

Cartel Regulation

Getting the fine down
in 42 jurisdictions worldwide

2010

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Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation and who enforces it?

The rules prohibiting cartel agreements and concerted practices are laid down in article 5 of the Law on Competition of the Republic of Lithuania (the Competition Law) of 23 March 1999. The rules are modelled on article 101 of the Treaty on the Functioning of the European Union (ex article 81 of the EC Treaty).

Infringement of the rules prohibiting cartels can be subject to civil and administrative procedures: the competition authority prosecutes cartels and imposes administrative sanctions, while private persons can bring damages claims for breaches of the Competition Law under the rules of civil procedure. No criminal sanctions can be imposed as a result of cartel agreements per se.

The national authority responsible for the enforcement of national competition law and EC competition rules in Lithuania is the Competition Council of the Republic of Lithuania (the Competition Council). The Competition Council consists of four members and a chairman of the Competition Council, all appointed for a six-year term by the president of Lithuania upon presentation of the prime minister. Decisions of the Competition Council are taken by a simple majority. The day-to-day work of the Competition Council is carried out by the Administration Office, managed by the director of the administration. The work of the Office is organised into eight departments.

The civil courts can also be involved in the process of enforcing the rules prohibiting cartels in private enforcement cases initiated by private persons (companies and individuals).

The Competition Council and the national courts share competence with the European Commission in respect of the application of articles 101 and 102 TFEU (see question 10).

2 Proposals for change

Have there been any recent changes or proposals for change to the regime?

The Competition Law was last amended on 25 April 2009. The amendment included certain structural changes, for example, the chairman of the Competition Council and its members are now appointed for a six-year term (it was previously only five years).

The amendment also established the right of authorised officials of the Competition Council to carry out unannounced searches of premises, territories and vehicles other than the ones used by the undertaking, including residential and other premises of the managers of the undertakings and other employees if there is well-founded suspicion that such premises, territories or vehicles contain evidence essential to proving grave violation of articles 101 and 102 TFEU and equivalent provisions of the Competition Law. The amendment also established the right of the officials to seal premises used by the

undertaking. Unauthorised removal of such a seal is penalised by up to 1 per cent of annual income.

The amendment also included a provision allowing the Competition Council to keep its resolutions confidential regarding investigation of Competition Law infringements until any threat to the investigative process disappears, but only until certain investigative powers (including the ones indicated above) of the Council under the Competition Law have been exercised. Further, the Competition Council was explicitly provided with a right to investigate conformity of legal acts or other decisions adopted by public administration entities with the Competition Law requirements for indiscriminate undertakings or their groups and freedom of fair competition.

Finally, the amendments expanded the list of mitigating circumstances to be taken into account in the setting of fines, which now includes voluntary termination of the infringement, the non-implementation of restrictive practices, acknowledgement of the material circumstances established by the Competition Council in the course of investigation, and also the fact that the actions constituting the infringement were influenced by actions of the authorities as well as any serious financial difficulties of the undertaking. At the same time, the Competition Council is no longer entitled to take into account mitigating circumstances that are not expressly provided for in the Competition Law.

3 Substantive law

What is the substantive law on cartels in the jurisdiction?

The term 'cartel' is not defined under Lithuanian law, but article 5(1) of the Competition Law prohibits agreements that restrict or may restrict competition, which substantially resembles article 101 TFEU and reads as follows:

All agreements which have as their object the restriction of competition or which may restrict competition shall be prohibited and shall be void from the moment of conclusion thereof, including:

- 1 *agreements to directly or indirectly fix prices of certain goods or other conditions of purchase or sale;*
- 2 *agreements to share the product market on a territorial basis, according to groups of buyers or suppliers or in any other way;*
- 3 *agreements to fix production or sale volumes for certain goods as well as to restrict technical development or investment;*
- 4 *agreements to apply dissimilar (discriminating) conditions to equivalent transactions with individual undertakings, thereby placing them at a competitive disadvantage; and*
- 5 *agreements to require other undertakings to assume supplementary obligations which, according to their commercial nature or purpose, have no direct connection with the subject of the contract.*

The Competition Law stipulates that agreements and concerted practices between competitors regarding price fixing, sharing product

markets, and limiting production or sales shall be prohibited as they restrict competition per se.

The Competition Law defines an agreement as a contract concluded in any form (written or oral) between two or more undertakings or concerted practices between undertakings, including decisions made by any combination (association, amalgamation, consortium, etc) of undertakings or by representatives of such combination. The prohibition applies to both vertical and horizontal agreements.

The general rule of Lithuanian competition law provides that no anti-competitive effects need be proven to establish an infringement of competition law if the object of the agreement was to restrict competition.

The Resolution of the Competition Council No. 1S-172 of 9 December 2004 on approval of the requirements and conditions for agreements of minor importance that do not appreciably restrict competition elaborates on the notion of hard-core cartels. The Resolution stipulates that the de minimis principle is not applied to horizontal agreements that directly or indirectly seek to fix prices, limit output or sales, or allocate market on a territorial basis, according to groups of buyers, suppliers or in any other way. Neither does the de minimis principle apply to vertical agreements setting minimum prices or fixing prices.

According to EU Council Regulation No. 1/2003 (Regulation No. 1/2003) the Competition Council is required to apply article 101 TFEU where an agreement or concerted practice may affect trade between member states. Regulation No. 1/2003 prescribes that national law may not lead to the prohibition of agreements or concerted practices that do not restrict competition within the meaning of article 101(1) TFEU, that fulfil the conditions of article 101(3) TFEU, or that are covered by the Commission Regulations for the application of article 101(3) TFEU. The Competition Council forfeits the competence to apply article 101 TFEU in Lithuania when it commences proceedings.

When applying article 101 TFEU, the Competition Council will apply Lithuanian rules of procedure and sanctions will include those established under the Lithuanian law.

4 Industry-specific offences and defences

Are there any industry-specific offences and defences?

There are no industry-specific offences or defences under national law. However, Competition Council Resolution No. 1S-132 of 2 September 2004 established that agreements that satisfy the conditions for exemption laid down in the regulations of the EU Council and the European Commission regarding the application of article 101(3) TFEU shall also be deemed as satisfying the conditions for exemption under Lithuanian law. Where European legislation specifies the undertaking's income as a condition for eligibility for exemption, such an amount is reduced by 10 per cent for the purposes of applying relevant Lithuanian laws.

5 Application of the law

Does the law apply to individuals or corporations or both?

The Competition Law applies to individuals and corporations. Its definition of an undertaking provides that an undertaking is an enterprise, a combination of enterprises (associations, amalgamations, consortiums, etc), an institution or an organisation, or other legal or natural persons that perform or may perform economic activities in the Republic of Lithuania or whose acts affect or whose intentions, if realised, could affect economic activities in the Republic of Lithuania.

Lithuanian public administration entities are considered undertakings if they engage in economic activity.

6 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction?

The Competition Law is applicable to the activity of undertakings registered abroad if such activities restrict competition in the Lithuanian market. It is not applicable to the activities of undertakings that restrict competition on foreign markets unless treaties to which Lithuania is a party provide otherwise.

Investigation

7 Steps in an investigation

What are the typical steps in an investigation?

The typical steps in an investigation are initiation, the decision to start an investigation, conducting and completion of investigation.

Initiation

The Competition Council has the right to start an investigation by a reasoned decision or upon receipt of a written application from:

- undertakings whose interests have been allegedly violated by restrictive practices;
- public administration entities; or
- associations or unions representing the interests of undertakings or consumers.

Decision to start an investigation

The Competition Council must examine applications no later than within 30 days from the submission of the application and supporting documents and take a decision in respect to starting an investigation. The Competition Council must complete the investigation within five months of the commencement thereof. The period is extendable by reasoned decision for a period of up to three months (the number of extensions is not formally limited).

Conducting an investigation

The authorised officers of the Competition Council carrying out the investigation have the investigative powers indicated in question 8, some of which require authorisation from the administrative court.

The undertakings suspected of violating the Competition Law have the right to complain to the Competition Council against any illegal actions of the authorised investigating officers. A complaint must be lodged within 10 days of the performance of the disputed actions and the Competition Council must take a decision relating to the complaint within 10 days of the date of receipt thereof. If the undertakings suspected of infringing the Competition Law object to the Competition Council's decision or if the Competition Council fails to make a decision within 10 days, the undertakings have the right to lodge a complaint with the Vilnius Regional Administrative Court, which, however, does not suspend the investigation.

The Competition Council, seeking to prevent substantial or irreparable damage to the interests of undertakings or the public, has the right to apply interim measures that may be appealed by the suspected undertaking within the time limit set by the Council in urgent cases, provided there is prima facie evidence of infringement of the Competition Law. The interim measures cease to apply upon implementation of sanctions imposed by the Competition Council resolution.

The decision on the application of interim measures may be appealed in the Vilnius Regional Administrative Court within one month of the date of the decision. The lodging of the complaint does not suspend the application of interim measures.

Any Competition Council resolutions on the investigative actions, interim measures or restriction of economic activities must be authorised by a decision of the Vilnius Regional Administrative Court.

Completion of an investigation

An investigation is ended when the Competition Council adopts a decision to terminate or complete it.

The investigation will be terminated when during the course of the investigation it is established that there is no substance to the infringement of the Competition Law, the actions did not result in significant damage to those interests protected by law, and the undertaking suspected of infringing the Competition Law voluntarily terminates the actions and submits to the Competition Council a written obligation not to perform such actions, to perform actions eliminating the suspected infringement or creating preconditions to avoid it in the future.

Obligations submitted in accordance with the second reason for termination and entered in the resolution of the Competition Council in relation to the termination of the investigation shall be binding on the undertakings.

The applicant and interested parties shall be notified in writing of the decision taken. The operative part of the resolutions adopted by the Competition Council pursuant to second cause of termination of investigation shall be published in the official gazette, *valstybės žinios*.

The Competition Council has the right to reopen the closed investigation.

The parties to the proceedings shall be notified in writing of the findings of the authorised officers regarding the restrictive practices, the place and time of hearing of the case and shall be offered the opportunity to submit their written comments. The Competition Council may notify the hearing of the case through the mass media.

8 Investigative powers of the authorities

What investigative powers do the authorities have?

The Competition Council has the following investigative powers under the Competition Law:

- to carry searches on any premises, land and means of transport, including residential and other premises of directors and employees of the undertaking (this requires authorisation from the administrative court);
- to order production of documents necessary for investigation;
- to require oral and written explanations, and to request appearance at the office of an authorised officer;
- to order the production of documents and information relating to the economic operations of the investigated undertaking from other undertakings and public administration entities;
- to carry out an inspection (audit) of the economic activity and order expert evaluation thereof;
- to seize any documents and articles having evidential value;
- to enlist the assistance of specialists and experts in carrying out the investigation;
- to use technical means for investigation purposes in compliance with established procedures; and
- to seal the premises used by the undertaking wherein documents are held for the time period and to the extent necessary to carry out authorised searches, but for a period no longer than three calendar days.

Before carrying out the above actions, the authorised officers of the Competition Council must produce a document issued by the Competition Council confirming their powers, the purpose and the time limits of investigation. The officials must record all actions of the investigation in writing. The Competition Law does not impose the obligation on the officials of the Competition Council to wait for arrival of legal advisors.

Requests made by the authorised officers of the Competition Council while performing actions provided for in the bullet points

in this question shall be obligatory to undertakings and members of their bodies and administrative staff. Sanctions provided for in laws shall apply for failure to comply with the requests.

Requests made by authorised officials of the Competition Council during the investigation are compulsory for undertakings, members of their bodies, and administrative staff. The Competition Council may impose a fine of up to 1 per cent of the gross annual income of the preceding financial year upon the undertakings for (i) failure to provide information required for investigation or providing incorrect or incomplete information (or both); (ii) obstructing authorised officials from entering and searching the premises, land and means of transport used by the undertaking or inspecting or seizing any documents or items having evidential value; and (iii) unauthorised damaging or breaking of the seal affixed to the premises by the authorised officials. Such sanctions are, however, rarely applied in practice.

Undertakings suspected of having violated the Competition Law have the right to make a complaint against the illegal actions of investigating officers. A complaint must be lodged within 10 days of the date the relevant act was committed and the Competition Council must take a decision in relation to the complaint within 10 days of the date of receipt. The undertakings suspected of infringing the Competition Law may appeal against the decision of the Competition Council or its failure to take its decision within 10 days with the Vilnius Regional Administrative Court. The lodging of the complaint does not suspend the investigation.

International cooperation

9 Inter-agency cooperation

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

Inter-agency cooperation on the EC level is carried out under Regulation 1/2003 EC. Under Regulation No. 1/2003, the European Commission and all the competition authorities of the EU member states apply the EC competition rules in close cooperation within the framework of the European Competition Network (ECN). The ECN enables the authorities to share information on pending cases, to allocate enforcement actions, to coordinate investigations in international cases and inspections on behalf of another competition authority, and to discuss the proposed course of action. When investigating a case under article 101 TFEU, the Competition Council is required to liaise with the European Commission and the competition authorities in other member states within the ECN. Within the ECN, the case must be allocated to a competition authority that is best placed to investigate the case.

The Competition Council and Lithuanian police must assist the officers authorised by the European Commission in performing an investigation in Lithuania in accordance with the EU competition rules. The Competition Council is a member of the International Competition Network and cooperates with the OECD.

10 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

If certain cartels, which are active or have effects in Lithuania, are investigated in other jurisdictions, it may trigger similar investigations in Lithuania. The fact that an undertaking has already been penalised in another jurisdiction does not prevent the Competition Council from conducting an investigation or imposing sanctions whereby the amount of fines will not necessarily be adjusted to take into account the fines levied in another jurisdiction. As investigations by national competition authorities frequently focus on the effects of

cartels within local markets, the problem of double punishment will generally not arise.

As regards parallel investigations by the Competition Council and the European Commission, the Competition Council cannot investigate the case if the Commission has initiated its own investigation in that case. Under Regulation already 1/2003, the Competition Council may not prohibit or penalise behaviour in contravening the Competition Law if such behaviour is permissible under article 101 TFEU.

11 Adjudication

How is a cartel matter adjudicated?

The Competition Council has the right to start an investigation on its own initiative or upon receipt of a written application from any undertakings whose interests have been allegedly violated by restrictive practices, entities of public administration, or associations or unions representing the interests of undertakings and consumers. The Competition Council must examine applications no later than 30 days after the submission of the application and supporting documents and take a decision in respect of starting an investigation. The Competition Council must complete the investigation within five months of its commencement. The period is extendable by reasoned decision for a period up to three months (the number of extensions is not limited). The Competition Council requires authorisation of the administrative court for searches in premises, land, and means of transport of undertakings and their employees (see question 7).

Upon completion of an investigation, officials of the Competition Council refer the case with their findings and proposals to a session of the Competition Council for hearing. The parties to the proceedings are provided with such findings and with access to the documents of the case except those containing commercial secrets of another undertaking. In case of the latter, the consent of the undertaking is required.

Any parties to the case have the right to apply to the Competition Council at any stage requesting protection of their commercial secrets. The Competition Council or its authorised officer must adopt a reasoned decision on the protection of commercial secrets and notify the applicant accordingly.

At the stages of investigation and hearing of the case, the parties participating in the proceedings have a right to present their arguments both in writing and orally. In the absence of the parties to the proceedings, the case may be heard only when information is available that the said parties have been notified in a timely fashion of the place and time of the hearing and have been given an opportunity to provide explanations and familiarise themselves with the findings of the investigation. The cases are heard in public.

The Competition Council may, on its own initiative or at the request of the respondent or any other interested person, announce a closed hearing of the case where it is necessary to protect state secrets or the commercial secrets of undertakings.

The Competition Council's resolution or its extract is delivered to the parties to the proceedings. The operative part of the resolutions adopted by the Competition Council is published in valstybės žinios.

See question 12 for the appeal process and question 17 for private damage claims.

12 Appeal process

What is the appeal process?

Decisions of the Competition Council may be appealed to the Vilnius Regional Administrative Court. A written appeal must be submitted by the parties to the proceedings (applicant, investigated undertaking or other parties whose interests are directly related to the case) within

20 days of the date of receipt or publication of the decision (whichever occurs first).

Unless the court decides otherwise, the filing of the complaint does not suspend the implementation of the decision of the Competition Council.

Decisions of the Vilnius Regional Administrative Court may be appealed to the Supreme Administrative Court of Lithuania. The decisions of the Supreme Administrative Court are final.

Appeals are possible on the facts and on the law.

13 Burden of proof

With which party is the burden of proof?

According to the law of administrative procedure, as a matter of principle the burden of proof lies with the Competition Council (see also question 3). The undertaking bears the burden of proof when it challenges the decision of the Competition Council in court.

At the same time, in the event of dispute regarding the compliance of an agreement with the exemption provisions of the Competition Law, the burden of proof concerning compliance lies with the party to the agreement benefiting from such an exemption.

Sanctions

14 Criminal sanctions

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

Criminal sanctions are not envisaged for cartel agreements per se.

15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Competition Council, subject to principles of impartiality and proportionality, has the right to:

- order the undertakings to:
 - cease illegal activities;
 - restore the situation prior to the infringement;
 - eliminate consequences of infringement, including the obligation to cancel, amend or conclude contracts; and
 - set the time limit and lay down the conditions for discharge of the above obligations; and
- impose fines on undertakings of up to 10 per cent of the gross annual income of the preceding financial year.

Please refer to question 19 for the sentencing guidelines and question 21 for the leniency programmes.

16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Criminal sanctions are not envisaged for cartel activity; therefore, no choice of sanctions is made.

17 Private damage claims and class actions

Are private damage claims or class actions possible?

Any person, whose legitimate interests have been violated by cartel activities (eg, owner of the registered trademark, or any undertaking injured by misleading advertising) is entitled to bring an action requesting a court order to cease illegal activities or provide compensation for direct or indirect damages (lost profits), or both.

The Vilnius County Court, as the first instance court, hears civil damage cases in respect of cartel conduct. The decisions of the said court can be appealed to the Lithuanian Court of Appeals and, further, to the Supreme Court of Lithuania.

However, private antitrust litigation practice is slim in Lithuania: the first Lithuanian case was brought in 2008 by AB flyLAL – Lithuanian Airlines.

Class actions in Lithuania are not possible as such. However, joint actions of certain persons, actions brought by a prosecutor in defence of public interest, and actions by either the State Consumer Rights Protection Authority or public consumer organisations are possible.

Please also refer to the Lithuania chapter of *Getting the Deal Through – Private Antitrust Litigation 2010*.

18 Recent fines and penalties

What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated? What is the history of criminal sanctions against individuals?

The Competition Council may impose a fine of up to 10 per cent of the gross annual income of an undertaking in the preceding business year.

The Competition Council has imposed more than 15 fines since 2001. In 2009, a record fine totalling 3,392,100 litas was imposed on the Lithuanian Communication Agencies Association and its members for an alleged cartel agreement (the appeal of this decision is now pending in the Vilnius County Court).

The maximum fine for a single undertaking is presently 865,900 litas in respect of a cartel agreement between milk processing companies. The general trend is an increase in the total amount of fines imposed for a single cartel agreement:

- 2002 – 346,000 litas (cartel activity in the oil products market) and 1,041,000 litas (cartel agreement regarding large value tenders in the construction market);
- 2006 – 680,880 litas (cartel activity in the paper market);
- 2008 – 2,236,000 litas (cartel agreement in the milk market); and
- 2009 – 3,392,100 litas (cartel agreement in communications sector).

The tendency is not so obvious, however, in terms of individual fines: the maximum fine of 543,000 litas in 2001 was exceeded in 2008 only by the 865,900 litas fine for the cartel agreement between the milk processing companies.

Recent case law shows that fines of 3 to 5 per cent of the gross annual income of the preceding financial year are imposed for hard-core cartel agreements.

The number of fines imposed is limited: one to two fines per year in 2001 to 2006, and reaching three fines per year in 2007 to 2009.

The amount of the fine depends on the gravity and duration of the infringement, as well as the mitigating or aggravating circumstances. The rules for the setting of fines are approved by Government Resolution No. 1591 of 6 December 2004 on rules concerning the setting of the amount of a fine imposed for the infringement of the Competition Law (Rules for Setting Fines).

According to the Rules for Setting Fines, the amount of the fine is the sum of the fine for the gravity of the infringement and the fine for the timescale of the infringement. The assessment of gravity will be made taking into account the nature of the infringement, consequences of the infringement and extent the geographical market concerned. If the infringement lasts for more than a year, the fine for the timescale of the infringement makes up 10 per cent of the fine for the gravity of the infringement for every year of the infringement.

The fine may be increased or reduced by up to 50 per cent in accordance with mitigating or aggravating circumstances of the Competition Law. Mitigating circumstances are as follows:

- voluntary prevention of the detrimental consequences of the infringement;
- assisting the Competition Council in the course of investigation;
- compensation for the losses, elimination of the damage caused;
- voluntary termination of the infringement;
- non-implementation of restrictive practices;
- acknowledgement of the material circumstances established by the Competition Council in the course of investigation; and
- the fact that actions constituting the infringement were determined by the actions of the authorities as well as serious financial difficulties of the undertaking.

Aggravating circumstances are as follows:

- obstruction of the investigation;
- concealment of the committed infringement;
- failure to terminate the infringement, notwithstanding the obligation to the Competition Council to discontinue illegal actions; and
- repeated infringement for which the undertakings have already been imposed sanctions under the Competition Law.

The Competition Council will also take into account the influence of each undertaking in the infringement where the infringement has been committed by several undertakings. This includes such factors as the role of the undertaking (active or passive) and its market share.

As mentioned previously, criminal sanctions are not envisaged for cartel activity.

Sanctions

19 Sentencing guidelines

Do sentencing guidelines exist?

Sentencing guidelines are approved by the Rules for Setting Fines. Please refer to question 18 for details.

20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

The Rules for Setting Fines are approved by government resolution and, therefore, are binding upon the Competition Council and Lithuanian courts.

21 Leniency and immunity programmes

Is there a leniency or immunity programme?

Basic leniency provisions are laid down in article 43 of the Competition Law. Provisions of the leniency programme are elaborated in the Rules on Setting Fines, and the Resolution of the Competition Council No. 1S-132 of 28 February 2008 on the rules on exemption from and reduction of fines for the participants of the prohibited agreements (Rules on Exemption). The programme provides for exemption or reduction of fines (see question 22).

22 Elements of a leniency or immunity programme

What are the basic elements of a leniency or immunity programme?

Exemption from fines

A party to a prohibited agreement between competitors is exempted from fines upon presenting to the Competition Council full

information relating to the agreement if all the following conditions are satisfied:

- the undertaking provides information prior to the beginning of investigation of the agreement;
- the undertaking is the first party to the prohibited agreement to provide such information;
- the undertaking provides complete information available to it regarding the prohibited agreement and cooperates fully with the Competition Council during the investigation; and
- the undertaking was not the initiator of the prohibited agreement and has not induced other undertakings to participate in such an agreement.

The Competition Council, having completed the investigation and when adopting the final resolution on the infringement, decides whether the conditions specified herein have been met and the undertaking qualifies for exemption from fines.

An undertaking may not be exempted from a fine if it has destroyed, forged or concealed evidence on the prohibited agreement while preparing the application to the Competition Council or disclosed the fact of preparation of such an application to third parties (excluding the European Commission and competition authorities of the member states). The same applies to reduction of fines.

If one or several agreements or practices have effects on competition in more than three member states, and the undertaking has applied or is preparing to apply for leniency, the applicant is entitled to submit a simplified request of leniency to the Competition Council. The latter shall set the time period within which the applicant must submit the necessary information and evidence.

Reduction of fines

A fine may be reduced if an undertaking provides the complete information available to it regarding the prohibited agreement and cooperates with the Competition Council during the investigation. The fine may be reduced by between 50 and 75 per cent if the Competition Council had already taken a decision to start the investigation, and the undertaking satisfies all the following conditions:

- the undertaking is the first party to the prohibited agreement to provide such information;
- the undertaking provides evidence of the prohibited agreement that is not in possession of the Competition Council, and which is significant for proving the existence of the prohibited agreement;
- the undertaking was not the initiator of the prohibited agreement and has not induced other undertakings to participate in such an agreement;
- the undertaking immediately ceases participation in the prohibited agreement, except when the Competition Council orders otherwise; and
- the undertaking continuously and fully cooperates with the Competition Council until the end of the investigation.

The initiator of the prohibited agreement or an undertaking that has induced other undertakings to participate in such an agreement may apply for a 50 per cent reduction of fine if it fulfils the conditions indicated in the first three bullet points of 'Exemption from fines'.

The fine may be reduced by 20 to 50 per cent, if:

- the undertaking provides evidence of the prohibited agreement that is not in possession of the Competition Council, and which is significant for proving the existence of the prohibited agreement;
- the undertaking immediately ceases participation in the prohibited agreement, except when the Competition Council orders otherwise; and

- the undertaking continuously and fully cooperates with the Competition Council until the end of the investigation.

23 First in

What is the importance of being 'first in' to cooperate?

Being 'first in' is the condition for exemption from fines, provided that the undertaking provides information prior to the beginning of investigation. If the investigation has been already started, being first-in along with fulfilling other conditions specified in question 22 may entitle the undertaking to a 50 to 75 per cent reduction of fine.

24 Going in second

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

There are no specific provisions regarding the second undertaking to cooperate. Amnesty plus or 'immunity plus' options are not envisaged under Lithuanian law.

25 Approaching the authorities

What is the best time to approach the authorities when seeking leniency or immunity?

An undertaking wishing to take advantage of the leniency programme should contact the Competition Council with a written request, supported by information and evidence indicated in the Rules on Exemption.

Before submitting the said request, undertakings may unanimously contact the Competition Council for general advice on the application of the Rules on Exemption. Such a reference does not create any rights or obligations.

Undertakings may inform the Competition Council about their intent to apply for the leniency programme and request to extend the time period (usually no longer than 15 days) in order to gather the necessary information and evidence.

Decisions of the Competition Council may be appealed to the Vilnius Regional Administrative Court. A written appeal must be submitted within 20 days of the date of receipt or publication of the decision (whichever occurs first). Decisions of the Vilnius Regional Administrative Court may be appealed to the Supreme Administrative Court.

26 Confidentiality

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

The submission and the contents of the application on exemption from or reduction of fines are treated as confidential and cannot be disclosed to any third party until the end of the investigation in respect of the cartel activity, except with the consent of the undertaking. Upon completion of the investigation, other parties to the proceedings are entitled to receive information regarding the contents of the application for the leniency programme.

27 Successful leniency or immunity applicant

What is needed to be a successful leniency or immunity applicant?

Success in applying for leniency depends on compliance with the requirements elaborated in question 22. Please also refer to question 36.

Update and trends

The latest amendments to the Competition Law entered into force on 25 April 2009. The amendments established the right of authorised officials of the Competition Council to carry out unannounced searches of premises, territories and vehicles other than the ones used by the undertaking, including residences and other premises of the managers of the undertakings and other employees if there is a well-founded suspicion that such premises, territories or vehicles contain evidence essential for proving grave violation of articles 101 and 102 TFEU and equivalent provisions of the Competition Law. The amendments also established the right of the officials to seal premises used by the undertaking. Unauthorised removal of such a seal is penalised by up to 1 per cent of annual income.

The amendment included a provision permitting the Competition Council to keep its resolutions regarding investigation of Competition Law infringements confidential until a threat to the investigation process disappears but no later than certain investigative powers

(including the ones indicated above) of the Council under Competition Law are exercised.

Further, the Competition Council was explicitly provided with a right to investigate conformity of legal acts or other decisions adopted by entities of public administration with the Competition Law requirements of indiscriminate between undertakings or their groups and freedom of fair competition.

Finally, the amendments expanded the list of mitigating circumstances for setting fines, which now include voluntary termination of the infringement, non-implementation of restrictive practices, acknowledgement of the material circumstances established by the Competition Council in the course of investigation, and also the fact that infringing actions were determined by the actions of the authorities as well as the undertaking's serious financial difficulties. At the same time, the Council is no longer entitled to take into account mitigating circumstances not expressly provided for in the Competition Law.

28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

There are no formal 'plea bargain' rules for alleged cartel activity. In practice, arrangements with the Competition Council in respect of the amount of the fines are possible. However, the amount of the fine imposed by the Competition Council is final.

29 Corporate defendant and employees

What is the effect of leniency or immunity granted to a corporate defendant on its employees?

The Competition Law sanctions against the cartel activities apply to undertakings only; the penalties may not be imposed on employees of the undertaking.

30 Cooperation

What guarantee of leniency or immunity exists if a party cooperates?

Cooperation is one of a number of conditions for application of the leniency programme. The requirement of continuous and full cooperation ceases to apply when the Competition Council completes the investigation, issues an investigation report and takes a decision on exemption from or reduction of fines. See question 22 for details.

31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

An undertaking wishing to take advantage of the leniency programme should contact the Competition Council through a person authorised to represent the undertaking, preferably a lawyer.

The first contact with the Competition Council should be made on unanimous basis with a request for hypothetical advice on the application of the Rules on Exemption, which could be done over the phone. Such a reference does not create any rights or obligations and gives the undertaking an opportunity to discuss important issues (such as confidentiality, evidence the party can provide, how to obtain further evidence, behaviour of the party at cartel meetings) without revealing its identity.

To secure the highest possible reduction of fines, the undertaking (preferably through its counsel) should contact the Competition Council as soon as possible to set the 'marker'.

Unfavourable decisions of the Competition Council in respect to the fines may be appealed to the Vilnius Regional Administrative Court.

32 Ongoing policy assessments and reviews

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

The Rules on Exemption were adopted in 2008 and, to the best of our knowledge, there is no policy review underway.



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Defending a case

33 Representation

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

There are no strict rules regarding the representation of employees under investigation and corporations. The relevant rules are focused generally on conflicts of interest. In turn, liability of employees and members of corporate bodies under the Competition Law is limited to cases of obstruction of investigations conducted by the Competition Council, and respective sanctions are applied extremely rarely in practice.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

In general, counsel may represent multiple corporate defendants unless such representation leads to a conflict of interests. Nonetheless,

the doctrinal view suggests that counsel may not represent the undertaking that was 'first in' to cooperate and any of the other parties to the prohibited agreement at the same time.

35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

Lithuanian law does not specifically prohibit an undertaking from covering the legal costs of its employee. The general rule is that the liabilities of a person may be covered by any third party. Accordingly, such third party will be entitled to the right of recourse against the person who has incurred the liability.

36 Getting the fine down

What is the optimal way in which to get the fine down?

Please refer to question 31.

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