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ABSTRACT

Transposition of Directive (EU) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers (simply called "ECN+ Directive") will have the most significant impact on uniform application of the EU antitrust rules since Regulation (EC) No. 1/2003 was adopted. It shall be implemented in the Member States by 4 February 2021. Comparative analysis of the modalities of national implementation of the Directive may give many answers how to ensure that a different outcome in different Member States is not reached. Does the ECN+ Directive require only minimal harmonisation and thus give broad discretion to national competition authorities (the NCAs) how to apply harmonised rules concerning the priorities of investigation, inspections, interim measures, joint liability, imposition and payment of joint fines, etc.? Lithuanian legislation which was amended for the purposes of transposition of the ECN+ Directive already in June 2020 contains a comprehensive set of rules aimed at ensuring that Lithuanian national competition authority has the guarantees of independence, resources, enforcement and fining powers. To some extent, the amendments give broader discretion to the national authority than is required by the Directive.

La transposition de la directive (UE) 2019/1 du 11 décembre 2018 visant à habiliter les autorités de concurrence des États membres à appliquer plus efficacement la législation (simplement appelée "directive ECN+") aura l'impact le plus significatif sur l'application uniforme des règles antitrust de l'UE depuis l'adoption du règlement (CE) n° 1/2003. Il doit être mis en œuvre dans les États membres d'ici le 4 février 2021. L'analyse comparative des modalités de mise en œuvre de la directive au niveau national peut apporter de nombreuses réponses quant à la manière de garantir qu'un résultat différent dans les différents États membres ne soit pas atteint. La directive ECN+ ne nécessite-t-elle qu'une harmonisation minimale et laisse-t-elle donc une grande latitude aux autorités nationales de la concurrence (les ANC) quant à la manière d'appliquer les règles harmonisées concernant les priorités d'enquête, les inspections, les mesures provisoires, la responsabilité conjointe, l'imposition et le paiement d'amendes communes, etc. La législation lituanienne, qui a été modifiée aux fins de la transposition de la directive ECN+ dès juin 2020, contient un ensemble complet de règles visant à garantir que l'autorité nationale lituanienne de la concurrence dispose des garanties d'indépendance, de ressources, de pouvoirs d'exécution et d'amendes. Dans une certaine mesure, les modifications donnent à l'autorité nationale un pouvoir discrétionnaire plus large que celui requis par la directive.

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I. The tasks of the ECN+ Directive

1. Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (simply called "ECN+ Directive") will be the most important instrument of the EU and national competition law since Regulation (EC) No. 1/2003. It shall be implemented in the Member States by bringing into force the necessary laws, regulations and administrative provisions by 4 February 2021. The Lithuanian Parliament (Seimas) adopted implementing amendments of Law on Competition of the Republic of Lithuania on 26 June 2020.

2. Already from the date of the EU enlargement in 2004, Regulation (EC) No. 1/2003 decentralised the enforcement of EC competition law by establishing the European Competition Network (ECN) and introducing a procedural framework for the uniform application of Articles 101 and 102 TFEU (former Articles 81 and 82). A system of parallel competences between the Commission, on the one hand, and the national competition authorities (NCAs) and national courts, on the other, was created. In this framework, the same main substantive rules of the EU and national competition law are applied simultaneously for the purposes of enforcement of Articles 101 and 102 in accordance with the case law of the Court of Justice. In addition, cooperation and notification system between the Commission and the NCAs was established. However, the NCAs operated under different national procedural rules, a variety of sanctions and remedies were applied. Many areas were left for voluntary harmonisation.[1] As it is stated in the Preamble of the ECN+ Directive, the application by the NCAs of different national competition law may affect trade between Member States

1 *See* K. Cseres, Comparing Laws in the Enforcement of EU and National Competition Laws, *European Journal of Legal Studies* 3, No. 1 (2010): 17, 36–38; J. Malinauskaite, *Harmonisation of EU Competition Law Enforcement* (Springer, 2020), p. 137, available at https://www.researchgate.net/publication/338315440_Harmonisation_of_EU_Competition_Law_Enforcement.

and could lead to a different outcome. It was necessary therefore to go far beyond the framework established by Regulation (EC) No. 1/2003 and provide the NCAs with broad enforcement powers.

3. According to the Impact assessment made by the Commission, the general objective of the Directive is to boost effective enforcement of the EU competition rules by the NCAs and the functioning of markets in Europe. This requires the achievement of the following specific objectives:

– Ensuring all NCAs have effective investigation and decision-making tools;

– Ensuring that all NCAs are able to impose effective deterrent fines;

– Ensuring that all NCAs have in place a well-designed leniency programme that facilitates applying for leniency in multiple jurisdictions; and

– Ensuring that NCAs have sufficient resources and can enforce the EU competition rules independently.[2]

4. Before the amendments, the Lithuanian Law on Competition was already in accordance with main provisions of the Directive related to the powers of the NCAs. The Competition Council of the Republic of Lithuania (Lietuvos Respublikos konkurencijos taryba) was empowered to inspect business and other premises, to take or obtain information and documents, to seal the premises, to be accompanied by police during inspections. The Competition Council had the power to order interim measures, to accept commitments, to impose fines including periodic payments, to apply leniency rules, etc. In addition, the Competition Council already had broad powers to set its enforcement priorities and to reject complaints on the grounds that it does not consider such complaints to be an enforcement priority.

II. Minimal harmonisation?

5. It seems that current amendments of Lithuanian Law on Competition are inspired by the idea of minimal harmonisation, which establishes minimum standards that should be introduced into national legislation and thus, in the opinion of drafters of amendments, gives the Member States broad discretion in transposing the ECN+ Directive.[3] In the Proposal for the Directive the Commission explained that for most aspects the proposal will set minimum standards to empower NCAs to effectively enforce EU competition rules. Member States will still be able to set higher standards and adapt their rules to national specificities and will remain free to design, organise and fund their national competition authorities as they see fit, provided their effectiveness is ensured.[4]

6. Although it is true with regard to the rules of organisation of the NCAs and to a large extent to rules of procedure, does it mean, however, that the Directive requires only minimal harmonisation of substantive rules such as interim measures, commitments, liability and fines for antitrust infringements, etc.? In the case of minimal harmonisation, a directive sets minimum standards, often in recognition of the fact that the legal systems in some EU countries have already set higher standards. Usually, this type of harmonisation is applied in the areas of environmental and consumer protection where technical standards are used and the EU Member States have the right to set higher standards than those set in the directive. In case of maximum harmonisation, the Member States are bound by strict transposition of the rules of the directive into national legislation and may not introduce rules that are stricter than those set in the directive.

7. An essential distinction shall be made between the provisions of the Directive containing minimal requirements necessary for ensuring effective functioning of the NCAs, on the one hand, and its substantive rules governing the finding and termination of infringement, imposition of interim measures, acceptance of commitments, calculation of fines, maximum amount of the fine, periodic penalty payments, leniency programmes for secret cartels, mutual assistance of the NCAs, limitation periods, access to file by parties and use of information, admissibility of information, on the other.

8. The Directive establishes minimal requirements necessary for ensuring independence of national administrative competition authorities (Article 4), sufficient number of qualified staff and sufficient financial, technical and technological resources and abilities, at a minimum, to conduct investigations with a view to applying Articles 101 and 102 TFEU, to adopt for that purpose necessary decisions applying those provisions; and to cooperate closely in the European Competition Network (Article 5). It also provides that the Member States shall ensure that the NCAs or their officials are, at a minimum, empowered to conduct some necessary actions: to enter any premises of undertakings or other premises, to examine the books and other records (Articles 6 and 7), to summon any representative of an undertaking or association of undertakings, any representative of other legal persons, and any natural person (Article 9). In addition, Article 13(2) stipulates that Member States shall ensure at a minimum that NCAs

2 SWD(2017) 114 final, PART 1/2, p. 34.

3 The same idea of minimal harmonisation rules of this Directive was expressed in the literature. *See* K. J. Cseres, The Implementation of the ECN+ Directive in Hungary and Lessons Beyond, *Yearbook of Antitrust and Regulatory Studies* 12, No. 20 (2019): 55–90, available at: https://doi.org/10.7172/1689-9024.YARS.2019.12.20.2, at p. 57: "*The so-called ECN+ Directive introduces minimum harmonisation rules allowing competition authorities to have common investigative, decision-making (notably fining decisions) and enforcement powers.*" *See also*. J. Malinauskaite, op. cit., p. 64.

4 COM(2017) 142 final, 2017/0063 (COD), p. 8, available at https://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf.

may either impose by decision in their own enforcement proceedings or request in non-criminal judicial proceedings the imposition of effective, proportionate and dissuasive fines on undertakings and associations of undertakings.

9. In comparison to this group of minimal rules, the second group of rules set out by the ECN+ Directive is aimed at a uniform application of Articles 101 and 102 TFEU.

10. The ECN+ Directive is based on Articles 103 and 114 TFEU. Article 103 provides for adoption of regulations and directives giving effect to the principles set out in Articles 101 and 102. Article 114 allows adopting the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. With regard to the functioning of the internal market, the European Union has exclusive competence in so far as the establishment of competition rules necessary for the functioning of the internal market is concerned. Where harmonisation is intended to contribute to the completion of the internal market, the European Union is free to choose between minimum and full harmonisation. Only Article 114 TFEU provides for the possibility of full harmonisation.[5] As the Court of Justice stated in *González Sánchez v. Medicina Asturiana*, this legal basis provides no possibility for the Member States to maintain or establish provisions departing from Community harmonising measures.[6] As set out in Article 1(1) of the ECN+ Directive it is aimed at ensuring that national competition authorities have the necessary guarantees of independence, resources, and enforcement and fining powers to be able to effectively apply Articles 101 and 102 TFEU so that competition in the internal market is not distorted and that consumers and undertakings are not put at a disadvantage by national laws and measures. Therefore, the national rules of substantive law aimed at uniform application of Articles 101 and 102 TFEU shall not depart from the rules established by the Directive. Under Article 3 of Regulation (EC) No. 1/2003 where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. The same principle shall be applied with regard to Article 82 of the Treaty. In conclusion, transposition of substantive rules of the ECN+ Directive shall ensure uniform application of Articles 101 and 102 TFEU.

III. Strengthening of independence, accountability and resources of the Competition Council

11. The amendments of the Law on Competition will also ensure more guarantees of independence for the Competition Council as national competition enforcement authority. According to amended Article 17(1) of the Law, when enforcing antitrust rules, the Council shall act independently, the Council works in a fully impartial manner, without taking instructions from politicians or other entities, including state institutions and public or private entities.

12. The amended Law requires the Competition Council to have sufficient human, financial, technical and technological resources as well as qualified staff able to carry out legal and economic assessment when investigating the infringements (new Article 17(4)).

13. Furthermore, staff responsible for the adoption of the decisions in the Competition Council, namely, the chairman and council members, as well as the administrative staff, after leaving state civil service will refrain from representing another party for seven years in matters relating to infringements or merger control proceedings in which they have participated during their work in the Competition Council.

14. The Law also includes new provisions relating to the collaboration with other EU authorities when enforcing the payment of fines against infringing companies that do not have property in Lithuania or, for example, when the need arises to hand over the documents when it is not possible to do so in Lithuania. The Competition Council will also be able to provide the same type of assistance to other EU competition authorities should the need arise.

IV. Enforcement priority

15. The ECN Recommendation on the Power to Set Priorities was adopted by ECN competition authorities already in 2013. It was recommended that the NCAs should have the ability to set priorities in the exercise of their tasks, to determine prioritisation criteria and the ability to open and close *ex officio* cases insofar as cases are deemed to be a priority by the authority concerned. They should also, to the greatest extent possible, have the ability to decide not to initiate cases and reject complaints if they do not consider them to be a priority.

5 *See* M. B. M. Loos, Full Harmonisation as a Regulatory Concept and its Consequences for the National Legal Orders: The Example of the Consumer Rights Directive (July 13, 2010), *Centre for the Study of European Contract Law Working Paper Series* No. 2010/03, p. 4, available at SSRN: https://ssrn.com/abstract=1639436.

6 Judgement of the Court (Fifth Chamber) of 25 April 2002, *María Victoria González Sánchez v. Medicina Asturiana SA*, Case C-183/00, ECLI:EU:C:2002:255, para. 23.

16. Under Article 4(5) of the ECN+ Directive national administrative competition authorities shall have the power to set their priorities for carrying out the tasks for the application of Articles 101 and 102 TFEU as referred to in Article 5(2) of this Directive.[7] To the extent that national administrative competition authorities are obliged to consider formal complaints, those authorities shall have the power to reject such complaints on the grounds that they do not consider such complaints to be an enforcement priority.

17. Lithuania was one of the Member States introducing a "priority of investigation" rule even before the ECN+ Directive was adopted. The Competition Council was enabled to set its priorities and to reject complaints without the need for a detailed investigation on substance. In some other Member States (France, Germany and Italy) investigation procedure was based on the legality principle which triggers a legal duty to consider all complaints.

18. Belgian legislation empowers the Belgian Competition Authority to close a complaint, request or injunction by reasoned decision if the case does not justify an investigation in view of the priority policy or the available means (Code de droit économique, Article IV.44 (§ 1, 3)). The Committee of Directors is in charge of the drafting of an annual note in which the priorities of the Belgian Competition Authority in terms of management are established, after consulting the Minister (Article IV.25 (3°) thereof).

19. New French legislation implementing the Directive will introduce the principle of expediency which the Competition Authority (l'Autorité de la concurrence) does not have yet. The latter envisaged by the Directive being much broader than the power Competition Authority currently holds to declare a referral inadmissible or reject it. This is a useful measure to enable it to conduct a more effective competition policy by targeting its investigative choices in order to optimise its limited resources.[8]

20. From a comparative point of view, it is also interesting to note that discretion of national competition authorities in opening and closing investigation may be allowed not only in the EU Member States. For example, the Swiss Federal Administrative Court (le Tribunal administratif fédéral) in Judgement of 30 October 2019 in case *Dargaud (Suisse) SA*, B-3938/2013. point 1.3, held that "*as soon as the competition authorities decide alone on the opportunity of opening an investigation, they also decide, if necessary, alone on the opportunity of classifying them. Thus, even if the appeal is admitted, the Federal Administrative Court cannot force the investigation to be closed.*"[9]

21. The Lithuanian Law on Competition already before the ECN+ Directive gave the Competition Council the power to refuse to open an investigation if investigation of the factual circumstances specified in the application does not correspond to the Competition Council's priorities (Article 24, paragraph 4(8)). The Competition Council on 2 July 2012 adopted The Rules on the Priority of the Activities of the Competition Council While Implementing the Supervision of the Law on Competition, in which it established three main principles that it must follow when deciding whether it may refuse to examine the complaint submitted by an undertaking: (i) whether the investigation will have an "impact on effective competition and consumer welfare," (ii) the "strategic significance" of the investigation, and (iii) the "rational use of resources" by the Competition Council. The Rules list eleven situations described as "usually" falling within the operational priorities of the Competition Council. However, there is no clarity whether a complaint really targets an infringement which directly restricts the ability of economic operators to operate in the relevant market by closing or sharing it; that the investigation required by the undertaking will achieve its aims; that investigation would be adequate in time it would require, as well as to the necessary and available human and financial resources; whether the amount of resources of the Competition Council required to conduct the investigation will not hamper other investigations and tasks of the Competition Council's strategic plans, etc.

22. In practice, application of strategic significance principle gave rise to contradictory practice and case law—for instance, the refusal to give access to universal postal service in the *Greitasis kurjeris* case was not considered sufficiently strategically significant to open an investigation. The same ground for refusal was given in *A. R. valymo įrenginiai case:* refusal to give access to centralised municipal wastewater treatment network was devoid of strategic significance.

23. The Competition Council must complete the investigation no later than five months after its opening but may extend the term of the investigation for another three months. The number of extensions is not limited. Five months would seem to be enough to prioritise the investigation. However, for example, the Competition Council in 2014 closed as non-corresponding to its priority the investigation of alleged abuse of dominant position (Article 102 TFEU) opened in 2009 in the *Viasat World Limited and Viasat AS* case. In 2016 the investigation of alleged cartel (Article 101 TFEU) and non-notified concentration was closed in the *Akmenės cementas and HeidelbergCement Northern Europe AB* case. More than 25 months elapsed from opening to closing of the investigation.

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7 Article 5(2) stipulates that NCAs shall be able, at a minimum, to conduct investigations with a view to applying Articles 101 and 102 TFEU, to adopt decisions applying those provisions and to cooperate closely in the European Competition Network with a view to ensuring the effective and uniform application of Articles 101 and 102 TFEU. To the extent provided for under national law, national competition authorities shall also be able to advise public institutions and bodies, where appropriate, on legislative, regulatory and administrative measures which may have an impact on competition in the internal market as well as promote public awareness of Articles 101 and 102 TFEU.

8 *See* Sénat, Projet de loi portant diverses dispositions d'adaptation au droit de l'Union européenne en matière économique et financière, available at http://www.senat.fr/rap/a19-548/a19-54810.html.

9 The Federal Administrative Court concluded: "*1.3* (…) *Partant, dès lors que les autorités de la concurrence décident seules de l'opportunité d'ouvrir une enquête, elles décident, le cas échéant, également seules de l'opportunité de classer celles-ci. Ainsi, même en cas d'admission du recours, le Tribunal administratif fédéral ne peut imposer de classer l'enquête*"(https://jurispub.admin.ch/publiws/pub/cache.jsf?displayName=B-3938/2013&decisionDate=2019-10-30).

24. Article 4(5) of the ECN+ Directive does not allow to reject complaints of alleged infringements of Articles 101 and 102 TFEU. On the contrary, the priorities shall be set for carrying out the tasks for the application of Articles 101 and 102 TFEU. Under the Preamble of the Directive (para. 23) the NCAs should be able to prioritise their proceedings for the enforcement of Articles 101 and 102 TFEU to make effective use of their resources, and to allow them to focus on preventing and bringing anti-competitive behaviour that distorts competition in the internal market to an end.

25. It seems that investigation priority rules of Lithuanian legislation allow almost unlimited discretion to the Competition Council without requiring it to prioritise its proceedings for the enforcement of Articles 101 and 102 TFEU. Article 4(5) of the ECN+ Directive shall be interpreted in the sense that in situations where the resources of an NCA do not allow to investigate at the same time infringements of Articles 101 and 102 TFEU and other infringements, priority shall be given to preventing and bringing anti-competitive behaviour that distorts competition in the internal market to an end. Nevertheless, serious question of domestic law remains unanswered: does such "priority discretion" correspond to guarantees established in Article 23 of the Law on Competition, i.e., to the right of undertakings whose interests have been violated by competition law infringements as well as the right of associations or unions representing the interests of undertakings and consumers to request an investigation? Article 24(4) provides already eight grounds for refusal to open an investigation, including the cases where no substantive damage could be found, etc. It seems that the question of "priority discretion" may be asked not only on domestic law level. As it is stated in the Preamble of the Directive (para. 14), the exercise of the powers, conferred by this Directive on NCAs, including the investigative powers, should be subject to appropriate safeguards which at least comply with the general principles of Union law and the Charter of Fundamental Rights of the European Union, in accordance with the case law of the Court of Justice of the European Union. The amended Law on Competition transposed the safeguards of Article 3 of the Directive aimed at ensuring that the exercise of the powers of the NCAs is subject to appropriate safeguards in respect of the undertakings' rights of defence, including the right to be heard and the right to an effective remedy before a tribunal.

V. Inspections

26. The amended Law on Competition gives more power of inspection to the Competition Council. First of all, the Law (Article 25, paragraph 1(1)) gives it *expressis verbis* power to seal business premises, land and means of transport for the period and to the extent necessary for the inspection, as it is required in Article 6 (Power to inspect business premises) of the Directive. At the same time, the Law on Competition extends this power to all types of investigation and does not limit this power to the infringements of Article 101 or Article 102 TFEU provided in the Directive (or the same antitrust infringements on national level). As far as inspection of other (non-business) premises, land, means of transport, including the homes of directors, managers, and other members of staff, is concerned, this inspection is allowed by law in cases of cartel and abuse of dominance prohibited under the Law on Competition and Articles 101 and 102 TFEU. In all types of investigation, the officials of the Competition Council are empowered to seal business premises, books of employees and records. However, Article 7(2) of the Directive requires that inspections of other (non-business and private) premises, land and means of transport shall not be carried out without the prior authorisation of a national judicial authority. Under the amended Law on Competition prior judicial authorisation is required only for entering and inspecting business and other premises (including for sealing of business premises) and receiving information from electronic communications networks, whereas for all other acts of inspection especially for taking and obtaining copies or extracts from books and records found in non-business premises, land and means of transport is not. For instance, it empowers Lithuanian NCA to seal documents and staff records without prior judicial authorisation from all types of information media on which they are stored for the period and to the extent necessary for the inspection (Article 25, paragraph 1(4)). Prior judicial authorisation for sealing of documents and records found in non-commercial or private premises is not required.

VI. Interim measures

27. According to Article 11(1) of the Directive the NCAs shall be empowered to act on their own initiative to order by decision the imposition of interim measures on undertakings and associations of undertakings; such a decision shall be proportionate. The Lithuanian Competition Council was vested with this power to impose interim measures on its own initiative according to legislation which was in force before the amendments. Now only safeguard of proportionality and some other amendments were added.

28. Under Article 11(2) of the Directive the Member States shall ensure that the legality, including the proportionality, of the interim measures can be reviewed in expedited appeal procedures. Some amendments to this aim were added. The Competition Council will no

longer be obliged to apply to the court for authorisation of interim measures. Amended Article 26(5) of the Law on Competition also provides that an appeal against interim measures may be lodged within 10 days (instead of the former term of 1 month) and decided within 45 days by the Vilnius Regional Administrative Court. Decision of the Vilnius Regional Administrative Court may be appealed to the Supreme Administrative Court of Lithuania within new short terms of 7 days and 45 days for decision on appeal. Before imposing interim measures, the Competition Council will only be required to hear the undertakings or entities of public administration on which it is intended to impose interim measures.

29. However, short terms of appeal—namely, 10 and 7 days—may limit, especially if an appeal would need to present complex economic data necessitating interim measures, the right to access to court guaranteed by Article 6 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights. Article 3(2) of the Directive inter alia provides that Member States shall ensure that the exercise of the powers is subject to appropriate safeguards including the right to be heard and the right to an effective remedy before a tribunal.

VII. Joint liability: Parental or group liability?

30. Until actual amendments were made, Lithuanian legislation did not contain norms establishing *expressis verbis* joint liability for infringements of competition law. Notwithstanding this legislative lacuna, the Competition Council from 2016 up to now imposed joint fines on participants of cartels in eleven cases. By imposing joint fines on the participants of cartels the Competition Council followed the case law of the European Court of Justice based on the concept of a single economic unit. In general, fining policies already complied with what is laid down in the Preamble of the Directive: "*(46) To ensure the effective and uniform application of Articles 101 and 102 TFEU, the notion of 'undertaking', as contained in Articles 101 and 102 TFEU, which should be applied in accordance with the case law of the Court of Justice of the European Union, designates an economic unit, even if it consists of several legal or natural persons. Accordingly, NCAs should be able to apply the notion of undertaking to find a parent company liable, and impose fines on it, for the conduct of one of its subsidiaries, where the parent company and its subsidiary form a single economic unit.*"[10]

31. New dispositions of the Law on Competition go beyond well-established rules of joint liability of parent company and its subsidiaries for infringements of Articles 101 and 102 TFEU. Joint liability is governed by the new disposition of Article 35(6) of the Law on Competition [translation by the author]: "*6. In cases where two or more natural or legal persons performing economic activities act as one economic entity, the parent and subsidiary undertaking shall be jointly and severally liable for violations of this Law, as well as other persons constituting economic entity performing economic activities. The conditions of such liability shall be determined in accordance with the requirements laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union. Payment of the fine may be demanded both from all the persons specified in the decision of the Competition Council jointly and from any of them separately* (. . .)"

32. This new disposition contains two elements broadening the traditional scope of joint liability in competition law. Firstly, the amended Law on Competition provides for joint liability "*for violations of this Law*." An example of extension of joint liability beyond cases of cartels and abuse of dominance may be found in the decision of the Competition Council of 25 September 2019 (obstruction of investigation). Two companies—parent company UAB "Mano Būsto priežiūra" holding 100% of the capital of its subsidiary UAB Būsto aplinka—were held jointly and severally liable for the acts of obstruction of investigation committed by the subsidiary, i.e., the entry into business premises, hindering on-site inspection, etc., by officials of the Competition Council. The total amount of fine was €1,074,416, although the case of cartel giving rise to this investigation was classified. The Council argued in the decision that for the purposes of joint liability the notion of "single economic entity" shall be applicable to both procedural and substantive infringements of competition law.[11] An analogous decision was taken on 22 May 2019 in France by the French Competition Authority (obstructing the conduct of inspections). The Akka Technologies Group was fined a total of €900,000 for breaches of seals and alteration of electronic messaging functioning committed by the subsidiaries of parent company Akka Technologies. The Court of Appeal of Paris in its judgement of 26 May 2020 in *Akka Group* confirmed that the notion of "undertaking" shall be applicable to single economic entity in the same way to both infringements of substantive rules and to the obstruction of inspection which investigates such infringements.[12] Although it is a matter of national law to apply for the purposes of joint liability the notion of "undertaking" to "other infringements," such an extended application cannot be linked with the implementation of dispositions of the ECN+ Directive as it is required by its Preamble (para. 46) and Article 13 concerning infringements of the Articles 101 and 102 TFEU. In general legal terms, the

10 Article 13(5) of the Directive stipulates: "*Member States shall ensure that for the purpose of imposing fines on parent companies and legal and economic successors of undertakings, the notion of undertaking applies.*"

11 https://kt.gov.lt/uploads/docs/docs/4063_44a1affa13e0d04a11c2a44ccdfa437a.pdf.

12 The Court of Appeal of Paris held: "*73* (...) *Il y a donc lieu, pour des raisons de cohérence, d'interpréter cette notion de la même manière, qu'il s'agisse de sanctionner une infraction aux règles de fond ou de réprimer une obstruction à une enquête destinée à rechercher une telle infraction, et d'appliquer en conséquence, les mêmes règles d'imputabilité à ces deux types d'infraction*"CA Paris, 26 May 2020, No. 19/118807.

concept "undertaking" may refer to different conceptions applicable with regard to antitrust infringements, on the one hand, and merger control, on the other. In addition, the notions of "decisive influence" and "control" used to define the scope of undertakings differ significantly in antitrust and merger cases. In cartel cases, the presumption of control for the purposes of imposing a fine requires full or almost full legal ownership of subsidiary capital, whereas for the purposes of merger control the mere 50% share ownership or even less may suffice.

33. The second element that broadens the application of the well-established concept of joint liability consists of establishing the possibility of group liability. Under the terms of the new disposition of Article 35(6), group liability means that not only "*the parent and subsidiary undertaking shall be jointly and severally liable for violations of this Law*," but also that "*other persons constituting the economic entity performing economic activities*" shall be held jointly and severally liable for infringements of competition law. The Explanatory Note of the Draft Amended Law on Competition explains this broad rule in the following way [translation by the author]: "*There is no need to establish in the law what are the conditions for the application of joint and several liability and which persons form an economic entity—one economic unit and can be held jointly and severally liable for each other's actions—this issue should be decided on a case-by-case basis. EU law also does not define the conditions for joint and several liability and which persons may form an economic entity as a single economic entity within the meaning of competition law and may be jointly and severally liable, a matter which is also left to the ECJ to assess*."[13]

34. With regard to the category of "*other persons constituting economic entity*," the Competition Council explained in the Economic Committee of Lithuanian Parliament, that joint liability also applies "*in cases where the structure of a single economic unit is such that no legal person controls the entity and there are only horizontal links (sister companies) between the enterprises that make up the unit*."

35. This is a concept of group liability for infringements of competition law. It goes beyond the well-established notion of holding a parent company liable for its subsidiaries for infringement of Article 101 TFEU based on the decisive influence of parental company within a single economic unit controlled by that company. On the contrary, the idea of group liability for infringements of antitrust law is exclusively based on the existence of a single economic unit without decisive influence exercised by the parent company. As suggested by Prof. Christian Kersting, "*close examination of the ECJ's reasoning regarding group liability reveals that group liability under competition law, i.e., the joint liability of the parent company and its subsidiaries, derives from the unity of action of the undertaking ('joint action triggers joint liability'). In this respect, the existence of a decisive influence is not relevant; the criterion of decisive influence merely serves to determine whether there is an economic unit. If there is an economic unit, this leads to joint liability amongst all the constituent entities of this economic unit. As a result, an innocent subsidiary is also liable for the parent company or sister companies if they belong to the same economic unit*."[14]

36. It is true that neither well-established ECJ case law of joint liability for antitrust infringements[15] nor Article 13(5) of the Directive does *per se* expressly exclude the possibility of joint liability of sister companies or other companies outside the liability of the parent company for infringements committed by its subsidiary. However, it would be difficult to find convincing evidence that the Court of Justice had accepted the concept of group liability based exclusively on the existence of the same economic unit.[16] In fact, there is only pending request for a preliminary ruling in Case C-882/19, *Sumal*, asking in substance: does the doctrine of the single economic unit developed by the Court of Justice provide grounds for extending liability from the parent company to the subsidiary, or does the doctrine apply solely in order to extend liability from subsidiaries to the parent company? It also seems that there is no widespread recognition of joint liability of "sister companies" by the Member States. In Germany, as Prof. Christian Kersting suggests, "*section 81 para. 3a GWB, which provides for parental liability regarding fines, is clearly marked by the effort to exempt the innocent sister company or the innocent subsidiary from liability for the parent company by limiting the attribution of liability to an attribution from the bottom (i.e. the subsidiary) upwards (i.e. to the parent(s))*."[17] In France, for instance, the Court of Appeal of Paris in its judgement of 26 May 2020 in *Akka Group* held jointly liable the parent company and its controlled subsidiaries for their participation in the obstruction of inspection in the premises of one of the subsidiaries of this group, the company Akka I&S. The judgement was based "*on the basis of a rebuttable presumption of decisive influence on their behaviour, when the parent company controls 100% or almost all of their capital*." On the contrary, joint liability of "sister companies" Akka Ingénierie Produit et Akka Informatique et Systèmes for one of the acts of this obstruction was excluded because they did not participate in this single act and do not have any share in the capital of the company Akka I&S.[18]

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13 https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/22535ca0b2a411e982dae1db4290b1a9?jfwid=nj21zou91. *See* Explanatory Note (*Aiškinamasis raštas*.pdf, p. 8).

14 C. Kersting, Liability of Sister Companies and Subsidiaries in European Competition Law, available at https://ssrn.com/abstract=3355816. *See also* https://antitrustdigest.net/christian-kersting-liability-of-sister-companies-and-subsidiaries-in-european-competition-law-2020-european-competition-law-review-41-125.

15 The CJEU, for example, held in its judgement of 27 April 2017 in case C- 516/15 P, *AkzoNobel*, para. 52 that "*according to the settled case-law of the Court, the unlawful conduct of a subsidiary may be attributed to the parent company in particular where, although having a separate legal personality, that subsidiary does not determine independently its own conduct on the market, but essentially carries out the instructions given to it by the parent company, having regard especially to the economic, organisational and legal links between those two legal entities*."

16 Case C-882/19: Request for a preliminary ruling from the Audiencia Provincial de Barcelona (Spain) lodged on 3 December 2019 – *Sumal, S. L. v. Mercedes Benz Trucks España, S. L.*

17 C. Kersting, *op. cit.*, pp. 5–6.

18 "*82. En revanche, aucun élément de la procédure ne permet d'imputer ce comportement aux sociétés Akka ingénierie produit et Akka informatique et systèmes, qui ne détiennent aucune participation dans le capital de la société Akka I&S, à la différence de la société Akka technologies, sa société mère* (...)", *op. cit.*

37. The broad concept of group liability raises more difficult questions than it gives answers. First, does this concept mean that joint liability in antitrust law is a strict liability, i.e., "liability of innocent company" based only on the fact of legal ownership of this company? The Preamble of the Directive requires that in accordance with the Charter of Fundamental Rights of the European Union, in proceedings before national administrative competition authorities, fines should be imposed where the infringement has been committed intentionally or negligently. When the finding of an infringement is based on the criterion of objective liability, it shall be compatible with the case law of the Court of Justice of the European Union (see para. 42 of the Preamble). It may also be assumed that "sister companies" determine their conduct in the market independently from each other, whereas a rebuttable presumption that a parent company determines conduct of a subsidiary controlled by 100% or almost 100% of its capital shall be applied.

38. Christian Kersting in his interesting study on the liability of sister companies and subsidiaries comes to the conclusion that "[t]*he unity of liability amongst all legal entities constituting the undertaking as an economic unit follows from the unity of action ('joint action triggers joint liability')*."[19] Indeed, joint liability of all members of an economic unit for their joint action infringing competition law would not create serious doubts.

39. In general terms, strict liability does not correspond to requirements flowing from certain general principles of European Union law such as the principle of the presumption of innocence, the principle that penalties should be applied solely to the offender and the principle of legal certainty.[20] Moreover, the fine imposed jointly on a group of companies within the scope of joint liability and counted on the total worldwide turnover of a group may, according to the jurisprudence of the European Court of Human Rights, be qualified as a "quasi-criminal" sanction because of severe amounts of such fine. In such a situation it is difficult to accept that the strict concept of group liability would correspond to the requirements of the ECHR and the EU Charter of Fundamental Rights under Article 3 (Safeguards) of the Directive.[21] In addition, under Article 26(1) of the Directive the Member States shall ensure that at the request of the applicant authority, the requested authority shall enforce decisions imposing fines or periodic penalty payments adopted by the applicant authority. Article 27(1) requires Member States to ensure that the requests are executed by the requested authority in accordance with the national law of the Member State of the requested authority. Will the requested authority execute the payment of fine imposed on "sister company" by the applicant authority if the national law of the Member State of the requested authority does not allow joint liability of "sister company?"

19 C. Kersting, *op. cit.*, p. 24.

20 *See* Case C-501/11 P, *Schindler Holding and Others*, para. 108.

21 *See* Case T-433/16, *Pometon SpA*, para. 55.

40. Second, the Directive requires that the application by the NCAs of national competition law to agreements, decisions by associations of undertakings or concerted practices, which may affect trade between Member States, should not lead to a different outcome to the one reached by the NCAs under Union law pursuant to Article 3(2) of Regulation (EC) No. 1/2003. Therefore, in such cases of parallel application of national competition law and Union law, it is essential that the NCAs have the same guarantees of independence, resources, and enforcement and fining powers necessary to ensure that a different outcome is not reached (para. 3 of the Preamble). The conditions for application of joint liability in national law shall correspond to conditions defined by the Court of Justice in cartel cases. Criteria of control exercised by a parent company over its subsidiary are the main condition of joint liability. The NCAs shall apply the same substantive EU rules in different procedural frameworks.

41. Joint liability for infringements of Article 101 TFEU as applied by the Court of Justice is an effective and powerful remedy which allows sanctioning of antitrust infringements committed on a large scale in the EU internal market. This exceptional legal tool must be applied only on the basis of well-established and uniform substantive rules of law.

VIII. Imposition and payment of joint fines

42. Imposition of joint fines is governed by amended Article 36(2) of the Law on Competition stipulating that where an agreement restricting competition or abuse of dominant position committed by a "unit of undertakings" relates to the activities of undertakings belonging to such a unit, the Competition Council shall have the right to impose on this unit a fine up to 10% of the amount obtained by summing the total annual global income of each undertaking belonging to this unit for the previous financial year. By the way, for the purposes of counting an amount of fine for antitrust infringements Lithuanian legislation constantly uses the term "income" (*pajamos* in Lithuanian) instead of "turnover" (*apyvarta*). The notion of the term "unit of undertakings" is not specified. Apparently, non-described "unit of undertakings" will also cover the associations of undertakings and their members. The financial liability of each undertaking belonging to the unit shall not exceed 10% of the gross annual worldwide income of the entity belonging to the entity in the previous financial year. As far as the associations are concerned, when a fine is imposed not only on the association but also on its members, the turnover of the members on which a fine is imposed should not be taken into account when calculating the fine of the association (see Preamble of the Directive, para. 48).

43. Under Article 14 of the Directive, where a fine for an infringement of Article 101 or 102 TFEU is imposed on an association of undertakings taking account of

the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine. NCAs may require the payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies of that association. Where necessary to ensure full payment of the fine, after the NCAs have required payment from such undertakings, they may also require the payment of the outstanding amount of the fine by any of the members of the association which were active on the market on which the infringement occurred.

44. In the new Article 39[1] of the Law on Competition this duty of contribution of members of an association to pay fines became a general rule applicable to all kinds of "units of undertakings" and, first of all, to parent companies and their subsidiaries.[22] The Competition Council shall have the right to request the fine imposed on the unit of undertakings to be paid by any undertaking belonging to this unit whose representatives were members of the decision-making bodies of the unit of undertakings. Such payment shall not be required from undertakings which prove that they did not comply with the decision of the group of undertakings violating the requirements of this Law and either were not aware of its existence or actively dissociated themselves from it until the date of the adoption of the Competition Council's decision to initiate an investigation. Thus, this rule of exoneration of payment of the fine provided for the members of an association in Article 14(4) of the Directive will apply to all categories of the new term "unit of undertakings."

IX. Conclusion

45. Lithuanian legislation which was amended for the purposes of the transposition of the ECN+ Directive into national law contains a comprehensive set of rules aimed at ensuring that Lithuanian national competition authority has the guarantees of independence, resources, enforcement and fining powers. To some extent, the amendments give broader discretion to the national authority than is required by the Directive. However, it would be premature to make definitive conclusions concerning new rules of the amended Law on Competition. It is for the case law of Lithuanian courts to give a judicial interpretation of new legislative constructs. The Court of Justice in the nearest future will give its interpretation of the ECN+ Directive, as the court did on many occasions with regard to Regulation (EC) No. 1/2003. ■

22 "*Article 39[1] Peculiarities of payment of fines imposed on units of undertakings*
1. If a unit of undertakings on which the Competition Council has imposed a fine in accordance with Paragraph 2 of Article 36 of this Law is unable to pay the imposed fine, the unit of undertakings must demand contributions from the undertakings belonging to the unit to cover the amount of the fine. Contributions shall be paid by the undertakings belonging to the unit of undertakings within the term set by the Competition Council.
2. If the undertakings belonging to a unit of undertakings fail to pay contributions to cover the amount of the fine in accordance with paragraph 1 of this Article within the term set by the Competition Council, the Competition Council shall have the right to demand the fine imposed on the unit of undertakings to be paid by any undertaking belonging to this unit whose representatives were members of the decision-making bodies of the unit of undertakings."

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