. BUAB-“flyLAL-Lithuanian Airlines” versus Air Baltic Corporation and AS and International Riga Airport is another recent private damages case. FlyLAL claimed damages alleging that Air Baltic abused its dominant position at the Vilnius Airport and had concluded a prohibited agreement with the
4.4.4. The EU Damages Directive

The European Parliament and Council Directive, 2014/104/EU, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, (26 November 2014, Damages Directive) was implemented and transposed into Lithuanian law on 27 December 2016. The Council also was an active participant in the inter-institutional working group, led by the Ministry of Economy that was responsible for the transposing Directive 2014/104/EU. The working group prepared the initial draft amendments to the Law on Competition implementing the Directive 2014/104/EU. Those amendments to the LOC were passed by the Parliament in January 2017 and became effective on 1 February 2017 and apply to infringements of Article 5 and 7 of the Law on Competition and Articles 101 and 102 TFEU.

According to the Competition Council, chapter VI of the LOC (new Articles 43-53) (which has not been made available to the OECD), covers a number of significant issues. The Council has instead provided a two-page summary of the amendments. The amendments (according to the Council’s summary) include the scope of compensation for which damages will apply (Article 44.1-2); the possibility for joint and several liability and contribution for harm caused by the infringement (Articles 45, 46 and 48); measures to safeguard the effectiveness of the Council’s leniency programme (Article 45.2); and protections for SME’s with small market share from joint and several liability (Article 46.3). The amendments also reportedly establish a rebuttable presumption that cartels cause harm (Article 44.3) and a final infringement decision of the Council of an infringement will constitute full proof of an infringement (Article 51.3), which such a determination by an EU Member State will constitute prima facie evidence of the infringement (Article 51.4). Apparently the amendments will allow a party to petition the court for an order requiring disclosure of documents from third parties that proves a claim or defence (Article 52.1). According to the Council, access to its files will be circumscribed by the use of specific “white”, “grey” and “black” lists of documents set out in Article 53 LOC. Additionally, according to the Council, those amendments take into consideration confidentiality protections, allow for disclosure of categories of documents and for so-called “confidentiality rings.” (Article 52.) The Council also notes that the amendments extend the period of limitations to five years (Article 49). The amendments address the legal consequences of so-called “passing on” by claimants for damages (Article 47). The Vilnius Regional Court will hear all cases brought under chapter VI LOC and may consolidate cases based upon the same infringements (Article 52). The fact that a damages claim has been filed and the identity of the parties will be announced on the Court’s website (Article 51.5).

The Competition Council Members and Ministry of Economy have expressed confidence that the Damages Directive and transposed Lithuanian law will resolve various issues that in the past may have discouraged parties from seeking compensation for damages under (then) Articles 43 and 47 LOC.

4.5. Judicial Review

As the cases recounted in this report amply demonstrate, judicial review of Competition Council decisions is a fully-functioning component of competition enforcement in Lithuania. Nearly all cases are appealed...
and the vast majority are taken through both levels of appeal to the VRAC and thereafter, to the SACL. There are 18 judges on the SACL and 24 on the VRAC.

The Administrative Courts of Lithuania were established in 2001 and are composed of the SACL (the final judicial institution for administrative appeals) and five regional administrative appeals courts, of which the VRAC is the largest. In the following 15 years they have adjudicated over 76,000 cases. The Administrative Courts also produce case bulletins and summaries of case law. They maintain a website containing all of their judgments.

There are no special “competition courts” in Lithuania. Although the VRAC is the designated court for appeals of Competition Council decisions, its administrative case load is wide-ranging and non-specialised except for administrative matters. Similarly, the SACL hears all administrative appeals for the country. Judges on the Supreme Administrative Courts are generalists and there are no advanced training requirements such as in economics or competition law specialities. There are many opportunities for judges to be trained on competition law, many of which are funded by EU institutions. Some of the judges on both the SACL and the VRAC have received specialised competition law training.

Competition appeals account for less than 1% of the SACL’s docket, which mostly concerns social benefits, customs and tax matters. The SACL has a backlog of cases and typically it will take the court from 15 to 18 months to hear and decide an appeal.

Virtually every case involving competition is appealed from the VRAC to the SACL. The Competition Council opinions are generally upheld. The level of the Competition Council’s work is considered by the Courts to be at the top of the practice among states authorities. The Council is praised for having progressively moved from a more formalistic approach when applying competition law principals towards more thorough, economics-based analyses. The SACL has asked the Council at times to clarify their practices, including the fining analysis and practices. A very common area for appeals is Article 4 cases involving municipalities. The SACL infrequently reviews cases involving shared competencies between the Competition Council and another regulator. Such reviews have occurred with cases involving the telecommunications regulator (CRA) and the sectoral price regulator, the National Commission for Energy Control and Prices, which is known by the acronym “NCC”.

The VRAC is one of five regional administrative courts of appeals. Those five courts will be consolidated into two administrative courts in 2017. The VRAC will be one of the two remaining regional administrative courts. There are a total of 40 judges on the 5 administrative courts, 24 of whom are located at the VRAC. Beginning in 2017, the VRAC has organised itself so that eight judges will be assigned to competition law appeals. Cases will continue to be assigned to a panel of three judges (from among the eight) randomly by a computer program.

In the view of legal practitioners appeals of Competition Council cases will invariably require them to appeal through both levels of judicial review. The VRAC is generally viewed as taking a more formalistic approach to appeals and not having the expertise to deal with difficult economic issues. The VRAC is acknowledged as having a large and varied case load that allows little time for developing competition law expertise. The lack of expertise the VRAC has to deal with competition cases is a widely expressed source of frustration for practitioners and is viewed as key inefficiency that adds time and expense to achieve finality in competition cases.

In the past, parties have petitioned seeking interim rulings and injunctions concerning the Council’s conduct of an inspection. The courts have denied claims based upon interim, non-final actions by the
Council. Council conduct may be raised in an appeal on the merits of a Council decision (Article 33) or in a separate claim alleging unlawful actions by the Council under Article 32 LOC. On appeal the Competition Council has been quite successful, with over 85% of its decisions having been affirmed by the courts. In light of the number of Council decisions that have in some manner been altered by the courts on appeal, it is also apparent that neither the VRAC nor the SACL is a “rubber stamp” for Council decisions. The chart below reflects the Council’s record on appeals before the VRAC and SACL in the past five years (and the fact that interim challenges to the Council’s actions if not available).

Table 11. Appeals for Competition Council Decisions to the Vilnius Regional Administrative Court and the Supreme Administrative Court of Lithuania from 2012 to 2015

<table>
<thead>
<tr>
<th>Council Court Cases</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vilnius Regional Administrative Court</td>
<td>i. Affirmed - 11</td>
<td>i. Affirmed - 16</td>
<td>i. Affirmed - 10</td>
<td>i. Affirmed - 14</td>
<td>i. Affirmed - 14</td>
</tr>
<tr>
<td>Interim Challenges to Competition Council Activities Concerning Enforcement</td>
<td>ii. Overturned - 2</td>
<td>ii. Overturned - 1</td>
<td>ii. Overturned - 0</td>
<td>ii. Overturned - 1</td>
<td>ii. Overturned - 4</td>
</tr>
<tr>
<td>i. Affirmed</td>
<td>iii. Changed – 2</td>
<td>iii. Changed – 3</td>
<td>iii. Changed – 1</td>
<td>iii. Changed – 4</td>
<td>iii. Changed – 4</td>
</tr>
<tr>
<td>ii. Overturned</td>
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<tr>
<td>iii. Changed</td>
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<td></td>
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</tr>
<tr>
<td>Cases Pending</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
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</tr>
</thead>
<tbody>
<tr>
<td>i. Affirmed</td>
<td>i. Affirmed - 12</td>
<td>i. Affirmed - 4</td>
<td>i. Affirmed - 6</td>
<td>i. Affirmed - 7</td>
<td>i. Affirmed - 5</td>
</tr>
<tr>
<td>ii. Overturned</td>
<td>ii. Overturned - 2</td>
<td>ii. Overturned - 1</td>
<td>ii. Overturned - 3</td>
<td>ii. Overturned - 1</td>
<td>ii. Overturned - 1</td>
</tr>
<tr>
<td>Cases Pending</td>
<td>9</td>
<td>12</td>
<td>8</td>
<td>12</td>
<td>21</td>
</tr>
</tbody>
</table>

The VRAC and the SACL have wide authority to recalculate the amount of the fines imposed by the Council. In the past 10 years the courts have reduced fines in 13 cases. In some cases the courts disagreed with the Competition Council that violations or some aspects of them were committed, which has occasioned reductions in fine levels. The basis for reductions in fines by the courts has varied. In a case

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involving bid rigging on vehicle leases the court found no evidence of an overarching cartel and reduced the fines accordingly. It treated each bid rigging episode as a separate infringement rather than a larger, overarching conspiracy and ruled that there was insufficient evidence that certain tenders had been rigged. In a related case concerning the same cartel the court reduced a fine for one of the undertakings on the grounds that its behaviour was passive. In the E-TURAS case, discussed above, the courts reduced fines because they calculated the duration of infringement differently than the Competition Council. In that case, the Court also adjusted the fines based upon evidence members of the Association provided inaccurate information about the value of sales directly or indirectly related to the infringement.

The Courts have also addressed internal Competition Council practices in reviewing fines. In one case the court reduced the fine because in its opinion the Council’s investigation took too long. In other cases the courts mitigated fine levels based upon findings of a serious financial difficulty on the part of the undertaking to pay the level of fines set by the Council.

4.6. Legislative Review and the Council’s Relationship to Ministries of Government

The Competition Council reviews draft legislation and regulations and submits its conclusions regarding potential anticompetitive effects to the Seimas and the government. The Council also has independent authority to submit proposals to the government on the amendment of laws and other legal acts that limit competition, when the Council uncovers restrictions of competition in the course of carrying out its functions. These two provisions give the Competition Council wide authority to address the adverse effects to competition in both proposed and existing legislation.

In 2015, the Competition Council reviewed 206 legislative proposals and provided comments and observations on 122 of them, 42 of which were adopted to address the competition problems cited by the Council.

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202 Judgment of 18 April 2012 of the Supreme Administrative Court of Lithuania, case No. A858-1704/2012, AB “Autoūkis” and others v Competition Council; judgment of 18 April 2012 of the Supreme Administrative Court of Lithuania, case No. A858-293/2012, UAB “Autodina” and others v Competition Council.

203 Judgment of 18 April 2012 of the Supreme Administrative Court of Lithuania, case No. A858-290/2012, UAB “Moller Auto” and others v Competition Council.

204 Judgment of 2 May 2016 of the Supreme Administrative Court of Lithuania, case No. A 97-858/2016, UAB “Eturas” and others v Competition Council.

205 This case was concerned with concerted practices by travel agents who co-ordinated their actions via an online travel booking system (“E-TURAS”) by limiting a discount to a maximum of 3% for online bookings. One of the disputed circumstances was when should the violators have known about the restriction to make a bigger discount. Essentially the question was whether the fact that the online booking system automatically reduced the discount when it started and that at the same date a message concerning the restrictions was sent through the online booking system is enough to presume that users of this system were aware of the restriction. In this case, the court reduced fines for some undertakings by taking into account when the undertaking factually started to apply the restrictive discount and for how long (rather than from the date when the system went online and when the message was sent).


Council. Some of the drafts would have directly infringed of Article 4 (LOC), while others involved competitive restrictions that might be corrected by alternative approaches that did not constrain competition or harm consumers. Generally the Council is of the view that having identified the matter to the Ministry of Economy, it has carried forward its statutory obligation. With the exception of a recent case involving the Ministry of Health, discussed below, it does not appear that the Council regularly monitors the application of statutes it has identified as having competitive concerns to self-initiate investigations into whether in practice they constrain competition and violate Article 4. Such an enterprise would also require that scarce resources be diverted from other activities and dedicated to such a task.

When drafting national legislation, the government is required to follow the Law on the Legislative Framework, which requires it to evaluate all possible alternatives and to choose the best one (Article 3.2.5 of Law on Legislative Framework).209 A key principle of the Legislative Framework is proportionality. All feasible alternatives must be assessed and the best solution must be selected. The government is required to publish all alternative proposals it receives. Legislative actions must be carried out within reasonable time limits. Justifications of the necessity for legislative or regulatory changes must accompany proposed changes. When a law or regulation is being revised, all competent, responsible institutions may participate in the process.

Changes related to regulations are to be evaluated according to the Methodology for Assessing the Impact of Planned Regulatory Framework, approved by the Resolution of the Government No. 276 of 26 February 2003 (Regulatory Methodology).210 The Regulatory Methodology provides a framework for weighing and evaluating the various aspects of a law or regulation. They include: the impact on economy (including the impact on competition), financial effects, social and environmental factors, administrative requirements and associated burdens, among others. The balancing does not always place competition at the forefront of legislative considerations.

According to the Regulatory Methodology, the Ministry of Economy is competent authority responsible for assessing the impact of legislation on the economy. (Point 32 of the Methodology). Other competent authorities are required to provide comments on the legislative initiative to the Office of the Government, along with their assessments of impacts and data supporting them within 10 days. The Competition Council’s assessments concerning legislation are submitted to the drafting body for consideration in its overall assessment of the potential impact of legislation on the Lithuanian economy. The Ministry of Economy does not have veto authority over proposed legislation.

A competition impact assessment is compulsory for priority legislation initiatives. In other cases the competition assessment should be done if the proposal may directly or indirectly affect competition/business conditions. The Regulatory Methodology includes instructions on how competitive impacts be should assessed. The government’s resolution On the Approval of Guidelines on the Application of Competition Policy Provisions and the Competition Council’s Guidelines on the Assessment of Impact of Decisions on Competition provide another source of useful guidance in the legislative process.211

209 The Law in English can be retrieved from: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/4125a932084d11e687e0fbad81d55a7c?jfwid=nz8qn8ibr.

210 Questionnaire Response, Item 7, and Lithuania’s Annex 2 to Questionnaire.

The Council observes that, in practice the assessment of benefits/costs of proposed legislation is not conducted very comprehensively and sometimes is not conducted at all. At times little economic analysis is done to determine whether the proposed competitive restriction is necessary and whether there are less burdensome alternatives with fewer effects on competition that would achieve the same outcomes. When particularly anticompetitive regulations come to the attention of the Council it may initiate an investigation.

For example, in 2016 the Ministry of Health adopted a regulation that required pharmacies in towns must have premises of at least 60 square meters (except charity pharmacies which must have premises of at least 30 square meters). To the Council’s knowledge, no regulatory assessment was carried out concerning this regulation. In August 2016 the Council launched an investigation concerning the regulation's possible infringement of Article 4. On 18 February 2017 the Ministry of Health announced amendments to the 2016 regulation, which will not limit the size of pharmacies but rather will require that market players will have to ensure that the premises of pharmacies are sufficient for implementing pharmaceutical activities. On 24 February the Council announced that it had terminated its investigation.

While the Council’s 2015 recommendations regarding legislation were followed only about 35% of the time, in matters regarding legislation under its purview, the views of the Competition Council appear to have been accorded substantial weight. At the Council’s urging, a 2015 proposal to change to the dominance thresholds for banks was not adopted. In 2014 proposed changes to the LOC to lower fines implementing a merger from 10% of annual turnover to a ceiling of EUR 43 443 were not adopted. The Council advocated and Ministry of Economy proposed legislation to abolish the Law on Prices, which was enacted by the Seimas and became effective on 1 May 2015. The Council also successfully advocated it be divested of regulatory responsibility for the Lithuanian the railroads. Regulatory responsibility for the railroads was transferred by statute to the Ministry of Transportation, Communications Regulatory Authority (CRA), effective on 1 November 2016. In other instances the Council’s recommendations have not been followed. The Seimas has declined to adopt changes to the LPUPR to allow the Council to prioritise cases. The Law on Advertising was amended over the Council’s objection to reduce the fine ceiling for aggravated infringements of the Law on Advertising from approximately EUR 35 000 to a ceiling of under EUR 9 000.

### 4.7. Market Studies

Market studies can be an effective tool to research the operation of markets and address market constraints in a comprehensive and non-adversarial context. They are often useful approaches to address systemic competition issues that may have been identified by successive infringements in the same industry sector or as a result of refusals by public entities to adopt competitive practices. The Competition Council market studies have been useful in both contexts.

Authority for the Competition Council to conduct market studies is specifically stated in the Law on Competition (Article 18.1.9). The Council shall “perform the surveillance of competition effectiveness on the markets and provide conclusions and proposals to the Seimas or the government on measures to ensure effective competition.” The duration of a market study depends on the complexity and size of a market.

Market studies generally take one year and the Council conducts about one market study per year. The Council’s 2017 market study has not been announced. In the past five years the council has conducted market studies into: reimbursable pharmaceutical products (2016, see Box 10); waste management in Lithuania (2015, see Box 11); raw milk (2014, see Box 12); parallel imports of pharmaceuticals in

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212 Questionnaire Response, Item 7.
214 Questionnaire Response, Item 3.C.
Lithuania (2013, see Box 13); and, study of road fuel in Lithuania (2012, see Box 14). The Council also carried out two surveys in the retail fuel trade in Lithuania in 2014.

There are three phases to market studies by the Council. During the first phase the Council gathers information, sends requests for information to market participants and public administrative bodies, and analyses the data and responses it receives. During the second phase, the Council compiles the information into a preliminary market study and proposals, which is presented for public review and consultation. Following review of the responses to its consultation, the Council adopts final conclusions and publishes a final report, which they submit to the government, Seimas and the public.

Although the Seimas and the government are not obliged to implement the recommendations and conclusions contained in Council market studies, the government is, nonetheless, obliged to evaluate the Competition Council’s proposals on changes to legal acts that were found to impose restrictions on competition. (See discussion above at Section 4.6)

The Council widely publicises the results of its market studies to the government, stakeholders, in the media, at industry meetings and on its website, in order to achieve the widest possible coverage for its conclusions and recommendations. It also engages actively with the affected public authority responsible for the particular market to discuss its findings and proposals for changes.

Comprehensive market studies also improve the Council’s knowledge of markets and practices. Although the Council does not undertake market studies for the purpose of identifying infringements, when evidence of infringements is uncovered in the course of a market study, the Council is not precluded from using the information to self-initiate an investigation. For example, during an investigation which looked at price volatility across a range of retail products, it became apparent that undertakings were uniformly and with regularity increasing their prices for milk. Based upon that information, in 2007 the Council initiated an investigation into price fixing in the milk sector. Each of the recent market studies and their outcomes are summarised below.
Box 10. Reimbursable Pharmaceuticals Market Study - 2016

The Council began its market study into the reimbursable pharmaceuticals market in May 2015. Based upon the study the Council concluded that the current regulation of reimbursable pharmaceuticals is inefficient and restricts entry into the market from less expensive analogous products. The Council found evidence that regulations create more favourable conditions for manufacturers who offer expensive pharmaceutical products than their competitors.1

The market study included six recommendations by the Competition Council designed to encourage more efficient and competitive pricing for pharmaceuticals and entry of new firms to the market.2 On 6 December 2016 the Council’s conclusions and recommendations were presented to the government, which has begun implementing new regulations governing reimbursed pharmaceuticals. The Council is hopeful that the full list of its recommendations will be taken into account and adopted in the final version of the new regulations.

Notes:

1 The Compulsory Health Insurance Fund (CHIF) establishes base prices that are calculated on the basis of publicly-declared prices by manufacturers, which permit suppliers to quote higher prices than they are actually offering in competitive tenders, thereby allowing suppliers to obtain artificially higher prices. The Council concluded that the use of reference pricing based upon other EU Member States reimbursement pricing was not appropriate because it does not encourage manufacturers to offer competitive prices in Lithuania. Additionally, it found that current regulations create favourable conditions for manufacturers to exchange commercially sensitive competitive information that might affect price competition. The Council also found deficiencies in Lithuania’s regulatory activities that did not adequately conduct an economic analysis of pricing of pharmaceuticals in the market.

2 The market study concluded that the State institutions responsible for health policy should: (i) encourage the entry of pharmaceuticals which are of analogous quality and equally effective but cheaper; (ii) apply factual and not publicly declared prices for the prices of reimbursable pharmaceuticals; (iii) find a more efficient way of calculating the reimbursement price than using reference prices from other EU Member States; (iv) eliminate the ability of market players to obtain information about the prices of their competitors; (v) ensure that consumers are better informed about the cheapest analogous-quality pharmaceuticals; and, (vi) improve the implementation and controls on distribution of reimbursed pharmaceuticals in order to prevent manufacturers from having impermissible influence on doctors and pharmacists.

On 6 May 2015 the Competition Council completed a study on waste management in Lithuania. The sector inquiry was started in response to a high number of investigations into municipal decisions concerning waste management. The aim of the inquiry was to analyse the market and to suggest improvements to the waste management system in Lithuania. The market study found: i) one third of Lithuanian municipalities ignore competition and grant exclusive waste management rights to municipal companies; ii) in some municipalities public tenders for waste management services have not been organised for seven years or longer; and, iii) prices in the municipalities that do not have competitive tenders for waste collection are more costly, with prices for non-competed services ranging between 5% to 100% more expensive.

The Council provided a set of recommendations for municipalities: to ensure transparent and open conditions for all suppliers; to organise public tenders; and to organise separate tenders for waste processing and collection/transportation services. In its publicity about the waste management study, the Council included a graphic summary of its findings which it used in subsequent outreach to the public and municipalities.

The effects of municipal activities concerning waste management have been the subject of a case before the Constitution Court. The Council’s preliminary market study results were publicly available prior to the Court’s judgment, although the Council is unaware whether its market study was considered by the Court in preparing its judgment (Section 2.3.1, above). The long-term effects of Constitutional Court’s judgment and the market study are not yet apparent. In August of 2016, following its market study, the Council conducted a survey regarding public procurement in municipal waste collection sector. All 60 municipalities participated in the survey which revealed that 39 municipalities have completed a public procurement procedure for services of municipal waste treatment or are in the process of organising such a procedure. Twenty-one municipalities have concluded in-house transactions or contracts based on decisions of the municipal councils.

The Ministry of Environment has not prepared a draft law that would take into account the recommendations for changes to the system for contracting for municipal waste proposed by the Competition Council’s market study. The Council plans to contact the newly elected government and the Parliament to revisit the conclusions and recommendations in the municipal waste market study.

Figure 2. Recommendations to Municipalities on Waste Management
Box 12. Raw Milk Market Study - 2014

The executive summary in its raw milk market study provides insights into the process the Council uses to gather information, to solicit feedback from stakeholders and to reach conclusions about the operation of the market. This market study focused on the structure of the market, in order to provide market participants and political decision-makers information about the overall market structure and competitiveness. During the study requests for information were sent to 91 market participants. The Council also solicited and received statistical information from public institutions supervising the sector and from industry associations. During the comment period it received feedback on its preliminary report from four important industry stakeholders: the Lithuanian Institute of Agrarian Economics, the Ministry of Agriculture, the Seimas and the Association of Agricultural Companies.

The market study recommended that more and better information be provided by the Ministry of Agriculture and other state institutions about the benefits of Producer Organisations and encouraging the use of co-operatives with larger number of members in order for producers to obtain better prices for their milk. It also recommended that the Milk Procurement Rules be changed to establish a minimum contract length of three months for purchase agreements with dairies and a minimum percentage of purchases by co-operatives from their members. The report also recommended against creating more small co-operatives. According to the Competition Council, to some extent those recommendations appear to have been adopted.

Notes:
1 The Council previously had conducted other market studies in the milk industry.
2 Raw milk cannot be stored and must be sold and processed the day it is produced. The Study found that five major dairies process 94% of the raw milk produced in Lithuania. The price obtained by raw milk producers is based upon the quantity of production and the bargaining power of producers. Bargaining is largely carried out through producer co-operatives. To obtain favourable pricing from dairies, the size of the co-operatives is important. In Lithuania, 30% of the co-operatives have fewer than five members. The structure of co-operatives, (which includes joint benefits to members from the profits of the group) provides few incentives for members to defect to direct purchasers. Under the regulations in the EU Milk Package, producers and members of the co-operative are permitted by law to establish producer organisations (POs) which are permitted to set prices for sales of milk from those producer organisations. At the time the market study was issued in 2015, there were no POs operating in Lithuania, despite activities by the Ministry of Agriculture to encourage the creation of POs.
3 According to the Competition Council, “at least to some extent the suggestions have been taken into account. There have been amendments to the Law on Co-operatives by which entity is recognised as a co-operative if the value of the products bought from the members and goods sold and services provided to the members are worth more than 50% of value of all products bought and all goods sold and services provided (Article 31). In 2017 there have also been a meetings with the Minister of Agriculture, who confirmed the ministry is taking measures to strengthen co-operatives and is going to do so in the future”.

Box 13. Parallel Imports of Pharmaceuticals - 2013

The Council’s 2013 market study into parallel imports of pharmaceuticals was aimed to evaluate the reasons for the small percentage of parallel imports in Lithuania (0.61%). The Council discovered that a regulation of the government (point 19 of the Description of the Calculation of Base Prices for Reimbursed Drugs, 13 September 2005, No 994), banned sales by parallel importers that were not 4% to 10% cheaper than the prices offered by authorised suppliers (which at the time of the report accounted for the majority of reimbursed sales of pharmaceuticals in Lithuania) and was a key reason for the small percentage of parallel imports. The Council recommended removing the restrictions to parallel imports.
Box 14. Market Study into the Retail Fuel Market - 2012

In 2012 the Competition Council began a study of the retail fuel market in Lithuania. Previously the Council conducted several market studies into the fuel sector (2010 and 2011). The main objective of the 2012 retail fuel market study was to fully understand the functioning of the road fuel market at every level of supply chain and to evaluate the barriers (natural, legal or artificial) preventing efficient competition.

During the course of the study, in January 2013, the SACL issued a final decision against AB Orlen Lietuva, the sole petrol refinery in Lithuania, which is also the largest wholesale supplier of petrol and diesel fuel in Lithuania. The Court upheld the Council’s decision and fine of EUR 2 300 000 for abusing its dominant position with the aim of restricting imports of fuel oil by obliging buyers to an anticompetitive pricing policy and volume requirements scheme. Also during the period of the market study the Council was considering failures by Lukoil to notify mergers in the retail petrol sales market.

Notes

2 See Lithuania’s contribution to the OECD Roundtable on Competition in Retail Fuel. DAF/COMP(2013)18 http://www.oecd.org/daf/competition/CompetitionInRoadFuel.pdf. At the time of the submission the market study was not complete.

Market studies have been used by the Competition Council effectively to address lack of competition in important market sectors. The capacity of the Council to engage in more market studies is constrained by lack of resources, both in terms of overall staff and in particular because of the limited number of economists on the Council staff. In light of the highly concentrated nature of many of Lithuania’s market sectors, there would appear to be possible synergies between greater numbers of targeted market studies and the possibility of uncovering and self-initiating more abuses of dominance investigations.

4.8. Competition Advocacy

The Council recognises that competition advocacy is an important component of effective competition policy and enforcement. The Council’s regular advocacy functions within the government have been highlighted elsewhere in this report. They include on-going efforts to expand public understanding about the benefits of competition and the operation of the Law on Competition through publications, guidelines and other materials, and in training sessions for ministries, municipalities, trade associations and other groups. The Council uses a variety of types of media and approaches to advocate for competition. The Council has recently established a dedicated communications unit (which currently has four employees.)

One notable advocacy effort by the Council achieved international recognition through an award co-sponsored by the ICN and World Bank to recognise successful competition advocacy by agencies worldwide.215 The Competition Council took first prize in the category of “comprehensive targeted advocacy involving stakeholder engagement,” for its initiatives concerning competition infringements of Article 4 of the Law on Competition, particularly by municipalities.

To combat the problem, in 2014-2015 the Competition Council initiated eight free seminars for Lithuanian municipalities. In 2015 the Ministry of Economy held six free of charge seminars for the public bodies and municipalities on competition matters. During these seminars public bodies and municipalities were taught

how to ensure fair competition in the decision making process of public administration in compliance with Article 4 LOC.

The Council introduced a competition checklist and distributed it to municipalities and other public administrative bodies and encourages municipal authorities and their employees to self-report and seek guidance concerning decisions that may distort competition. To better engage with public entities and municipalities concerning Article 4 infringements, the Council has initiated a new internal procedure to inform municipalities by letter prior to starting an investigation, which outlines the potentially harmful activity and suggests ways to remedy the distortion of competition.

The Council’s targeted advocacy campaign to municipalities and public entities has four goals: i) to increase the awareness of competition throughout the country; ii) to draw the attention of public administrative bodies, especially municipalities, to their role in eroding compliance with the law when they became “champions” for avoiding competition rather than being the examples of compliance; iii) to initiate a nation-wide discussion on the liability of public administrative bodies and necessity to amend the Law on Competition with stricter provisions against competition infringements by public administrative bodies; and, iv) to reduce the number of infringements committed by public administrative bodies.

The Council believes that its advocacy concerning Article 4 may have had a direct contribution to new legislation concerning liability of municipalities for Article 4 breaches and the obligation to get prior approval for new in-house projects. In 2016 the Council initiated visits to municipalities to discuss competition law and State Aid requirements of municipalities and to further reinforce the requirements of the LOC and TFEU.

4.8.1. Raising Awareness – Public Advocacy and Outreach

The Council regularly engages with the public to raise awareness about the benefits of competition, prohibitions against anticompetitive behaviour and its work. The Competition Council has provided a representative list of its annual outreach activities, some of which include:

- **Social media and awareness campaigns**: The Council participates annually in an initiative called “CLEAR WAVE”. The social campaign is aimed at encouraging transparent and ethical Lithuanian business practices and educating the society on these issues.

- **Conferences and seminars**: Several times a year Lithuania’s largest law firms and the Council co-sponsor conferences on “hot topics” in competition law to discuss the issues and debate alternative approaches to addressing them. Topics that have been discussed include: anti-competitive agreements, merger control, State Aid, abuse of dominance and anti-competitive decisions by public administrative bodies. In addition every year the Council conducts more than five seminars for both private and public sector, to discuss the ways of enhancing competition and eliminating the actions which could lead to potential infringements of the LOC.

- **Close co-operation with media**: The Council regularly engages with the media and contributes opinions advocating for competition and its benefits. The Deputy Chairperson, Mrs. Jūratė Šovienė, is a regular, weekly contributor and one of the most widely read op-ed columnists in the national business daily “Verslo žinios” and a leading weekly “Veidas.”

- **Collaboration with universities and schools**: The Council co-operates with Vilnius University, Kaunas University of Technology and Mykolas Romeris University to regularly organise

216 For instance, articles by the Deputy Chairperson Mrs. Jūratė Šovienė in the national business daily “Verslo žinios” can be retrieved from here: [http://vz.lt/section/?template=search&search=%DBRAT%CB+%D0OVIEN%CB&day_from=01&month_from=01&year_from=2012&day_to=01&month_to=01&year_to=2017&catid=0&pageno=0](http://vz.lt/section/?template=search&search=%DBRAT%CB+%D0OVIEN%CB&day_from=01&month_from=01&year_from=2012&day_to=01&month_to=01&year_to=2017&catid=0&pageno=0).

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seminars on competition-related topics. Academic scholars are sometimes engaged to contribute opinions and expert advice in Council investigations.

- **Competition tour around Lithuania:** The Council recently launched a new initiative, a series of seminars in 10 different regions on two major topics, State Aid and anti-competitive agreements.  

- **Monthly Newsletters:** The Newsletters are available on the Council’s website and summarise information about the Council’s activities.

- **Redesign and Improvements to the Council’s webpage:** In 2016 the Council redesigned, improved and launched a new webpage. The new webpage is highly visual. It incorporates and embeds social media channels, provides links to the Council’s decisions and some of its data. It offers an opportunity to subscribe to Council’s newsletter. The website is fully compatible with all mobile devices. It incorporates a robust, simple search facility with interactive links to encourage users to explore more of the site.

#### 4.8.2. Public Interaction by the Competition Council Annually

The chart below lists the interactions of the Competition Council with the public on an annual basis for the past five years.

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<td>Inquiries Received</td>
<td>587</td>
<td>632</td>
<td>606</td>
<td>471</td>
<td>274</td>
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<tr>
<td>Letters and Replies sent in response; of which:</td>
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<td></td>
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<tr>
<td>to institutions of Lithuania</td>
<td>148</td>
<td>121</td>
<td>161</td>
<td>67</td>
<td>52</td>
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<tr>
<td>to undertakings and organisations</td>
<td>162</td>
<td>198</td>
<td>210</td>
<td>154</td>
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<td>to natural persons</td>
<td>257</td>
<td>295</td>
<td>231</td>
<td>245</td>
<td>23</td>
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<tr>
<td>to foreign entities</td>
<td>18</td>
<td>14</td>
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<td>16</td>
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5. Special Competition Regimes

A key principle to competition law is that there are no sector exemptions or exclusions to the operation of competition law. The relationship of the Council to sector regulators is important to ensuring robust, effective competition in market sectors. In this section the working relationships between the Council and sector regulators is discussed in greater depth. Public procurement and joint initiatives to make public procurement more competitive and to eliminate corruption are also addressed.

Key areas of the Lithuanian market have not been fully liberalised. Notable among them are the railroads and other parts of the transportation sector, where there is substantial institutional inertia to opening markets to competition. Although the Lithuanian energy and telecommunications are liberalised according to EU Parliament and Council regulations, those markets have on-going competition issues, some of which are touched upon below.

Commentators have widely expressed concerns over the low levels of competition in the energy and transport markets. The concerns are not over the liberalisation legislation, which is in place, but rather about the commitment to and pace of actions to make those markets not just technically compliant but truly competitive. Regarding the energy market, questions are raised whether the Ministry, having technically opened the market, views its job with regard to ensuring competition as complete. Questions arise whether there might be a preference for having foreign entrants be acquired by SOEs, rather than vigorously ensuring competition and fully opening the energy market. Another commentator expressed the need for a truly independent, competent and professional energy regulator.

While the Government has promised to allow independent producers more access to the energy grid, national security interests concerning the energy and IT sectors have created countervailing pressures. SOEs account for 60% of installed energy generation capacity.

Additionally, issues involving competition in the municipal energy markets have been the subject of numerous Council investigations and advocacy activities to improve competition and activities regarding tenders for services. At least one commentator questioned whether the Council is using the tools available to it as vigorously as it might to investigate and pursue lack of competition in the energy markets.

The municipal/district heating sector is not subject to European Commission regulation, but rather is subject to national regulation. It is viewed by the government as a “natural monopoly” and is acknowledged as a sector that is not unbundled. There is an expressed desire to keep the market as a secure monopoly, while liberalising up to 70% of the sources of supply. Supplying heating inputs is profitable, whereas distribution is not. Unbundling of the municipal heating sector has been an area of contention for private suppliers who have attempted to compete. Independent suppliers have found it difficult to compete when prices for heating inputs must be below the average variable cost of the municipal supplier of heating, i.e. the municipality, where the municipality has not unbundled supply from distribution and is also a supplier of heating inputs. Apparently criticism of the pricing methodology is under evaluation, but changes in method for calculating the cost basis, from average variable costs to total variable costs, reportedly has met with strong resistance. A Liquid Natural Gas (LNG) initiative begun in 2011, with an LNG terminal which came online in 2015 has been a step towards liberalisation of supply. Once again, however, there appears to be less than full-throated enthusiasm for supplies of LNG coming from outside Lithuania by some regulators.

In the transport sector, the Lithuanian Railways are widely viewed by members of the Bar and others who were interviewed as not being competitive and actively resisting competition. One commentator identified the railway network as a monopoly, which has been “badly liberalised” and suffers from the lack of an independent regulator; although another commentator pointed to recent changes in leadership in the sole
railway and transport operator and initiatives to mitigate non-transparent procedures. In the transport sector, security concerns at the Ministerial level are expressed concerning privatisation of freight services. Despite assertions that the railway networks are “open for competition since 2004”, there is as yet only one undertaking providing passenger and freight transportation services: the JSC Lithuanian Railways. Additionally, as discussed below (paragraph 348), there appears to be at least one instance where the Lithuanian Railways took actions that might reasonably be interpreted as seeking to discourage competition by potential competitors.

This section addresses structures mandated both by EU-wide and Lithuania specific regulations.

5.1. Relationship to Sector Regulators

Regulation of market sectors is mandated by both European Union and Lithuanian laws. The Council’s enforcement of competition laws involving regulated sectors, its review of proposed laws and regulations in sectors and its reviews specific sector markets through market studies result in frequent interactions between the Council and sector regulators.

5.1.1. Shared Competencies

Both the regulatory bodies and the Competition Council have legislatively-mandated responsibilities to ensure competition. The Competition Council has overall responsibility to enforce the competition laws, but sector-specific laws that are the primary responsibility of sector regulators also have stated mandates requiring them to ensure competition. The Council’s area of authority is broad and encompasses all competition, while that of the regulators is targeted to the markets they regulate and to ensuring liberalisation and fair market practices. In some cases of overlapping competencies involving the Competition Council and sector regulators, where the regulations leave no discretion for the undertakings to act under the regulations, the SACL has ruled that the undertakings are not liable under LOC.

Sector regulators are required to periodically review the necessity and effects of their regulations. The national regulators, the National Commission for Energy Control and Prices (NCC) 220 and the Communications Regulatory Authority of the Republic of Lithuania (CRA),221 regularly analyse whether specific regulations remain necessary, and if so, whether they are sufficient or could achieve their purposes in less a burdensome fashion. Sector laws, including the Law on Energy, Law on Natural Gas, Law on Electricity and Law on Electronic Communications, require the NCC and CRA to perform market analyses, including market analyses required by the European Commission. (E.g. European Commission Recommendation 2014/710/EU).222 For example, Article 16.9 of the Law on Electronic Communications223 requires the CRA to perform a market analysis every third year.


223 The Law on Electronic Communications (in Lithuanian) can be retrieved from here: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.232036/xpdScPCNB T. The Law on Electronic Communications in English (without some newest amendments) can be retrieved from here: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/7092f502e43811e5a141fecd4d43d7867?fwid=96t6gvygg. To the CC’s
Sector laws specifically provide for shared competency by the Competition Council to ensure competition within the regulated sector. Article 11 of the Law on Energy states that the Competition Council supervises how undertakings in the energy sector comply with the fair competition rules and apply the Law on Competition. Article 65.11 of Law on Electricity states that supervision of competition in the electricity sector shall be performed by the Competition Council. Article 3.5 of the Law on Heat Sector states that the Competition Council shall control how the requirements of Law on Competition are implemented in the heat sector, including specific reference to the fact that heat producers, heat suppliers and supervisors (operators) of heating and hot water systems of a building shall not abuse a dominant position or shall not conclude prohibited agreements. Article 14.2 of the Law on Electronic Communications states that Competition Council shall exercise supervision of competition in the field of electronic communications in accordance with the Law on Competition.

In Lithuania, the National Commission for Energy Control and Prices (NCC) is the regulator of entities providing energy, drinking water, and treatment of waste water. It also supervises the energy sector. The Laws on Energy, on Electricity and on Natural Gas provide for the NCC to fine systems operators who do not provide non-discriminatory access to suppliers. Annually the NCC is required to issue recommendations related to the compliance of the prices in the energy sector with the requirements on transparency, equal treatment and other requirements laid down in the legal acts. It submits the recommendations to the Competition Council for review. It is in this area its functions intersect with the Council’s supervision and enforcement competition law. The Competition Council has the right to assess the decisions of market regulators concerning their compatibility with requirements of Article 4 LOC, but has not found occasion to do so between 2010 and 2016. Additionally, in cases involving actions of unfair competition or an infringement of the principle of non-discrimination against customers in the energy sector, the NCC shall have the power to conduct investigations and provide mandatory instructions and assess sanctions (e.g. Law on Electricity, Article 9; Law on Natural Gas Articles 49 through 52, concerning access to the system.) Under EU regulations concerning the wholesale energy market, the NCC is required to inform the Competition Council if there are reasonable grounds to believe acts on the wholesale energy market are likely to constitute a breach of the competition law.

The Communications Regulatory Authority (CRA) is an independent national institution regulating the Telecommunications sector in Lithuania. It was established under the Law on Telecommunications and the provisions of the European Union Directives. It is responsible for information and communications technologies (ICT), postal services, and within the railway sector. As discussed above, since 1 November 2016, the CRA has been statutory responsible for regulation of the railway transport market, which had previously been the responsibility of the Competition Council. Similar to the NCC, the CRA must create conditions for effective competition in the field of electronic communications and prevent the abuse of

knowledge, at the moment a new translation of the Law on Electronic Communications is being prepared and should be ready soon.

224 Among the rate-related functions are: approving the requirements on accounting the regulated activity (10.2.); setting the state-regulated prices and their ceilings (10.4.); unilaterally setting the state-regulated prices in the cases when the energy undertakings or drinking water suppliers have breached the requirements on setting these prices, the energy undertakings have failed to correct the violations identified by the NCC (10.8); approving the rates of connection of energy facilities (networks, systems, equipment) in line with the general criteria for setting the connection fees (10.9.); establishing the procedures and conditions for purchasing heat energy from independent heat producers (10.14); and, exercise control over the application of the state-regulated prices and tariffs (10.16).

market power by undertakings. The CRA may impose obligations on undertakings that have significant market power to provide third-party access to networks and other requirements to encourage market entry and competition in previously closed markets. In exceptional circumstances it may order a vertically integrated undertaking to separate its relevant wholesale access services from the rest of its commercial activities by transferring those activities to a separate legal entity.226

5.1.2. Court Cases involving Shared Competencies

In two recent cases the SACL reviewed the operation of shared competency between the Council and the NCC and the CRA. The first case had to do with an interpretation of the Law on Electronic Communications and precisely how regulatory shared competency between the CRA and Council should operate. The second case dealt with the definition of a relevant market by NCC as part of its regulatory functions and whether it could use its own definition of relevant market or was required to use the Council’s definition of relevant market. The SACL held that the NCC was required to use the Council’s relevant market definition.

Law on Electronic Communications and the CRA

Article 14.2 of the Law on Electronic Communications provides shared competency with Competition Council which “shall exercise supervision of competition in the field of electronic communications in accordance with the Law on Competition”. The Council’s supervision should be exercised only if regulatory measures are not sufficient. Article 12.1 of that Law enables the Council and CRA to exchange information, enter into consultations and co-operate when exercising supervision of competition in the field of electronic communications. The division of authority and competency is, however, only generally defined.

The SACL ruled that the same issue may be examined under the Law on Competition and the Law on Electronic Communications, as both laws have the goal effective competition.227 The Court ruled that the measures of the Law on Competition are not to be applied if the issue has been solved by the CRA, according to the Law on Electronic Communications. Priority is to be accorded to expertise of the CRA competence and its law. The Law on Competition may be applied only if the measures in the Law on Electronic Communications are not sufficient to ensure effective competition. In other words, the CRA and Council do not have authority to engage in parallel examinations of the same (identical) issues at the same time.

In AB Lietuvos energijos gamyba v the NCC the SACL ruled on market definition rules used by the NCC during its regulatory activities. AB Lietuvos energijos gamyba challenged a decision by the NCC that defined the company as an undertaking having significant market power in the market of electricity energy production in Lithuania. The NCC defined the market using only production data by the company, without taking into account other sources of supply or imports available from AB Lietuvos energijos gamyba’s competitors. Based upon its definition, the NCC found that AB Lietuvos had significant market position.

The case ultimately was appealed to the SACL, which requested the Council to submit its interpretation of the relevant market definition. The Council advised that normally production and other sources of supply in a market are not considered separately and that imports of electricity should have been taken into account (in the absence of special market circumstances that indicated reasons they should not be taken into account.). It also advised the Court that energy produced by an undertaking that is not offered in the market, typically is not considered to be part of the relevant market. The Council also expressed its view that energy imports should not have been eliminated from analysis of the product market and imported energy’s ability to substitute for that of AB Lietuvos should have been evaluated. In its judgment, the SACL ruled that the NCC had not used the proper factors to define relevant market and held that competition rules and principles, and the Council’s Rules on Market Definition must be observed when regulators such as the NCC engage in regulatory activities requiring definitions of relevant markets.


Since the litigation, the Council and NCC have not consulted concerning application of the market definition rules. The NCC has indicated that in the future it shall use and apply the Council’s Rules on Market Definition. It has also expressed the view that the Council should take a more active role in relevant market definition when it (NCC) is required to make a relevant market determination.

The Council is not in favour of such an approach. It believes that its Rules on Market Definition are clear and capable of being applied by the NCC, as they are applied by other public entities and private parties. It does not favour taking on responsibilities that would in essence require it to become an ex ante regulator concerning market definition in sector areas over which it does not have expertise and where regulators are far more capable of applying the Council’s Rules in specific factual contexts. Although the Council does not eschew its responsibility to supply consultation and co-operation on an informal basis concerning application and operation of its Rules on Market Definition, it does not foresee a role for itself beyond those functions. Additionally, the Council’s scarce resources would prelude such activity.

Three key industries, energy, transport and communications provide other examples of the shared competencies and how they interrelate in practice when it comes to opening markets and ensuring access and competition to private suppliers.

5.1.3. Ministry of Energy and the National Commission for Energy Control and Prices

The energy sector is particularly important to the Lithuanian economy. Energy security and threats from outside interference with energy supplies are a particularly important strategic security issue for the Lithuanian Government. Strengthening of energy independence and energy efficiency are key strategic priorities of the government.
In Lithuania, the Ministry of Energy is responsible for establishing policies concerning oil, gas, electricity, nuclear, renewable and other sources of energy production, supply and transmission in the country. The Energy Ministry also owns companies on behalf of the State: SC ESO, the Lithuania distribution operator; SC Litgrid, the Lithuanian electricity transmission system operator; SC “Amber Grid”, the natural gas transmission system operator and SC “Klaipėdos nafta”, the natural gas liquefaction operator. The Ministry of Finance owns companies on behalf of the State: SC Energijos skirstymo operatorius, the Lithuania distribution operator, SC “Lietuvos dujų tiekimas” and SC Litgas, the natural gas suppliers, SC Lietuvos Energija, the state-controlled company that is involved in power and heat distribution, natural gas trade and construction of power plants. Other institutions within the Ministry of Energy include the Energy Agency, which is responsible for policy concerning alternative and sustainable energy sources.

Lithuania has adopted and implemented the EU Third Energy package. It has implemented industry ownership unbundling in the sectors of electricity and natural gas, which requires that the sector transmission system operator is not part of a vertically integrated undertaking and is not involved with production, supply or pricing of inputs. Separation of transmission and supply, which is required by Article 9 of European Commission Directives (2009/72 and 2009/73) has been implemented by Lithuania in Articles 24 and 36 of the Law on Electricity. Lithuania complies with the requirements for vertically integrated undertakings within Member States that supply electricity (Article 26 of Directive 2009/72) by separating the legal form, organisation and decision making from other activities that do not concerning transmission (grid operations). The Law on Energy requires that Lithuania’s electricity generation is separate from its distribution system. The laws also require separate accounting and control between transmission and production.

The Law on Natural Gas requires unbundling of natural gas transmission from production and supply. The same persons are not permitted to direct or to indirectly exercise control over both transmission of natural gas and its production and supply. The prohibitions extend to membership on boards or other supervisory activities. Municipal operators are bound by the same rules. Access to the systems of common use must be granted objectively and without discriminating between system users.

Requirements for non-discriminatory access to municipal distribution systems by public suppliers of natural gas and biofuel have resulted in complaints to the Council and cases involving compliance with Article 4. Municipal awards of in-house contracts to their municipally-owned production entities are another roadblock to liberalisation of energy markets. There are instances involving construction of new municipal production facilities for biomass fuel production where municipalities are undertaking new initiatives where there already are private suppliers operating. As previously discussed, municipalities strongly contest whether private suppliers will continue to provide reliable supplies at fair prices. Private suppliers note those stated concerns by municipalities merely mask their larger concerns about losing captive revenues and sources of cross-subsidies for their distribution systems.

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5.1.4. Ministry of Transport and Communications and the Communications Regulatory Authority

The Ministry of Transport and Communications is responsible for regulation of roads, railways, waterways and civil aviation and airports in Lithuania, including the Vilnius International Airport discussed above. It owns the Lithuanian Railways. The State Railway Inspectorate under the Ministry of Transport and Communications is the national safety authority of Lithuania mainly responsible for the railway traffic safety and the interoperability of the railway system. The State Railway Inspectorate is currently being reorganised: in order to centralise safety institutions’ functions, it will be merged with the State Road Inspectorate under the Ministry of Transport and Communications. The Communications Regulatory Authority of the Republic of Lithuania is the market regulator of railway transport and monitors railway transport services in Lithuania.

In 2013 the European Commission opened an investigation into alleged anticompetitive activity and abuse of dominance by Lithuanian Railways to dismantle railway tracks connecting its system with Latvia. In September 2008 the Lithuanian Railway suspended traffic on a track between Lithuania and Latvia and in 2013, when the European Commission opened its inquiry, the track had not been rebuilt. In January 2015 the Commission sent a Statement of Objections to the Lithuanian Railway indicating that it believed the Railway had abused its dominant position. That case is pending before the European Commission.

The Ministry is also responsible for policy-making in these areas: telecommunications, information society, and post. The government owns three telecommunications companies: i) Placiajusčios Internetos, which it operates as a non-profit entity to provide broadband internet infrastructure to rural areas of Lithuania; ii) the Lithuanian Radio and Television Centre (a joint-stock company fully owned by the government and which owns the Vilnius transmission tower among other assets); and iii) the SOE Infostruktūra (fully owned by the State) which is charged with establishing secure network and IT services of strategic importance to the state. It is also responsible for information society development of capacity within Lithuania. Litigation concerning access and privatisation of the portions of the Infostruktūra network are presently in litigation before the Supreme Court of Lithuania. Litigation has also been brought by competitors concerning access to the Vilnius transmission tower and whether provision of broadband services to rural areas should be reserved exclusively to Placiajusčios Internetas or should be required to be opened to competition.

As previously noted, the Council presently has an ongoing investigation into alleged infringements by the Lithuanian post, which has been the subject of two prior Article 7 infringement decisions by the Council.

5.2. Co-operation Agreements and MOUs

Co-operation agreements and Memoranda of Understanding are useful tools to enhance the relationships between institutions, particularly where there are areas of joint responsibility and shared competencies. Co-operation between the Sector Regulators and the Competition Council are also established by the various regulatory statutes.

The Council and the Financial Crime Investigation Service (FCIS) have a longstanding co-operative arrangement. The FCIS reports to the Ministry of Interior, has a staff of 350 persons, and is responsible for investigating financial crimes, international fraud (principally with VAT) and misallocation of EU funds.


The Council and FCIS have developed a co-operative informal relationship and are in the early stages of an agreement to share data on investigations. In the past they have collaborated in Council inspections, where the FCIS has provided personnel to assist with data collect during the inspection. They have provided cross-training opportunities to investigative staff. The two agencies heads meet at least twice a year to discuss common issues and collaboration.

Similarly, the Council and the Special Investigation Service (SIS) have a long and fruitful history of co-operation on an informal basis, and were formalised in February 2017 with an MOU. The SIS is an independent agency which is accountable to the President and the Seimas. It has a staff of 250 persons and is responsible for anti-corruption efforts in Lithuania. It represents Lithuania in the OECD Working Group on Bribery in International Business Transactions. The next priority for the SIS is public procurement. The SIS also has assisted the Council on inspections and shared data with the Council. In one case where the SIS could not pursue an investigation criminally, it provided data concerning the illegal activities to the Council, which used it to successfully pursue a case of bid rigging under Article 5.

5.2.1. Memoranda of Understanding

The Competition Council has signed co-operation agreements with a number of sector regulators and other entities, including: the Energy regulator, the Finance sector regulator, the Public Procurement Office, the National Paying Agency under the Ministry of Agriculture. It is the early stages of formalising longstanding co-operation efforts into more formal relationships with the SIS and FCIS. These agreements govern mutual co-operation between the competition authority and other bodies, which include consultations, enforcement assistance, information and staff exchanges. The Competition Council puts considerable efforts into ensuring that sector regulators promote fair competition by defining regulations in the relevant markets in accordance with the principles of competition law. Conversely, the Council carefully considers inputs, recommendations and conclusions of regulators during consultations and information exchanges during its investigation of mergers and abuse of dominance cases.

The Council uses four methods to ensure better co-operation when engaging with regulators and other entities of government, by: i) establishing a legal written framework that governs co-operation, including mutual consultations, enforcement assistance, as well as information exchange between sector regulators and the Council; ii) providing the Council with standing to submit public comments on the application of regulations that require written response by the regulator prior to issuing a final decision; iii) encouraging personnel transfers or exchanges between sector regulator and the Council; and, iv) adopting measures to avoid overlapping functions between the Council and sector regulators.

5.3. Public Procurement

Public procurement is an area of shared competency between the Competition Council and the Ministry of the Economy and the Public Procurement Office (PPO). Public procurement policy is set by the Ministry of Economy. The PPO implements the Ministry’s policies and supervises compliance with the law and the implementing legislation. The PPO’s functions include providing methodological assistance and consulting to the contracting authorities, administering the central e-procurement portal, preventing infringements, controlling contracting authorities’ compliance with the law and monitoring public procurement procedures and public procurement contract implementation together with partner ministries.


234 The English language version of the SIS web-site is found at: https://www.stt.lt/en/menu/about-stt/.
and other State authorities. The Central Purchasing Organisation (CPO) conducts centralised procurement on behalf of contracting authorities, including the central administration and its territorial branches, as well as local authorities.235

The European Union Public Procurement Directive 2014/24/EU236 establishes principles and procedures for procurement by public authorities in Member States. The Directive is part of a wider European Union legislative package on public procurement and concessions, which seek to improve public procurement efficiency and value for money, simplify rules and make them more flexible, reduce the administrative burden on public authorities and contractors, and stimulate greater competition across the European single market.

The Lithuanian Law on Public Procurement (LLOPP) is the national act regulating public procurement and transposing the EU Directives. The Competition Council was one of the parties in the national working group for transposing the European Union Procurement Directive into national law. The Competition Council submitted its comments and proposals so that the transposition of the Directive into the Law on Public Procurement would assure adequate competition in public procurements.

The LLOPP introduced two levels of Lithuanian public contracts that are below EU thresholds, i.e. simplified procurement procedures. According an assessment by the European Union, Public Procurement – Study on administrative capacity in the European Union – Lithuania Country Profile:237

“contracts below EUR 3 000 in value are largely free of regulation, including mandatory contract notification. For contracts above EUR 3 000 but below EUR 58 000 (for supplies and services) and EUR 145 000 (for works) a simplified procedure is used. For tenders below the EU thresholds, individual contracting authorities must establish their own implementation rules and publish them in the Central Public Procurement Information System. Contracting authorities must define and publish an annual procurement plan indicating planned procurement procedures chosen on the basis of their estimated values. Procedures for procurements above the simplified procurement thresholds (but below EU thresholds) are established by the LLOP. Although individual contracting authorities have the authority to establish rules for so-called simplified procedure contracts (that fall below the thresholds set out above), those rules must nonetheless fully comply with the LLOP. Additionally, when promulgating their rules, contracting authorities may make use of standard rules prepared by the Public Procurement Office to the extent they meet the requirements of the contracting authority and are proportionate to the size and complexity of the types of procurements it undertakes. Rules for simplified procurement procedures promulgated by contracting authorities must be published at Central Public Procurement Informational System.”

The Competition Council investigates and prosecutes bid rigging under Article 5 LOC (See discussion above at Section 3.2.3). The bid rigging schemes uncovered by the Council involve classic types of bid rigging: complementary bidding, sham bids, as well as improper use of consortium bidding, and the use of sub-contracting or other illegal means to compensate losing bidders for their participation in the illegal schemes. Five of those recent cases involve collusive bidding on tenders involving the use of EU structural funds.


5.3.1. Public Procurement Capacity in Lithuania

According to a recent study, by the European Commission Directorate General for Regional Aid and Urban Policy, “Stock-taking of administrative capacity, systems and practices across the EU to ensure the compliance and quality of public procurement involving European Structural and Investment (ESI) Funds” provides:

“an overview of the current state of administrative capacity in the field of public procurement in the EU with a special focus on the implementation of the European Structural and Investment (ESI) Funds. It looks at the systems and structures in the individual Member States and provides valuable information as to how to improve the quality of public procurement and ensure more efficiency, transparency and regularity, in line with the Investment Plan for Europe and the European Structural and Investment Funds focused on results initiative. This study [also] provides a systematic assessment of the public procurement systems of each of the Member States with a particular focus on the way how they are organised and function.” 238

The Study also contains separate reports concerning the administrative capacity of each Member State in the area of public procurement.239

“Public Procurement Study on Administrative Capacity in the EU” (Lithuania Country Profile), public procurement in Lithuania accounts for roughly one third of the national budget and 11% of GDP.240 Public procurement in Lithuania is conducted principally by sub-national contracting authorities with supervision by the national Public Procurement Office operating a strong reporting system to monitor procurement activities. The study found:

“As a result, updated data on the planning and implementation of tender procedures is regularly published, making Lithuanian public procurement particularly transparent. Nevertheless, problems persist in practice especially when it comes to reducing the number of irregularities and controlling the correct application of public procurement legislation.”

While the Public Procurement Study noted the challenges related to corruption which Lithuania is facing in this area, it also highlighted a new National Anti-Corruption Programme for the years 2015-2025, which was approved by the Parliament, with the primary aim of strengthening the oversight of public procurement and reducing related corruption.241 The public procurement sectorial anti-corruption programme is derived

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241 The Public Procurement Study noted: “In Lithuania, corruption is identified as a major problem in public procurement and as a barrier to doing business. 95% of Lithuanians say corruption is widespread in their country, and 29% report having been asked or expected to pay a bribe for services received over the past 12 months, the highest share in the EU. What is more, business representatives believe that public funds are often diverted to preferred companies, individuals or groups due to corruption, and that government officials frequently favour well-connected companies and individuals in the process of awarding contracts. Recent cases have also drawn attention to corruption in procurement at local level. Furthermore, procurement in the health care sector is considered particularly vulnerable to corruption.” (Page 5, footnotes omitted.)
from the national anti-corruption programme and was adopted on November 2016 by order IS-14 of the PPO director.

A 2011-2014 anti-corruption programme produced positive results. It notably defined specific targets in the field of public procurement, including having 80% of tenders be carried out electronically, and holding the cost of public tenders within 7% of private sector prices. By the end of 2014, approximately 70% of all public tenders were being carried out electronically.\(^\text{242}\) In 2015, the share of procurement carried through the e-tendering platform CPP IS was 92.8% of the total number of procurements. The Study found that a very positive development since 2012 has been the requirement for an authorisation by the PPO in order to carry out direct awards without a competitive process. Although there are a number of exceptions allowing for direct awards, nevertheless the PPO must still be notified immediately if a direct award of a contract is made without competition.

The Study found that Lithuania has an adequate legislative framework and oversight structures in place. It praised the e-procurement system. However, it also concluded that authorities in charge of controlling tender procedures have made limited progress in reducing recurrent irregularities and fraud in the field of public procurement. This is mainly attributed to the dispersed nature of supervision responsibilities, disproportionately low levels of penalties imposed on contracting authorities for irregularities and the lack of prevention mechanisms within contracting authorities.

As part of the National Anti-Corruption Programme 2011-2014, the PPO developed a prototype for an online Price Comparison Model which might in the future enable a comparison of standard unit prices for goods in the public and private sectors to enable better contract budgeting and better assessment of tender offers. According to the PPO, much further development is needed to make the prototype available for wide-spread use.

The PPO and National Audit Office are the two main bodies in charge of oversight of irregularities in public procurement. A 2014 National Audit Office (NAO) Activity Report found that the number of irregularities was decreasing. However, the NAO Audit Report found recurrent issues. The PPO conducted 259 reviews of procurements that led to 13 contracts being annulled. A number of procedural irregularities in the documentation of tenders were uncovered. In 2014, Lithuania also created a Public Procurement Risk Management Informational System. The PPO manages the risk management system which is used to evaluate the potential risk in procurement. The methodology to assess risk is confidential to ensure the effectiveness of the system.

5.3.2. Co-operation among the Competition Council, Public Procurement Office and Special Investigation Service

In order to optimise tasks and avoid possible redundancies, the PPO and the Competition Council agreed in 2011 on a separation of their functions. The PPO reviews compliance with public procurement rules, the Competition Council ensures compliance with competition regulations.

In 2015, the PPO and Competition Council signed an information sharing agreement regarding access by the Council to documents on the PPO’s E-Tender data base. The E-Tender initiative will provide greater access to and analysis of data concerning public tenders in order to better uncover patterns of bid rigging and other anticompetitive arrangements among competitors. The screening project is being designed to enable the Competition Council to apply economic and other methods in screening the public procurement data automatically. The Competition Council’s IT experts are now working on creating new algorithms to screen procurements to uncover patterns of suspicious behaviour on tenders and bid rigging that will work

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with a new data base being created by the PPO. That work is in process. Screening has been used by the Council on the PPOs previous data base on a limited basis. Recently the PPO, the Competition Council and the SIS formalised their informal working arrangements that have already successfully produced positive results on a case-by-case basis. The three agencies have established mutual trust and good working relationships among them. As of February 2017 they have agreed to:

- Structure co-operation between all three institutions on the rotation basis, so one of the institutions would be responsible of forming agenda and other organisational matters for one year tenure. The Competition Council would be the first to take the lead, starting March 2017.

- Assign two contact points, who would act as key officials to be reached from the co-operating institutions.

- Organise workshops or training sessions once every quarter. It should take a form of the following, but is not limited to: training participating institutions of one another competences; organising workshops on topics of common interest when inviting outside experts; organising strategic sessions when deciding on the development of the co-operation, presenting institutional priorities, sharing insights of the recent cases and delivering problematic markets’ overviews.

- Together produce analytical products such as market investigations. Every institution that has relevant skills and resources at the time would deliver an individual investigation on the common subject that complements the information from the other institutions.

- When releasing public notices and individual analytical products, which may encompass competences of another institution, the publishing institution would share it first with the concerned institution and take account of its comments. Also, institutions would co-ordinate public notices if they cover the same subject.

- Structure and broaden practices of information and data transfer between participating institutions. It includes a means for the Competition Council to consult and use the Special Investigation Service’s information gathered in preliminary proceedings. Similarly, following the request, the Competition Council may obtain public procurement’s tender information from the Public Procurement Office.

- Other types of co-operation during investigations, including shared use of IT and human resources where appropriate.”

5.3.3. Operation of Public Procurement and Competition Laws in Lithuania

During the course of the accession review, areas of potential competition concerns have been identified concerning the operation of the Lithuanian Law on Public Procurements (LLOPP) and PPO rules implementing that law. They include the scope of data about individual tenders that is made public, the practice of some procurement authorities of publishing budgets for projects, in-house transactions, consortium bidding rules, debarment procedures and other features of the Lithuanian public procurement rules.

Public procurement rules are purposefully designed to provide for more open and transparent information about tenders. Access to information about tenders is designed to support anticorruption efforts and to allow the public and media to actively monitor the tender process and identify irregularities to the PPO and other officials. The transparency is meant to shine a light on the tenders, to encourage scrupulous adherence to lawful tender procedures and to actively discourage favouritism and outright corruption.
There are two electronic systems used to support public procurements. The Central Public Procurement Informational System (e-tender system) (CPP IS) is a limited access system designed to be used by contracting authorities for publishing tenders, submitting electronic bids, and reporting on the tender. Suppliers submit their bids electronically on the e-tender system. The LLOPP establishes the type of information that is to be included on the CPP IS. Access to information submitted by bidders on the CPP IS e-tender system is limited to the contracting authority employees who are appointed to deal with the particular procurement procedure. An informational site (www.freedata.lt) provides aggregated public information concerning tenders to the general public and allows for greater public scrutiny of tenders. Following the conclusion of the procurement certain information from the CPP IS is ported to www.freedata.lt.

It appears that in some instances contracting authorities may use their discretion to make information, such as the budget for an individual procurement, available to suppliers. While there are anti-corruption considerations behind publishing budgets for projects, if they are not thoughtfully used budgets may encourage collusion and result in pricing on tenders, that rather than being competitive is at or just below the published budget on the project. It does not appear that there is uniform guidance concerning publication of budgets.

Bid opening procedures are set by Article 31 of the LLOPP, and provide for a public bid-opening at which all suppliers who have submitted tenders may be present. The winning tender is also uploaded and made available to those persons authorised to have access to the CPP IS. According to information provided by the Public Procurement Office and the Ministry of Economy, the LLOPP has recently been amended in

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243 “According to the Article 17(2) of the Law on Public Procurement it is imperative to ensure that the contracting authority examines the content of tenders only after the expiration of the time limit for their submission. Also, Article 17(7)(3) of the Law on Public Procurement requires that devices for the electronic receipt of tenders (including CPP IS) must guarantee, through technical means, and appropriate procedures, that before the time limits laid down (ex. deadline for submitting bids), no one can have access to data transmitted.” (Information provided by the PPO and Ministry of Economy.)

244 The Public Procurement Office notes, “Neither the LLOPP nor implementing PPO laws provide for an obligation to disclose the planned procurement budget. PPO implementing law just recommends as one of the alternatives to indicate in the yearly procurement plan an amount of procured products in terms of sum in Euro. However, contracting authorities evaluating possible risks may choose other alternatives of describing the procured amount of products. Finally, it should be noted that a Contract notice form approved by Annex II of the Commission implementing regulation (EU) 2015/1986 of 11 November 2015 also allows prior indication of an estimated total value (see point II.1.5 of the mentioned Contract notice form).”

245 The PPO and Ministry of Economy note: “The information announced during the tender opening procedures (i.e. the price quoted in the tender, information about the main technical data of the tender, etc.) shall be communicated in writing also to the suppliers which have submitted tenders, but are not participating in the tender opening procedure, if they request so. Each supplier or its representative taking part in the tender opening procedure shall have the right to examine the publicly announced information; however, when communicating such information, the contracting authority may not disclose the confidential information provided in the supplier’s tender. After the bids opening session, at the request of the tenderers, the contracting authority must provide them with access to other tenderers’ tenders, with the exception of the information which the tenderers have designated as confidential. (Article 31 of the Law on Public Procurement).”

246 According to the PPO and Ministry of Economy, “Article 41(5) of the Law on Public Procurement states that access to the information relating to the examination, clarification, evaluation and comparison of tenders shall be granted only to the Commission members and experts invited by the contracting authority, representatives of the Public Procurement Office, the head of the contracting authority, the persons authorised by him, other persons and institutions entitled under the laws of the Republic of Lithuania to have access to such information, also the public legal persons authorised by a resolution of the Government of the Republic of Lithuania and administering the financial assistance of the European Union or individual states.”
the draft procurement law. “Given the high risk of collusion” from 1 July 2017, the LLOPP “revokes the possibility for suppliers to participate in the bid opening sessions (save in exceptional cases when the bids are submitted not in electronic format” and “tenderers will be able to ask for access only to the winning tender (but not to all tenders) after the decision to award the contract is adopted.”

After the completion of the procurement, public information from the CPP IS is ported to www.freedata.lt. It appears that at present there may not be uniform practices concerning the extent of the data that is made public on www.freedata.lt. The level of transparency on the Lithuanian electronic tender procurement system (CPP IS) and open data system (www.freedata.lt) may not in all cases be fully in line with the guidelines of the Recommendation of the Council on Fighting Bid Rigging in Public Procurement [C(2012)115]. Additional guidance by the Public Procurement Office and the Ministry of Economy concerning what information may be made public (in line with the Recommendation on Fighting Bid Rigging in Public Procurement) could be useful. Continued close consultation with the Competition Council will also benefit the process of making procurements less susceptible to collusion and bid rigging.

Another area of concern is in-house contracts, which should be used only in exceptional cases and are specifically excluded from the requirement of competitive tenders by the LLOPP in certain circumstances. Such contracts account for around 3% of public procurement value. Article 10 LLOPP permits purchasing organisations to conclude in-house contracts with their own companies without competitive procedures, provided three cumulative criteria are met. Even though in-house contracts may be excluded from the competitive procurement requirements of the LLOPP, contracting authorities are still required to include them in annual procurement plans, which are publicly announced and in annual reports on the award of in-house contracts to the PPO. The Competition Council has actively advocated the repeal of the right to conduct in-house agreements, and they have also been highly criticised by civil society, the SIS and the NAO. At the moment there are deliberations in the Parliament whether the possibility to conclude in-house contracts should remain in the law and the new draft contains provisions to better control the use of such provisions.

Improper use of in-house contracts has been the subject of Article 4 investigations and litigation. Review of the in-house contracts as contained in annual procurement budgets is the responsibility of the PPO. Improperly used, in-house contracts may deny non-discriminatory access to networks. Lack of transparency regarding the application of the criteria for in-house contracts and the level of scrutiny applied to justify their use make them difficult for private parties to challenge. There is potential for in-house contracts to conflict with EU requirements, including improper State Aid.

From 1 July 2017 municipalities must notify new economic activities to the Competition Council and obtain prior approval. The new law should encourage greater rigour by local governments regarding the use of in-house contracts. Municipalities will be required to justify how new economic activities meet each of the three qualifying criteria for in-house contracts. As a result, the use by municipalities of in-house contracts hopefully may become more thoughtful and circumscribed.

Another area that was mentioned by commentators was the level of penalties for procurement officials who take part in misfeasance or corruption. Questions arise whether the sanctions for violations of the Public Procurement Regulations by contracting officials which came into force on 1 January 2017, are sufficiently robust. Violation of the law is punishable by a reprimand from the PPO or by fines of between EUR 140 and 740. These are to be imposed on the head of the contracting authority or subordinates. Repeat violations may be fines up to EUR 1 050 to 2 300. Higher fines were suggested prior to the recent amendments to the law (first violation EUR 140 to 3 000 and repeat violations from EUR

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247 Sanctions for violations of the Public Procurement Regulations are set out in the Code of Administrative Offenses (Article 184, valid since 1 January 2017).
1 050 to 6 000), but they were not adopted as it was thought that the lower sanctions provided sufficient deterrents. According to the PPO, recently amendments to increase the sanctions (monetary sanction for the first violation from EUR 250 to 3 000, and from EUR 2 000 to 6 000 for a repeated violation) have passed the Parliament and are awaiting Presidential signature.

In some OECD jurisdictions, corruption or fraud by procurement officials are serious criminal offences and in some systems, procurement officials are required to sign, under penalty of perjury, a certification accompanying each tender that states they had no conflicts or self-interest in the project and that they carried out the tender in accordance with all competitive and other legal tender requirements. Additionally, some jurisdictions require that each public tender bid be accompanied by a signed declaration by the CEO of the company stating that the tender is a competitive bid, independently arrived at without consultation or knowledge of the tenders of other bidders. Declarations may be used for criminal prosecutions and debarment proceedings if contrary evidence is uncovered. It appears that amendments are under consideration that would adopt similar practices or give renewed emphasis where certification practices exist that may presently be underutilised or ignored.

Consortium bidding is another area where balance between competition and public procurement is important. On the one hand the European Commission procurement regulations do not prohibit consortium bidding; rather, they recognise the usefulness of consortium bidding to open markets to SME’s and to qualify new entrants, thereby bringing additional competition into markets. On the other hand, consortium bids sometimes are used by bidders, who otherwise are capable of independently bidding on a tender and should be interested in competing, to avoid competition by entering into consortium bids with competitors to stifle competition and gain their mutual benefits at the expense of agencies and consumers. Those types of consortium bids deprive the public of the benefits of competitive tendering and in some instances are little more than thinly disguised bid rigging (e.g. each bidder providing the same offer so that the public authority feels obligated to award the contract to all of them, or consortium bids that are little more than market allocation schemes).

According to the PPO, the extent to which bidders may be required to disclose the full extent of their corporate structure and possible joint ownership interests of bidders is presently the subject of review within the government. Additionally, the Supreme Court of Lithuania recently referred a question to the CJEU concerning the requirements of the TFEU (Articles 45 and 46, and related directives). When “related tenderers, whose economic, management, financial or other links may give rise to doubts as to their independence...have decided to submit separate (independent) tenders in the same public procurement procedure, are they, in any event under a duty to disclose those links between them to the contracting authority, even if the contracting authority does not inquire of them separately, irrespective of whether or not the national legal rules governing public procurement state that such a duty does exist?”

Debarment is another area where potentially competing policy considerations must carefully be taken into account. In small markets with few competitors, automatic debarment rules required balancing with competitive concerns in order that they do operate to limit the ability of the public entity to obtain sufficient competitive bids in the future. Article 45.4.1 of the Draft Law on Public Procurement contains the following language: “4. Contracting authority will exclude from participation in a procurement procedure any economic operator in any of the following situations: 1) the economic operator has entered into agreements with other economic operators aimed at distorting competition among the economic operators

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248 See: [https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/e51812b024ff11e79f89f996496b137f39?positionInSearchResults=2&searchModelUUID=62744300-9d66-4e3d-912e-c7f9e7c506be](https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/e51812b024ff11e79f89f996496b137f39?positionInSearchResults=2&searchModelUUID=62744300-9d66-4e3d-912e-c7f9e7c506be).

participating in the procurement procedure, and contracting authority has plausible evidence of collusion.” The Council has taken the position that this language places too high of a burden on the purchasing authorities and therefore should be adjusted to reflect the standard set in the EU Directive, i.e. sufficiently plausible indications to conclude that the economic operator has entered into agreements.

Each of these areas and others provide opportunities for fruitful co-operation between the PPO, Competition Council and SIS to ensure better public tenders that satisfy all of the policy mandates of the three agencies.
6. Extraterritorial Effects and International Co-operation

International co-operation and convergence around best international practices is one of the organising principles of the OECD and its work seeks to achieve those goals. Lithuania, represented by its Competition Council, has been an active Participant at the Competition Committee and has used this status to contribute actively to the Committee’s work and gain the benefits of listening to and interacting with its more experienced peers.

6.1. International Co-operation and Activities as a Member of the European Union

As a member of the European Union since 2004, Lithuania is a signatory to the EU Treaty and is bound to uphold its requirements and fulfil its responsibilities under the Treaty. The Competition Council has since then been responsible for enforcing Article 101 and 102 TFEU, as well as for monitoring and reporting on the use of State Aid. The Council fully implements the requirements of EC Regulation 1/2003 and is a member of the European Competition Authorities (ECA).

The Council also informs the European Commission about the antitrust investigations concerning the application of Articles 101 and 102 TFEU. During the last five years the Competition Council has sent five notifications to the European Commission about the investigations of the abuse of dominance and anti-competitive agreements. The Council is required to notify the competition authorities of other Member States concerning mergers and must notify the European Commission on mergers that have a Community dimension. In 2016, the Competition Council sent four notifications and received four notifications from other Member States. The Competition Council has no statistics about ECA notices sent or received in previous years.

The Competition Council actively co-operates and exchanges information with competition authorities from other EU Member States. During the last five years Competition Council has replied to more than fifty Informal Requests for Information (RFI). Fifteen of them were related to mergers. Another fifteen related to investigations of the abuse of dominance. During the same period the Council has sent more than a dozen RFI requests. Eleven of them related to mergers and one related to investigations of the abuse of dominance. There are instances when the Competition Council contacted other national competition authorities asking to gather information that might be important for the investigation. Usually, information available in public domain in the respective country is sought, which due to the linguistic barriers could not be easily accessible to the officials of the Competition Council.

Both officials of the European Commission and officials of its Member States are authorised to carry out inspections within Lithuania and to request assistance and co-operation from the Competition Council and Courts of Lithuania to do so. Lithuanian courts do not have the right to conduct a full-blown inquiry into the necessity of the Council’s request for authorisation to conduct inspections. In practice the Council has not experienced difficulties obtaining permission to conduct inspections for its own investigations or when it is provided required assistance to the European Commission or other competition authorities to conduct inspections. The Competition Council has provided assistance in three cases.

The Competition Council has assisted the European Commission to conduct inspections in two cases. The Baltic rail transport case (COMP/39813) concerned actions of Lithuanian railway incumbent AB Lietuvos geležinkeliai. The European Commission suspected the company of having limited competition on the rail markets in Lithuania and Latvia by removing a railway track connecting the two countries. The second case, involved Gazprom (COMP/39.816). European Commission opened an Article 102 TFEU investigation of Gazprom concerning upstream gas supplies in Central and Eastern Europe. In 2011, the Council assisted the Latvian competition authority under Article 22.1 of Regulation 1/2003, to obtain court
authorisation to undertake unannounced inspections at the premises of an undertaking active on the Lithuanian market that had been suspected of having infringed the requirements of Article 101 TFEU. The Competition Council has twice requested assistance with inspections from competition authorities in other Member States, first in Latvia in 2011, and thereafter in 2013 in Italy.

6.2. Other International Co-operation and Bi-Lateral Co-operation Agreements

The Competition Council participates in the International Competition Network (ICN) to address practical competition concerns among competition agencies worldwide. The three Baltic countries competition authorities also co-operate closely. A Baltic Competition Conference is held annually. The Council organises the conference every third year. The Council views the conference as an excellent forum to share experiences and ideas among the representatives of three closely associated countries and provides opportunities to engender more coherence in approaches by three authorities that often have to deal with similar concerns or even the same undertakings.

The Council also has two bilateral agreements with the Agency of the Republic of Kazakhstan for Competition Protection (Antimonopoly Agency) and Antimonopoly Committee of Ukraine. The cooperation agreement with the Agency of the Republic of Kazakhstan for Competition Protection mainly concerns co-operation in the area of competition policy and law through sharing non-confidential information and by providing joint training opportunities. The agreement does not cover assistance in investigations. The co-operation agreement with the Antimonopoly Committee of Ukraine contains clauses on assistance in carrying out investigations of anti-competitive activity (Article 4) and on supplying each other with information necessary to carry out an investigation of anticompetitive activity (Article 5). To date assistance on investigations has not been used in practice.

The Council has also signed a memorandum on partnership in the field of competition law enforcement with the Competition Agency of Georgia. The authorities agreed to: i) to take all possible measures to encourage the development of competition policy, competition law and competition advocacy; ii) to promote the creation of a competitive environment and prevent actions that are aimed at or may result in the distortion or restriction of competition in the markets; iii) to exchange information within the framework of joint projects in the field of the competition law enforcement, to hold mutual consultations; and, iv) upon the request of the Parties, to appoint appropriate specialists and experts for the arrangement of joint meetings, seminars, workshops and symposia in the field of the competition law enforcement. During the last five years Competition Council has replied to ten Informal Requests for Information (RFI) from the competition authorities located outside of the European Union. Three of the requests were related to mergers.

The Council has participated in three European Commission-sponsored “twinning” projects and a technical assistance project. The Council’s twinning projects were with the Ukraine Antimonopoly Committee, the Egyptian Competition Authority, and Armenia’s State Commission for the Protection of Economic Competition. The projects lasted between twenty-four and thirty-two months. Technical assistance was also supplied by the Council to three employees from the Central Bank of Armenia concerning competition issues and issues of State Aid in the banking sector. Twinning and technical assistance projects allow the Council to gain insights into different enforcement models and their effectiveness or, in contrast, the challenges they may create. The twinning projects provided the Council a better understanding of the advantages and shortcomings its own enforcement model and practices.

The Council notes that it obtains great benefits from international co-operation. By participating in competition conferences, training, international organisations and forums it gains valuable information about techniques and strategies used by other competition enforcement to authorities to enforce laws, protect consumers and promote competition. Participation in international fora, particularly as a Participant to the Competition Committee of the OECD, has given the Council better knowledge of colleagues,
channels of communication, and access to very high quality written materials that permit the Council to understand approaches used by other countries to common issues. It believes that the most important of forums have so far been the OECD and the ECN, although lately the Council has started to participate more actively in the activities of the ICN. Direct participation in ICN events is, however, somewhat dependent of the location of the event, as financial capabilities do not always allow to send representatives to meeting locations more distant from Lithuania.

The table below lists the Council’s participation in international organisations.

| Table 13. Competition Council Participation in International Organisations from 2012-2016 |
|---------------------------------------------------------------|----------------|----------------|----------------|----------------|----------------|
| **CC participation in international organisations** | **2012** | **2013** | **2014** | **2015** | **2016** |
| OECD | | | | | |
| Number of articles and written materials submitted | 7 | 6 | 6 | 4 | 7 |
| Number of conferences attended | 2 | 2 | 2 | 2 | 2 |
| Number of speeches given | 2 | 2 | 2 | 2 | 5 |
| Number of participants sent | 3 | 3 | 3 | 3 | 3 |
| ICN | | | | | |
| Number of articles and written materials submitted | N/D | N/D | N/D | N/D | 1 |
| Number of conferences attended | N/D | 2 | 3 | 3 | 3 |
| Number of speeches given | N/D | N/D | N/D | N/D | 2 |
| Number of participants sent | N/D | 2 | 4 | 4 | 5 |
| ECN | | | | | |
| Number of articles and written materials submitted | N/D | N/D | N/D | N/D | N/D |
| Number of conferences attended | 15 | 21 | 32 | 42 | 25 |
| Number of speeches given | 1 | 1 | 1 | 2 | |
| Number of participants sent | 24 | 25 | 33 | 47 | 29 |
| UNCTAD | | | | | |
| Number of articles and written materials submitted | 1 | N/D | N/D | N/D | N/D |
| Number of conferences attended | N/D | N/D | N/D | N/D | N/D |
| Number of speeches given | N/D | N/D | N/D | N/D | N/D |
| Number of participants sent | N/D | N/D | N/D | N/D | N/D |
| ECA | | | | | |
| Number of articles and written materials submitted | N/D | N/D | N/D | N/D | N/D |
| Number of conferences attended | 9 | 4 | 12 | 9 | 11 |
| Number of speeches given | N/D | 1 | 2 | 4 | |
| Number of participants sent | 17 | 9 | 14 | 10 | 23 |

**Notes:**
*1 We have also included submitted annual reports.
*2 Here we include oral remarks when participating in roundtables. We do not have precise data how many such speeches were given. The CC is quite active and we believe at least once in every conference the representatives of the CC have made remarks/speeches. Thus, apart from the year 2016, where we know that at least 5 times the Council’s representatives have made remarks, we indicate in other years the number of speeches as 2.
*3 No precise data available. It would be safe to state that at least 3 persons from the Council have attended OECD events each year, as usually Chairman Mr. Šarūnas Keserauskas and at least one other staff member have been present in any given conference, and thus such number is given in the table.
*4 No data available, but the Council provides answers to the questionnaires for the workgroups.
7. Conclusions

7.1. Overview of Lithuania’s willingness and ability to implement the OECD Recommendations in the field of competition law and policy

The Competition Committee acquis consists of twelve Recommendations, which are organised under the three core principles contained in the Appendix to the Roadmap.

Lithuania in its Initial Memorandum of 16 January 2016 accepted each of the twelve competition acquis Recommendations, without any reservations, observations or timeframes for implementation. It broadly complies with the Recommendations and has taken steps to implement each of them although there are still areas for improvement. This section discusses each of the twelve Recommendations and summarises Lithuania’s competition policies and laws, along with the Competition Council’s powers and activities, in order to assess Lithuania’s willingness and ability to further implement the Recommendations under the Competition Committee’s competence. Potential areas of further improvement are suggested to enhance effective enforcement, increase international co-operation and embed competition practices in the operation of Lithuania’s economy. The summarised list of proposed measures for further considerations is provided in Section 7.2 below.

A general overview of the competition Recommendations and Lithuania’s willingness and ability to meet them are discussed first. Preliminary recommendations follow the general discussion and cover six specific areas: i) bid rigging and public procurement; ii) competition assessments and legislative reviews; iii) the use of in-house contracts; iv) State Aid; v) the use of market studies to identify competitive problems in key regulated sectors; and, vi) transposition and implementation of the EU Damages Directive into Lithuanian law.


This Recommendation contains broad commitments by Adherents to engage in effective consultations, comity and international co-operation in investigations and enforcement of competition laws. Adherents commit to take appropriate steps through consultations and information sharing to minimise direct or indirect obstacles or restrictions to effective co-operation in enforcement. Where possible, Adherents are encouraged to seek confidentiality waivers and share information among jurisdictions to achieve better investigations and more consistent outcomes. The use of “information gateways” is promoted. Where two or more jurisdictions are investigating or initiating proceedings against the same entities, they should endeavour to co-ordinate their investigations when it is in their mutual interests to do so. This Recommendation supports Principle 1, to promote effective competition law enforcement and Principle 2, to facilitate international co-operation in investigations and proceedings involving competition enforcement. International co-operation is discussed in Section 6. of this report.

Lithuania accepts this Recommendation. The Initial Memorandum notes that as a Member of the European Union and the European Competition Network (ECN) it must adhere to EU co-operation requirements. Lithuania has provided assistance to other EU Member States through information sharing and assistance to the Competition Commission in unannounced inspections and other activities in Lithuania. Lithuania points out its bi-lateral co-operation agreements with Ukraine and Kazakhstan. Additionally, the Competition Council is required to safeguard commercial and professional secrets and maintain confidentiality, although parties to an investigati0 Council has complied with this Recommendation in the past and will continue to do so in the future. As an active participant in the ECN, the Competition Council
co-operates with other EU Member States and works to improve co-operation procedures and practices. Accordingly, no additional actions or procedures are proposed with regard to the Recommendation.

7.1.2. Recommendation of the Council on Fighting Bid Rigging in Public Procurement (C(2012)115) (incorporating the Guidelines for Fighting Bid Rigging in Public Procurement)

This Recommendation urges Adherents to undertake assessments of public procurement laws and procedures to reduce the risk of bid rigging and ensure that procurement officials are adequately trained to detect and report suspicious behaviour that might suggest collusion or bid rigging on tenders. They are encouraged to promote the Guidelines for Fighting Bid Rigging in Public Procurement at all levels of government within their jurisdictions. This Recommendation supports Principle 1, to ensure effective enforcement of competition laws. Activities by the Competition Council to fight bid rigging in public procurement are discussed in Sections 3.2.3 and 5.3 of this report.

In 2016, the OECD issued a follow-up report, *Fighting bid rigging in public procurements: Report on implementing the OECD Recommendation.* The Report recommended that future activities should include “an in-depth stock-taking of country measures to monitor the level and quality of compliance with the Recommendation at central and sub-central levels of government...” It also suggested co-operation among authorities to address bid-rigging should include competition, public procurement and anticorruption authorities, as well as audit institutions. As discussed in Section 5.3 of this report, the Competition Council is the process of extending and deepening its co-operation efforts with other government agencies to co-ordinate activities designed to uncover and fight bid rigging.

Lithuania accepts this Recommendation. The Initial Memorandum notes that the Law on Public Procurement of Lithuania (LLOPP) has a set of measures to prevent bid rigging practices and an electronic tender process that is to be used by all procurement authorities in Lithuania in at least 50% of their total procurements (by value). It points out that the LLOPP contains provisions to exclude bidders who previously have been involved in bid rigging or other grave professional misconduct. It also notes that a new draft of the LLOPP, which transposes European Commission Directive 2014/24/EU into Lithuanian law is currently under consideration and will oblige a contracting authority to exclude a bidder from participating in a tender if the contracting authority has “sufficiently plausible indications to conclude the bidder has entered into agreements with other bidders aimed at distorting competition.” The draft law also requires the Competition Council to provide contracting authorities with methodological assistance on how to identify collusive agreements between bidders.

The potential adverse effects to the Lithuanian economy from bid rigging are significant given that one third of the national budget is dedicated to public procurement. The previous lack of transparency in procurement and the toxic effects of corruption add to the competition challenges Lithuania faces from bid rigging in procurements and the use of in-house contracts that limit competition discussed in Section 5.3.

As noted in its Initial Memorandum, public procurement is a key area of focus for the government of Lithuania. Areas of concern in the operation of the LLOPP and PPO rules implementing the law include the access to public data bases, the practice of publishing budgets for projects with the tender documents which are available not only to procurement agencies but to bidders and potential bidders, potential exemptions to the procurement law for in-house contracts, consortium bidding rules, debarment procedures and other features of the Lithuanian public procurement rules. The Competition Council has actively advocated the

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repeal of the right to conduct in-house agreements. In early 2017 there have been deliberations in the Parliament whether the possibility to conclude in-house contracts should remain in the law.

Lithuania is in the process of effectively implementing the Recommendation concerning public procurement. The Competition Council, Public Procurement Office (PPO) and Special Investigation Service (SIS) have initiated procedures to better co-ordinate their enforcement and investigation efforts and to jointly address these issues. The Lithuanian government and the Ministry of Economy have identified public procurement as a key policy area for further review and reform. Each of these initiatives are important steps to more effectively co-ordinate and comprehensively address bid rigging and other irregularities involving public procurement that undermine the value of competition and transparency in procurements.

The Competition Council, PPO and SIS joint initiatives are timely, important and should ensure that procurements are effective and accomplish their public goals, while at the same time ensuring that they do not unwittingly foster collusion or public misfeasance. The agencies are committed to maintaining transparency and public access to information in a manner that will not compromise their competition or anticorruption goals. However, access to procurement data bases, in-house transactions, debarment proceedings and consortium bidding are areas where it appears greater consultation may yield productive results and better public procurements. Each of those practices (i.e., access to data bases, levels of transparency in procurements, in-house transactions, consortium bidding rules, debarment) and other potentially anticompetitive features of the LLOPP and procurement regulations in Lithuania may benefit from a comprehensive assessment of their effects on competition, for example by reducing bidders’ access to information about actions of other bidders.


This Recommendation urges Adherents to identify existing or proposed public policies that unduly restrict competition and develop specific, transparent criteria for screening new policies, laws and regulations and revising existing ones that impinge on competition. It further states that competition assessment is warranted when a government (1) establishes or modifies a regulatory body or regime, (2) creates a new price or entry regulation scheme, (3) restructures an incumbent monopoly, or (4) introduces a ‘competition for the market’ process. Adherents are encouraged to use the OECD Competition Assessment Toolkit and to refine it to the needs of their jurisdictions. The Recommendation also includes guidance concerning how competition assessments may be best integrated into government operations, including the types of policies that should be subjected to competition assessments, how they should be conducted, the timing for assessment reviews and how stakeholder inputs should be taken into consideration. This Recommendation supports Principle 3, to promote public objectives with fewer anticompetitive effects. The Competition Council’s activities to identify policies that unduly restrict competition, to review proposed legislation and to conduct self-assessment of its own activities and procedures is discussed at Section 4 of this report.

Lithuania has accepted this Recommendation and notes that it values competition assessment and that review of existing public policies is an ongoing and constant process in Lithuania. It supports and uses the OECD Competition Assessment Toolkit. Internal legislative requirements contained in the Guidelines on the Application of the Competition Policy Provisions (Resolution No. 1510, 12 December 2012) require that procedural rules concerning competition assessments are followed during drafting of laws and regulations. When reviewing proposed legislation, the Council and government use the Methodology for Assessing the Impact of Planned Regulatory Framework (Resolution No. 276, 26 February 2003) and the Guidelines on the Assessment of the Impact of Decisions on Competition. Each of these tools is designed to give effect to Constitutional requirements and to encourage market competition. In addition, the Council applies assessment principles to its own work and enforcement priorities to ensure that they are being used to best effect to promote competition and improve consumer welfare.
The Competition Council is given a strong mandate and effective tools to review and comment upon the potential anticompetitive effects of proposed legislation and regulations. The Council provides recommendations directly to the Ministry of Economy and the government. Ex ante review of legislation is an important tool to uncover anticompetitive measures and deal with them at their incipiency. The Ministry and government are not required to adopt the Council’s recommendations and in one recent year adopted only approximately 35% of the recommendations provided by the Council. Although the government is not mandated to take the Council’s advice, Article 4 remains effective. Following passage of a law or regulation, the Council may review its implementation to determine if Article 4 or other parts of the Law on Competition have been abridged.

The Council does not at present keep track of the outcome of each of its recommendations concerning legislation and whether anticompetitive consequences have resulted from passage of the laws or regulations which should be addressed with Article 4. It would be extremely time consuming to review the final version of each statute and regulation to see if its recommendations had been adopted. Understanding that it may not be a fruitful use of resources to monitor each piece of legislation, the Council might consider devising a systematic method for keeping track of the most important and problematic pieces of legislation (and regulations) and actively monitoring their results to ascertain if investigations and Article 4 enforcement actions should be undertaken.

The Council’s competition review and screening of legislation are important processes to identify potentially anticompetitive features and provide advice and recommendations to the Ministry of Economy so that legislation may be amended to eliminate problems during the legislative process. However, while the Council's recommendations are important to the Ministry and Seimas during the legislative process, they may not always be given appropriate consideration. Achieving the appropriate balance may benefit from additional practices to ensure that Council recommendations focusing on effective competition are given due consideration and, where not adopted they are flagged as policy areas to be monitored and reviewed for future anticompetitive effects. In a recent year only a little over one third of the Competition Council’s recommendations were actually adopted.

Ex post monitoring and enforcement is not the most efficient means for addressing anticompetitive legislation, but when ex ante review by the Council is not given appropriate weight, it may in certain instances be warranted. The recent Council enforcement action concerning the size of pharmacies demonstrates that monitoring legislative outcomes and pursuing enforcement under Article 4 may in certain circumstances be an effective option. There also may be scope for the Council and Ministry of Economy to consider other procedures to ensure greater consideration is given to the Council’s concerns about anti-competitive effects in proposed legislation. Additionally, when potentially anticompetitive legislation is enacted, consideration might be given to a periodic review of the competitive effects of the legislation.


This Recommendation urges Adherents to ensure that merger reviews within their jurisdictions are effective, efficient and timely. They should enable competition authorities to obtain sufficient information to assess a merger’s competitive effects, to conduct merger reviews within reasonable and determinable time frames, and to avoid imposing unnecessary costs and delay on the merging parties. Merger procedures should be transparent and fair. Adherents should seek to give competition authorities powers to conduct efficient investigations. Where transnational mergers are involved, protocols should provide the necessary tools for Adherents to co-operate and co-ordinate merger reviews. This Recommendation supports Principle 1, to ensure effective enforcement of competition laws and Principle 2, to facilitate international co-operation in investigations and proceedings involving competition laws. Merger review and enforcement is discussed at Section 3.5 of this report.
Lithuania accepts this Recommendation and in the Initial Memorandum notes that merger control in Lithuania is regulated by the Law on Competition which establishes mandatory notification thresholds for mergers and an ex ante merger review procedure. It treats foreign firms no differently than domestic undertakings. The Competition Council has significant powers to require information relevant to the review of a merger from both the undertakings and public entities. Merger review is accomplished in time frames that allow for clearance of non-restrictive mergers in a period of thirty days, and which requires all mergers to be cleared within a period of four months from the time of notification of the concentration. Parties with legitimate interests may participate in merger reviews and merger decisions by the Council may be appealed to the administrative courts. National law allows for co-operation with other countries concerning mergers and the Law on Competition protects commercial and professional secrets.

The Competition Council has effective tools and procedures for merger review and is using them consistent with this OECD Recommendation and best practices. Where necessary it has effectively modified procedures and sought additional procedural flexibility to review mergers and accept commitments to eliminate competition concerns.

Lithuania’s merger review is informed by EU standards of practice and is conducted in a timely and effective fashion. In the past five years only two mergers have been opposed by the Council. Between one fifth and one sixth of all merger notifications have gone to second level review in the past five years. The Council has become more comfortable with the use of structural remedies to address problematic mergers. It has used the full array of tools and penalties available to pursue and sanction failures by firms to notify mergers and mergers finalised without prior Council permissions. It has examined mergers that fall below filing thresholds, but which may nonetheless pose competitive concerns. It has published guidelines and guidance and has updated those documents as appropriate.

The Council has made certain that commitments offered in mergers, even if more than a decade old, are honoured by the merging parties. When, as alleged in the Gazprom case undertakings have chosen to ignore their prior merger commitments, the Council has pursued them and imposed stiff sanctions. In the case of Gazprom the Council imposed fines of over EUR 35 million, which have been upheld by the Lithuanian courts.

Lithuania’s requirements and participation in international co-operation concerning merger review is a condition to its EU membership as elaborated in Council Regulation (EC) No. 1/2003 and the Merger Regulation (EC) No 139/2004. The Competition Council has requested assistance in 11 cases and has provided assistance in response to 15 requests by other EU Member States in the past five years. It has entered into co-operation agreements with three non-EU States, Kazakhstan, Ukraine and Georgia to share information and best practices, including those relating to mergers. It has participated in international fora, including OECD Competition Committee Roundtables and Global Forums and has provided written materials concerning its merger practices and procedures.

The Council has effectively used structural commitments to address problematic mergers and, when requested by a party may extend the merger review period for an additional month to allow for commitments to be finalised. Even the additional month is not sufficient time in some instances to allow the Council to consider, accept and implement structural remedies that will effectively address competition concerns. Although there may be scope for additional procedural flexibility, the Council appears to be fully cognisant of the potential trade-offs and pitfalls to providing additional time for finalising commitments. The parties, who control the timing of their merger notifications, at all times have the ability and incentives to identify potential anticompetitive issues and propose methods for eliminating them early in the process, rather than at the end of merger review. Accordingly, no additional action is proposed with regard to the Recommendation.

This Recommendation addresses situations where a regulated firm operates in a non-competitive activity and a potentially competitive complementary activity. Introductory language in the Recommendation refers to a 1997 Meeting of the Council at Ministerial level at which agreement was reached to recommend reform of economic regulation in all market sectors and specifically to urge: (1) that potentially competitive activities be separated from regulated utility networks to reduce the market power of incumbents; and, (2) that market entrants be guaranteed access to essential network facilities on a transparent and non-discriminatory basis. It supports Principle 3, to identify and revise anticompetitive laws, policies and practices that can be accomplished with less anticompetitive effects. Regulated industries, which in Lithuania include SOEs, are discussed at Sections 1 and 5 of this report.

Lithuania accepts this Recommendation and in the Initial Memorandum it notes that the legal framework regulating specific economic sectors is in full conformity with the Recommendation. The Competition Council and national regulators have shared competency to ensure competitive practices in regulated sectors. Sector laws contain specific provisions requiring competition, mandating access to government-owned transmission networks by private providers and separating those transmission networks from government-owned sources of supply. Lithuania has adopted the EU Third Energy Package and has implemented unbundling of vertically-integrated markets in electricity and natural gas.

As discussed in Section 5, although unbundling has been achieved to a large extent, private parties contest the extent to which some transmission networks should be exclusively held by the government and whether access to essential facilities is provided in a non-discriminatory fashion in specific instances. At the national level, access to transmission networks and other government-owned services has been the subject of litigation that is on-going in the courts. In other regulated sectors, involving transport the European Commission has launched an investigation and issued a Statement of Objections concerning access to Lithuanian rail connections by another EU Member State. Structural separation and competitive markets have been achieved in some, but not all regulated sectors in Lithuania.

Municipalities and regulated market sectors are not exempt from the competition laws in Lithuania. However, the operation of in-house contracts, if not effectively implemented, can have the effect of creating an exemption in practice to Article 4. Lack of transparency regarding the application of the criteria for in-house contracts and the level of scrutiny applied to justify their use make them difficult for private parties to challenge. There is potential for in-house contracts to conflict with EU requirements, including improper State Aid.

At the municipal level, the award of in-house contracts to municipally-owned firms supplying fuel to municipal transmission systems has been addressed by the Competition Council on multiple occasions. Creation of new municipal generation capacity with the construction of new biofuel facilities also raises competition concerns. There continues to be strong opposition to greater competition in municipal utility services and there are efforts by some municipalities to withdraw the benefits of competition. While there are legitimate municipal concerns regarding security of supply and the ability to budget for utilities, other motivations for limiting competition exist as well, including cross-subsidisation benefits from municipally-owned sources of supply. Although regulated market sectors are not exempt from the competition laws in Lithuania under the Constitution and Article 4, the operation of in-house contracts, if not appropriately used, may in practice have the effect of creating an exemption to Article 4.

In 2016 the Council was granted greater powers, in the form of monetary sanctions, to ensure that its Article 4 decisions are complied with by municipalities in a timely fashion. On 1 July 2017, changes in the law governing municipalities will require that municipalities obtain ex ante permission to engage in new economic enterprises or to expand the activities of existing ones. The Competition Council has analogue those changes to ex ante merger review for municipalities, has proposed new procedures and has issued a
notification form. These changes in laws are additional steps by the government and Parliament to ensure that the Law on Competition is effectively applied and markets are liberalised.

The Competition Council has already identified in-house contracts and potential State Aid issues as an area for outreach and education to all municipalities in Lithuania over the next two years. Additional education and outreach by the Council concerning the competition consequences of new municipal economic activities as well as on how municipalities may improve the review of their proposals for new economic activity could serve well both municipalities and the Competition Council. A thorough understanding by municipalities about how to apply competition screens to new economic activity and in-house contracts prior to filing notifications with the Council could better ensure the efficiency of the application process and promote better outcomes for municipalities concerning their applications. Initially, the Council and municipalities would be well-served by adopting a variety of approaches for informal consultations and guidance prior to filing notifications. Additional Council resources may need to be allocated to reviews of new municipal economic activities.

The PPO is responsible for reviewing in-house contracts contained in annual procurement budgets of government ministries and municipalities. Before the new legislation requiring municipalities to notify the Competition Council of new economic activity and in-house contracts come into effect on 1 July 2017, it could be useful for the Council and PPO to consult concerning the legislation and the criteria the Council will use to assess notifications by municipalities. The PPO and Competition Council might explore collaborative initiatives to assess the use of in-house contracts. They might consider whether greater ex ante review of in-house contracts by the PPO to forestall their improper use is warranted, and whether regular input and advice from the Competition Council would assist the PPO’s review process.

### 7.1.6. Recommendation of the Council concerning Effective Action against Hard Core Cartels - C(98)35/FINAL

This Recommendation urges Adherents to ensure that their competition laws provide for effective sanctions to remedy and deter cartels. Enforcement procedures should provide competition agencies with sufficient authority to detect, to investigate and to remedy hard-core cartels, including powers to obtain necessary evidence and documents and to impose penalties for non-compliance. Where possible, Adherents should co-operate to enforce their laws and should engage in positive comity as appropriate. This Recommendation supports Principle 1, to ensure effective enforcement and Principle 2, to facilitate international co-operation. Cartels and anticompetitive agreements are discussed at Section 3.2 of this report.

Lithuania accepts this Recommendation and notes in its Initial Memorandum that the Law on Competition and the TFEU both prohibit agreements that restrict competition by their object or their effects. Hard-core cartels do not qualify for De Minimis exemptions to the Law on Competition or the TFEU. Undertakings that take part in anticompetitive agreements are subject to fines of up to 10% of their annual gross income in the preceding business year. Individual managers (such as CEOs) who take part in cartels may be held personally liable, subjected to fines and barred from management, supervision or membership on boards for a period of between three to five years. The Competition Council has adequate powers to detect and remedy hard-core cartels and may impose fines for non-compliance with inspections. The Council cooperates with the ECN to share information under its EU Treaty obligations.

Since 2004 nearly two-thirds of Council enforcement has involved enforcement of anticompetitive agreements, including hard-core cartels and bid rigging. In the past five years the Council’s infringement decisions have all involved anticompetitive agreements, with a focus on hard-core infringements. Whereas in the past the vast majority of anticompetitive agreement infringements involved resale price maintenance, more recently hard-core cartels have been uncovered being operated by industry associations (and their members) and by dominant suppliers of key consumers products (e.g. bread and bakery products). Those cartels have been the subject of multi-million euro sanctions. The statutory leniency programme has been
effectively used, and although there have been only a handful of leniency applicants that have come forward they have done so in cases involving sectors with few competitors, where there is often greater inertia by undertakings to use leniency. In comparison to fines for other administrative infringements in Lithuania, fines for competition law sanctions are at the top of levels that may be imposed for administrative infringements.

As with merger enforcement, the Council has responded to requests for information and has made requests to other EU Member States for assistance with cartel enforcement. It has supported European Commission inspections within Lithuania on two occasions and the request of another EU Member State to obtain information within Lithuania. In two instances the Council has sought assistance of EU Member States to obtain information within their jurisdictions concerning a Council investigation. The Law on Competition applies to activities by undertakings registered outside of Lithuania to the extent that they restrict competition within the domestic market. The Council has applied the Law to reach infringements by foreign companies operating within the State and sanction their infringements, but it also has been scrupulous when applying sanctions to take into account only the effects on commerce within the State. The Council has complied with this Recommendation and is committed to uncovering, investigating and sanctioning hard-core cartel infringements. Accordingly, no additional actions or procedures are proposed with regard to the Recommendation.


When Adherents apply competition analysis to patent and know-how licensing agreements, the Recommendation of the Council concerning the Application of Competition Laws and Policies to Patent and Know-How Licensing Agreements requires that insofar as their laws permit they must take into account the Conclusions contained in the Competition Committee’s 1989 Report on Competition Policy and Intellectual Property Rights [CLP(89)3 and Corrigendum 1].251 Specifically, competition law should not be applied to prevent licensors from capturing the surplus associated with their inventions, but should only interdict the extension of market power beyond that conveyed by the innovation. This Recommendation supports Principle 1, to ensure effective enforcement of competition laws. The application of competition laws and policies to patent and know-how licensing is briefly addressed in Section 3.6.1 of this report in relation to Article 15 LOC.

Lithuania accepts this Recommendation and the Initial Memorandum notes that under the Law on Competition all agreements must be assessed by evaluating their procompetitive and anticompetitive aspects. As noted in the Initial Memorandum, the Law on Competition does not create any presumptions concerning market power by patent-holders or licensors of know-how. Allegations of either abuses of dominance or anticompetitive vertical agreements are examined on a case-by-case basis. The Law on Competition and the TFEU specifically provide the possibility for exemptions, on a case-by-case basis, for agreements which promote technical or economic progress or improve the production or distribution of goods, thereby creating conditions for consumers to receive additional competition benefits. The EU block exemption regulations have been adopted as part of the Lithuanian competition regulations. Lithuania’s laws and policies are in line with this Recommendation. Cases involving patents and know-how licensing agreements have not played a significant role in Competition Council investigations and enforcement. Accordingly, no additional actions or procedures are proposed with regard to the Recommendation.

7.1.8. Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies – C(86)65/FINAL

The Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies urges Adherents to take steps to ensure that proceedings initiated under unfair trade practices laws are not used for anticompetitive purposes. It also recommends that Adherents refrain from encouraging the exercise in foreign markets of export cartels and from establishing restrictive trade practices under the guise of competition regimes and rules. It encourages Adherents to actively participate in requests for consultations concerning export cartels or other restrictions that may be adversely affecting trade within the markets of another Adherent and to co-operate with other authorities on investigations into alleged trade restrictions. This Recommendation supports Principle 2, to facilitate international co-operation and Principle 3, to identify and revise anticompetitive policies. Trade policies are addressed briefly in Section 1 of this report.

Lithuania accepts and strongly supports this Recommendation. The Initial Memorandum notes that it supports and maintains an open and free trade regime as part of the European Union and is highly dependent on the benefits of free trade. It does not apply import or other trade-distorting restrictive measures such as export prohibitions. It maintains its international obligations and commitments to non-discriminatory, rules-based trading through its membership in the WTO. The Law on Competition (as well as the other laws the Competition Council enforces) provide equal treatment to foreign undertakings operating in Lithuania.

Lithuania is very dependent on having access to export markets and benefits greatly from free trade. Exports account for 81% of the country’s GDP. Lithuania complies with and relies upon this Recommendation. Its Membership in the European Union provides Lithuania with access to the export markets of other Member States and it respects access of EU Members to its markets. When applying the Law on Competition and market definition rules, the Competition Council is mindful to ensure that it takes into account imports and exports, and where appropriate possible entry (or exit) by foreign firms in its analysis. Accordingly, no additional actions or procedures are proposed with regard to the Recommendation.

7.1.9. Recommendation of the Council on Competition Policy and Exempted or Regulated Sectors – C(79)155/FINAL

The Recommendation of the Council on Competition Policy in Exempted or Regulated Sectors seeks to ensure that Adherents are provided with adequate tools to deal with government created monopolies and exempted market sectors. It urges Adherents to undertake reviews of regulatory regimes and exemptions from competition laws to determine if they remain valid. When undertaking such reviews, Adherents are encouraged to consult with other Adherents who have had undertaken similar reviews and, wherever practicable, to gain the benefit of their solutions and approaches to infuse competition into regulated industry sectors. This Recommendation supports Principle 2, to facilitate international co-operation and Principle 3, to identify and revise anticompetitive laws and policies to promote competition. Exemptions and regulated sectors are discussed in Section 2, Section 4.4 and Section 5 of this report.

Lithuania accepts this Recommendation. The Initial Memorandum notes that none of the regulated sectors is automatically exempt from competition laws and national regulators, including the National Commission for Energy Control and Prices (NCECP) and the Communications Regulatory Authority of Lithuania (CRA) regularly analyse and change regulations. In addition, as a Member of the European Union, Lithuania must comply with EU requirements and regularly review its legislation and regulations to ensure that it remains in compliance with EU regulations.
As discussed in Section 2 of this report, Lithuania’s Constitution and Law on Competition robustly adopt and enforce this Recommendation. There are no exemptions or exceptions to Article 46 of the Constitution or Article 4 of the Law on Competition for regulated sectors. Competition Council enforcement of Article 4 infringements by public entities, municipalities and State-owned enterprises form a substantial part of the Council’s enforcement activities and administrative sanctions. As discussed in Section 4.6 of this report, the Law on Competition gives the Council responsibilities to prospectively review legislation for potential anticompetitive effects and to make recommendations for changes during the legislative process. If the Council’s recommendations are not adopted, they nonetheless may serve as a marker for further inquiry into whether implementation of the objectionable provisions results in a violation of Article 4 of the Law on Competition. As discussed in Section 5 of this report, the Competition Council has shared competency with sector regulators concerning competition in regulated industries, along with the responsibility to review new legislation and the ability to conduct market studies. So too, sector regulators are responsible under their own enabling statutes to ensure competition and conduct periodic assessments and market studies.

Security of regulated networks (particularly in energy and telecommunications sectors), universal services requirements, and efficient and effective provision of essential services are primary concerns of sector regulators. Those mandates may create legitimate concerns by regulators as to whether they will be able to guarantee an adequate supply of inputs that meet their quality, timeliness and price requirements. Those concerns sometimes result in a lack of confidence and under-utilisation of competition. Sector regulators may seek to avoid the “risks” of competition because the costs and benefits have not been thoroughly considered.

As a result of legacies from previous eras, when networked monopolies were more commonplace, regulated sectors are often characterised by few market participants, with higher concentrations of market power. Additionally, as discussed in Section 3.4 of this report, abuse of dominance cases have been a lower Council enforcement priority in the past few years, and although investigations have been undertaken no cases have resulted. Understanding that uncovering abuses of dominance involves resources and time intensive investigations, the Council may find it useful to explore approaches to better identify anticompetitive actions by dominant firms in markets with few competitors.

The Council’s annual market studies, their requirements for staffing and time commitments and their results are addressed at Section 4.7 of this Report. Consideration might be given to targeting annual Council market studies into sectors that have not been fully liberalised. The Council may find it beneficial to consult with sector regulators to identify problem areas in regulated sectors that might be susceptible to valuable competition analysis and where regulations might be restructured to provide more competition. By targeting market studies into regulated markets, the Council may gain greater insights into potential areas where abuses of dominant positions may be occurring.

As previously discussed, with respect to the Recommendation of the Council on Competition Assessment (Section 7.1.3), and the Recommendation of the Council Concerning Structural Separation in Regulated Industries (Section 7.1.5), there are areas for potential reinforcement of this Recommendation involving municipal regulatory regimes and liberalisation of transportation and telecommunications sectors. Additionally, use of market studies to highlight competition in regulated sectors that have not full liberalisation may serve to inform the Council, sector regulators and government officials about areas where additional efforts should be made and where competition might be improved.

7.1.10. Recommendation of the Council concerning Action against Restrictive Business Practices Affecting International Trade Including those Involving Multinational Enterprises – C(78)133/FINAL

The Recommendation was adopted at a time when the OECD Members wished to focus attention on implications of competition policy on the increasing role of multi-national enterprises in international
trade. Since that time significant progress has been made through both the efforts of OECD Members and evolution of competitive international markets worldwide. The Recommendation at present urges only that Adherents consider whether additional modifications to their competition laws are warranted. Adherents are also urged to consider areas where further improvements to co-operation on investigations or safeguards concerning information sharing might be appropriate. The Recommendation supports both Principle 1, to ensure effective investigations and Principle 2, to enhance international co-operation. State Aid is discussed at Section 3.7 of this report.

Lithuania accepts the Recommendation and in the Initial Memorandum notes that the Law on Competition and the TFEU cover and prohibit all of the anticompetitive practices mentioned in the Recommendation. Additionally, it highlights co-operation by the Competition Council with other competition agencies through the ECN and other international organisations.

As discussed above, in Section 2.2 of this report, Lithuania’s competition laws apply to foreign undertakings operating in Lithuania but the Competition Council has been mindful that sanctions and fines extend only to infringements with anticompetitive effects within Lithuania. The law specifically excludes from its coverage those activities of undertakings that restrict competition on foreign markets.

The TFEU specifically prohibits unwarranted and exclusionary State Aid that may have the effect of favouring domestic markets and limiting free and open trade with the European Union. State Aid rules are enforced in the European Union by the European Commission. In Lithuania, the Competition Council is given regulatory responsibility for reviewing grants of State Aid for compliance with EU regulations. It maintains databases concerning grants of aid and reports grants of State Aid to the European Commission. Council recommendations concerning State Aid are not required to be adopted by agencies.

There is no single agency in Lithuania responsible for co-ordinating or overseeing grants of State Aid, which are the purview of individual ministries and municipalities. At times State Aid requirements create tensions within granting organisations with their other programmatic goals and objectives. There are no clear procedures for challenging State Aid within Lithuania and there is virtually no litigation in respect of State Aid at the EU level.

Consideration might be given to whether support for this Recommendation could be improved by centralised review of State Aid in an independent agency other than the Competition Council.

7.1.11. Recommendation of the Council concerning Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licences - C(78)40/FINAL

This Recommendation urges Adherents to consider eliminating restrictions on parallel imports and to prohibit agreements involving trademarks that allocate territories on actual or potential competitors or impose territorial restrictions, resale price maintenance or tying requirements. This Recommendation supports Principle 1, to ensure effective enforcement of competition laws.

Lithuania accepts this Recommendation and in the Initial Memorandum notes that Lithuanian and EU competition laws prohibit the practices highlighted in the Recommendation. To the extent trademarks and trade licenses provide pro-competitive, innovation enhancing effects, they may benefit from block exemption rules or exemptions to the application of competition law prohibitions on a case-by-case basis, under both the LOC and TFEU.

The Ministry of Economy is generally responsible for trade policy in Lithuania, which does not devolve to enforcement by the Competition Council. Lithuania has been a member of the World Trade Organisation since 2004. As a general matter, parties seeking to protect trademarks or intellectual property do not recur to competition law. The Lithuanian legal framework has other laws at their disposal to enforce their intellectual property rights. However, Article 15 of the Law on Competition does specifically prohibit
“unfair competition” through unauthorised use of trademarks and product packaging, and prohibits use of commercial secrets without permission, which provides an additional means for holders of intellectual property to protect their rights. Although Article 15 has not been enforced in the past five years by the Council, because of the “majority interest” requirement (discussed in Section 3.6 of this report), it has been used by private parties. No changes to Article 15 LOC or additional enforcement efforts by the Council with respect to Article 15 appear to be warranted.

Lithuania complies with this Recommendation. The Law on Competition fully applies to competition involving trademarks and trade licenses and prohibits territorial restrictions, resale price maintenance and other types of anticompetitive restrictions highlighted in the Recommendation. Accordingly, no additional actions or procedures are proposed with regard to the Recommendation.

7.1.12. Recommendation of the Council concerning Action against Inflation in the Field of Competitive Policy - C(71)205/FINAL

This Recommendation was originally adopted in 1971 when the OECD wished Adherents to focus attention on the possibility of employing competition law to help curb inflationary price increases. It urges Adherents to effectively use their laws to curb anticompetitive agreements, monopolistic and oligopolistic practices, anticompetitive mergers and restrictive business practices in the fields of patents and licensing. The Recommendation also urged that actions be taken to strengthen policies concerning consumer protection and education concerning the benefits of competition. More recently, inflationary pressures have been of less concern in the area of competition policy. Price increases resulting from anticompetitive practices, however, remain at the core of competition enforcement worldwide. Providing competition agencies with better tools to uncover anticompetitive practices affecting prices and to eradicate them remain key policy objectives for competition agencies.

Lithuania accepts this Recommendation and the Initial Memorandum notes that Article 46 of Lithuania’s Constitution prohibits monopolisation of production. Other prohibitions contained in the Law on Competition, in the TFEU and secondary legislation of the European Union prohibit the practices which are the subject of the Recommendation. It notes that there are no exemptions to competition law in Lithuania, the sector regulators share responsibilities with the Competition Council for ensuring effective competition. Where monopolistic operators are present and competition is unable to solve price-related problems, some necessary price regulation exists (for example, approval of services prices, price caps, methodologies for setting prices). The Initial Memorandum also recognises that competition and consumer protection share common goals of enhancing consumer welfare.

The Council, government and stakeholders in Lithuania generally view the Council’s powers to address and appropriately sanction competition infringements are sufficient, effective and appropriately applied. Review on appeal in the courts is timely and provides finality in a relatively efficient fashion. Over time when a sufficient body of judicial expertise and legal precedent has been established it would, however, be more efficient if parties did not find the necessity to appeal almost every case through both levels of court appeals.

The Council’s powers to effectively enforce cartels, monopolistic practices and merger concentrations have been expanded and modified over the years and conform to EU requirements and procedures and to international best practices. The Council has focused its efforts on hard-core cartel infringements and has expanded its merger enforcement efforts with new tools. It has vigorously enforced actions against resale price maintenance. Abuse of dominant position is an area where, in light of the concentrated nature of many industry sectors in Lithuania, more investigative efforts might be pursued.

As discussed in Section 4.3.4 of this report, Lithuania is in the process of transposing the EU Damages Directive into Lithuanian law. Private damages actions for infringements of the competition laws are already available in the Law on Competition. (Articles 43 and 47). Although they have been infrequent,
private damage actions have been brought under the LOC. Damages actions are brought in civil courts. Examples of some recent civil actions (discussed in Section 4) illustrate the challenges faced by civil courts. Although those courts are knowledgeable about damages actions in general they have limited or no experience with competition cases and complex competition assessments. With the transposition of the EU Damages Directive into Lithuanian law, there will be clearer rules concerning damages actions. There may also be more requirements for the Council to interact with civil courts concerning information contained in its files, access to commercial secrets, prohibitions concerning disclosure of documents and evidence from leniency applications, and an array of other competition law specific issues. The proper procedures for Council involvement in civil cases and measures to ensure that joinder of the Council in cases is appropriate will need to be addressed. Additionally, competition law training for civil courts may be useful.

One of the principles behind the Damages Directive is to allow private parties to pursue remedies, and to ensure that public enforcement resources are devoted to matters with the widest consumer welfare affects. It is important that Council resources are not unnecessarily diverted and devoted to supporting private damages matters and the parties are encouraged to pursue their own interests to gain the benefits of private damages without inappropriately or unnecessarily joining the Council to their actions. The Council’s role with the private damages should be well established and delimited in advance.

The Council might find it beneficial to consult with the Ministry of Economy, the judiciary and the private bar concerning implementation of the Damages Directive into Lithuanian law in order to proactively consider and establish appropriate policies, best practices and procedures concerning the Competition Council’s participation in private damages cases. Consideration of uniform policies and practices may be an efficient means for the Council to avoid piecemeal litigation about its role in private damages cases and further serve to inform private practitioners and consult with the courts about the appropriate role of the Competition Council in private damages actions.

7.2. Additional Measures potentially worthy of consideration by Lithuania in support of the implementation of the OECD legal instruments in the field of competition law and policy.

Lithuania has accepted the twelve Recommendations in the field of competition law and policy. It has taken steps to implement and continue to improve the effectiveness of its competition regime. The government of Lithuania is engaged in improving Lithuania’s market economy and providing citizens with the benefits of competition. The Ministry of Economy, the Competition Council, sector regulators and local government entities each have important roles to play in extending market practices and ensuring a level playing field for all market competitors. There are some areas where additional measures might be considered by Lithuania to further support the implementation of OECD Recommendations and enhance competition in Lithuania. These measures are discussed more fully in Section 7.1, above, and summarised below.

**7.2.1. Additional Measures for Consideration Concerning the Recommendation on Fighting Bid Rigging in Public Procurement**

The Competition Council, Public Procurement Office (PPO) and Special Investigation Service (SIS) have recently formalised and extended their co-operation efforts to uncover and fight bid rigging in public procurement (Section 5.3.2). Consideration could be given to extending the collaboration agreement among the Competition Council, PPO and SIS to serve as the basis for a comprehensive review of policies and procedures contained in the LLOPP. Co-ordinated efforts by the Council, PPO and SIS to consult on and identify countervailing competition and transparency objectives in the LLOPP might serve to better balance the requirements of effective and efficient tenders with measures to avoid anticompetitive and collusive bidding practices and to uncover...
and eradicate corruption. Where appropriate, additional amendments to the LLOPP or other laws or regulations might be jointly identified as part of the review and collaboratively presented to the government.

7.2.2. Additional Measures for Consideration Concerning the Recommendation on Competition Assessment

Consideration might be given for the Council to devise methods for more proactively monitoring legislation that has been passed over its competition objections and take necessary steps to pursue enforcement. Consideration might also be given to developing additional tools for the Council to engage with ministries concerning legislation that poses competition problems.

7.2.3. Additional Measures for Consideration Concerning the Recommendation on Structural Separation in Regulated Industries

Consideration could be given to using an array of tools to scrutinise use of in-house contracts by municipalities and make certain that municipalities are appropriately applying the criteria that permit them to use in-house contracts.

The Council has issued a new Directive concerning notifications of new economic activities by municipalities. Outreach and advocacy to accompany the publication of the new Council Directive will be important in order for the new law to be effective. In addition to efforts to educate municipalities concerning State Aid and in-house contracts, benefits may be gained by the Council from engaging in additional advocacy and training of municipal entities to ensure compliance with new laws affecting the economic activities. The PPO and Competition Council might explore collaborative initiatives to assess the use of in-house contracts by municipalities.

7.2.4. Additional Measures for Consideration Concerning the Recommendation of the Council on Competition Policy and Exempted or Regulated Sectors

Consideration might be given by the Council to using market studies to identify areas where sector regulators could better infuse competition into regulated markets that have not been fully liberalised. The use of market studies to better understand regulated sectors where competition has not been achieved could provide additional opportunities for the Council, along with sector regulators and government ministries, to develop strategies to open markets and make regulated sectors more competitive.

7.2.5. Additional Measures for Consideration Concerning the Recommendation against Restrictive Business Practices affecting International Trade including those involving Multinational Enterprises

Consideration might be given to whether designating authority to grant State Aids to individual government ministries and the lack of co-ordinated oversight of State Aid is the most effective means to organise State Aid in Lithuania.

It is not recommended that the Council be given additional responsibilities concerning State Aid. However, consideration might be given by the Ministry of Economy as to whether the present approach to State Aids is the most effective means of meeting Lithuania’s obligations and whether it would be appropriate to create a unitary State Aid granting authority to co-ordinate and oversee grants of State Aids.
7.2.6. Additional Measures for Consideration Concerning Recommendation against Inflation in the Field of Competitive Policy

The Council may wish to consider initiatives with the Ministry of Economy, the judiciary and private parties concerning implementation of the EU Damages Directive in order to most efficiently and effectively establish the Council’s role in private damages cases.
Annex A. Rulings concerning Article 46

The Council has produced a chart of the most recent rulings concerning Article 46 (2017-2012). It also provides the number of rulings for earlier period. The sector can be seen from the title of the ruling, as well as the laws that were balanced with Article 46. Please note that most of the rulings\textsuperscript{252} (and summaries thereof) in English can be found on the website of the Constitutional Court at: \url{http://lrkt.lt/en/court-acts/rulings-conclusions-decisions/171/y2016}.

\begin{tabular}{|c|c|c|}
\hline
No. & Year & Ruling & Laws that were balanced \\
\hline
1 & 2016 & 05-10-2016 ruling No. KT25-N12/2016, case No. 36/2014-37/2014 \& 253 On the limitation of the possibility of the owners of flats and other premises in blocks of flats to choose the administrator of common-use objects \& 253 On the limitation of the possibility of the owners of flats and other premises in blocks of flats to choose the administrator of common-use objects \& 253 On the limitation of the possibility of the owners of flats and other premises in blocks of flats to choose the administrator of common-use objects & The Civil Code \\
\hline
2 & 2007 & 07-06-2016 ruling No. KT17-N8/2016, case No. 5/2014 \& 253 On limiting the opportunity of the owners of flats or other premises in blocks of flats to choose the supervisor of the heating and hot water systems of a building & The Law on the Heat Sector \\
\hline
3 & 2015 & 16-12-2015 ruling No. KT33-N21/2015, case No. 23/2013 \& 253 On the research and use of the subsurface by applying hydraulic fracturing & The Subsurface Law \\
\hline
\hline
5 & 2015 & 03-04-2015 ruling No. KT10-N6/2015, case No. 23/2012-38/2014-54/2014 \& 253 On the selection of the company implementing the project of a terminal of liquefied natural gas and on funding this project & The Law on the Liquefied Natural Gas Terminal \\
\hline
\hline
\hline
\hline
\end{tabular}

\textsuperscript{252} Some newer rulings might not be translated yet.

\textsuperscript{253} This link and those in the following cases will send you to the ruling translated into English. As mentioned, some newer rulings might not yet be translated. However, summaries and press releases in English might be available. Please click on the “Act file” and you will be referred to the press release and the summary.
During the earlier period of 1993-2011 (since the beginning of the jurisprudence of the Constitutional Court), by our counting there have been 50 rulings of the Constitutional Court where Article 46 was discussed. Thus, in total there have been 64 rulings where Article 46 was discussed during the period of 1993-2017.\(^{254}\)

\(^{254}\) At the moment of writing on 17 February 2017.
Annex B. State Aid Statistics for Lithuania

Table B.1. Total National State Aid in Lithuania

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>MEUR</td>
<td>294.30</td>
<td>180.63</td>
<td>205.04</td>
<td>233.22</td>
<td></td>
</tr>
<tr>
<td>EUR per employee</td>
<td>200.41</td>
<td>136.95</td>
<td>139.94</td>
<td>158.38</td>
<td></td>
</tr>
<tr>
<td>% of GDP at Current Prices</td>
<td>0.78</td>
<td>0.50</td>
<td>0.17</td>
<td>0.71</td>
<td></td>
</tr>
<tr>
<td>% of national budget expenditures</td>
<td>2.24</td>
<td>1.42</td>
<td>0.48</td>
<td>1.96</td>
<td></td>
</tr>
<tr>
<td>% of national deficit</td>
<td>387.11</td>
<td>74.33</td>
<td>6.48</td>
<td>21.30</td>
<td></td>
</tr>
</tbody>
</table>

Note: *The information for the year 2016 is not available yet, as the year is not over.

Table B.2. Decisions of the European Commission on State Aid Notifications – 2012 to 2016

<table>
<thead>
<tr>
<th>Notification Date by EU Commission</th>
<th>Title</th>
<th>Sector</th>
<th>Purpose</th>
<th>Duration of Aid Scheme</th>
<th>Decision Date by EU Commission</th>
</tr>
</thead>
<tbody>
<tr>
<td>2016 02.09.2016</td>
<td>SA.46285 Prolongation of the duration until 31 December 2020 and evaluation plan of regional aid scheme for the promotion of the development of strategic information and communication technology (ICT) projects on strategic ICT sites</td>
<td>Information and communication technology</td>
<td>The promotion of the development of strategic information and communication technology projects</td>
<td>Until 31.12.2020</td>
<td>08.11.2016</td>
</tr>
<tr>
<td>2016 10.03.2016</td>
<td>SA.44844 Partial refinancing of compensation indemnities paid by insurance companies to agricultural producers as a result of drought (reinsurance)</td>
<td>Agriculture, forestry and fishing</td>
<td>To encourage agricultural producers to insure the basic crops in Lithuania</td>
<td>Until 31.12.2020</td>
<td>30.05.2016</td>
</tr>
<tr>
<td>2015 20.01.2015</td>
<td>SA.40605 Start-up aid for flights from regional airports</td>
<td>Passenger air transport</td>
<td>The proposed aid is a start-up aid scheme in the aviation sector, whose objective is to create net economic</td>
<td>From 01.05.2016 to 30.04.2025</td>
<td>22.04.2016</td>
</tr>
<tr>
<td>Notification Date</td>
<td>Registration Date by EU Commission</td>
<td>Title</td>
<td>Sector</td>
<td>Purpose</td>
<td>Duration of Aid Scheme</td>
</tr>
<tr>
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</tr>
<tr>
<td>2015 19.06.2015</td>
<td>SA.42225 Aid for the promotion of the development of strategic information and communication technology (ICT) projects on strategic ICT sites</td>
<td>Data processing, hosting and related activities</td>
<td>Data processing, hosting and related activities</td>
<td>The measure aims at promoting regional development and employment by facilitating the establishment of data centres providing high-value data processing and hosting services which would result in job creation</td>
<td>From 01.08.2015 to 31.12.2016</td>
</tr>
<tr>
<td>2015 29.09.2015</td>
<td>SA.43206 The Vilnius Congress Centre project</td>
<td>Development of building projects; Administrative and support service activities; Organisation of conventions and trade shows</td>
<td>Development of building projects; Administrative and support service activities; Organisation of conventions and trade shows</td>
<td>The measure concerns the public funding of the reconstruction of the Vilnius Concerts and Sport Palace and its rearrangement into a congress, conference and cultural events centre (“VCC”)</td>
<td>From 31.05.2016 to 31.12.2017</td>
</tr>
<tr>
<td>2015 26.05.2015</td>
<td>SA.41981 Relief from indirect CO2 costs in electricity in Lithuania</td>
<td>Manufacturing</td>
<td>Manufacturing</td>
<td>The measure compensates certain undertakings for increases in electricity prices resulting from the inclusion of the costs of greenhouse gas emissions due to the EU ETS</td>
<td>Until 31.12.2020</td>
</tr>
<tr>
<td>Notification Date</td>
<td>Registration Date by the EU Commission</td>
<td>Title</td>
<td>Sector</td>
<td>Purpose</td>
<td>Duration of Aid Scheme</td>
</tr>
<tr>
<td>------------------</td>
<td>--------------------------------------</td>
<td>-------</td>
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<td>------------------------</td>
</tr>
<tr>
<td>2013 09.01.2013</td>
<td>SA.36047 Fifth prolongation of the Lithuanian bank support scheme – H1 2013</td>
<td>Financial and insurance activities</td>
<td>To prolong the Lithuanian bank support scheme</td>
<td>From 01.01.2013 to 30.06.2013</td>
<td>22.02.2013</td>
</tr>
<tr>
<td>2013 25.01.2013</td>
<td>SA.36132 Development of Rural Area Information Technology Network - Amendment</td>
<td>Telecommunications</td>
<td>To develop an infrastructure of electronic networks offering wholesale broadband services in rural areas of Lithuania which are currently not served and where there are no plans for coverage in the near future</td>
<td>From 13.05.2013 to 31.08.2015</td>
<td>13.05.2013</td>
</tr>
<tr>
<td>2013 22.02.2013</td>
<td>SA.36248 Liquidation aid for the resolution of AB Ukio Bankas</td>
<td>Financial and insurance activities</td>
<td>Remedy for a serious disturbance in the economy</td>
<td>From 04.03.2013</td>
<td>14.08.2013</td>
</tr>
<tr>
<td>2013 11.04.2013</td>
<td>SA.36519 Renewal of a Lithuanian scheme for restructuring aid for SMEs</td>
<td>____</td>
<td>____</td>
<td>To prolong a rescue and restructuring scheme for SMEs in Lithuania</td>
<td>From 02.07.2013 to 31.12.2015</td>
</tr>
<tr>
<td>2013 29.05.2013</td>
<td>SA.36740 Aid to Klaipedos Nafta – LNG Terminal</td>
<td>Manufacture of gas; distribution of gaseous fuels through mains</td>
<td>Services of general economic interest</td>
<td>Until 31.12.2014</td>
<td>20.11.2013</td>
</tr>
<tr>
<td>2013 10.06.2013</td>
<td>SA.36771 (2013/N) – State aid for the co-operation development</td>
<td>Manufacturing</td>
<td>Aid for the new co-operation establishment</td>
<td>Until 31.03.2014</td>
<td>06.08.2013</td>
</tr>
<tr>
<td>2013 28.11.2013</td>
<td>SA.37850 Prolongation of approved State aid scheme “RAG - Sectorial measure for energy” (N197/2008) until and including 30 June 2014</td>
<td>Electricity, gas, steam and air conditioning supply; Water supply; sewerage; waste management and remediation activities</td>
<td>Regional development</td>
<td>From 01.01.2014 to 30.06.2014</td>
<td>19.12.2013</td>
</tr>
<tr>
<td>2013 27.03.2013</td>
<td>SA.36427 Vilnius City Municipality “Remediation of the contaminated site of the former AB Skaitės</td>
<td>Environmental protection</td>
<td>Until 31.12.2015</td>
<td>02.08.2013</td>
<td></td>
</tr>
<tr>
<td>Notification Date by EU Commission</td>
<td>Registration Date by EU Commission</td>
<td>Title</td>
<td>Sector</td>
<td>Purpose</td>
<td>Scheme</td>
</tr>
<tr>
<td>-----------------------------------</td>
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<td>-----------------------------------------------------------------------</td>
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<td>------------------------------------------------------------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td>2012 17.01.2012</td>
<td>SA.34236 Vilnius City Municipality - “Remediation of the contaminated site of the former AB Skaiteks electrical metering technology factory”</td>
<td>electrical metering technology factory - Project budget amendment of SA.34236</td>
<td></td>
<td>To eliminate all soil contamination on the site</td>
<td></td>
</tr>
<tr>
<td>2012 01.08.2012</td>
<td>SA.35227 Lithuanian film tax incentive</td>
<td>Motion picture, video and television programme production, sound recording and music publishing activities</td>
<td>Cultural development</td>
<td></td>
<td></td>
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<tr>
<td>2012 27.01.2012</td>
<td>SA.34288 Extension of Lithuanian schemes in support to bank – H1 2012</td>
<td>Financial and insurance activities</td>
<td>Financial and insurance activities</td>
<td>Remedy for a serious disturbance in the economy</td>
<td></td>
</tr>
<tr>
<td>2010 12.04.2010</td>
<td>SA.30742 Construction of Infrastructure for the Passenger and Cargo Ferries Terminal in Klaipeda</td>
<td>Transport</td>
<td>Transport</td>
<td>The overall objective of the notified measure is to enable the establishment of the new passenger and cargo ferries’ terminal in order to improve connectivity of Lithuania with the neighbouring regions by sea and to develop maritime tourism by making it possible to serve modern ro-pax ferries</td>
<td></td>
</tr>
</tbody>
</table>
### Table B.3. Total State Aid in 2015 By Sector

<table>
<thead>
<tr>
<th>Sector</th>
<th>A1</th>
<th>A2</th>
<th>B1</th>
<th>C1</th>
<th>C2</th>
<th>D1</th>
<th>Total (LTM)</th>
<th>Total (MEUR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1 Agriculture</td>
<td>10.83</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>10.83</td>
<td></td>
</tr>
<tr>
<td>1.2 Fisheries</td>
<td>0.30</td>
<td>0.30</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0.60</td>
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</tr>
<tr>
<td>2. Industry Services</td>
<td>269.43</td>
<td>13.44</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>282.87</td>
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<tr>
<td>2.1 Horizontal Aid</td>
<td>134.20</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>134.20</td>
<td></td>
</tr>
<tr>
<td>2.1.1 Research, Development, Innovations</td>
<td>12.78</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>12.78</td>
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<tr>
<td>2.1.2 Environmental Protection</td>
<td>94.95</td>
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<td></td>
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<td>94.95</td>
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<tr>
<td>2.1.3 SMEs</td>
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<tr>
<td>2.1.4 Trade</td>
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<tr>
<td>2.1.5 Energy Efficiency</td>
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<tr>
<td>2.1.6 Investment</td>
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<td>2.1.7 Employment Programmes</td>
<td>17.84</td>
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<td>17.84</td>
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<td>2.1.8 Qualification Improvement</td>
<td>0.71</td>
<td></td>
<td></td>
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<td></td>
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<td>0.71</td>
<td></td>
</tr>
<tr>
<td>2.1.9 Privatisation</td>
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<td>2.1.10 Rescue Restructuring</td>
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<tr>
<td>2.2 Sectoral Aid</td>
<td>18.53</td>
<td>2.77</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>21.30</td>
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<tr>
<td>2.2.1 Steel Industry</td>
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<td></td>
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<td></td>
</tr>
<tr>
<td>2.2.2 Ship Building</td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>2.2.3. Transport</td>
<td>1.93</td>
<td>0.10</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2.03</td>
<td></td>
</tr>
<tr>
<td>2.2.4 Coal Industry</td>
<td></td>
<td></td>
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<tr>
<td>2.2.5 Synthetic Fibre</td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.2.6 Other Sectors</td>
<td>16.60</td>
<td>2.67</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>19.27</td>
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</tr>
<tr>
<td>2.3 Regional Aid</td>
<td>116.70</td>
<td>10.67</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>127.37</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>280.56</td>
<td>13.74</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>294.30</td>
<td></td>
</tr>
</tbody>
</table>

**Notes:**
- * Compensations for the provision of services of general economic interest not included
- ** Aid granted under temporary State aid measures not included

**Explanations of symbolic markings:**
- A1 – non-recoverable aid: subsidies, grants
- A2 – tax exemptions, tax relief, write-off of default payments and fines, other exemptions
- B1 – different types of increase of the state-owned equity in enterprises or increase of its value
- C1 – soft loans
- C2 – tax deferrals
- D1 – state guarantees
## Annex C. Article 32 Appeals to the Courts and their Outcomes

<table>
<thead>
<tr>
<th>Appellant</th>
<th>Date</th>
<th>Subject</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>AB „Orlen Lietuva”</td>
<td>2010-10-26</td>
<td>Law on Competition Refusal to prolong the term for the submission of the opinion regarding the statement of objections</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>AB „Lietuvos draudimas”</td>
<td>2010-11-12</td>
<td>Law on Competition Refusal to allow to access case material</td>
<td>Appeal partly satisfied</td>
</tr>
<tr>
<td>AB „Lietuvos draudimas”</td>
<td>2010-11-12</td>
<td>Law on Competition Refusal to prolong the term for the submission of the opinion regarding the statement of objections</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>AB „Rokiškio suris”</td>
<td>2011-04-04</td>
<td>Law on Competition Refusal to prolong the term for the submission of the opinion regarding the statement of objections</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>UAB „Marijampolės pienokonserviai”</td>
<td>2011-04-08</td>
<td>Law on Competition Refusal to prolong the term for the submission of the opinion regarding the statement of objections</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>UAB „Interneto partneris“</td>
<td>2011-05-12</td>
<td>Law on Advertising Refusal to decide on the opening of the investigation of the infringement</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>VSI „Const CC”</td>
<td>2012-07-30</td>
<td>Law on Competition, Law on Advertising Refusal to decide on the opening of the investigation of the infringement</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>UAB „Voyage-Voyage“</td>
<td>2012-09-24</td>
<td>Law on Advertising Refusal to decide on the opening of the investigation of the infringement</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>AB DNB bankas</td>
<td>2012-11-12</td>
<td>Law on Competition Refusal to allow to access case material</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>AB „Swedbank“</td>
<td>2012-11-12</td>
<td>Law on Competition Refusal to allow to access case material</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>AB „Swedbank“</td>
<td>2012-11-19</td>
<td>Law on Competition Refusal to allow to access case material</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>UAB „Lukoil Baltija“</td>
<td>2013-12-02</td>
<td>Law on Competition Refusal to decide on the suspension, renewal and prolongation of the investigation</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>UAB „Lukoil Baltija“</td>
<td>2013-12-06</td>
<td>Law on Competition Refusal to allow to access case material</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>UAB „Švyturys-Utenos alus“</td>
<td>2013-12-12</td>
<td>Law on Competition Obligation to provide e-mail translations into Lithuanian language</td>
<td>Appeal satisfied</td>
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<tr>
<td>UAB „Švyturys-Utenos alus“</td>
<td>2014-01-06</td>
<td>Law on Competition Refusal to treat information as commercial secret</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>UAB „Nemuno busto priežiura“</td>
<td>2014-03-13</td>
<td>Law on Competition Obligation to provide full information in the notification of the concentration</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>UAB „Nemuno busto priežiura“</td>
<td>2014-04-28</td>
<td>Law on Competition Request to provide information</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>UAB „Nemuno busto priežiura“</td>
<td>2014-09-15</td>
<td>Law on Competition Refusal to allow to access case material and request to provide information</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>OAO Gazprom</td>
<td>2014-06-26</td>
<td>Law on Competition Refusal to allow to access case material</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>Rugby Holding B.V.</td>
<td>2015-12-23</td>
<td>Law on Competition Refusal to allow to access case material</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>UAB „Patikimas verslas“</td>
<td>2016-04-11</td>
<td>Law on Competition Refusal to decide on the opening of the investigation of the infringement</td>
<td>Appeal dismissed</td>
</tr>
</tbody>
</table>

*Note: The appeals did not mean that the entire case got overturned. The identified result means that the appeal concerning the specific procedural matters was successful/partly successful.*