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**COMMITMENT DECISIONS IN ANTITRUST CASES**

-- Note by Lithuania --

**15-17 June 2016**

*This document reproduces a written contribution from Lithuania submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.*

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English - Or. English

## LITHUANIA

### 1. Introduction

1. This paper is intended to provide information concerning the rules and practices on commitment decisions in antitrust cases in Lithuania.

### 2. Power to adopt commitment decisions and experience of the Competition Council of the Republic of Lithuania

2. Article 28(3)(2) of the Law on Competition of the Republic of Lithuania<sup>1</sup> (hereinafter the Law on Competition) states that the Competition Council of the Republic of Lithuania (hereinafter the Competition Council) shall adopt a resolution to close the investigation if the actions did not cause a significant damage to the interests protected by the law and the undertaking suspected of the violation of the Law has voluntarily terminated the actions and submitted to the Competition Council a written obligation not to perform such actions or to perform actions eliminating the suspected violation or creating preconditions to avoid it in the future.

3. Therefore, there are three cumulative conditions that have to be fulfilled in order to close the investigation by adopting a commitment decision:

- the actions did not cause a significant damage to the interests protected by the law;
- the undertaking suspected of the violation has voluntarily terminated the actions;
- 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 creating preconditions to avoid it in the future.

4. The courts have confirmed in their practice that when adopting a commitment decision, the Competition Council does not have to establish that the investigated undertaking has indeed infringed the Law on Competition. The Competition Council does not need to define the relevant market precisely as well. Although the right not to make a complete assessment was challenged in the courts, the courts have dismissed these claims<sup>2</sup>.

5. The Competition Council enjoys a wide discretionary power when deciding whether or not to adopt a commitment decision in a particular case and what the scope of commitments is. In principle, relevant rules and practice follow the European Union competition rules and their application, which Lithuania as a Member State must adhere to.

6. However, as the courts have made clear, the discretion of the Competition Council in this field, albeit acknowledged to be wide, is not absolute, and the courts have not limited themselves only

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<sup>1</sup> Retrieved from: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=1040736](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=1040736)

<sup>2</sup> Judgment of the Supreme Administrative Court of Lithuania of 10 February 2006, case No. A7-783-06. Retrieved from: [http://kt.gov.lt/index.php?show=teismai\\_view&t\\_id=69](http://kt.gov.lt/index.php?show=teismai_view&t_id=69)

to a purely formal review of the Competition Council's commitment decisions (more about judicial review, please see part 4 of this paper).

7. In total, there have been 62 infringement decisions in antitrust cases<sup>3</sup> and 8 commitment decisions for the period from January 2004 to May 2016. Thus the ratio of commitment decisions to infringement decisions is about 8:1. In addition, there have been 42 infringement decisions concerning anticompetitive agreements in comparison to two commitment decisions, both of which addressed vertical agreements<sup>4</sup> (ratio 21:1), and 20 infringement decisions concerning the abuse of dominance in comparison to six cases of commitment decisions<sup>5</sup> (ratio ~ 3:1). Hence, commitment decisions have been adopted mostly in cases of the alleged abuse of dominance.

8. Undertakings which were subject to investigation tried to make the Competition Council to close the investigation by adopting commitments in numerous cases. However, in cases where there was a significant damage made to the interests protected by the Law, the Competition Council refused to end investigations in this way. On the other hand, the Competition Council acknowledged in some cases that the actions of undertakings can be recognized as mitigating circumstances. For instance, after receiving information through leniency programme, the Competition Council conducted an investigation and on 18 December 2015 adopted a decision concerning two cartels between cinema operators (they agreed to fix prices of tickets to popular movies in two biggest cities of Lithuania – Vilnius and Kaunas). Although the undertaking UAB Forum Cinemas sought to close the investigation by submitting commitments, the Competition Council concluded that in the case of the investigated actions it would not be possible. However, UAB Forum Cinemas provided information that it adopted various measures to prevent such actions in the future, and thus the Competition Council held that these actions constitute mitigating circumstances and reduced the fine<sup>6</sup>.

9. There has not been any sector that is more frequently subject to commitment decisions than other sectors. The Competition Council investigated competition problems concerning possible restrictions to sugar beet trade<sup>7</sup>, beer distribution through retail shops and public catering enterprises<sup>8</sup>, access to distribution of publications<sup>9</sup>, motor vehicle maintenance services<sup>10</sup>, cinema distribution and exhibition<sup>11</sup>, wholesale distribution of pharmaceuticals, medical goods and medical devices<sup>12</sup>, TV

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> Competition Council decisions of: 4 March 2004, No 1S-31; 16 December 2004, No 1S-175; 28 May 2008, No 1S-65; 9 June 2010, No 1S-98; 22 November 2011, No 1S-233; 18 April 2014, No 1S-58/2014. For links to cases please see references below.

<sup>6</sup> Competition Council decision of 18 December 2015, No 2S-19/2015. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=1667](http://kt.gov.lt/index.php?show=nut_view&nut_id=1667)

<sup>7</sup> Competition Council decision of 4 March 2004, No 1S-31. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=742](http://kt.gov.lt/index.php?show=nut_view&nut_id=742)

<sup>8</sup> Competition Council decision of 16 December 2004, No 1S-175. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=733](http://kt.gov.lt/index.php?show=nut_view&nut_id=733)

<sup>9</sup> Competition Council decision of 28 May 2008, No 1S-65. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=660](http://kt.gov.lt/index.php?show=nut_view&nut_id=660)

<sup>10</sup> Competition Council decision of 24 December 2009, No 1S-200. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=1099](http://kt.gov.lt/index.php?show=nut_view&nut_id=1099)

<sup>11</sup> Competition Council decision of 9 June 2010, No 1S-98. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=1145](http://kt.gov.lt/index.php?show=nut_view&nut_id=1145)

<sup>12</sup> Competition Council decision of 21 July 2011, No 1S-137. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=1286](http://kt.gov.lt/index.php?show=nut_view&nut_id=1286)

channel distribution and multi-channel TV subscription services<sup>13</sup>, as well as TIR carnet distribution<sup>14</sup>. Below we present short summaries of the Competition Council's commitment decisions:

### **2.1 Commitment decision concerning Danisco sugar<sup>15</sup>**

10. The object of the investigation was to establish whether sugar manufacturers AB Danisco sugar Panevėžys and AB Danisco sugar Kėdainiai abused their dominant position. The investigation was launched after sugar beet growers notified the Competition Council that an agreement between the two sugar manufacturers and five cooperatives of sugar beet growers prohibited the sugar beet growers to deliver the sugar beets for processing in cases when the sugar beets were grown from the seeds acquired from other sources than the sugar factories. By imposing the obligation upon the sugar beet growers to purchase the seeds exclusively from the factories, sugar manufacturers restricted the possibilities of the sugar beet growers to opt for other more acceptable payment terms and to choose other seed suppliers. The sugar manufacturers and sugar beet growers concluded a new agreement which allowed the growers to choose seeds and their quantities.

### **2.2 Commitment decision concerning UAB Švyturys-Utenos alus<sup>16</sup>**

11. This investigation was essentially concerned with the alleged abuse of a dominant position by a beer supplier UAB Švyturys-Utenos alus in beer distribution through public catering enterprises<sup>17</sup>. During the investigation it was established that contracts on sale promotion/advertising between Švyturys-Utenos alus and public catering enterprises included a clause whereby the enterprises concerned were paid in advance by Švyturys-Utenos alus and the ultimate settlement for the services provided was calculated on the basis of the volumes of beer purchased by the enterprises from Švyturys-Utenos alus. In case of the termination of the contract or where the contract would not be extended, such public catering enterprises were obligated to refund part of the advance payment for the outstanding advertising/sales promotion services to Švyturys-Utenos alus and pay the fine in equal amount. Furthermore, sales promotion/ advertising contracts with Švyturys-Utenos alus obligated public catering enterprises to coordinate with Švyturys-Utenos alus advertising material of its competitors, as well as methods and places of provision of information. Švyturys-Utenos alus waived its requirements imposed upon the contracting public catering enterprises. It also assumed an obligation to amend the provisions of the contracts and refrain in the future from imposing such obligations upon the public catering enterprises.

### **2.3 Commitment decision concerning Rautakirja Oy<sup>18</sup>**

12. The investigation was carried out after the claimant UAB Medipresa submitted an application to the Competition Council in which it argued that Rautakirja Oy abused its dominant

<sup>13</sup> Competition Council decision of 22 November 2011, No 1S-233. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=1328](http://kt.gov.lt/index.php?show=nut_view&nut_id=1328)

<sup>14</sup> Competition Council decision of 18 April 2014, No 1S-58/2014. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=1528](http://kt.gov.lt/index.php?show=nut_view&nut_id=1528)

<sup>15</sup> Competition Council decision of 4 March 2004, No 1S-31. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=742](http://kt.gov.lt/index.php?show=nut_view&nut_id=742)

<sup>16</sup> Competition Council decision of 16 December 2004, No 1S-175. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=733](http://kt.gov.lt/index.php?show=nut_view&nut_id=733)

<sup>17</sup> The Competition Council investigated UAB Švyturys-Utenos alus actions aimed at restricting other beer suppliers' possibilities to supply beer to retail shops as well, but these claims were unfounded and were not addressed in commitments.

<sup>18</sup> Competition Council decision of 28 May 2008, No 1S-65. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=660](http://kt.gov.lt/index.php?show=nut_view&nut_id=660)

position by refusing to provide access for Medipresa publications to its network of newspaper kiosks. Before that, Rautakirja Oy was allowed by the Competition Council to acquire (subject to conditions) UAB Lietuvos spauda Vilniaus agentūra, an enterprise operating on the wholesale and retail markets for the distribution of publications (newspapers and magazines). Rautakirja Oy had been active on the same markets through its joint venture UAB Impress Teva as well. During the investigation, on 29 December 2007 the Competition Council adopted a merger decision allowing Rautakirja Oy to acquire 100 percent of the shares of UAB Impress Teva (from 51 percent) subject to commitments, including the obligation to allow all publishers access to its wholesale distribution system on non-discriminatory terms. The commitment decision of 28 May 2008 referred to the merger decision commitments and established that after the merger decision investigated actions were no longer implemented.

#### **2.4 *Commitment decision concerning undertakings engaged in trade of motor vehicles***<sup>19</sup>

13. The investigation was concerned with alleged vertical agreements between numerous motor vehicles manufacturers (Honda, Hyundai, Renault, Saab and Toyota) and their respective dealers. The Competition Council investigated whether the companies selling new motor vehicles were justifiably requiring technical maintenance and service of such motor vehicles to be performed in authorized garages only. If technical maintenance was provided not in an authorized garage, the owner of the vehicle would lose the warranty. The Council adopted undertakings' commitments that they will change the warranty clauses (not later than two months after the decision) so that the warranty would not be lost if an owner were to seek maintenance in other than authorized garages. In addition, the undertakings had to inform their existing clients about this change, as well as to publish this information on their website for a year.

#### **2.5 *Commitment decision concerning UAB Forum Cinemas***<sup>20</sup>

14. UAB Forum Cinemas was a vertically integrated undertaking, operating both at cinema distribution and exhibition levels. The investigation was launched in response to an application of one of its competitors (a cinema operator). The investigation addressed the alleged dominant position by Forum Cinemas and its abuse in both cinema distribution and exhibition markets. The allegations were that Forum Cinemas abused its dominant position by refusing to rent the copies of certain films to some other cinema operators and by exercising pressure upon other film distributors to impose restrictions in renting film copies to other cinema operators. In addition, in the advertisements of its distributed movies Forum Cinemas was using its trademark which resulted also in the advertisement of its cinema exhibition activities. The advertisements were paid by all cinema operators thus Forum Cinemas as a cinema operator could have had some competitive advantage in relation to other operators. The commitments targeted these problems. Forum Cinemas committed not to exercise the pressure upon other film distributors and not to refuse to rent its own films to other cinemas. In addition, Forum Cinemas committed to clearly state in advertisements that it acts as a film distributor. The commitments were adopted for three years.

#### **2.6 *Commitment decision concerning undertakings engaged in wholesale trade in pharmaceuticals***<sup>21</sup>

15. This case was concerned with an investigation of alleged vertical agreements between numerous manufacturers<sup>22</sup> (operating through their offices in Lithuania) and wholesale distributors<sup>23</sup>

<sup>19</sup> Competition Council decision of 24 December 2009, No 1S-200. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=1099](http://kt.gov.lt/index.php?show=nut_view&nut_id=1099)

<sup>20</sup> Competition Council decision of 9 June 2010, No 1S-98. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=1145](http://kt.gov.lt/index.php?show=nut_view&nut_id=1145)

<sup>21</sup> Competition Council decision of 21 July 2011, No 1S-137. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=1286](http://kt.gov.lt/index.php?show=nut_view&nut_id=1286)

of pharmaceuticals, medical goods and medical devices. It was suspected that these undertakings agreed to restrict in public tenders to whom the products might be sold and to restrict sale prices. The adopted commitments obligated the companies to ensure that all agreements for the distribution of pharmaceuticals or other similar agreements would not contain any clauses under which the wholesalers of pharmaceuticals would have an obligation to coordinate with the pharmaceutical manufacturer their terms and conditions proposed for the public tenders organised by budget institutions. The commitments also obligated the companies to ensure that such type of provisions were not implemented in practice. In addition, the Competition Council issued recommendations to the Ministry of Health to review the pricing of the reimbursed pharmaceuticals and to create conditions facilitating the parallel import of pharmaceuticals from foreign countries.

## **2.7 Commitment decision concerning Viasat World Limited<sup>24</sup>**

16. This investigation was concerned with allegations that the undertaking Viasat World Limited abused its dominant position in the wholesale TV distribution market. The claimants TEO LT, AB and UAB Kavamedia (providers of multi-channel TV subscription services) stated that they were offered by Viasat World Limited to acquire TV channel Viasat Sport Baltic for distribution only together with Viasat Golden Package, although other providers of multi-channel digital television subscription services could acquire this channel for distribution separately from the Viasat Golden Package. Thus the application of such different rebroadcasting terms could potentially result in the restriction of competition among digital television service providers, constituting an abuse of the dominant position by Viasat World Limited. Viasat World Limited offered commitments not to apply different Viasat Sport Baltic channel distribution terms to the providers of multi-channel digital TV subscription services. The commitments were adopted for two years, but could end sooner if the Viasat Sport Baltic channel was terminated<sup>25</sup>.

## **2.8 Commitment decision concerning association LINAFA<sup>26</sup>**

17. This investigation was concerned with the prices of TIR Carnets sold by the Lithuanian National Road Carriers Association LINAFA to the members and non-members of the Association. The Competition Council suspected that LINAFA, being the only body authorized to issue TIR Carnets, could have abused its dominant position by applying different prices of TIR Carnets sold to the members of LINAFA and non-members. To address the Council's concerns, LINAFA submitted commitments to make the prices of TIR carnets uniform both to the members of LINAFA and to non-members.

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<sup>22</sup> UAB Berlin Chemie Menarini Baltic, UAB GlaxoSmithKline Lithuania, limited liability company Fresenius Kabi Polska, UAB Viasana, and UAB Nutricia Baltics.

<sup>23</sup> UAB Tamro, UAB Limedika, and UAB Armila.

<sup>24</sup> Competition Council decision of 22 November 2011, No 1S-233. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=1328](http://kt.gov.lt/index.php?show=nut_view&nut_id=1328)

<sup>25</sup> 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. Nr. A552-2705/2012. Retrieved from: [http://kt.gov.lt/index.php?show=teismai\\_view&t\\_id=283](http://kt.gov.lt/index.php?show=teismai_view&t_id=283)). In the second case the Supreme Administrative Court of Lithuania upheld the claimants' arguments and returned the case to the Competition Council for additional investigation (judgment of 5 March 2013, case No. A502-706/2013. Retrieved from: [http://kt.gov.lt/index.php?show=teismai\\_view&t\\_id=282](http://kt.gov.lt/index.php?show=teismai_view&t_id=282)).

<sup>26</sup> Competition Council decision of 18 April 2014, No 1S-58/2014. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=1528](http://kt.gov.lt/index.php?show=nut_view&nut_id=1528)

### 3. Types of Commitments, Market-testing and Monitoring

18. The Law on Competition as well as EU competition rules allow both structural and behavioural remedies. In practice, as the summaries of the cases above show, behavioural remedies were adopted, in many cases by obligating undertakings to change contract clauses.

19. The Law on Competition does not constrain the Competition Council to adopt binding commitments only for a limited period of time. This position that commitments could last indefinitely has also been upheld by the Court of Justice of the European Union<sup>27</sup>.

20. We believe the remedies have been essentially successful in restoring competition. In most cases, the commitment decisions have not been challenged in the courts and subsequently only in one case there were allegations that the undertaking which was subject to investigation breached its commitments. Moreover, there were no subsequent infringement decisions concerning the same behaviour in any of the cases.

21. In its earlier practice the Competition Council did not market-test commitments. However, in its recent decisions the Council announced publicly the commitments for comments before adopting them. We believe that market-testing of commitments should reduce the risk of adopting commitments which would not be adequate and proportionate for the issues in question.

22. On the other hand, the Competition Council has never adopted commitment decisions in the genuinely fast-moving sectors. There is no specific procedure that would ensure the suitability and proportionality of commitments in such cases. The situation would have to be evaluated on a case-by-case basis having regard to the arguments of the undertaking under investigation as well as market-testing results. However, the Competition Council would not be required itself to seek out less onerous or more moderate solutions than the commitments offered to it. Its only obligation in relation to the proportionality of the commitments is to ascertain whether the commitments offered in the proceedings are sufficient to address the concerns it had identified<sup>28</sup>.

23. There are certain means enabling the Competition Council to deter the breaches of commitments. Article 36(4) of the Law on Competition establishes that a fine of up to five per cent of the average gross daily income in the preceding business year may be imposed on undertakings for each day of failure to meet the assumed obligations (i.e. commitments).

24. There has been only one case where the Competition Council started a formal investigation for the alleged breaches of commitments. It concerned UAB Forum Cinemas commitments. The claimants (cinema operators) argued that Forum Cinemas refused to provide the copies of premiere movies and pressed other distributors to do the same. However, there was not enough evidence to support these claims and no infringement was found. Accordingly, the investigation was terminated<sup>29</sup>. Although this Competition Council's decision was appealed, the court of first instance dismissed the

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<sup>27</sup> Judgment of the Court of Justice of the European Union of 29 June 2010, case No. C-441/07 P - *Commission v Alrosa*. Retrieved from: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d5f68c1e2e146c4be5a38cd79a06354b03.e34KaxiLc3eQc40LaxqMbn4OchqSe0?text=&docid=84751&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=287359>

<sup>28</sup> It was decided by the Court of Justice of the European Union concerning the European Commission's discussion (judgment of 29 June 2010, Case C-441/07 P - *Commission v Alrosa*, para. 61). It would apply to the Competition Council as well.

<sup>29</sup> Competition Council decision of 17 February 2015, No. 1S-16/2015. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=1608](http://kt.gov.lt/index.php?show=nut_view&nut_id=1608)

action and upheld the Competition Council's findings<sup>30</sup>. The claimant did not appeal this court decision.

25. In order to ensure the compliance with the Law, the Competition Council usually obligates the investigated undertaking to report within a given timeframe to the Council how it has implemented the commitments and to provide the evidence thereof. For instance, in its 2009 commitment decision concerning the motor vehicle sellers, the Competition Council obligated the undertakings to change warranty clauses and to inform their clients about changes not later than two months after the publication of the decision and to start publishing information about these changes on their websites not later than three weeks after the publication of the decision. Not later than two weeks after the implementation of commitments, the undertakings had to submit the evidence thereof. In addition, the Competition Council relies on interested parties to ensure that the adopted commitments would be respected.

#### **4. Judicial review of commitment decisions and relationship with private enforcement**

26. Usually commitment decisions are not appealed to courts. Out of the eight indicated commitment decisions, only two were appealed. In all cases the appeal was submitted not by the investigated undertaking, but by a third party (or parties).

27. The courts developed the legal standard of the assessment of appeals of commitment decisions. In order to be able to challenge the commitment decision in courts, a person must have material interest in the commitment decision<sup>31</sup>. The review of commitment decisions encompasses several stages. Courts have held that the assessment of commitments can be divided into the assessment of the form of commitments and the assessment of substantive adequacy of commitments. Accordingly, the courts have reviewed whether commitment decisions addressed these issues properly.

28. According to courts, the investigated undertaking must submit commitments in such a form that it could be possible for the Competition Council to evaluate their substantive suitability to solve the competition concerns in question. If the undertaking submits commitments which do not comply with the formal requirements, the undertaking must be informed about it and given an opportunity to submit commitments in a proper form. This formal assessment should be carried out during the investigation and not in the final decision. In the court's opinion, refusal to evaluate the submitted commitments in the final decision on the formal grounds would deprive the investigated undertaking of the possibility to be subject to the closure of the investigation with adequate commitments (on these grounds the court returned the case<sup>32</sup> to the Competition Council for additional investigation<sup>33</sup>). Whereas the substantive evaluation of the properly submitted commitments can be made in the final decision.

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<sup>30</sup> Judgment of the Vilnius Regional Administrative Court of 4 January 2016, case No. eI-7862-281/2015. Retrieved from: <http://liteko.teismai.lt/viesasprendimupaiska/tekstas.aspx?id=252495c7-b2a7-40a5-8ae9-433f0c519044>

<sup>31</sup> Judgment of the Supreme Administrative Court of Lithuania of 27 July 2012, case No. Nr. A552-2705/2012. Retrieved from: [http://kt.gov.lt/index.php?show=teismai\\_view&t\\_id=283](http://kt.gov.lt/index.php?show=teismai_view&t_id=283)

<sup>32</sup> The case was concerned with vertical agreements (exclusivity arrangements) between UAB G4S Lietuva, the largest provider of cash handling services, and Lithuania's three major banks which restricted the ability of other providers of such services to compete with UAB G4S Lietuva. Competition Council decision of 20 December 2012, No. 2S-15. Retrieved from: [http://kt.gov.lt/index.php?show=nut\\_view&nut\\_id=1427](http://kt.gov.lt/index.php?show=nut_view&nut_id=1427)

<sup>33</sup> Judgment of the Supreme Administrative Court of Lithuania of 8 April 2014, case No. A502-253/2014. Retrieved from: [http://kt.gov.lt/index.php?show=teismai\\_view&t\\_id=304](http://kt.gov.lt/index.php?show=teismai_view&t_id=304)



29. The substantive review of commitment decision essentially consists of evaluating the three above-mentioned cumulative conditions:

- the actions did not cause a significant damage to the interests protected by the law;
- the undertaking suspected of the violation has voluntarily terminated the actions;
- 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 creating preconditions to avoid it in the future.

30. The judicial review of the commitment decisions is, however, limited. In *Alrosa* case<sup>34</sup> the Court of Justice of the European Union decided that judicial review for its part would have to relate solely to whether the assessment in the commitment decision is manifestly incorrect<sup>35</sup>. Thus, a court could not substitute its own assessment for that of the Competition Council. The court could hold that the Council has committed a manifest error of the assessment only if it found that the Council's conclusion was obviously unfounded, having regard to the facts established by it.

31. One way how the courts review the commitment decisions is by assessing their consistency in general. For instance, in the second *Viasat* case<sup>36</sup> the Supreme Administrative Court of Lithuania overruled the Competition Council's commitment decision on the grounds that it investigated competition problems concerning the multi-channel TV subscription services whereas the adopted commitments established solutions to competition concerns in the multi-channel digital TV subscription services sector. Thus, in court's opinion, the commitments addressed a narrower problem than the one which was investigated. The court stated that the decision of the Competition Council was not consistent because it gave no reasons why the adopted commitments were addressing a seemingly different (narrower) relevant market than the one which was under investigation. The court returned the case to the Competition Council for an additional investigation.

32. We cannot indicate any problems caused by the limitations of a judicial review.

33. According to Article 28(3)(2) of the Law on Competition, the Competition Council adopts a commitment decision without the need to establish an infringement. Therefore, a plaintiff in a private damages action could not claim that the Competition Council in its commitment decisions established an infringement. However, nothing precludes the plaintiff to rely on the facts that were established by the Competition Council in the commitment decision. To our knowledge, there have been no follow-on damages actions based on commitment decisions in Lithuania.

## 5. Benefits and risks associated with the use of commitment decisions

34. We believe that in general, the benefits have materialized. There has been only one case (concerning UAB Forum Cinemas) where allegations were made that the commitments were breached and there have been no other indications that the undertakings have not adhered to their commitments. Overall, the absence of claims and investigations concerning the same competition problems could indicate that the competition concerns have been resolved effectively.

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<sup>34</sup> Judgment of the Court of Justice of the European Union of 29 June 2010, case No. C-441/07 P - *Commission v Alrosa*.

<sup>35</sup> *Ibid*, para. 42.

<sup>36</sup> Judgment of the Supreme Administrative Court of Lithuania of 5 March 2013, case No. A502-706/2013. Retrieved from: [http://kt.gov.lt/index.php?show=teismai\\_view&t\\_id=282](http://kt.gov.lt/index.php?show=teismai_view&t_id=282)

35. On the other hand, below we provide the tables<sup>37</sup> which compare the duration of an infringement and commitment procedures. As the data shows, in our experience the average duration of commitment procedures was not shorter than that of infringement investigations<sup>38</sup>.

**Table No. 1. Duration of investigations of the abuse of a dominant position (2004-2016)**

Type of decision	Number of decisions	Average duration
Infringement	8	1 year 7 months
Commitment	6	1 year 7 months

**Table No. 2. Duration of investigations of anticompetitive agreements (2006-2016)**

Type of decision	Number of decisions	Average duration
Infringement	29	1 year 9 months
Commitment	2	3 years 2 months

36. Commitment decisions in cartel cases would be highly unlikely and investigations in bid rigging cases (comprising a substantial part of investigations) are quite short (frequently not longer than 1 year). Therefore, a comparison could be made between infringement decisions concerning vertical (or mixed) agreements and commitment decisions that addressed alleged vertical agreements. However, the data would still not indicate a shorter duration of commitment investigations.

**Table No. 3. Duration of investigations of vertical (or mixed) anticompetitive agreements (2006-2016)**

Type of decision	Number of decisions	Average duration
Infringement	5	2 years 7 months
Commitment	2	3 years 2 months

37. The number of enforcement actions after the introduction of commitment procedures has not increased. As it was mentioned above, there has been only one instance (concerning UAB Forum Cinemas) where the Competition Council started an investigation based on the claims of breached commitments. However, the Competition Council established that these claims were unsubstantiated.

38. There have not been any concerns raised by undertakings to the Competition Council about the use of commitment decisions. Up till now the Competition Council has not adopted any guidelines or other measures to increase the transparency.

<sup>37</sup> 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.

<sup>38</sup> 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).