

Development of Private Enforcement of Competition Law in Lithuania

by

Raimundas Moisejevas*

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Abstract

The article reviews the jurisprudence of Lithuanian courts on private enforcement of competition law and identifies the main obstacles for the development of this practice. The analysis of the jurisprudence makes it possible to summarise that: most rulings of the Lithuanian courts relate to cases on the abuse of dominance; usually,

* Dr. Raimundas Moisejevas, Advocate and Associated Professor in Business Law Department, Faculty of Law, Mykolas Romeris University, Lithuania; raimundas11@yahoo.com.

dominant undertakings were allegedly applying discriminatory conditions towards the injured party and; most of the claims were presented as follow-on actions after a decision of the Competition Council. The courts held that damages caused by a breach of competition law have to be recovered in accordance with Lithuania's main principles of civil responsibility. At the same time, the courts made it clear that their jurisprudence is based on the rulings of European Courts and the main principles of EU competition law. The main obstacles for the successful development of antitrust damages claims in Lithuania are, *inter alia*: complexity of competition cases; difficulty in obtaining substantive evidence; proving a consequential relationship and; high legal costs. The article also analyses substantial and procedural provisions of Lithuanian legislation that regulate the submission of antitrust damage claims.

Résumé

L'article examine la jurisprudence des cours lituaniens sur l'application privée du droit de la concurrence et identifie les principaux obstacles pour le développement de cette pratique. L'analyse de la jurisprudence permet de constater que la plupart des décisions des cours lituaniens concerne le cas de l'abus de position dominante; généralement les entreprises dominantes prétendaient appliquaient des conditions discriminatoires à l'égard des victimes et la plupart des requêtes ont été présentées suite à la décision du Conseil de la concurrence («*follow-on actions*»). Les cours ont conclu que les dommages subis à cause de violation du droit de la concurrence doivent être récupérés conformément aux principes de la responsabilité civile prévus en droit lituanien. En même temps, les cours ont clairement indiqué que leur jurisprudence est fondée sur les décisions des cours européens et sur les grands principes du droit européen de la concurrence. Parmi les principaux obstacles au développement de l'application privée du droit de la concurrence en Lituanie nous pouvons indiquer: la complexité des affaires portant sur la violation du droit de la concurrence; la difficulté pour obtenir des preuves de violation; la difficulté de prouver un lien de causalité; les frais juridiques élevés. L'article analyse également des dispositions substantielles et procédurales de la législation lituanienne régissant les actions en dommages-intérêts en droit de la concurrence.

Classifications and keywords: antitrust damage; antitrust damage claims; Directive on antitrust damages actions; evidence; follow-on action; Lithuania; nullity; private enforcement of competition law; public enforcement of competition law.

I. Introduction

Lithuania's first Law on Competition was adopted in 1992¹. The Law was significantly amended in 2004 as it was necessary to harmonize the Lithuanian

¹ Lietuvos Respublikos konkurencijos įstatymas (1992 m. rugsėjo 15 d. įstatymo redakcija Nr. I-2878) // Valstybės žinios. 1992. No. 29-841.

legal system with *acquis communautaire*.² The Competition Council of Lithuania and Lithuanian courts had been referring to the practice of the European Court of Justice (hereafter: ECJ) and the European Commission (hereafter: EC) many years before Lithuania entered the European Union (hereafter: EU). However, to the best of our knowledge, antitrust damages claims have not been in existence in Lithuania until 2003 when the first claim for antitrust damages was actually presented.

Private enforcement of competition law is still quite an undeveloped legal area in Lithuania in comparison to its public enforcement. Undertakings lack clear information concerning the possibility to submit private enforcement claims and have a lot of worries related to proceedings in competition cases. The complexity of competition law cases and the lack of clear-cut jurisprudence mean that undertakings usually abstain from the submission of antitrust damages claims.

This article covers the main judgments of Lithuanian courts that relate to private enforcement of competition law. Unfortunately, not all rulings of the courts and arbitral tribunals are available to public and legal review since parts of the claims were dealt with in arbitral tribunals on a confidential basis.

Directive 2014/104/EU on antitrust damages actions (hereafter, Damages Directive) was signed into law on 26 November 2014 and published in the Official Journal of the European Union on 5 December 2014³. This Directive has introduced a number of measures intended to facilitate private enforcement claims in EU Member States. After the Directive enters into force, all Member States will be obliged to modify their national legal systems⁴. Although antitrust damages claims are currently subject to the same legal rules as usual claims for damages, the situation will change. In a couple of years, the conditions for antitrust damages claims established in the national legal system of Lithuania, as well as of other EU Member States, will have to be significantly amended. The intended changes should increase the number of private enforcement of competition law cases in Lithuania.

² Lietuvos Respublikos konkurencijos įstatymo pakeitimo ir papildymo, valstybės pagalbos ūkio subjektams kontrolės įstatymo pripažinimo netekusiu galios ir civilinio proceso kodekso 1 straipsnio pakeitimo įstatymas (2004 m. balandžio 15 d. įstatymo redakcija Nr. IX-2126) // Valstybės žinios. 2004. Nr. 63-2244. [The Law concerning amendment of the Law on Competition, repeal of the Law on state aid to the undertakings and amendment of the Article 1 of the Civil Procedure Code].

³ http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html

⁴ C.F. Weidt, 'The Directive on Actions for Antitrust Damages After Passing the European Parliament' *ECLR* 2014, 35(9); G. Downie, M. Charrier, 'UK and EU Developments in Collective Action Regimes for Competition Law Breaches' (2014) *E.C.L.R.*, issue 8; E. Hjelmeng, 'Competition Law Remedies: Striving for Coherence or Finding New Ways?' (2013) 50 *CMLR* 1007.

II. Legal rules on private enforcement of competition law in Lithuania

1. Legal background

Private enforcement of competition law in Lithuania is regulated by the Law on Competition, the Civil Code (hereafter, CC) and the Code of Civil Procedure (hereafter, CCP). Article 47 (1) of the Law on Competition provides that a person whose legitimate interests have been violated by actions performed in contravention of Articles 101 or 102 TFEU, or by any other anti-competitive actions that are prohibited by the Law on Competition, shall be entitled to bring an action for damages before the Vilnius Regional Court. The Vilnius Regional Court has thus exclusive jurisdiction as the 1st instance court to hear civil disputes concerning breaches of 101 or 102 TFEU and the provisions of the Lithuanian Law on Competition. It should be noted that disputes related to the challenge of decisions issued by the Competition Council (administrative acts) are heard by the Vilnius Regional Administrative Court and, subsequently, by the Supreme Administrative Court. Administrative courts are currently dealing with more competition law cases than civil courts because private undertakings tend to have legal disputes concerning breaches of competition law with the Competition Council rather than with each other.

On the other hand, there are quite a few civil disputes between private undertakings that relate to unfair competition issues but these disputes are not related to anti-competitive agreements or the abuse of a dominant position. The ban on actions of unfair competition prohibits the performance of any actions contrary to fair business practices and good usages, provided such actions may be detrimental to the competitive potential of another economic entity. They include: usage, transfer, disclosure of information representing a commercial secret of another economic entity; imitating of the product or product packaging of another economic entity; proposal to the employees of a competing economic entity to terminate their employment contracts and similar unfair commercial practices.

Under Article 47 of the Lithuanian Law on Competition, an injured person is entitled to present two types of claims. An injured person is entitled: 1) to present a claim seeking the termination of the illegal actions and 2) to present a claim seeking compensation for the damages incurred.

In Lithuania, undertakings may choose between two different strategies in private enforcement cases. An injured person may present an antitrust damages claim in a follow-on action after the Competition Council adopts a resolution recognizing that an infringement of competition law had taken place. On the other hand, an injured person may present an antitrust damages

claim without a prior decision of the Competition Council. In Lithuania, private enforcement claims are usually presented as follow-on actions after a decision of the Competition Council has been issued since it is quite difficult for an injured person to independently prove the claimed infringement. It should be noted that after receiving a claim based on an infringement of competition law, Lithuanian courts quite often refer to the Competition Council asking for its opinion concerning the alleged breach. Therefore, even if an injured person applies directly to the court, it is highly possible that the Competition Council will participate in the case in a certain status.

2. Conditions of civil liability

Actions for damages in private enforcement cases are governed by the basic principles on civil liability established in Articles 6.245-6.255 CC. Articles 6.246-6.249 CC specifically provide that in order to establish the civil responsibility of a given person, all four elements of civil responsibility have to be established. These elements are:

- a) unlawful act (infringement of competition law);
- b) fault;
- c) damages;
- d) causal link between the unlawful act (infringement of the Law on Competition) and damages.

The notion of an unlawful act should be understood as an infringement of the provisions of Law on Competition or Articles 101 and 102 TFEU. The Civil Code provides that fault is presumed once the unlawful act is established. Therefore, if the Competition Council or the court recognizes that the accused undertaking has infringed competition law, the fault of such undertaking is presumed. The presumption of fault is rebuttable, however, and the respondent can present respective arguments during the proceedings.

The simple fact that an undertaking has committed an infringement of competition law is not sufficient for a successful claim in private enforcement cases. The courts require that the claimant should prove a causal link between the unlawful act and damages. Article 6.247 CC provides that only those damages are going to be compensated which are related to actions giving rise to civil liability of the debtor in such a manner that the damages, taking into account their nature and the nature of the civil liability, can be imputed to the debtor as a result of his actions. In order to establish a causal link, the respondent should have performed his actions prior to the emergence of the damages and the damages should result from the respondents' behaviour. On the other hand, it is not necessary to prove that the behaviour of the

respondent is the only cause of the damages – it is sufficient to prove that the actions of the respondent are a sufficient cause for the appearance of the damages, even if they are not the only reason for the damages⁵.

3. Evaluation of the evidence

Article 176 CPC provides that the goal of civil proceedings is for the court to ascertain that certain circumstances related to the dispute exist, or do not exist. The CPC does not specify ‘how’ confident the court must be (i.e. the degree of the confidence of the court that has to be achieved). The standard of a reasonable person may be viewed as a suitable criterion here and facts are considered to be proven when the court is completely or almost completely persuaded. The Civil Procedure Code establishes a balance of probabilities standard that allows the court to determine freely what evidence is substantial and persuasive⁶.

Any factual data can be used as evidence in a civil case which would help the court conclude that any circumstances relevant for resolving the case exist, or do not exist. The collection of evidence might be very problematic in private enforcement cases since the claimant has limited powers to obtain evidence concerning anti-competitive behaviour, or anti-competitive agreements, of the respondent. Para 1 of Article 199 CPC provides that the party which asks the court to demand written evidence from another party should specify: what written evidence it is asking for; the grounds for believing that a certain party has the requested written evidence and; the circumstances that should be proved by this written evidence. In practice, it might be difficult for the injured party in a competition law dispute to identify what evidence exactly it is asking for and the circumstances that are going to be proved by this evidence.

Article 177 CPC provides that expert evidence is acceptable in civil disputes. Actually, courts have asked experts to submit their findings concerning the amount of the damages in most cases on private enforcement in Lithuania. However, undertakings should remember that only the court has the right to appoint experts. Where parties on their own initiative ask experts to provide some given findings, such “expert” opinions would be treated as simple evidence. There was a case in Lithuania where the claimant provided the court, without being prompted to do so, a report on the calculation of damages

⁵ *Lietuvos Respublikos civilinio kodekso komentaras. Šeštoji knyga: Prievolių teisė. T. 1*, Justitia, 2003, p. 338.

⁶ Z. Terebeiza, *Laisvas įrodymų vertinimas civiliniame procese: teoriniai ir praktiniai aspektai* (2007) 5(95) *Jurisprudencija* 79.

prepared by a recognized international audit company. However, the court disregarded such evidence and appointed its own court experts⁷.

The Damages Directive should facilitate access to evidence by the claimant. The present Directive provides that it is appropriate to ensure that claimants are afforded the right to obtain disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence sought. If the party needs specific pieces or categories of evidence to prove a claim or a defence, it will have the possibility to request that the court orders other parties to disclose the evidence. The Directive also regulates the disclosure of evidence contained in the file of the competition authority.

It will be clear in two years how the EU Member States will transpose the particular provisions of the Directive into their national legal systems. It is already clear, however, that rules on the disclosure of evidence will be harmonized in the EU.

4. Limitation periods and the duration of proceedings

According to Article 1.125 CC, the limitation period for bringing an action for damages is three years. The limitation period starts after the claimant finds out, or can reasonably be expected to know, that certain behaviour constituted a breach of competition law and caused him damages. However, current Lithuanian legislation is going to be fundamentally changed since the Damages Directive provides that Member States shall ensure that the limitation period for bringing an action for damages is at least five years. Moreover, the Directive requires Member States to ensure that the limitation period is suspended if a competition authority takes action in order to investigate or process an infringement of competition law.

To the best of our knowledge, 1st instance proceedings concerning civil disputes in relation to competition law infringements tend to take over 6 months to be resolved, and quite often exceed a year. Private enforcement cases are more complex than other disputes related to competition law and thus take more time. Proceedings may take much longer still if the judiciary decides to appoint court experts or ask the Competition Council to present an opinion on the alleged infringement. Moreover, claimants usually present their claims for damages in civil courts only after the Competition Councils' investigation. When the authority starts investigating the actions of a particular undertaking in a complex case, it takes it 18 months on average until it adopts a resolution. Subsequently, parties recognized to be in breach of the Law on

⁷ Decision of 26 May 2006 of the Court of Appeals of Lithuania, civil case no. 2A-41/2006.

Competition usually appeal the decision of the Competition Council to the Vilnius Regional Administrative Court. The resulting proceedings may take another 6 months or so. Afterwards, the judgments of the Vilnius Regional Administrative Court are usually appealed to the Supreme Administrative Court. These proceedings may last up to 12 months.

III. Lithuanian jurisprudence on private enforcement of competition law

Although Lithuania's Law on Competition was adopted more than 20 years ago, there is still very little court practice on private enforcement. The main rulings of the courts that deal with antitrust damages claims are overviewed below.

1. *UAB Šiaulių Tara vs. AB Stumbras* (2006)

The case *UAB Šiaulių Tara vs. AB Stumbras* is considered the first Lithuanian case on private enforcement of competition law⁸. On 30 May 2002, the Competition Council of Lithuania adopted a decision recognizing that AB Stumbras abused its dominant position in the market of strong alcoholic beverages⁹. AB Stumbras has concluded a number of multilateral agreements concerning the provision of marketing services. The agreements concluded by AB Stumbras established, however, different payment conditions applicable to different contractual partners for the marketing services. The Competition Council concluded also that since some of these undertakings had received from AB Stumbras additional discounts for alcoholic beverages, they were able to sell these beverages cheaper than their competitors. The Competition Council held that AB Stumbras has, by establishing different conditions of compensation for marketing services, created unequal conditions of competition for its different contracting partners (including the claimant, UAB Šiaulių Tara). The Competition Council concluded that the actions of AB Stumbras amounted to an abuse of a dominant position and were contrary to Article 9 of the Law on Competition of Lithuania.

⁸ Decision of 26 May 2006 of the Court of Appeals of Lithuania, civil case no. 2A-41/2006.

⁹ Decision of the Competition Council of the Republic of Lithuania of 30 May 2002 No. 6/b on correspondence of the actions of SPAB Stumbras providing discounts and payment for the marketing services (advertising) to the Article 9 of the Competition Law.

UAB Šiaulių Tara submitted a claim for damages against AB Stumbras on 2 January 2003 – half a year after the adoption of the resolution by the Competition Council. UAB Šiaulių Tara asked the court for an award of 2 864 809 LTL (829 706 EUR) in damages from AB Stumbras.

The Kaunas Regional Court that dealt with this case as the 1st instance court satisfied the claim in part. The Kaunas Regional Court recognized that AB Stumbras abused its dominant position and caused damages to the claimant. However, the court decided to award the claimant only 500 000 LTL (144 810 EUR) in damages. UAB Šiaulių tara appealed the ruling of the Kaunas Regional Court since it believed that the amount of damages actually awarded was unreasonably low.

The Court of Appeals recognized that AB Stumbras abused its dominant position on the basis of several reasons. First, the Court recognized that decisions of the Competition Council have great probative value. The Court granted substantial value to the decision of the Competition Council that recognized an abuse of a dominant position by AB Stumbras¹⁰. Second, the Court of Appeals held that since AB Stumbras has not appealed the decision of the Competition Council, it is possible to conclude that AB Stumbras acknowledged the circumstances established by the Competition Council. Finally, the Court of Appeals concluded that a comprehensive analysis of the facts and documents submitted to the Court make it possible to recognize that AB Stumbras had held and abused a dominant position.

The Court of Appeals also recognized the existence of a consequential relationship between the abuse of dominance committed by AB Stumbras and the damages experienced by UAB Šiaulių tara. However, although the Court of Appeal recognized the entitlement to a compensation, the court decided to substantially reduce the amount of the compensation awarded by the 1st instance court setting it at the lower level of 301 633,37 LTL (87 359 EUR). The Court of Appeals was confronted with two different expert opinions concerning the calculation of damages. One opinion was prepared by an international audit company which concluded that claimant had experienced damages in the amount of 2 864 809 LTL (829 706 EUR). The other opinion was presented by an expert from the Forensic Science Centre of Lithuania. The second opinion concluded that UAB Šiaulių tara was entitled to receive only 301 633,37 LTL. The Court decided to accept the expert opinion provided by the Forensic Science Centre. The latter calculated the average payment for marketing services that AB Stumbras had paid to various of the undertakings involved and decided that such average payment should be provided to UAB

¹⁰ The Directive on antitrust damages actions established the ability of the claimant to rely on a final decision of a national competition authority.

Šiaulių tara also. The Court also concluded that the claimant has not proved plausibly that it experienced damages because of lost markets.

Two undertakings (UAB Belvedere prekyba and UAB Palink) submitted subsequently their own claims against AB Stumbras asking for the compensation of losses that had allegedly been caused by the abuse of dominance. AB Stumbras reached out of court settlements with these two claimants.

2. *LUAB Klevo lapas v. AB Orlen Lietuva* (2010)

On 10 July 2000, the Competition Council adopted a decision recognizing that AB Mažeikių nafta abused its dominant position in the Lithuanian national markets of petrol and diesel. The Competition Council found that those undertakings which had import licences, as well as a couple of undertakings without such import licences, had received from AB Mažeikių nafta substantial discounts on petrol and diesel. However, some companies, including the claimant LUAB Klevo lapas, found themselves in quite an unfavourable position. The Competition Council concluded that the agreements for the sale of petrol and diesel concluded by AB Mažeikių nafta implemented discriminatory provisions and were contrary to Article 9 of the Law on Competition that prohibits the abuse of a dominant position. AB Mažeikių nafta was subjected to a 100 000 LTL (28 960 EUR) fine.

LUAB Klevo lapas submitted a claim for damages against AB Orlen Lietuva (the successor of AB Mažeikių nafta). LUAB Klevo lapas asked the court for the award of 36 606 156, 42 LTL (10 601 875 EUR) in damages. The claimant alleged that the discriminatory discounts applied by AB Orlen Lietuva had caused substantial damages to LUAB Klevo lapas leading to its subsequent bankruptcy. The claim of LUAB Klevo lapas was rejected by the 1st instance court as well as by the Court of Appeals.

Subsequently, LUAB Klevo lapas appealed the case to the Supreme Court¹¹. At present, this is the only private enforcement case which has been scrutinized by the Supreme Court of Lithuania. In its judgment, the Supreme Court relied on the principles of EU competition law established in key rulings of the European Court of Justice such as *Courage v. Crehan*¹², *Manfredi*¹³ and *City Motors Groep*¹⁴. The Supreme Court concluded that EU law does not establish, at the moment, unified rules for the compensation of damages suffered in competition cases; the compensation of such damages

¹¹ Decision of 17 May 2010 of the Supreme Court of Lithuania, civil case no. 3K-3-207/2010.

¹² Case C-453/99 *Courage v. Crehan* [2001] ECR I-627.

¹³ Joined cases C-295/04 to C-298/04 *Manfredi v. Assitalia SpA* [2006] ECR I-06619.

¹⁴ Case C-421/05 *City Motors Groep NV v. Citroën Belux NV* [2007] ECR I-00653.

must therefore be done on the basis of national provisions. The Supreme Court held that the fact of a competition law breach occurring does not, in itself, make it possible to present a claim for damages – the claimant must prove that all of the above mentioned elements of civil responsibility are present.

The Supreme Court focused on causality in order to determine whether the actions of AB Orlen Lietuva have caused the contested damages and the following bankruptcy of LUAB Klevo lapas. After analysing the factual circumstances of the case, the Supreme Court determined that LUAB Klevo lapas lacked financial resources even before AB Orlen Lietuva abused its dominant position by engaging in discriminatory pricing. The Supreme Court concluded also that AB Orlen Lietuva had awarded LUAB Klevo lapas beneficial terms of payment, which gave the claimant an even large economical advantage than the application of the abusive discounts provided to other undertakings. On the basis of the abovementioned arguments, the Supreme Court dismissed the claim of LUAB Klevo lapas.

3. AB flyLAL-Lithuanian Airlines v. Air Baltic Corporation A/S and Airport Riga (2008)

In 2008, AB flyLAL-Lithuanian Airlines submitted a damages claim against Air Baltic Corporation A/S and Airport Riga alleging that the two Latvian companies have breached Articles 101 and 102 TFEU. The claimant stated that Air Baltic Corporation A/S and Airport Riga had concluded an anti-competitive agreement and engaged in abuse. AB flyLAL-Lithuanian Airlines submitted that Air Baltic Corporation A/S is paying substantially lower fees for the services of the Riga Airport than other undertakings. The claim provided that since the Air Baltic Corporation A/S has received financially beneficial conditions from the Riga Airport, it was able to offer much cheaper tickets than AB flyLAL-Lithuanian Airlines.

AB flyLAL-Lithuanian Airlines asked the court for the award of 199 830 000 LTL (57 874 768 EUR) in damages. In 2008, the Court of Appeals of Lithuania made a decision to arrest the property of the Riga Airport and of Air Baltic Corporation A/S in the amount of 199 830 000 LTL (57 874 768 EUR)¹⁵. The fact of the freezing of the assets of the respondents attracted a lot of attention since the Lithuanian court ruled to freeze assets in another country (Latvia).

¹⁵ Decision of the Court of Appeals of Lithuania of 31 December 2008, civil case no. 2-949/2008.

It should be noted that the Latvian Competition Council recognized in 2006 that Airport Riga abused its dominant position through the award of illegal discounts to “Air Baltic Corporation” A/S. Therefore, as in other of the abovementioned cases, the claimant here was also relying on a decision already adopted by a competition authority, albeit a foreign one.

Although AB flyLAL-Lithuanian Airlines presented its claim in 2008, the case is still pending before the Court of Appeals. It is expected that the Court of Appeals should reach a decision in 2015. However, it is also highly possible that the ruling of the Court of Appeals will not become final and will be appealed to the Supreme Court.

4. *AB Orlen Lietuva v. the Competition Council of the Republic of Lithuania (2011)*

This case is not a clear-cut private enforcement case. However, it is quite interesting since it dealt with a claim for damages submitted against the Competition Council.

On 22 December 2005, the Competition Council adopted a resolution recognizing that AB Orlen Lietuva abused its dominant position and imposed upon it a fine in the amount of 32 000 000 LTL (9 267 840 EUR). In 2006, AB Orlen Lietuva paid the fine to the Lithuania state. However, in 2008 the Supreme Administrative Court repealed the original resolution of the Lithuanian Competition Council.

Afterwards, AB Orlen Lietuva decided to present a claim for damages to the Competition Council. AB Orlen Lietuva claimed that the State has kept in its possession 32 000 000 LTL (9 267 840 EUR) without any legal basis. It was alleged that if AB Orlen Lietuva would have had this money, it could have earned more than 3 000 000 LTL (868 860 EUR) in revenue. Moreover, AB Orlen Lietuva claimed that it had to borrow 3 000 000 LTL (868 860 EUR) and paid the related interest. In total, AB Orlen Lietuva asked the Court for the award of 4 700 000 LTL (1 361 214 EUR) in damages from the State.

The Supreme Administrative Court dismissed the claim of AB Orlen Lietuva and stated that the State should only be responsible if its institutions clearly breach the provisions of the law or legal principles. According to the Court, repealing a certain administrative act of the State, is not a satisfactory ground for the tortious responsibility of the State¹⁶.

¹⁶ Decision of the Supreme Administrative Court of Lithuania of 14 July 2011, administrative case no. A502-3034/2011.

5. *UAB Naftos grupė v. AB Klaipėdos nafta* (2014)

In 2011, UAB Naftos grupė presented a claim against AB Klaipėdos nafta asking for the compensation of its losses in the amount of 17 090 795,49 LTL (4 949 836 EUR), which allegedly originated from the breach of their Agreement on services. The claim was submitted to the Klaipėda Regional Court.

The respondent, AB Klaipėdos nafta, submitted a counter claim and asked the Court to recognize that the Agreement on services is in fact not valid since it is contrary to Article 5 of the Law on Competition. The respondent also asked to adjudge from UAB Naftos grupė a total of 34 778 000 LTL (10 072 405 EUR) in losses, which it allegedly experienced. The respondent asked also to have the case transferred to the Vilnius Regional Court since, according to Article 47 of the Lithuanian Law on Competition, the Vilnius Regional Court has exclusive jurisdiction to deal with cases related to the breach of Articles 101 or 102 TFEU or other restrictive actions prohibited by the Law on Competition. The Klaipėda Regional Court, which had received the original claim, decided to transfer the case to the Vilnius Regional Court.

On 17 June 2014, the Court of Appeals unfortunately adopted a confidential decision in this case and the circumstances of the dispute remain undisclosed¹⁷. The Court of Appeals has recognized as invalid those specific provisions of the Agreement on services which provided exclusive rights to reload gasoil to UAB Naftos grupė. The Court decided also to adjudge 2 988 341,14 LTL (865 483,37 EUR) to the claimant UAB Naftos grupė. Since the judgment is confidential, it is difficult to comment on whether any important competition law issues have been involved in this case.

6. Main qualifying features of Lithuanian private enforcement practice

Notwithstanding the very limited Lithuanian court practice in antitrust damages litigation, the main features of the existing, sparse jurisprudence can be outlined as follows:

- a) Almost all of the mentioned cases concerned the abuse of dominance. Moreover, these cases mainly dealt with abuses taking the form of the application of discriminatory conditions towards the injured undertakings. It can be assumed that the fact that most antitrust damages claims are brought against dominant undertakings is not a specific characteristic of Lithuania. After analyzing private enforcement cases from Poland,

¹⁷ Decision of the Court of Appeals of Lithuania of 17 June 2014, civil case no. 2A-606/2014.

Latvia, Estonia, Slovakia as well as other countries, it came as no surprise that most of such cases originated in the abuse of dominance¹⁸. This fact may have a number of possible explanations. First, it might be simpler to determine and to prove an abuse of dominance than anti-competitive agreements. Second, a company that suffered from an abuse might be more inclined to present a claim to the court, or approach the Competition Council, than a company which has participated in an anti-competitive agreement as a counterpart because the Competition Council could impose a fine on both undertakings that have concluded the anti-competitive agreement. Third, for those not party to an anti-competitive agreement, it is really difficult to collect evidence concerning such an agreement. An undertaking may suffer damages because of an anti-competitive agreement, but it might have no information that such an agreement has been concluded;

- b) In most cases, antitrust damages claims have been submitted as follow-on actions. This feature is common to most antitrust damages cases in EU Member States and can be easily explained. First, private enforcement cases are very complex and often suffer from lack of evidence. Moreover, specific expert knowledge in competition law is required. The Competition Council has competition law experts and is empowered to carry out inspections (with prior authorization of the Vilnius Regional Administrative Court) in order to collect evidence for a comprehensive investigation. Second, since antitrust damages cases are complex, they could prove very lengthy and involve huge legal costs. An investigation performed by the Competition Council would allow the claimant to save a considerable amount in costs. Third, if the undertaking may base the claim on the prior decision of the Competition Council, it is much easier to persuade the court that the claim is sound. Fourth, because of the complexity of competition cases, undertakings might quite often have a lot of doubts whether there a competition law infringement actually occurred – a prior decision of the Competition Council would eliminate any doubts concerning the breach;
- c) Antitrust damages claims have so far only been submitted by undertakings – consumers have not been acting as claimants yet;

¹⁸ M. Brkan, T. Bratina, 'Private Enforcement of Competition Law in Slovenia: A New Field to Be Developed by Slovenian Courts' (2013) 6(8) *YARS* 75–106; A. Jurkowska-Gomułka, 'Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development' (2013) 6(8) *YARS* 107–128; A. Piszcz, 'Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper' (2012) 5(7) *YARS* 55–77; K. Sein, 'Private Enforcement of Competition Law – the Case of Estonia' (2013) 6(8) *YARS* 129–140.

- d) Legal doctrine on private enforcement is not sufficiently developed in the jurisprudence of Lithuanian courts. One reason for that is the lack of cases. Another reason is that only one case has reached the Supreme Court so far, gathering the judges with the strongest theoretical background.

IV. Obstacles for the development of the private enforcement practice in Lithuania

It should be noted that the reviewed jurisprudence does not reflect all of the antitrust damages claims in Lithuania. One private enforcement case submitted to one of Lithuania's arbitral tribunals has been dealt with here; it is also known that more competition-related claims have been submitted to arbitration. Moreover, after the Damages Directive enters into force in Lithuania, the national legal system will be amended. These changes will reduce the number of obstacles for antitrust damages claims.

A number of barriers preventing an increase in the number of antitrust damage claims in Lithuania includes:

- a) The complexity of competition cases. This obstacle causes substantial legal costs for the injured party in order to submit the claim. In case of a successful litigation, the legal costs of the injured party will be at least partly compensated by the respondent, but the complexity of competition cases means that the final outcome is usually not completely clear;
- b) The lack of clear-cut jurisprudence of Lithuanian courts;
- c) Prolonged litigation in antitrust damages claims. This factor is partly caused by the complexity of competition cases. Proceedings may last even far longer if the injured party decides that before presenting its private claim to the court, it would submit a complaint to the Competition Council. In this case, proceedings are likely to last approximately three years longer;
- d) High legal standard for proving the causal relationship between anti-competitive actions and the damages incurred. Lithuanian courts have already outlined that even if the Competition Council adopts a resolution recognizing a competition law breach, all allegedly injured undertakings are obliged to prove the causal relationship between the illegal actions and the damages they themselves suffered;
- e) Difficulties related to the calculation of antitrust damages actually suffered. As mentioned, the Court of Appeal has not accepted in one of its cases the damages calculations report prepared by a recognized

international audit company. Moreover, there is still no jurisprudence to clearly indicate how to calculate damages in competition law cases. There is hope that the Damages Directive will add more clarity concerning the calculation of damages since the Commission has adopted a Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU.¹⁹ Moreover, the Directive has established that EU Member States must ensure that it shall be presumed that cartel infringements cause harm.

V. Conclusions

Public enforcement of competition law is much more developed in Lithuania at the moment than its private enforcement. It is usually thought that the Competition Council is the only entity responsible for the enforcement of competition law. The Directive on antitrust damages actions is introducing a number of important measures for the facilitation of antitrust damages claims. The Directive will harmonize national rules of EU Member States on the submission of antitrust damages claims. However, for the number of private enforcement actions to increase, it is necessary to have more cases of successful private litigations. To a certain extent, this is a vicious circle.

So far, all private enforcement claims in Lithuania were brought forth by undertakings – there are no antitrust damages claims submitted by consumers. However, the Parliament of Lithuania has adopted an amendment of the Code on Civil Procedure that will regulate group actions. It can be hoped that the present amendment will create a legal platform for consumers to submit antitrust damage claims.

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