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by Lithuania****5 December 2017**

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Abstract

There are several legal presumptions and safe harbours in competition law in Lithuania. Most of the legal presumptions/safe harbours are substantive. They can be both absolute and rebuttable. Some evidentiary legal presumptions are also used. As regards the prohibition of anti-competitive agreements, the Law on Competition of the Republic of Lithuania enshrines an absolute legal presumption of the illegality of the agreements stipulated in Article 5(1) points 1-4 of the Law on Competition (this provision covers hard-core restrictions). The aforementioned legal presumption was applied by the Competition Council and the courts in a judicial review procedure in a number of cases. Further, an important interpretation of both substantial and evidentiary legal presumptions with regard to a concerted practice was provided in the E-Turas case, which was scrutinized not only by the national competition authority and the courts, but also by the ECJ, which issued a preliminary ruling upon the request of the Supreme Administrative Court of Lithuania in this case. A safe harbour rule as regards anti-competitive agreements, which do not have an appreciable effect on competition, is enshrined in the Law on Competition and is further specified by the Competition Council. With regard to an abuse of a dominant position, the Law on Competition provides a legal presumption of single and collective dominance. Yet, a different legal presumption (based on lower market shares) is provided for undertakings in the retail sector. When it comes to the analysis of an abuse of a dominant position, the Competition Council has dealt in several cases with the question of predatory pricing (thus, also a legal presumption enshrined in the AKZO case) as well as with the thereto related cross-subsidization. Furthermore, the Law on the Prohibition of the Unfair Practices of the Retail Companies includes an evidentiary legal presumption on particular types of conduct that are considered illegal under the aforementioned law. Moreover, the aforementioned law applies only in case of the retail company with significant market power thereby providing a safe harbour for companies, which do not fall under this definition. As regards merger control, the Law on Competition enshrines a safe harbour rule for mergers related to banks and other credit institutions. Also, a safe harbour is provided in the Law on Competition in terms of the turnover thresholds for merger control. Yet, the amendment of the law as regards the latter is currently considered. The Project on the Amendment of the Law on Competition suggest increasing the turnover thresholds. Also, an introduction of a new legal presumption as regards mergers is suggested by the aforementioned proposal on the amendment of the Law on Competition. According to the proposal, it is suggested that two or more transactions, concluded in a period of two years by the same undertakings, should be considered to be one concentration. Finally, legal presumptions are provided with regard to private enforcement of competition law as well as unfair commercial practices.

1. Introduction

1. In Lithuania, there are several legal presumptions and safe harbours in competition law. They can be found in such areas of competition law as the prohibition of anti-competitive agreements, the abuse of a dominant position and merger control as well as in the field of unfair commercial practices. Most of the legal presumptions/safe harbours are substantive, since they relate to such questions as the illegality of the behaviour, the presumption of dominance, the examination of a merger by the competition authority etc. Yet, as will be illustrated later, some evidentiary legal presumptions are also used.

2. Substantive legal presumptions can be both absolute and rebuttable. In case of the latter, the burden of proof normally shifts to the defendant. The setting of the legal presumptions and safe harbours is mostly vested in the legislature, but they can also be set by the Competition Council as well.

3. With regard to institutional considerations, such as resources and capacity to conduct detailed market analyses, the Priorities issued by the Competition Council should be mentioned. Although they do not directly set legal presumptions or safe harbours, they provide principles, based on which the competition authority may refuse to start investigation. According to the Priority on the Enforcement of Competition Law¹ and the Priority on the Enforcement of Advertising Law,² the Competition Council will take into account following principles when deciding whether the investigation complies with the Priority: 1) the effect on effective competition and consumer welfare, 2) strategic importance, 3) rational use of resources.³

4. In the following, legal presumptions and safe harbours, as applied in Lithuania, are analysed in different areas of competition law, including the legal provisions against unfair commercial practices. Legal presumptions and safe harbours, as enshrined in the legal acts, are explained followed by their illustration on the basis of case-examples.

2. Legal Presumptions and Safe Harbours with regard to the Prohibition of Anti-Competitive Agreements

5. The legal provision on the prohibition of anti-competitive agreements in the Law on Competition of the Republic of Lithuania⁴ (hereinafter: Law on Competition) is

¹ Decision of the Competition Council of the Republic of Lithuania on the confirmation on the priority of the activity of the Competition Council with regard to safeguarding the Law on Competition of the Republic of Lithuania, 2 July 2012, No. 1S-89 (hereinafter: Priority on the Law on Competition).

² Decision of the Competition Council of the Republic of Lithuania on the confirmation on the priority of the activity of the Competition Council with regard to safeguarding the use of advertisement, 24 September 2013, No. 1S-135 (hereinafter: Priority on the use of advertisement).

³ Points 8-15 of the Priority on the Law on Competition, Points 8-14 of the Priority on the use of advertisement.

⁴ Law on Competition of the Republic of Lithuania, 23 March 1999, Nr. VIII-1099, as lastly amended on 12 January 2017.

Article 5. The latter provision basically reflects Article 101 TFEU and is thereby its national equivalent.

2.1. Legal Presumptions

6. According to Article 5(1) of the Law on Competition, the agreements, the object of which is to restrict competition or which restrict or may restrict competition, are prohibited and are not valid from the moment they are concluded, including:

1. the agreement to directly or indirectly fix the prices of the good or other sale-purchase conditions,
2. the agreement to share the relevant product market based on the territory, the groups of purchasers or distributors or in any other way,
3. the agreement to set the amount of the manufacturing/sale of a particular good, to limit technical development or investment,
4. the agreement to apply discriminatory conditions to similar contracts of different undertakings, thereby creating different competition conditions for them,
5. the agreement to require from other undertakings additional obligations, which by their commercial purpose and nature are not directly related to the object of the contract.

7. An absolute legal presumption of the illegality of the conduct is provided in Article 5(2) of the Law on Competition, which stipulates that the competitors' agreements, which are mentioned in Article 5(1) points 1-4 of the Law on Competition, will in all cases be considered as restricting competition.

8. The application of the aforementioned legal presumption can be found in a number of cases. For example, in the *Event Organizers'* case⁵ the Supreme Administrative Court of Lithuania, reviewing the Competition Council's decision,⁶ held that, as regards anti-competitive agreements, a distinction had to be made between the agreements, which *per se* restrict competition, and the agreements, which may have a negative effect on competition. The former group of the agreements was said to fall under Article 5(2) of the Law on Competition, which stipulates that agreements mentioned in Article 5(1) points 1-4 are *per se* restricting competition. The Supreme Administrative Court held, that agreements, which *per se* restrict competition, are such, the negative effect on competition of which is presumed. So, it was said that the Competition Council in such cases does not bear the burden of that the object of the agreement is contrary to fair competition, and/or of its negative effect on competition. It was stressed by the Court that the overall aim of including such a presumption into law (*in casu*: the legal presumption that an agreement on a direct or indirect price fixing *per se* restricts competition (Article 5(1) point 1 and Article 5(2) of the Law on Competition)), was not only to protect the interests of the competitors acting in a relevant market and of consumers, but also the structure of the market and thereby competition itself, as the society's values, which guarantee *inter alia* the constitutional freedom of economic activity and initiative. Free competition on prices was said to be one of the main forms of fair competition, whereas price fixing was said to directly intervene and hinder the

⁵ Judgement of the Supreme Administrative Court of Lithuania, 27 May 2011, Case No. A858-294/2011.

⁶ Decision of the Competition Council on compliance of actions of the Association of Event Organizers and its members with Article 5 of the Law on Competition, 11 June 2009, No. 2S-14.

formation of the results of competitive process. Furthermore, the Court held that, as regards the burden of proof, it was sufficient for the Competition Council to determine, first, the fact that the agreement between the competitors was concluded, and secondly, the object of the agreement - a direct or indirect fixing of the prices of the goods (services).⁷

9. In another case – *Lithuanian Cynological Society*⁸ – the Supreme Administrative Court, when reviewing the Competition Council decision on the collective boycott,⁹ explained that, if it is found that the object of the agreement is to restrict competition, it is not necessary to analyse its effect. Relying on the case-law of the ECJ,¹⁰ the Supreme Administrative Court held that the object to restrict competition is presumed, when the agreement by its nature can restrict competition. According to the Court, this would be the case if the agreement, taking into account its legal and economic context, may have a negative effect on competition. The definition of the object to restrict competition was said to cover also such agreements, in the case of which, based on an economic analysis, it can be assumed that appreciable damage to competition was caused.¹¹ It was reiterated by the Court that account here should be taken of a legal and economic context. According to the Supreme Administrative Court, although such an analysis bears resemblance to the assessment of the agreement, which may have the effect of restricting competition, the main difference is that in case of the agreement, the object of which is to restrict competition, the danger to the conditions in the market is so evident that the effect of the agreement in terms of restricting competition may be presumed even without having conducted any detailed analysis of the market.¹²

10. The Competition Council has dealt in several cases with a legal presumption on the participation of the undertakings in a cartel/concerted practice.

⁷ The outcome of the Court's judgement was that the Competition Council's decision was upheld. The latter in its decision found that the Association of Event Organizers and its members had infringed Article 5 of the Law on Competition by having fixed a common fee for the participation in tenders, which the undertakings required from the organizers of tenders for a procurement of event organization services.

⁸ Judgement of the Supreme Administrative Court of Lithuania, 1 June 2011, Case No. A822-2240/2011.

⁹ Decision of the Competition Council on compliance of actions of the Lithuanian Cynological Society with Article 5 of the Law on Competition, 1 April 2010, No. 2S-9.

¹⁰ ECJ, Case 19/77, *Miller International Schallplatten v. Commission*, 1 February 1978, ECLI:EU:C:1978:19, para. 7; ECJ, Case C-8/08, *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, 4 June 2009, ECLI:EU:C:2009:343, para. 31.

¹¹ In this regard, the Supreme Administrative Court of Lithuania relied on the ECJ case: ECJ, Case 56/65, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, 30 June 1966, ECLI:EU:C:1966:38.

¹² The outcome of the judgement was that the Competition Council's decision was upheld. The latter in its decision found that the Lithuanian Cynological Society had infringed Article 5 of the Law on Competition by having forbidden its members to sell puppies with the origin documents issued by the LCS to any natural and/or legal persons for the purposes of further reselling and had imposed a fine.

11. For example, in the *Advertising Agencies* case,¹³ in which the Competition Council fined a number of advertising and media planning agencies and their Association KOMAA for an infringement of Article 5 of the Law on Competition for having fixed a common fee for a participation in tenders, which the undertakings required from the organizers of tenders for a procurement of advertising and media planning services, the Competition Council held that even if some of the undertakings did not attend the meetings, they were aware of and bound by the decisions of the Association and that they did not oppose to them. The Competition Council relied on the decision of the European Commission, in which it is stated that “the fact that members who were entitled to attend the meetings of the bodies did not do so did not mean that the decisions and/or agreements reached within such bodies did not apply to or did not have to be applied by such absent members”.¹⁴

12. Furthermore, the question of the participation of undertakings in a concerted practice through an online platform arose in the *E-Turas* case.¹⁵ This case related to substantial as well as evidentiary legal presumptions. In its decision the Competition Council held that 30 travel agencies and Eturas coordinated their behaviour with regard to the discounts for online travel bookings through the E-TURAS system and thereby infringed Article 101(1) TFEU and Article 5(1) of the Law on Competition. Fines were imposed on all undertakings, except for one, which informed the Competition Council about the practice. The Competition Council said that, although the information about the „capping“ of the discount rates was sent to the undertakings by the E-TURAS system in a form of an electronic message, the undertakings, by having used the same online platform and having not opposed to the „capping“ of the rebate, indirectly/implicitly expressed their common will as regards the behaviour in the relevant market and thereby were participating in a concerted practice, which falls under Article 101 TFEU and Article 5 of the Law on Competition.¹⁶ This case reached the ECJ on the basis of a request for a preliminary ruling posed by the Supreme Administrative Court of Lithuania.¹⁷

¹³ Decision of the Competition Council on compliance of actions of the undertakings providing advertising and media planning services and of their Association with the requirements of Article 5 of the Law on Competition of the Republic of Lithuania, 4 June 2009, No. 2S-13.

¹⁴ Commission Decision of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 – *Cement* (94/815/EC)), para. 44(4).

¹⁵ Decision of the Competition Council on compliance with actions of the undertakings providing organized trips' sales and other related services with the requirements of Article 5 of the Law on Competition of the Republic of Lithuania and Article 101 TFEU, 7 June 2012, No. 2S-9.

¹⁶ *Ibid.*, paras 153-172.

¹⁷ ECJ, Case C-74/14, *"Eturas" UAB and Others v Lietuvos Respublikos konkurencijos taryba*, 21 January 2016, ECLI:EU:C:2016:42. The questions posed by the Court were: „In those circumstances, the Lietuvos vyriausiosios administracinės teisiosios (Supreme Administrative Court, Lithuania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling: ‘(1) Should Article 101(1) TFEU be interpreted as meaning that, in a situation in which economic operators participate in a common computerised information system of the type described in this case and the Competition Council has proved that a system notice on the restriction of discounts and a technical restriction on discount rate entry were introduced into that system, it can be presumed that those economic operators were aware, or ought to have been aware, of the system notice introduced into the computerised information system and, by failing to oppose the application of such a discount restriction, expressed their tacit approval of the price discount restriction and for that reason may be held liable for engaging in

Specifically, the ECJ was asked whether “the mere sending of a message concerning a restriction of the discounts rate could constitute sufficient evidence to confirm or to raise a presumption that the economic operators participating in the E-TURAS booking system knew or ought to have known about that restriction”.¹⁸ Based on the guidance provided by the ECJ in the preliminary ruling, the Supreme Administrative Court issued the judgement on 2 May 2016.¹⁹ The Court pointed out that in order to clarify whether the companies coordinated their behaviour in terms of Article 5(1) point 1 of the Law on Competition and Article 101(1) TFEU, three elements with regard to each company had to be determined: the coordination of the behaviour, the behaviour in the market and a causal link between the coordination of the behaviour and the behaviour in the market.²⁰ The Court stated that the finding of a concerted practice relates to the finding of the element of will, so that it was said to be important to assess whether the evidence, which was present in the case, could confirm that the companies knew about the limitation of the discounts applied to their sales by the E-TURAS system and that it was also important to find out whether any specific company by its behaviour distanced itself from such practice, thereby rebutting the presumption of a causal link between a concerted practice and the behaviour in the market.²¹ Furthermore, the Court stressed that the mere fact that the message was sent by the system did not allow to conclude that the companies read it and knew about the limitation of the discount – moreover, such a conclusion was said to run counter to the presumption of innocence.²² The Court noted that, if the evidence, which was present in the case, revealed that a travel agency, which knew about the limitation of the discount in the E-TURAS system, systemically applied additional discounts, then the Court would conclude that such a travel agency rebutted the presumption of a causal link between the coordination of the behaviour and the behaviour in the market, and thereby did not participate in the concerted practice (i.e. distanced itself).²³ On the basis of the rebuttal of the aforementioned legal presumption, the Supreme Administrative Court annulled the fines for some of the undertakings that had been fined by the Competition Council in its decision.

13. Finally, as regards the exceptions to the prohibition of anti-competitive agreements, Article 6(1) of the Law on Competition lists the conditions when Article 5 of the Law on Competition is not applied. Thereby, Article 6(1) of the Law on Competition is a national equivalent of Article 101(3) TFEU. According to the Decision of the Competition Council on the agreements, which fulfil the conditions of Article 6(1) of the

concerted practices under Article 101(1) TFEU? (2) If the first question is answered in the negative, what factors should be taken into account in the determination as to whether economic operators participating in a common computerised information system, in circumstances such as those in the main proceedings, have engaged in concerted practices within the meaning of Article 101(1) TFEU?”.“ (para. 25)

¹⁸ *Ibid.*, para. 24.

¹⁹ Judgement of the Supreme Administrative Court of the Republic of Lithuania, 2 May 2016, Case No. A-97-858/2016.

²⁰ *Ibid.*, para. 353.

²¹ *Ibid.*, para. 362.

²² *Ibid.*, para. 373.

²³ *Ibid.*, para. 379.

Law on Competition,²⁴ the by Article 5 of the Law on Competition prohibited agreements, which cannot affect trade between Member States, but which fulfil the conditions enshrined in the regulations of the Council of the European Union and of the European Commission on the application of Article 101(3) TFEU to particular groups of the agreements (block exemption regulations listed in the annex of the aforementioned decision), with later amendments, are considered to fulfil the conditions of Article 6(1) of the Law on Competition. It is further stipulated that in case the aforementioned decision is applied, the amounts of the annual turnover, expressed in euros in the aforementioned regulations, are reduced ten times.

2.2. Safe Harbours

14. A safe harbour rule is enshrined in the Law on Competition in cases of the agreements, which do not have an appreciable effect on competition. Article 5(3) of the Law on Competitions says that Article 5 may be not applicable to the agreements, which due to their inappreciable effect cannot significantly restrict competition. It further stipulates that the requirements of and the conditions for such agreements are to be set by the Competition Council.

15. In fact, the Competition Council on 22 July 2016 by its Decision (No. 1S-84)²⁵ adopted a new version of the requirements and conditions for the agreements, which due to their inappreciable effect cannot significantly restrict competition (hereinafter: The Requirements and Conditions). According to Point 1 of The Requirements and Conditions, the Competition Council will not apply Article 5 of the Law on Competition to such agreements, which fulfill the requirements and the conditions set out by the Competition Council. Such requirements and conditions are described in more detail in Point 3, which says that following agreements due to their inappreciable effect will not be considered as significantly restricting competition:

1. the competitors' agreements, when a joint market share of the undertakings does not exceed 10 percent (point 3.1),
2. the non-competitors' agreements, when the market share of each of the undertaking does not exceed 15 percent (point 3.2),
3. when the distinction between the competitors' and non-competitors' agreements is not clear-cut, the agreements, when a joint market share of the undertakings does not exceed 10 percent (point 3.3),
4. the agreements, which due to their cumulative effect restrict competition in the relevant market, when the limits of the market shares as stipulated in points 3.1, 3.2 and 3.3 do not exceed 5 percent (point 3.4),
5. the agreements, which are stipulated in points 3.1, 3.2, 3.3 and 3.4, when the market shares of the undertakings participating in the agreement do not exceed the

²⁴ Decision of the Competition Council on the agreements, which fulfill the conditions of Article 6(1) of the Law on Competition of the Republic of Lithuania, 15 July 2010, No. 1S-140, as amended by the Competition Council's decision of 3 April 2013, No. 1S-48.

²⁵ Decision of the Competition Council on the confirmation of the requirements and the conditions for agreements, which due to their inappreciable effect cannot significantly restrict competition, 22 July 2016, No. 1S-84(2016). According to Point 3 of the decision, the decision entered into force on 1 November 2016. This decision replaced the former Decision of the Competition Council (of 13 January 2000, No. 1).

limits of the relevant market shares stipulated in the aforementioned points by more than 2 percent (point 3.5).

16. Yet, according to Point 4 of The Requirements and Conditions, the safe harbour, provided in Point 3, does not apply:

1. to the agreements, the object of which is to restrict competition, including the agreements, which are stipulated in Article 5(2) of the Law on Competition (point 4.1), and
2. to the agreements, which include at least one hard-core restriction enshrined in any of the regulations of the Council of the European Union and of the European Commission with regard to the application of Article 101(3) TFEU to certain types of agreements (point 4.2).

3. Legal Presumptions and Safe Harbours with regard to the Abuse of a Dominant Position

17. The legal provision on the prohibition of an abuse of a dominant position in the Law on Competition is Article 7. The latter provision basically reflects Article 102 TFEU and is thereby its national equivalent.

18. Article 7 stipulates that it is prohibited to abuse a dominant position in the relevant market by actions, which restrict or may restrict competition, unjustifiably limit the abilities of other undertakings to perform in the market or cause damage to the interests of consumers, including:

1. the direct or indirect imposition of unfair prices or other conditions of purchase or sale;
2. the restriction of trade, production, or technical development resulting in harm to consumers;
3. the application of dissimilar (discriminatory) conditions to equivalent transactions with individual undertakings, thereby placing them under different competitive conditions;
4. making the conclusion of a contract subject to the acceptance by the other party of supplementary obligations which, by their commercial nature or usage, are not directly related to the object of the contract.

19. In this context, it is also noteworthy that in 2009 the Law on the Prohibition of the Unfair Practices of the Retail Companies²⁶ was adopted in Lithuania (the Law entered into force on 1 April 2010). This Law aims at limiting the use of power by the retail companies, which have significant market power, and ensuring the balance of interests as regards the distributors and the retail companies with significant market power (Article 1(1) of the aforementioned law). Regarding the relationship between this Law and the Law on Competition, Article 1(2) of the Law on the Prohibition of the Unfair Practices of the Retail Companies states that in case a retail company by its actions infringes both this law and the Law on Competition, it is the latter that will be applied.

²⁶ Law of the Republic of Lithuania on the Prohibition of the Unfair Practices of the Retail Companies, 22 December 2009, No. XI-626. This law was amended in 2015: Law of the Republic of Lithuania on the Prohibition of the Unfair Practices of the Retail Companies, 17 December 2015, No. XII-2204. The amended law entered into force on 1 May 2016.

3.1. Legal Presumptions

20. The Law on Competition includes a rebuttable legal presumption as regards a dominant position. Article 3(2) of the Law on Competition stipulates that, until it is proven otherwise, an undertaking (except for undertakings in the retail sector) will be presumed to be dominant in the relevant market if it has a market share of no less than 40 percent. As regards collective dominance, it will be presumed, until it is proven otherwise, that every out of three or of a smaller number of undertakings (except for undertakings in the retail sector), which in the relevant market have the highest market shares, which jointly amount to at least 70 percent, is dominant. With regard to the undertakings in the retail sector, Article 3(2) of the Law on Competition says that, until proven otherwise, it will be presumed that an undertaking in the retail sector will be presumed to be dominant in the relevant market if it has a market share of at least 30 percent. As regards collective dominance, it will be presumed, until it is proven otherwise, that every out of three or of a smaller number of undertakings in the retail sector, which in the relevant market have the highest market shares, which jointly amount to at least 55 percent, will be held to be dominant. The aforementioned legal presumption of dominance of the undertakings in the retail sector was included into the Law on Competition in 2009.²⁷ According to the Explanatory Note on the Project of the Law on the Amendment of Article 3 of the Law on Competition,²⁸ the aim of the amendment introducing a legal presumption of dominance based on (lower) market shares in the retail sector was to create conditions for a more effective safeguarding of fair competition in this sector and to guarantee a more efficient finding of dominance in different markets. Furthermore, it was stated that, based on practice, it could be observed that undertakings in the retail sector get market power more earlier than they reach the market share thresholds of the legal presumption on dominance as it is stipulated in the Law on Competition. It was therefore argued that due to the use of market power the position of other undertakings may get worse, their business stability may be endangered, competitiveness in general and competition in specific markets may be weakened. Yet, a legislative initiative, which followed, advocating for a further lowering of a market share in case of a legal presumption for dominance in a retail sector (respectively, replacing 30 percent for single market dominance by 20 percent, and 55 percent for collective dominance by 40 percent)²⁹ was not accepted and was not included in the Law on Competition.

21. In light of the legal presumption of single/collective dominance based on the market shares, it is worthwhile noting that the Competition Council, in its Decision on the explanation concerning the establishment of a dominant position,³⁰ states that even if an undertaking has a market share exceeding that, which is enshrined in Article 3(2) of the

²⁷ Law on the Amendment of Article 3 of the Law on Competition of the Republic of Lithuania, 24 September 2009, No. XI-434.

²⁸ Explanatory Note on the Project of the Law on the Amendment of Article 3 of the Law on Competition of the Republic of Lithuania, 5 June 2008 (No. XP-3155).

²⁹ Project of the Law on the Amendment of Article 3 of the Law on Competition of the Republic of Lithuania, 18 October 2010 (No. XIP-2581).

³⁰ Decision of the Competition Council on the explanations of the Competition Council concerning the establishment of a dominant position, 17 May 2000, No. 52, as amended by the Competition Council's decision of 3 April 2013, No. 1S-51.

Law on Competition, an undertaking may be not dominant if there is/are one or more undertakings, which have a relatively high market share and are thereby capable of limiting the possibilities of the former undertaking to exercise decisive unilateral influence.³¹ The Competition Council stresses that also the stability of the market shares,³² as well as the potential changes of the market structure³³ have to be taken into account. In case of low entry barriers, even a significant market is said to not necessarily indicate dominance.³⁴ The Competition Council elaborates on such market entry barriers as, for example, the control of an essential facility, regulatory barriers, intellectual property rights, strategic advantages (such as “first mover” advantage), economies of scale and scope etc.,³⁵ whereas the behaviour of the undertaking in the past, its financial standing and the countervailing buyer power may also be taken into account when assessing dominance.³⁶

22. Furthermore, an interesting relation arises with regard to the Law on Competition and the Law on Electronic Communications.³⁷ The latter entails a concept of an undertaking with significant market power. The consequence of having significant market power is that such undertakings may be subject to by the Electronic Communications Agency set obligations, such as transparency, non-discrimination, granting access etc. (Article 17 of the Law on Electronic Communications). In fact, the competences as regards safeguarding the functioning of electronic communication markets is split between the Competition Council (which safeguards competition in this area based on the Law on Competition) and the Electronic Communications Agency, which aims at creating conditions for effective competition in this area and at hindering the undertakings to abuse their power in the market (Article 14 of the Law on Electronic Communications). As clarified by the Supreme Administrative Court of Lithuania,³⁸ whereas the Electronic Communications Agency exercises an *ex-ante* control over competitive conditions in the electronic communications markets, the Competition Council exercises such control *ex-post*. Pursuant to Article 15(1) of the Law on Electronic Communications, an undertaking is considered to have significant market power in the relevant market if it, alone or together with other undertakings, holds a position which is equivalent to dominance, i.e. a position of such an economic strength which enables it to act sufficiently independently from its competitors, customers and ultimately from consumers. Yet, according to Article 15(3) of the Law on Electronic Communications, an undertaking is considered to have significant market power in the market by the decision adopted by the Electronic Communications Agency based on the conducted market analysis and is presumed to have such market power until the Electronic Communications

³¹ *Ibid.*, para. 12.

³² *Ibid.*, para. 13.

³³ *Ibid.*, para. 14.

³⁴ *Ibid.*, para. 15.

³⁵ *Ibid.*, paras 16-20.

³⁶ *Ibid.*, paras 26-27.

³⁷ Law on Electronic Communications, 15 April 2004, No. IX-2135, with later amendments.

³⁸ Judgement of the Supreme Administrative Court of Lithuania, 10 November 2010, Case No. A858-1309/2010.

Agency conducts another market analysis, based on which it makes a decision that that undertaking does not anymore have significant market power in the relevant market.

23. With regard to the abuse of dominance, the Competition Council has dealt in several cases³⁹ with the question of predatory pricing, and thereby with a legal presumption of an abuse, as enshrined in the *AKZO* case.⁴⁰ In the latter, the ECJ held that “prices below average variable costs [...] by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive”⁴¹ and that „prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor”⁴². For example, in the *International Vilnius Airport* case,⁴³ the analysis by the Competition Council of prices requested by the company for jet fuel showed that they were not only above average variable costs, but also above average total costs, so that the Competition Council did not find an infringement. In the case *Lietuvos Paštas*,⁴⁴ the Competition Council held that, based on the analysis of the calculations and documents provided to the Competition Council by Lietuvos Paštas, the prices requested by the dominant undertaking were not below average variable costs, so that the need for the analysis of average total costs would arise only in such cases when a pricing strategy of a dominant undertaking revealed that it was part of a plan to eliminate a competitor. Since the evidence of such a plan was lacking, the Competition Council refused to start the investigation. In some of the cases, the Competition Council stated that cross-subsidization, in the absence of evidence on predatory pricing, *per se* cannot be considered as an abuse of a dominant position – the fact, which, in turn, means that cross-subsidization could be analysed in the framework of an abuse of a dominant position only after predatory pricing was confirmed.⁴⁵

³⁹ Decision of the Competition Council on a refusal to start investigation on compliance of actions of AB „Lietuvos Energijos gamyba“ with the requirements of Article 7 of the Law on Competition, 26 June 2017, No. 1S-62(2017); Decision of the Competition Council on a termination of the investigation on compliance of actions of “TEO LT” with Article 9 of the Law on Competition, 21 July 2011, No. 1S-152; Decision of the Competition Council on a termination of the investigation on compliance of actions of “Lietuvos Geležinkeliai” with Article 9 of the Law on Competition, 15 September 2011, No. 1S-184; Decision of the Competition Council on compliance of actions of the state enterprise International Vilnius Airport with Article 9 of the Law on Competition and Article 102 TFEU, 21 January 2010, No. 2S-1; Decision of the Competition Council on a refusal to start investigation on compliance of actions of “Lietuvos Paštas” with Article 9 of the Law on Competition, 3 June 2010, No. 1S-94.

⁴⁰ ECJ, Case C-62/86 *AKZO v. Commission*, 3 July 1991, ECLI:EU:C:1991:286.

⁴¹ *Ibid.*, para. 71.

⁴² *Ibid.*, para. 72.

⁴³ Decision of the Competition Council on compliance of actions of the state enterprise International Vilnius Airport with Article 9 of the Law on Competition and Article 102 TFEU, 21 January 2010, No. 2S-1.

⁴⁴ Decision of the Competition Council on a refusal to start investigation on compliance of actions of “Lietuvos Paštas” with Article 9 of the Law on Competition, 3 June 2010, No. 1S-94.

⁴⁵ Decision of the Competition Council on a termination of the investigation on compliance of actions of “Lietuvos Geležinkeliai” with Article 9 of the Law on Competition, 15 September 2011,

24. An evidentiary legal presumption is enshrined in the Law on the Prohibition of the Unfair Practices of the Retail Companies. Article 3(1) prohibits the actions, which are contrary to fair business practices and which shift the risk of the activities of the retailers to the suppliers or impose additional obligations on the suppliers or which limit the possibilities of the suppliers to freely act in the market by specifying the prohibited unfair practices in Article 3(1) points 1-10. In general, it has been held in the decisions of the Competition Council as well as in the case-law of the Supreme Administrative Court that, in order to establish an infringement of Article 3 of the aforementioned law by a retail company with significant market power, three cumulative conditions have to be fulfilled: 1) the actions are performed by the retail company with significant market power, 2) the actions are performed with regard to the suppliers of foodstuffs and drinks, and 3) the actions are captured by one of the points listed in Article 3(1) of the aforementioned law.⁴⁶ An evidentiary legal presumption concerns Article 3(1) points 7, 8 and 10 of the aforementioned law. Namely, Article 3(3) states that the burden of proof in case of Article 3(1) points 7,⁴⁷ 8⁴⁸ and 10⁴⁹ as regards the existence of the agreement and whether it fulfils the requirements set is borne by the retail company, which concluded such an agreement. In these limited cases, the existence of the aforementioned agreement may serve as „saving“ the practice, which is otherwise considered illegal (due to the wording of Article 3(1): „is prohibited“).

3.2. Safe Harbours

25. A safe harbour rule is included in the Law on the Prohibition of the Unfair Practices of the Retail Companies. Article 1(3) stipulates that this law does not apply to the relationship of the retail companies with significant market power and the distributors, the overall income of which in the preceding financial year exceed EUR 40 million.

No. 1S-184; Decision of the Competition Council on a termination of the investigation on compliance of actions of “TEO LT” with Article 9 of the Law on Competition, 21 July 2011, No. 1S-152.

⁴⁶ See, for example, Decision of the Competition Council on compliance of actions of UAB „RIMI LIETUVA“ with the requirements of Article 3 of the Law on the Prohibition of the Unfair Practices of the Retail Companies, 18 September 2015, No. 1S-97/2015; Judgement of the Supreme Administrative Court of Lithuania (judicially reviewing the aforementioned Competition Council’s decision), 27 September 2017, Case No. eA-1537-858/2017.

⁴⁷ This legal provision prohibits the retailers with significant market power to require from the distributors directly or indirectly to bear part of the costs related to the promotion of the sales of goods or to cover them in any other way, except for the cases when a written agreement between the retailer and the distributor is concluded, which sets the amount of such costs and clearly defines the planned actions for the promotion of the sales.

⁴⁸ This legal provision prohibits the retailers with significant market power to require from the distributors to take back unsold foodstuffs, except for such foodstuffs, which are packed and not quickly perishable, if they are secure, of good quality, the expiry term is no less than 1/3 or their expiry term is unlimited and there is a prior agreement on their return.

⁴⁹ This legal provision prohibits the retailers with significant market power to require from the distributors to directly or indirectly pay or in any other way to compensate for the layout of the goods, except for cases when there is a written agreement between the retail company and the supplier on such a payment.

Furthermore, since this Law applies to the actions of retail companies with significant market power, only the actions of such undertakings, which fulfill the requirements of the definition of “a retail company with significant market power”, are captured. According to Article 2(1) of the aforementioned law, the retail company with significant market power is defined as an undertaking, which is engaged in the retail sales in non-specialized shops selling mostly foodstuffs, drinks and tobacco and which alone or together with other related undertakings engaged in the same business fulfills the following cumulative requirements:

1. out of all shops controlled by such an undertaking in the Republic of Lithuania at least 20 shops occupy more than 400 m²,
 2. an overall income of the undertaking (or of the undertaking together with the related undertakings) in the preceding financial year is not less than EUR 116 million.
26. If the retail company is a foreign undertaking, an overall income is calculated as a sum of income received in the Republic of Lithuania. Only with regard to such undertakings does the exhaustive list of prohibited conduct, as enshrined in Article 3(1) points 1-10 of the aforementioned law, apply.

4. Legal Presumptions and Safe Harbours with regard to Merger Control

27. Relevant legal norms, which apply to merger control, are Articles 8-14 of the Law on Competition.

4.1. Legal Presumptions

28. A legal presumption is included in the Law on Competition with regard to mergers related to banks or other credit institutions. Article 8(5) of the Law on Competition stipulates that it will be considered that no concentration is taking place when commercial banks, other credit institutions, the intermediaries of the public circulation of the security papers, the subjects of collective investment or the undertakings, which control them, and insurance companies acquire 1/3 or more of the shares of the other undertaking with the aim to give them over, if no use is made of the voting rights granted by such shares and such shares are given over no later than in one year and if the relevant information about such an acquisition is provided to the Competition Council no later than in one month after such an acquisition. However, if the financial institutions, which acquire more than 1/3 of the shares of other undertaking, decide not to comply with the aforementioned conditions, they must notify about the concentration pursuant to general rules. It is yet noteworthy that there is a legislative proposal to change this legal provision. According to Article 2(4) of the Project on the Amendment of the Articles 3, 8, 9, 11 and 12 of the Law on Competition,⁵⁰ it will be presumed that no concentration is taking place, when commercial banks, other credit institutions, the intermediaries of the public circulation of the security papers, the subjects of collective investment or the undertakings, which control them, and insurance

⁵⁰ Project on the Amendment of Articles 3, 8, 9, 11 and 12 of the Law on Competition, 23 October 2017, No. 17-9950(2). It is noteworthy that initially the project was submitted on 24 August 2017 (No. 17-9950), but the project itself was changed and the „new“ text was submitted on 23 October 2017.

companies acquire security papers of other undertakings with the aim to give them over, if no use is made of the voting rights granted by them and such security papers are given over no later than in one year and if the relevant information about such an acquisition is provided to the Competition Council no later than in one month after such an acquisition. If financial institutions, which acquire security papers of other undertakings, decide not to comply with aforementioned conditions, they must notify about the concentration pursuant to general rules.

29. Furthermore, the aforementioned legal proposal suggests including a new legal presumption with regard to several transactions concluded within the period of two years by the same undertakings. Namely, the aforementioned Project on the Amendments suggests adding Part 6 to Article 8 of the Law on Competition, which would state that two or more transactions, concluded in a period of two years by the same undertakings, are considered to be one concentration, the beginning of which would be counted as with the conclusion of the last transaction.

4.2. Safe Harbours

30. A safe harbour rule is provided in the Law on Competition in terms of the turnover thresholds for merger control. Article 8(1) of the Law on Competition foresees an obligation of the undertakings to notify a planned concentration to the Competition Council if the overall turnover of the undertakings involved in the year preceding the concentration is more than EUR 14,5 million and the turnover of each of at least two undertakings involved in the concentration in the year preceding the concentration is more than EUR 1,45million.

31. Yet, the Competition Council can ask the undertakings to notify a concentration even if the aforementioned turnover thresholds are not reached: according to Article 13(1) of the Law on Competition, the Competition Council can ask the undertakings to notify the concentration and to apply the rules on merger control *mutatis mutandis*, when, although the turnover thresholds as indicated in Article 8(1) of the Law on Competition are not reached, there is a likelihood that after the concentration a dominant position will be created or strengthened or competition in the relevant market will be significantly impeded. However, the Competition Council can make a decision to apply the rules of merger control only if no more than 12 months have passed after the implementation of the concentration (Article 13(2) of the Law on Competition).

32. It is noteworthy that there is a legislative proposal to amend Article 8(1) of the Law on Competition. The amendment would relate not only to increasing the thresholds enshrined for the notification of the concentration, but also for the calculation of the turnover – with regard to the latter it would be only the turnover in the Republic of Lithuania, that would be calculated. Namely, according to Article 2(1) of the Project on the Amendment of Articles 3, 8, 9, 11 and 12 of the Law on Competition, the undertakings would have to notify to the Competition Council the planned concentration and would have to get its permission if the overall turnover in the Republic of Lithuania by the undertakings involved in the year preceding the concentration is more than EUR 20 million and the turnover in the Republic of Lithuania by each of at least two undertakings involved in the concentration in the year preceding the concentration is more than EUR 2 million. The Explanatory Memorandum of the aforementioned

legislative proposal⁵¹ says that the thresholds, which are currently enshrined in the Law on Competition, are too low, so that undertakings often have to notify concentrations, which are not “problematic”.⁵² Furthermore, the attention is drawn to the aforementioned Article 13 of the Law on Competition, which still allows the Competition Council to capture the control of concentrations in cases when the thresholds are not reached.⁵³ The process as regards the proposal for these amendments of the Law on Competition is ongoing, so that it will be seen whether the amendments will be accepted into the final text of the Law on Competition.

5. Legal Presumptions with regard to Private Enforcement of Competition Law

33. Some important legal presumptions apply in case of damages. Firstly, a rebuttable legal presumption can be found in Article 44(3) of the Law on Competition in terms of damage caused by the competitors’ agreements, which fall under Article 5(1) points 1-4 of the Law on Competition, or by any other competitors’ agreements, the object of which is to restrict competition and which thereby infringe Article 5(1) of the Law on Competition or Article 101(1) TFEU. Secondly, there is a legal presumption with regard to the passing-on of overcharges to indirect purchasers. According to Article 47(4) of the Law on Competition, such passing-on of overcharges to an indirect purchaser will be presumed if all of the following circumstances are present:

1. a defendant has committed an infringement stipulated in Article 43 of the Law on Competition,⁵⁴
2. due to this infringement, a direct purchaser of the defendant paid an overcharge for the goods,
3. an indirect purchaser acquired such goods, which were the object of the infringement, or the goods, which were manufactured from the goods, which were the object of the infringement, or the goods, which are combined with the goods, which were the object of the infringement.

6. Legal Presumptions with regard to Unfair Commercial Practices

34. Some legal presumptions are included into the Law on the Prohibition of the Unfair Commercial Practices with regard to Consumers.⁵⁵ For example, Article 7 lists (in 23 points) the conduct, which constitutes a misleading commercial practice, which does not need to be proven. Thereby, this provision enshrines a legal presumption on unfair commercial practices. It has to be noted though, that the competences of the Competition Council under the aforementioned law cover the control of the advertisement, which is

⁵¹ Explanatory Memorandum of the Project on the Amendment of Articles 3, 8, 9, 11 and 12 of the Law on Competition, 20 October 2017.

⁵² *Ibid.*, p. 7.

⁵³ *Ibid.*, p. 7.

⁵⁴ Article 43 of the Law on Competition refers to an infringement of Article 5 or Article 7 of the Law on Competition or of Article 101 TFEU or Article 102 TFEU.

⁵⁵ The Law of the Republic of Lithuania on the Prohibition of the Unfair Commercial Practices with regard to Consumers, 21 December 2007, No. X-1409.

misleading, as well as the comparative advertisement (Article 9(2) of the Law on the Prohibition of the Unfair Practices with regard to Consumers). In this context, the Law on Advertising⁵⁶ provides a further legal presumption. Article 5 of the Law on Advertising sets the criteria for the assessment of a misleading advertisement. Yet, Article 5(6) stipulates that an advertisement will in any case be considered as misleading if it has any of the features of misleading commercial practice mentioned in Article 7 points 1-21 of the Law on the Prohibition of the Unfair Commercial Practices with regard to Consumers.

⁵⁶ Law of the Republic of Lithuania on Advertising, 18 July 2000, No. VIII-1871, as lastly amended on 16 May 2013.