

Private Enforcement of Competition Law in Lithuania: a Story of Underdevelopment

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Ⓞ Competition law; Costs; Indirect purchasers; Lithuania; Measure of damages; Passing on; Private enforcement; Representative actions

I. Introduction

Legal developments in the European Union epitomised by the entry into force of Regulation 1/2003¹ envisage enforcement not only by the competition authorities of the Member States, but also enforcement through litigation between private parties before the national courts. The Regulation exhibits an acknowledgement that each EU Member State has a sophisticated national court system and regulatory infrastructure to embark on the heavy load of enforcement of competition laws. Articles 101 and 102 TFEU have long been conceded to have direct effect and to create rights for individuals, which national courts must protect.² On several occasions the European Commission and the Court of Justice accentuated that the full effectiveness of the EU competition rules (i.e. arts 101 and 102 TFEU) requires that any individual can effectively claim compensation for the harm caused by an infringement of these rules.³ The European Commission has taken a number of steps to create an effective private antitrust enforcement framework, such as a Green Paper in 2004⁴ and a White

Paper in 2008⁵ with other guidance to be issued soon.⁶ These proposals are alleged to be “balanced measures that are rooted in European legal culture and traditions”.⁷ There is also well established Union case-law upholding the need to adapt and develop national procedures and remedies so as to secure the effectiveness of Union law rights by providing options for redress.⁸ While the right to compensation is recognised by EU law it does not amplify the procedural structure for a private action and therefore it has had little impact upon the private enforcement of competition law in Lithuania, as a range of hurdles currently stand in the way of injured parties effectively receiving compensation in Lithuania. Unlike public enforcement, which principally predominates in Lithuania, private enforcement is largely underdeveloped supporting a general view that private actions against anticompetitive behaviour is of little significance in the overall enforcement scheme in the Member States of the European Union.⁹

There is an elaborate legislative framework for the private enforcement of competition law in Lithuania, with the exception of collective redress. However, the actual practice is rather scarce. There have only been a handful of competition cases in private enforcement; even fewer of these were successful. The Competition Council of Lithuania calculated that infringements of competition law per annum incur LT154.75 million (approx. €44.82 million) of direct loss.¹⁰ However, the competition authority of Lithuania has limited resources and is unable to investigate every alleged infringement of the competition rules.¹¹ Underdevelopment of private enforcement in Lithuania, which can be an important complement to public enforcement, means that the deterrent effect of competition rules is not as great as it should be and the victims of anticompetitive activities are not compensated for their losses,¹² which is guaranteed by EU law. Akin to public enforcement, private actions

* Lecturer in Law, Brunel University. This paper is based on the national report for Professor Barry Rodger’s AHRC Project on Comparative Private enforcement and Collective Redress, available at www.clcpecreu.co.uk. I would like to thank Professor Barry Rodger for his valuable comments on the national report. I would also like to thank my former colleagues at the Competition Council J. Šoviene (current Board Member of the Competition Council), Dr L. Darulienė, partner of law firm Sutkiene, Pilkauskas & Partners, a former classmate Dr P. Cerka, partner of law firm Cerka ir partneriai for providing some valuable information. Any inaccuracies remain the responsibility of the author. Any comments are gratefully welcome at jurgita.malinauskaite@brunel.ac.uk.

¹ Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty OJ L 001, 04/01/2003. “national courts have an essential part to play in applying the Community [now Union] competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community [now Union] law, for example by awarding damages to the victims of infringements.” (at Recital 7)

² See for instance, *BRT and SABAM* (127/73) [1974] E.C.R. 51.

³ *Draft Guidance Paper Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, European Commission, June 2011.

⁴ *Green Paper - Damages actions for breach of the EC antitrust rules*, COM(2005) 672, December 19, 2005.

⁵ *White Paper on Damages Actions for Breach of the EC antitrust rules*, COM(2008) 165, April 2, 2008.

⁶ For instance, in June 2011 the Directorate-General for Competition issued the *Draft Guidance Paper on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*. The Commission Work Programme 2012 included a legislative initiative on actions for damages for breaches of antitrust law.

⁷ *White Paper on Damages Actions for Breach of the EC antitrust rules*, 3.

⁸ In *Courage v Crehan* (C-453/99) [2002] Q.B. 507; [2001] 3 W.L.R. 1646 the court held that national courts must provide a remedy in damages for the enforcement of the rights and obligations defined in art.101 TFEU.

⁹ The conclusion made by the Ashurst report. Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules, Comparative Report* (August 2004) http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf [Accessed November 20, 2012].

¹⁰ The Competition Council of Lithuania, *Assessing the Impact of the Work of the Competition Council: Benefits to Consumers are Obvious* (Press release, October 6, 2011).

¹¹ Although the Competition Council places efforts to strengthen the enforcement of competition rules, these efforts are constantly being restricted by one of the lowest budgets in comparison with other EU institutions (Šarunas Keserauskas, Chairman of the Competition Council, *Foreword of the Annual Report of 2011*). On September 20, 2011 the President of the Republic introduced a new draft Competition Act to the Parliament, where prioritisation is at the core of the reform package. The Competition Council will give priority to investigations of illegal agreements that create the biggest harm to consumers and petty commercial disputes with no public interest will not be considered. Such practice is already applied in other jurisdictions, such as the United Kingdom.

¹² Jurate Šoviene, “The Relationship between Public and Private Enforcement in Lithuania” presented at the seminar on December 14, 2011, Vilnius, Lithuania.

can also assist in developing a culture of competition amongst market participants, including consumers, and raising overall awareness of competition law.

The aim of this paper is to explore the extent to which private enforcement of competition law is workable in practice in Lithuania, whether there is a legal basis for it and what challenges undertakings, customers and consumers face in invoking a claim for damages resulting from an infringement of competition law. Explicit recourse to methodology is essential (section II) in order to define the empirical research undertaken and explain the process how the relevant cases were identified and delineated. Given that Lithuania only reappeared on the European map in 1991, this paper will also discuss the historical development of the Lithuanian legal system in section III. Thereafter, the following sections address various relevant aspects, such as the legal basis for private enforcement in Lithuania (section IV), the passing on defence and indirect purchasers (section V), damages (section VI), litigation costs (section VII), collective redress and representative groups (section VIII). Finally, the case studies will be extensively discussed (section IX) culminating with potential reasons for a lack of private enforcement of competition law in Lithuania (section X) and concluding remarks (section XI).

II. Methodology and empirical findings

As far as methodology is concerned, the empirical research was conducted in order to comprehensively identify all competition law cases before the national courts of Lithuania where the parties were seeking to exercise rights conferred to them either by the Treaty's arts 101 TFEU and 102 TFEU or the equivalent domestic legislation—arts 5 and 9 of the Law on Competition respectively. The research started with informal contacts with lawyers as well as the officials of the Competition Council in Lithuania in order to uncover the current situation of private enforcement of competition law in Lithuania. To supplement the initial research, the *Infolex* search engine was used to pinpoint cases that appeared before the Lithuanian domestic courts. Different searching terms were used ranging from more general, such as “Konkurencija” (Competition) to more specific “Article 5 of the Law on Competition”, “Article 9 of the Law on Competition”, “Article 81 EC”, “Article 82 EC” as well

as “Article 101 TFEU” and “Article 102 TFEU” in order to “catch” the most recent cases. The research undertaken covered the period 2000–2012 inclusive and revealed that there is a significant amount of private damages cases in the field of unfair competition,¹³ especially with regard to trademark infringements, that does not appear in the plethora of EU competition law and therefore these cases were discounted for this research. The study also dismissed the damages actions, involving an article for entities of public administration,¹⁴ concentration infringements,¹⁵ appeals against the decision of the Competition Council of Lithuania and public procurement cases. From a purely competition law perspective, specifically arts 101 TFEU and 102 TFEU and its domestic equivalence—arts 5 and 9 of the Law on Competition, there have been only five judgements discovered in private enforcement and one case is pending.¹⁶ Out of these cases there were two cases regarding infringement of art.5 of the Law on Competition (domestic art.101 TFEU), two on art.9 of the Law on Competition (domestic art.102 TFEU) and the final case involved a combination of both arts 101 TFEU and 102 TFEU.¹⁷ First instance and appeal decisions were counted as one case if the same parties and the same subject matter were addressed.

To have a more comprehensive outlook, the research embraced two ways where the antitrust prohibitions can be used in private enforcement, such as a “sword” (i.e. used by parties as a basis for claiming damages or injunctive relief) and a “shield” (i.e. the cases where the competition law provisions are used in defence against a contractual claim mainly to avoid the contract). There have been two private damages cases in Lithuania and additionally one more case, which successfully secured an injunction, is pending. The last two cases used competition law in their defences. However, several cases with an attempt to use competition law as a shield were excluded where the court failed to consider the competition law issue due to the lack of relevance.¹⁸ Given that details of settlements are usually not public, as secrecy is a condition; all competition litigation settlements were eliminated from the dataset of this research. For example, it is known that at least two competition cases UAB “Belvedere prekyba” / SPAB “Stumbras” and UAB “Palink” / SPAB “Stumbras” ended in litigation settlement.

¹³ Article 16(1) of the Law on Competition (No. XI-1937, 22/03/2012) prohibits the acts of unfair competition, such as unauthorised use of a trade mark identical or similar to the name, registered trade mark or unregistered well known trade mark or any other reference having a distinguishing feature of another undertaking, imitating the product or product packaging of another undertaking, copying the shape, colour or other distinguishing features of that product or product packaging, and misleading advertising etc.

¹⁴ Article 4 of the Law on Competition (No. XI-1937, 22/03/2012) provides that “when carrying out the assigned tasks related to the regulation of economic activity ... entities of public administration ... shall be prohibited from adopting legal acts or other decisions which grant privileges to or discriminate against any individual undertakings or their groups and which give rise to or may give rise to differences in the conditions of competition for undertakings competing in the relevant market, except where the difference in the conditions of competition cannot be avoided when the requirements of the laws of the Republic of Lithuania are complied with”.

¹⁵ Articles 10–15 of the Law on Competition (No. XI-1937, 22/03/2012).

¹⁶ See Table 1.

¹⁷ See Table 1.

¹⁸ For instance, case No. 2A-149-340/2011; case No. 2-8595-450/2010 (in Lithuanian).

Table 1 Private enforcement

Case Name	Citation	Level of Court	Type of action	Competition law provisions	Remedy sought	Date
UAB “MBR parduotuvii ir restoranų įranga” / IĮ E.A.	No. 2A-79/2004	Court of Appeal	Stand-alone	Domestic art.101 TFEU	Defence	February 2, 2004
UAB “Šiaulių tara”/SPAB “Stumbras”	No. 2A-41/2006	Court of Appeal	Follow-on	Domestic art.102 TFEU	Damages	May 26, 2006
AB “flyLAL-Lithuanian Airlines” / “Air Baltic Corporation” A/S and Airport “Ryga”	No. 2-949/2008	Court of Appeal	Follow-on	A combination	Injunction	December 31, 2008
LUAB “Klevo lapas”/AB “ORLEN Lietuva”	No. 3K-3-207/2010	Supreme Court	Follow-on	Domestic art.102 TFEU	Damages	May 17, 2010
UAB “Naftos grupe”/AB “Klaipedos nafta”	No. 2-2655/2011	Court of Appeal	Stand-alone	Domestic art.101 TFEU	Defence	December 22, 2011

Private enforcement of competition law is a complement to, not a substitute for, vigorous public enforcement of national competition authorities and the European Commission.¹⁹ However, the extent to which private enforcement of competition law complements public enforcement depends on the ration of stand-alone claims and follow-on actions. Similar to other Member States art.47(1) of the Law on Competition in Lithuania also allows two types of actions: i) a so called “standalone” action, where a person must prove an infringement of the competition rules without the benefit of a prior decision to that effect by the Competition Council of Lithuania (or other Competition Authorities, including the European Commission); ii) a follow-on action, which is pursuant to findings of an infringement of competition law by the Competition Council of Lithuania (or other Competition Authorities, including the European Commission). During the analysed period between 2000 and 2012 there were two stand-alone cases and three follow-on cases.²⁰ Yet, both stand-alone cases used the infringement of competition law as a defence (albeit unsuccessfully) in order to avoid the contract. This is because stand-alone cases are deemed to be complex and difficult to litigate due to the lack of easily available evidence.²¹ Follow-on litigation, on the other side of the

coin, benefits from preceding public efforts, as it eases costs and results in higher awards²² making follow-on actions more attractive. Given that the decisions of the Competition Council have probative value,²³ persons (so far only undertakings) in Lithuania prefer to lodge a complaint to the Competition Council to investigate suspected anti-competitive practices rather than bringing an action directly to the court resulting in both damages cases being the follow-on actions.²⁴ The study also compared public cases decided by the Competition Council of Lithuania with private cases. Only the public cases with substantive infringements of arts 101 TFEU and 102 TFEU and their domestic equivalence were considered that can be used in the follow-on actions in private enforcement. All the cases of administrative procedural matter, cease-and-desist proceedings that were closed were excluded from this research. Chart 1 reveals that public enforcement predominates in Lithuania in the field of competition law with barely any private enforcement. Although the actual level of private competition enforcement in Lithuania is likely to be higher due to settlements, dropped or dismissed claims, it is evident that the situation in Lithuania upholds the widespread underdevelopment assumption in private competition damages actions in the European Union.²⁵

¹⁹ White Paper on Damages Actions for Breach of the EC antitrust rules, 2–3.

²⁰ See Table 1.

²¹ Thomas E. Kauper and Edward A. Snyder, “An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared” (1986) 74 *Georgetown Law Journal* 1163.

²² Kauper and Snyder, “An Inquiry into the Efficiency of Private Antitrust Enforcement” (1986) 74 *Georgetown Law Journal* 1163, 1169.

²³ UAB “Šiaulių tara”/SPAB “Stumbras” No. 2A-41/2006 (in Lithuanian).

²⁴ UAB “Šiaulių tara”/SPAB “Stumbras” No. 2A-41/2006 and UAB “Klevo lapas”/AB “ORLEN Lietuva” No. 3K-3-207/2010 (in Lithuanian).

²⁵ Waelbroeck, Slater and Even-Shoshan *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules*, Comparative Report (August 2004) http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf [Accessed November 20, 2012]. Centre for European Policy Studies, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios* (Final Report, DG COMP/2006/A3/012, 2007) http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf [Accessed December 1, 2012]; and most recently Directorate-General for Internal Policies, *Collective Redress in Antitrust* (Study, IP/A/ECON/ST/2011-19, June 2012) <http://www.europarl.europa.eu/committees/en/studies/download.html?languageDocument=EN&file=74351> [Accessed November 20, 2012].

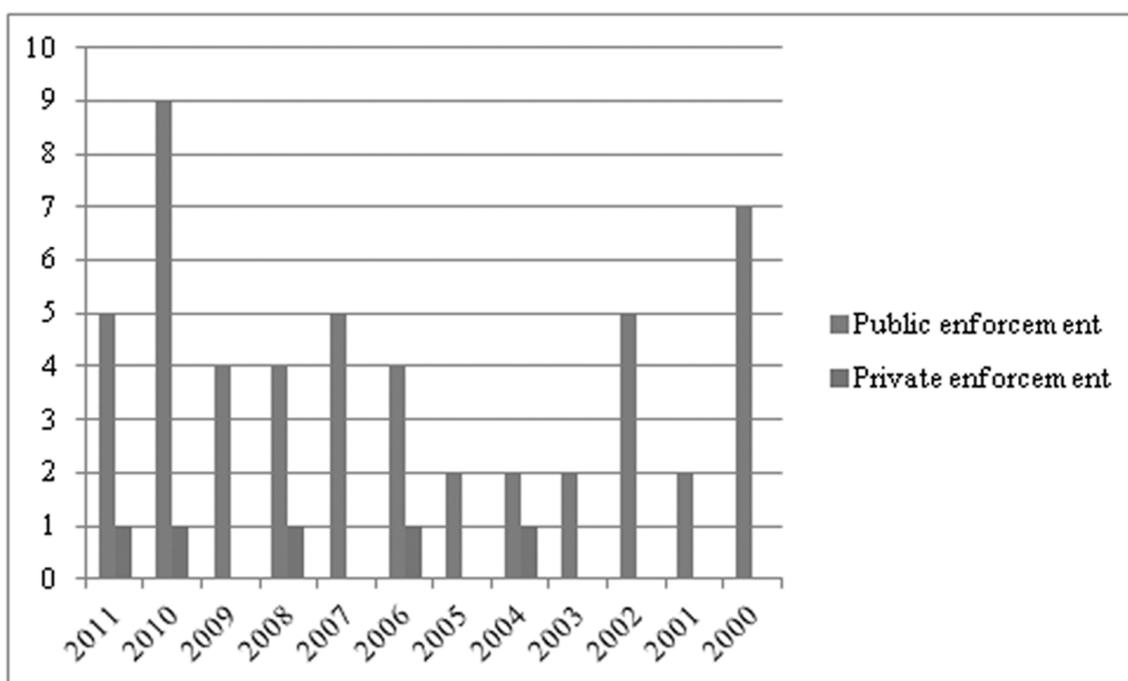


Chart 1—Public and private enforcement

III. Historical Background of Private Enforcement

The modern Lithuanian legal system and litigation are relatively new. The Republic of Lithuania regained independence on March 11, 1990, but international recognition of Lithuania only came a year later after the final collapse of the Soviet Union. Lithuania's history has been marked with a constant threat from its large neighbours shadowed by several occupations, which have stalled the development of the uniform Lithuanian legal system. For instance, during its independence phase of 1918–1940, the national Lithuanian legal system was highly divided: the Russian Imperial Civil Law of 1840 was employed in most of the territory, the Uzmemune region used the 1804 Napoleon Civil Code, while the German's Civil Code BGB of 1900 was applied in Klaipeda (Memel) and finally the 1864 Collection of Civil Laws of the Baltic Provinces was used in Palanga and Zarasai.²⁶ While there were some endeavours to unify Lithuanian private law throughout the period of 1937–1940, progress to produce the Lithuanian Civil Code was delayed due to the Soviet invasion in 1940 and was never accomplished.²⁷ The draft of World War II Lithuanian Code disappeared without trace and the new Codes were started from scratch when Lithuania regained its independence in 1991. This means that modern private enforcement in Lithuania is in its infancy, which officially started since the introduction of the new Civil Code in

2001 and the Code of Civil Procedure in 2003 providing a legal basis for private enforcement (alongside the reforms of the courts system).

Insofar as more specialised law is concerned, the history of Lithuanian competition law embarked with the adoption of the first Law on Competition on September 15, 1992 and has been commemorated by a gradual adjustment of national competition rules to meet the EU competition law standards. The signing of Free Trade Agreements with the European Community [now Union] and its Member States were the first steps of Lithuania on accession to the European Union.²⁸ Shortly after Lithuania signed the Association Agreements²⁹ (Europe Agreements) and committed itself to the EU policy. Prior to the accession to the EU Lithuania, like other candidate countries at the time had to implement modern EU compliant competition laws and establish attendant institutions as part of the harmonisation of its legal framework with the *acquis communautaire*—an essential pre-condition for admittance. This meant that the Lithuanian rules on competition had to echo those of the European Union, which instigated changes to the Law on Competition.³⁰ The 1999 Law on Competition also re-organised the Competition Council, which initially existed within the Agency of Prices and Competition under the Ministry of Economy, and was formed on the basis of the former State Price Committee.³¹ The Competition Council of Lithuania is now an independent body responsible for the enforcement of competition law

²⁶ Valentinas Mikelenas, "Unification and Harmonisation of Law at the Turn of the Millennium: the Lithuanian Experience" (2000) 5 UNI L.R.n.s. 243, 245.

²⁷ Mikelenas, "Unification and Harmonisation of Law at the Turn of the Millennium: the Lithuanian Experience" (2000) 5 UNI L.R.n.s. 243, 245.

²⁸ The Free Trade Agreement with Lithuania signed in 1994 and came into force on January 1, 1995.

²⁹ Free Trade agreement was incorporated into the European Agreement, which was signed on June 12, 1995.

³⁰ The Law on Competition No. VIII-1099 was adopted on March 23, 1999.

³¹ The Competition Council of Lithuania, *The Competition Council marks the 15th Anniversary 15 years of history* (Press release, May 28, 2008) http://www.konkuren.lt/en/index.php?show=news_view&pr_id=509 [Accessed June 30, 2012].

in Lithuania. Further amendments to the Law on Competition were designed to facilitate the enforcement of EU competition rules under the new regime provided in the Council Regulation 1/2003. Overall, since 1992 the Lithuanian Law on Competition has been amended 10 times with the latest changes being made in 2012.³² Although most of the amendments are of minor importance, nonetheless, the frequent changes diminish legal certainty and predictability.

IV. Legal basis for private enforcement

Private enforcement of competition law in Lithuania is governed by the Law on Competition,³³ the Code of Civil Procedure,³⁴ and the Civil Code.³⁵ Specifically, art.43(1) of the Law on Competition establishes an obligation for undertakings that are in breach of the Law to indemnify for damage caused to other undertakings or natural and legal persons. However, the former Law on Competition had narrow standing rules where only undertakings that had been harmed were allowed to seek compensation for damages incurred stemming from infringement of competition law.³⁶ The most recent Law³⁷ rectifies this drawback and indicates that any person (either natural or legal) whose interests have been violated by a breach of arts 101 TFEU or 102 TFEU, or other Lithuanian Competition Law provisions, is entitled to bring an action before the Vilnius Regional Court. This amendment is welcome and may persuade not only undertakings but also consumers to seek compensation. Attributing all competition law cases to one court, albeit not a specialised court, is also a positive step towards proliferation in private litigation, as the judges will gain necessary knowledge and experience to deal with complex competition law cases.

According to the general rules of the Code on Civil Procedure,³⁸ the parties have to prove their allegation on which they base their claims. In order to establish civil liability and reasonably claim for compensation of damages, the injured party must prove the following

elements: i) unlawful acts (in this case, infringement of competition law);³⁹ ii) damages;⁴⁰ iii) causal link between the unlawful act and damages;⁴¹ and iv) fault.⁴² While the Code on Civil Procedure does not provide the standard of proof, it is generally accepted that a claim is proven if there are no reasonable doubts as to whether the available evidence is substantial, relevant, and admissible.⁴³ The evidence must not be a misnomer and must direct to a reasonable conclusion of the existence of the circumstance in question.⁴⁴ The burden of proof of the infringement of the Law on Competition and of the occurrence of damage and its amount lies on the claimant, which can be problematic as it requires obtaining specific market data, which usually are not accessible to injured parties. Once the unlawful act is established the fault of the defendant is presumed.⁴⁵ However, the defendant, conversely, has a right to refute the plaintiff's allegations and bring in evidence to the contrary.

Similar to other civil law systems, the Lithuanian code of civil procedure does not provide rules on discovery. Yet, the parties may seek the court to obtain/disclose material from the other parties to the proceedings or from third parties. Such claims must pre-identify requested evidence, indicate grounds as to why this person might possess the requested evidence and finally relevant circumstances to be proven by such evidence.⁴⁶ Although the protection of business secrets is not explicitly defined as a ground for refusal to disclose, the court may, upon request of the parties or ex officio, declare that the file containing business secrets or other confidential information is not available for public access.⁴⁷

The Lithuanian Code of Civil Procedure also provides a possibility to "secure" evidence. Namely, art.221 postulates that any persons (including the parties to the proceedings and third parties) having grounds to believe that it would be impossible or difficult to obtain evidence in the future may request a court, either before or after submitting a claim, to secure evidence.⁴⁸

³² No. VIII-1099 March 23, 1999; No. VIII-1933, September 19, 2000; No. IX-1715, July 4, 2003; No. IX-2126, April 15, 2004; No. X-1311, October 25, 2007; No. XI-216, April 9, 2009; No. XI-434, September 24, 2009; No. XI-1347, April 21, 2011; No. XI-1607, September 29, 2011; No. XI-1937, March 22, 2012 came into force May 1, 2012.

³³ March 23, 1999, No VIII-1099 with the latest amendments in 2012, March 22, 2012, No XI-1937.

³⁴ February 28, 2002, No IX-743.

³⁵ July 18, 2000, No VIII-1864.

³⁶ Article 50(1)(2) of the Law on Competition, September 24, 2009—No XI-434. Although ex art.50(1) provided that only undertakings were entitled to bring an action for compensation for damages incurred, actions for damages could also be taken by consumers relying on art.43(1) ex art.46(1) of the Law.

³⁷ March 22, 2012, No XI-1937, art.47.

³⁸ Article 178, Code on Civil Procedure of the Republic of Lithuania, February 28, 2002 (in Lithuanian).

³⁹ Article 6.246 of the Civil Code.

⁴⁰ Article 6.249 of the Civil Code.

⁴¹ Article 6.247 of the Civil Code.

⁴² Article 6.248 of the Civil Code.

⁴³ Egidijus Lauzikas, Valentinas Mikelenas, and Vytautas Nekrosius, *Civilinio proceso teisė* (tr. *Law of Civil Procedure*) (Vilnius: Justitia, 2003), 416 (in Lithuanian).

⁴⁴ Lauzikas, Mikelenas and Nekrosius, *Civilinio proceso teisė* (2003).

⁴⁵ Article 6.248 of the Civil Code.

⁴⁶ Article 199 of the Code of Civil Procedure (in Lithuanian).

⁴⁷ Article 10 of the Code of Civil Procedure (in Lithuanian).

⁴⁸ Article 221 of the Code of Civil Procedure (in Lithuanian). The claim should indicate the evidence to be secured, circumstances to be confirmed by such evidence and reasons for securing such evidence (art.222 of the Code of Civil Procedure). Failing to provide these explanations may result in the court rejecting the request. Also see Jaunius Gumbis, Marius Juonys and Sarunas Keserauskas, *Report: Lithuania* (Commercial Dispute Resolution, 2012)<http://www.cdr-news.com/component/content/article/292-lithuania-competition-litigation> [Accessed July 1, 2012].

The private enforcement of competition law follows the standard adversarial court procedure and the parties have the obligation to provide evidence, to change, decrease or increase their claims or make a settlement.⁴⁹ On average, the proceedings can take from 6 to 14 months or longer depending on whether the case has exhausted all the remedies available. The chances of accelerating the proceedings are rather limited.⁵⁰ There are three stages of litigation: an appeal against the decision of the first instance court, both on points of fact and law, can be lodged with the appellate court (the Court of Appeal of Lithuania); a further appeal (otherwise cassation), albeit on points of law only, can be submitted to the Lithuanian Supreme Court, whose rulings are final and subject to no further appeal.

V. The passing-on defence and indirect purchasers

All products pass through a production chain before reaching the final consumer. If there is a cartel or an abuse of dominant position at any level of the chain, purchasers below that level face high prices. The undertakings that are forced to pay supra-competitive prices (“direct purchasers”) may be able to pass-on the overcharges downstream to “indirect purchasers”, usually consumers.⁵¹ The question of whether a defendant can argue as a defence that the claimant who was overcharged and passed on the allegedly excessive charge to the next purchaser and thereby suffered no damage is an important one for the structure of private competition law enforcement. While the Lithuanian Law on Competition grants courts a wide degree of flexibility, due to the lack of the case law, it is not clear whether a court would accept the passing-on defence (i.e. the defence that allows a defendant to escape liability in a damages action) and the extent to which an indirect purchaser can sue.

Given that the Lithuanian law allows the broad standing rules, theoretically an indirect purchaser is entitled to the same right to bring a lawsuit for damages and is subject to the same procedures as direct purchasers.⁵² However, an indirect purchaser will have to prove that the inflicted harm resulted from the actions of the defendant, for instance, because the higher prices have been passed on. If an indirect purchaser standing is allowed, then to ensure just compensation, it is important to address the passing-on defence. This is because, the

non-recognition of the defence may unjustly enrich the direct purchaser, which is not tolerated under Lithuanian law. Yet, the causal link between actions and benefits may be one of the major obstacles for the efficient use of the passing-on defence, as it would be for the defendant to prove that higher costs had been passed on.⁵³

VI. Damages

Similar to most Member States of the European Union, Lithuanian courts use methods of calculating damages available in normal civil proceedings. The aggrieved party is entitled to full compensation for harm sustained regardless of whether they occurred within or outside the jurisdiction.⁵⁴ There are no maximum limits to damages as long as the claimant is able to prove them. However, after taking into account the nature of liability, the financial position of the parties and their relationship, the court has the discretion to reduce the amount of damages, if claimed full compensation would generate severe results.⁵⁵ The aggrieved party must not be enriched by damages, meaning that punitive or exemplary damages are not available in Lithuania. The application of leniency policy in cartel cases grants whistle-blowers immunity from fines, but does not release them from civil liability, i.e. obligation to compensate for damages.⁵⁶

According to the Civil Code, a claimant can demand compensation in the form of direct (i.e. direct losses) and indirect (i.e. indirect losses, such as loss of income or profit) damages.⁵⁷ The loss of income or profit has to be real on which the victim could reasonably foresee. While the scholars agree that the specific amount of damages might be difficult to prove,⁵⁸ art.6.249(2) provides that the profit made by the defendant can be used as a measure of damages. Additionally, art.6.249(4) amplifies that the claimant can also seek compensation for the following reasonable expenses: i) for the prevention or mitigation of damages; ii) for the calculation of damages; and iii) for recovery of damages in out-of-court proceedings. Generally, non-material damages can be recovered in circumstances foreseen by laws.⁵⁹ Yet, they are not possible in competition cases, as the Law on Competition is silent vis-à-vis non-material damages.⁶⁰ The limitation period for damages claims is three years. This time period is calculated from the moment when the victims became aware or should become aware of the injury.

⁴⁹ Directorate for Financial and Enterprise Affairs, Competition Committee, *Institutional and Procedural Aspects of the Relationship between Competition Authorities and Courts, and Update on Developments in Procedural Fairness and Transparency: Lithuania* (DAF/COM/WP3/WD(2011)93, October 18, 2011).

⁵⁰ Gumbis, Juonys and Keserauskas, *Report: Lithuania* (Commercial Dispute Resolution, 2012) <http://www.cdr-news.com/component/content/article/292-lithuania-competition-litigation> [Accessed July 1, 2012].

⁵¹ Foad Hoseinian, “Passing-On Damages and Community Antitrust Policy, An Economic Background” (2005) 28(1) W.Comp. 3. Jakob Rugeberg and Maarten P. Schinkel, “Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line with Efficient Private Enforcement” (2006) 29 W.Comp. 397.

⁵² OECD Policy Roundtables, *Private Remedies: Lithuania* (DAF/COMP(2006)34, 2007) 223–224.

⁵³ Jaunius Gumbis, Marius Juonys and Sarunas Keserauskas, *The Lithuanian report submitted to the European Commission on Actions for Damages* (Comparative study produced Ashurst for the Competition DG, 2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html> [Accessed November 25, 2012].

⁵⁴ Unless a limited liability is provided by laws or agreement between the parties. See art.6.251(1) of the Civil Code.

⁵⁵ Article 6.251(2) of the Civil Code.

⁵⁶ Note: *The Heads of the European Competition Authorities expressed some concerns of the protection of leniency programmes and issued a Resolution on the Protection of leniency material in the context of civil damages actions*, May 23, 2012.

⁵⁷ Article 6.249(1) of the Civil Code. Also see Case No 2A-41/2006, 6.

⁵⁸ *The Commentary of the Civil Code of the Republic of Lithuania, Book 6 “Law of Obligations”, Vol.1*, (Vilnius: Justitia, 2003), p.342 (in Lithuanian).

⁵⁹ Article 6.250 of the Civil Code.

⁶⁰ Gumbis, Juonys and Keserauskas, *Comparative study produced Ashurst for the Competition DG*.

Neither the Lithuanian Law on Competition nor the current case law on damage compensation in competition law spells out any specific economic models for the calculation of damages leaving a large margin of discretion to the judges.⁶¹ That causes controversies in the establishment of the occurrence of damages and their amount in case law. Indeed, in the *UAB "Šiauliu tara"/SPAB "Stumbras"* case,⁶² both parties to the proceedings submitted the findings and conclusions on the quantity of damages incurred estimated by well-known international audit companies. Conversely, the amount of damages commissioned by the claimant was over €800,000, whereas the conclusions presented by the defendant stated that the defendant's actions did not inflict any damages to the claimant whatsoever. Even though the first instance court appointed the special State expertise institution (i.e. the Lithuanian Court expertise centre) to assess the damages sustained, the outcomes of the two expert examinations (primary and the repeated) were disregarded.⁶³ Instead, the court chose to be guided by the damages estimation presented by the claimant, but reduced the amount claimed after taking into consideration the slowdown of the growth in the claimant's trade volumes. Naturally, the court of appeal overturned this part of the judgement declaring that there was no reason to question and exclude the methods and technique of calculating indirect damages employed by the Lithuanian Court expertise centre. Given that the Law on Competition does not specify any criteria under which the damages in competition cases should be estimated, there is no coherent approach to the quantification of damages in Lithuania causing major concerns to litigants. It is potentially one of the reasons for the low number of private enforcement actions in the field of competition law in Lithuania.

VII. Litigation costs

The issue of litigation costs inevitably leads to the question of who pays the bill. In the course of the proceedings each party must bear its own legal costs. However, if one party is successful in the proceedings,

then it shall be awarded the legal costs which are covered by the unsuccessful party. This means that similar to other EU Member States, Lithuania employs the "loser pays" principle, which might be seen to be too discouraging of private enforcement.⁶⁴ While the recommended maximum possible litigation costs are established by supplementary acts of the Government, the courts conventionally award litigation expenses at their own discretion. There are two types of litigation costs: a stamp duty (i.e. the court fee which depends on the value of the case)⁶⁵ and other legal costs encountered in supporting or contesting a lawsuit.⁶⁶ Other legal costs include fees for witnesses, court appointed experts, institutions providing services of forensic experts and interpreters, attorney fees, service fees, expenses related to the execution of a court's decision as well as other reasonable expenses which are necessary to ensure the conduct of the hearing.⁶⁷ Attorney fees are generally granted only to a limited extent. This is because the attorney fees in Lithuania can be recovered only in the amount authorised by law.⁶⁸ Generally, one hour of attorney service in commercial cases varies from LT150 (€44) to LT800 (€232) depending on the lawyer's experience, expertise, and the complexity of the case. However, some Lithuanian lawyers may agree a "per case" fee. Also, art.50(2) of the Law on Advocacy⁶⁹ allows an attorney to enter into an arrangement with a client, where the attorney's fee is dependent on the outcome of the case. Thus, contingency fees are permissible in damages actions for breach of competition law, which can act as an encouragement in the initiation of private enforcement.

VIII. Collective redress and representative actions

It is widely accepted that consumers more than other categories of victims face huge hurdles when considering bringing a claim for damages incurred by anticompetitive practices. Given the litigation costs and the uncertainty in the outcome, the balance of risk and reward is hostile

⁶¹ The Lithuanian lawyers seem to agree that the national courts use the methods of calculating damages in normal civil proceedings where they exercise both subjective (concrete) and objective (abstract) calculation methods. The subjective calculation method is based on the principle of differentiation, where damages are calculated by comparing the position of the aggrieved party before and after the infringement in question. According to the objective calculation method the value of damaged (or destroyed) property is determined. The latter method seems to be preferred in calculating direct damages, whereas the former is used to determine indirect damages. Gumbis, Juonyas and Keserauskas, *Report: Lithuania*; Valentinas Mikelenas, *Problems of Civil Liability: Comparative Aspects* (Vilnius: Justitia, 1995), pp.147–148 (in Lithuanian); V. Mizaras, *Civil Remedies of Infringement of Copyright* (Vilnius: Justitia, 2003), pp.100–102 (in Lithuanian).

⁶² *UAB "Šiauliu tara"/SPAB "Stumbras"*, No 2A-41/2006 (in Lithuanian). The case is discussed in detail in section IX.

⁶³ OECD Policy Roundtables, *Private Remedies: Lithuania* (n 52).

⁶⁴ The European Commission raised some concerns that the "loser pays" rule might deter potential claimants from bringing damages actions. But it also admitted that it may discourage frivolous actions. For further discussion, see Green Paper (n 4) 2.6. Also see, the European Commission, *Staff Working Paper on accompanying the White Paper on Damages Actions for breach of the EC Antitrust Rules* (2 April 2008), pp.74–77, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf [Accessed July 2, 2012]. The European Commission urged the Member States "to reflect on their cost regimes so as to facilitate meritorious antitrust litigation, particularly for cases brought by claimants whose financial situation is significantly weaker than that of the defendant, and/or situations where costs prevent meritorious claims being brought due to the uncertainty of the outcome" (at 75).

⁶⁵ Article 80 of the Code on Civil Procedure provides that "the stamp duty of 3% is charged, if the value of the claim does not exceed 100,000 Lt (approx. €28,992); claims in the range of 100,000 Lt to 300,000 Lt (approx. €86,976) shall be subject to the stamp duty of 3,000 Lt (approx. €870) plus 2% from the amount which is above 100,000 Lt; claims exceeding 300,000 Lt shall be subject to stamp duty of 7,000 Lt (approx. €2,029) plus 1% from the amount which is above 300,000 Lt." However, the amount of the stamp duty may not exceed 30,000 Lt (approx. €8,698) article 80(1) of the Code on Civil Procedure (in Lithuanian).

⁶⁶ Article 79 of the Code on Civil Procedure (in Lithuanian).

⁶⁷ Article 88 of the Code on Civil Procedure (in Lithuanian).

⁶⁸ The April 2, 2004 Order No. 1R-85 of the Minister of Justice approved the Recommendations on the Maximum Amounts of Attorney Fees that can be Recovered in Civil Proceedings. The Recommendations provide a general procedure for calculation of remuneration for separate actions, such as representation in the court, drafting the claim etc. The actual amount of attorney fees which may be recovered from a losing party is determined on an individual basis (in Lithuanian).

⁶⁹ Law on Advocacy, No. IX-2066, March 18, 2004.

to consumers.⁷⁰ This means that consumers are not compensated for their loss caused by anticompetitive practices. To address this issue, the European Commission proposed two mechanisms of collective redress in the White Paper: i) representative actions; and ii) collective actions.⁷¹ In representative actions, usually consumer or trade associations or other qualified entities take legal action on behalf of the victims. Whereas in collective actions a group of persons with the same matter and demand can pool their small claims and have their day in court.⁷²

With respect to the first option, Lithuania has had representative action mechanism for several years in the Law on Consumer Protection of Lithuania,⁷³ which enables the State Consumer Rights Protection Authority or certain qualifying consumer associations to take enforcement action to protect the public interest of consumers. Specifically, a claim may include prohibition (termination) of certain actions (omissions) of a seller or service provider whereby legitimate common interests of consumers are being infringed upon and which are unfair from the consumers' viewpoint, are not in compliance with fair business practices or are in conflict with the provisions of the Lithuanian Civil Code, the Law on Consumer Protection of Lithuania or any other legislative acts, including the Law on Competition.⁷⁴ While actions brought by consumer protection institutions or public consumer organisations in the defence of public interest of consumers are possible, they cannot claim indemnification for damages. Unfortunately, these representative actions have never been explored in competition law cases and on the whole they do not provide full benefits for consumers due to their limitation to claim damages.

The second mechanism of collective redress in Lithuania is also disappointing. While, theoretically, art.49(6) of the Code of Civil Procedure⁷⁵ provides that a group action⁷⁶ may be submitted to protect public interest in accordance to the law, further provisions specifying the procedure for handling a class action were "forgotten" to be adopted. These difficulties are exhibited in the V.J/Republic of Lithuania case,⁷⁷ where the first instance court and subsequently the Court of Appeal in 2009 refused to accept a class action for consideration

due to the lack of class action mechanisms in place enabling the courts to deal with a class action in Lithuania.⁷⁸ This is because there are no laws specifying what type of claim could be identified as a group action, who has a right to the group action, what the requirements for the content of such a claim are, what the procedures for launching and examining such claims in court are and finally what legal power of a decision based on a class action would be.⁷⁹

Therefore, collective consumer antitrust actions could not be regarded as a genuinely relevant cause of action and are currently not enforceable in practice in Lithuania. Reflecting this legislative gap the Lithuanian Government approved a class action concept⁸⁰ in July 2011 and the Lithuanian Parliament is currently in the process of preparing the necessary amendments to the existing laws. There have been fierce debates revolving around the choice of two models available for implementing class actions, such as opt-out and opt-in or a combination of them.⁸¹ Under the opt-in model the claimants must take action to be included in the class, whereas in the opt-out system claimants, who have the same interest, are automatically included in the class by default unless they express exclusion from the class. Although the opt-out model can reduce the defendant and court's costs, as it guarantees one court proceeding, the Lithuanian Government, nonetheless, expressed that this model may be contrary to the Lithuanian Constitution and art.6 of the European Convention on Human Rights, as it violates the rights of any victim who might participate in the procedure unknowingly and yet would be bound by the court's decision (otherwise, a victim may not have an opportunity to speak in their own court proceeding).⁸² The mix of two models, where a judge after taking individual circumstances into account decides which model should be applied to a specific case was also rejected due to the fact that most Lithuanian judges lack the qualifications to make such a decision and it also may delay the litigation process.⁸³ The opt-in system has been recommended as the best option for Lithuania. However, this model is not without its shortcomings. The scholars warn that "[r]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held

⁷⁰ Neelie Kroes, 'Making consumers' right to damages a reality: the case for collective redress mechanisms in antitrust claims' (SPEECH/07/698, November 9, 2007, Lisbon).

⁷¹ *White Paper on Damages Actions for Breach of the EC antitrust rules.*

⁷² There is extensive literature on this topic. For instance, see Joseph A. Grundfest and Michael A. Perino, "The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation" (1996) 38 *Ariz. L.Rev.* 559 ("the class action device is an attempt to overcome the problem of dispersed injured parties whose damage claims are sufficiently small that they lack incentive to pursue individual litigation. Absent the class action device, collective action problems can prevent the aggregation of individual claims into one action that would support economically viable litigation" at 563). Also see, Alexandra Lahav, "Fundamental Principles for Class Action Governance" (2003) 37 *Ind.L.Rev.* 65 ("class actions solve the collection problems faced by individuals with claims too small to be economically adjudicated individually" at 70).

⁷³ Article 30 of the Law on Consumer Protection, No. I-657, November 10, 1994 as amended by No. X-1014, January 12, 2007.

⁷⁴ Gumbis, Juonys and Keserauskas, *Comparative study produced Ashurst for the Competition DG.*

⁷⁵ Article 49(5) of the former Code of Civil Procedure (in Lithuanian).

⁷⁶ Although the Lithuanian Code of Civil Procedure refers to a group action, it has the same meaning as a class action. Therefore a group action and class action will be used interchangeably in this paper.

⁷⁷ Note: it was not a competition case.

⁷⁸ Case No 2-492/2009, 4 (in Lithuanian).

⁷⁹ Case No 2-492/2009.

⁸⁰ The Government of the Republic of Lithuania, *Resolution with regard to the Concept of a Group Action Approval*, July 13, 2011, No. 885, Vilnius (in Lithuanian).

⁸¹ The Government of the Republic of Lithuania, *Resolution with regard to the Concept of a Group Action Approval*, 14.1.

⁸² The Government of the Republic of Lithuania, *Resolution with regard to the Concept of a Group Action Approval*, 14.1.2.

⁸³ The Government of the Republic of Lithuania, *Resolution with regard to the Concept of a Group Action Approval*, 14.1.3.

by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. [...] In [such] circumstances [...] it seems fair for the silent to be considered as part of the class.”⁸⁴ There is also a risk that after the initial class action a defendant may still face a large group of consumers that may attempt to use the precedent value of the initial successful opt-in class action as a “free ride” to bring waves of successive individual claims.⁸⁵ While the opt-in model is suggested to heed, the government recommended reviewing it in the future and potentially introducing a system to mix the two models, leaving the door open to revisit the issue later.

The Government’s resolution also proposed other suggestions. For example, it postulated to define the categories in which a class action would be possible, which embrace compensating victims stemming from the infringement of competition law.⁸⁶ The group members will have to meet certain requirements. First of all, it will be a quantitative criterion (i.e. the minimum number of a group, such as 20). Secondly, all members will have to share a common interest in a case.⁸⁷ Other proposals include a compulsory representation of an attorney in class action cases.⁸⁸ Higher hierarchy courts are recommended to deal with class action cases, such as regional and regional administrative courts.⁸⁹ Owing that a class action is more efficient than individual claims, the Lithuanian government suggests a lower stamp duty to encourage class actions in Lithuania.⁹⁰

In order to implement this concept of a class action in practice, both the Code of Civil procedure and the Code of Administrative procedure will have to be amended. It is unclear when exactly such laws would be passed through the Lithuanian Parliament or what would be their content. Thus for the time being a class action is simply impossible in the Lithuanian legal system. Any attempt to launch one should result in a refusal by the courts to treat it as a class action; instead the court may understand it as several individual claims filed together where all the injured parties will be considered as the parties to the proceedings and will be under obligation to defend their claim.

IX. Private enforcement of competition law in Lithuania: case studies

Private enforcement is not only governed by the institutional setting and the formulation of legal rules, but also by non-written factors, such as the willingness

of victims to take legal action and judges to make use of existing flexibilities.⁹¹ While the Lithuanian laws recognise the right to damages for the violation of competition rules, there are only a limited number of cases that have taken this opportunity. The positive theory of litigation claims that litigation increases and even prevails over settlements outside the courts where the party is optimistic about its chances of trial.⁹² Unfortunately, there is no “success” story in Lithuania in private enforcement of competition law. From 2000 to 2012 there were two partially successful cases, out of these one damages action and one injunction case; and three unsuccessful judgements (i.e. one damages case and two defence cases).

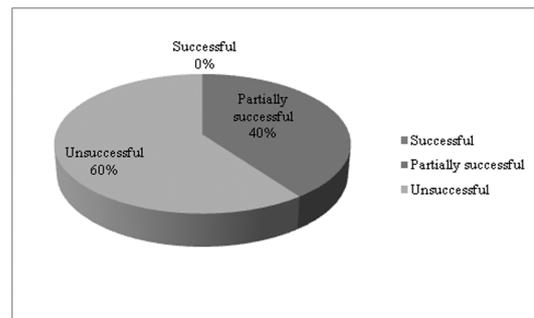


Figure “Successful” cases

One of the few actions that could be characterised as “partially successful” was *UAB “Šiaulių tara”/SPAB “Stumbras”*.⁹³ This is a follow-on action, where the claimant Šiaulių tara lodged a complaint to the Competition Council alleging that the defendant SPAB “Stumbras”, while enjoying a dominant position in the strong alcoholic beverages market in the course of 2000–2002 applied discriminating conditions to equivalent marketing service agreements with certain undertakings, including the claimant, therefore placing Šiaulių tara, which was unable to sell the products at a lower price, at a competitive disadvantage. Based on the Competition Council’s decision that actions by Stumbras constituted a breach of art.9(3) of the Law on Competition, the claimant sought the first instance court to award LT2,864,809 (approx. €829,706) damages, including both direct and indirect losses. The Kaunas Regional court, the first instance court, partly satisfied the claim. The court acknowledged that Stumbras abused its dominant position and therefore the claimant was entitled to damages. However, it awarded a lower amount— LT500,000 in damages (approx. €144,810)

⁸⁴ Benjamin Kaplan, “Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure” (I) (1967) 81 Harv. L. Rev. 356, 397–398.

⁸⁵ Werner Eyskens and Nanyi Kaluma, “Opt-out is Hardly an Option Chapter—Class and Group Actions 2012”, *The International Comparative Legal Guide to Class and Group Actions*, (GLG 2012) Ch.4.

⁸⁶ The Government of the Republic of Lithuania, *Resolution with regard to the Concept of a Group Action Approval*, 15.

⁸⁷ The Government of the Republic of Lithuania, *Resolution with regard to the Concept of a Group Action Approval*, 16.

⁸⁸ The Government of the Republic of Lithuania, *Resolution with regard to the Concept of a Group Action Approval*, 19.2.

⁸⁹ The Government of the Republic of Lithuania, *Resolution with regard to the Concept of a Group Action Approval*, 19.1.

⁹⁰ The Government of the Republic of Lithuania, *Resolution with regard to the Concept of a Group Action Approval*, 19.5.

⁹¹ Andreas Heinemann, “The Rise of a Private Competition Law Culture: Experience and Visions” in Jurgen Basedow, (et al.) (eds), *Private Enforcement of Competition Law* (Baden-Baden: Nomos, 2011), pp.218–229.

⁹² Bruce K. Hay and Kathryn E. Spier, “Litigation and Settlement” in Peter Newman (ed) *New Palgrave Dictionary of Economics and the Law* (London: Palgrave Macmillan, 1998), pp. 442, 444.

⁹³ *UAB “Šiaulių tara”/SPAB “Stumbras”*, No 2A-41/2006 (in Lithuanian).

than claimed by the claimant. UAB “Šiaulių tara” appealed that the reduction of damages was unjustified. The Court of Appeal of Lithuania expressed that an infringement decision by a national competition authority has probative value in Lithuania⁹⁴ and that the defendant abused its dominant position. Although the court agreed that the claimant was entitled to the compensation, it stated that Šiaulių tara failed to prove the whole amount of the requested damages and therefore reduced the damages claimed even further down to LT301,633.37 (approx. €87,359). The main focus of this case was on the calculation of damages. The court stressed that the claimant must prove indirect damages, such as loss of income and they should be realistic rather than just probable. Consequently, AB “Stumbras” reached a settlement out of court with other claimants, UAB “Belvedere prekyba” and UAB “Palink”, where similar to Šiaulių tara sustained damages stemming from *Stumbras* violation of competition law.

In the second damages case, which was largely unsuccessful, the claimant LUAB “Klevo lapas” filed a lawsuit against the defendant AB “ORLEN Lietuva”,⁹⁵ claiming that AB “ORLEN Lietuva” subsidiary AB “Mazeikių nafta”, while holding a dominant position provided exclusive conditions of distribution of its oil products to a limited number of companies, by fixing exclusive discounts of gasoline and diesel fuel to them. The claimant argued that these discriminating conditions placed it at a competitive disadvantage making it very hard to compete on the oil products market and subsequently forced it out of the market. Upon *Klevo lapas*’s request the Competition Council of Lithuania initiated the proceedings against AB “Mazeikių nafta” and concluded that *Mazeikių nafta* held a dominant position in some gasoline and diesel fuel markets and by taking advantage of its unilateral decisive influence in the markets, fixed dissimilar purchase conditions of its oil products for similar agreements with different companies. The Council therefore decided that *Mazeikių nafta* abused its dominant position under art.9(1)3 of the Law on Competition and imposed a maximum fine of LT100,000 (approx. €30,000) at the time. Although *Mazeikių nafta* appealed the decision twice, both the Vilnius Regional Administrative court and the Supreme Administrative court of Lithuania upheld the Competition Council’s decision.

Pursuant to the findings of an infringement of art.9 of the Law on Competition by the Competition Council, the claimant LUAB “Klevo lapas” brought a follow-on action against the parent company AB “ORLEM Lietuva” in order to recover LT36,606,156.42 (approx. €10,601,868) in damages. The court of first instance and the Court of Appeal of Lithuania rejected the claim as unfounded. The reasoning of the court of first instance is rather

conflicting. The court stated that there was no reason to suggest that the defendant applied dissimilar competitive conditions for the claimant,⁹⁶ undermining the decision of the Competition Council. It then argued that *Klevo lapas* was in a bad financial position before the defendant’s discounted prices to the certain undertakings and therefore it was not the defendant’s fault for its insolvency. The Court of Appeal also concluded that the claim was unproven. However, in its reasoning it stated that the prohibiting decision of the Competition Council against *Mazeikių nafta* for its abuse of a dominant position and the bankruptcy of UAB “Klevo lapas” lacked the causality. The case was further appealed to the Supreme Court of Lithuania, the last resort court. Owing to the fact, that this was the first competition law case in private enforcement in the Supreme Court, the court provided a more comprehensive reasoning. First of all, the court referred to the *Courage and Crehan* case⁹⁷ and declared that in the absence of Union rules, it is for the national legal system of each Member State to designate the courts and to lay down the detailed procedural rules governing actions for compensation. Accordingly, general national provisions apply in order to prove civil liability and claim compensation stemming from an infringement of competition law in Lithuania. This means that the decision of the Competition Council of an infringement of competition law proves only one of the conditions, the unlawful fact. Other conditions, such as actual damages and the causal link between the unlawful act and the damages must be proven by an aggrieved party. An infringement of the competition rules on its own is insufficient to seek damages. Secondly, the court focused on the causality. The court rejected the claimant’s argument that had *Klevo lapas* an opportunity to receive the products at a discounted rate it would have stayed in the market. In parallel to the court of first instance and the Court of Appeal, it held that the claimant was in a bad financial position before the infringement of competition law occurred. This led to the conclusion that *Klevo lapas* was forced to declare bankruptcy not because of the defendant’s anti-competitive practice, but because of its poor business management. On the grounds that there was no causal link between the infringement of competition law and the requested damages, the court rejected the claim upholding the previous courts’ decisions.

The final damages case and the first case in Lithuania with an international element is AB “flyLAL-Lithuanian Airlines” / “Air Baltic Corporation” A/S and Airport “Ryga”,⁹⁸ which is pending. The claimant AB “flyLAL-Lithuanian Airlines” argued that the defendants Latvian firm “Air Baltic Corporation” A/S and the Latvian airport “Ryga” infringed both arts 101 TFEU and 102 TFEU and therefore the claimant is seeking

⁹⁴ Article 197 of the Code of Civil Procedure (in Lithuanian).

⁹⁵ Case No. 3K-3-207/2010, May 17, 2010 (in Lithuanian).

⁹⁶ Case No. 3K-3-207/2010, 2 (in Lithuanian).

⁹⁷ Case C-453/99, para 29 (in Lithuanian).

⁹⁸ Case No. 2-230-881/2012 (in Lithuanian).

LT199,830,000 (approx. €57,874,761) in damages. Specifically, the defendant's dominant position and exclusive discounts in the international airport Riga allowed it to apply relatively low prices in the Vilnius airport, making it difficult for *flyLAL-Lithuanian Airlines* to compete. This is a follow-on action, as the claimant's lawsuit is supported by the decision of the Latvian Competition Council, which confirmed that Air Baltic Corporation infringed the competition law rules.⁹⁹ After initiating a private enforcement action, a person is entitled to claim for all interim relief measures that are available in civil action procedures in Lithuania.¹⁰⁰ Therefore, the claimant was partially successful in securing the precautionary measures. The Court of Appeal of Lithuania agreed to freeze the defendant's property for the amount of the grievance.¹⁰¹ But other interim measures, such as disallowing Airport "Ryga" to apply exclusive discounts to "Air Baltic Corporation" A/S and other actions that infringe the competition rules were rejected, as the measures were too closely related to the merits of the case.¹⁰²

Sometimes undertakings use competition law as a shield in their defences, for example, where one party to an agreement freely entered into, attempts to walk away from it on the ground that it is void under art.5 of the Law on Competition (equivalent to art.101 TFEU). As a rule of thumb, these cases are usually unsuccessful. For example, in the damage claim case for breach of contract, *UAB "MBR parduotuvė ir restoranu iranga" / IĮ E.A.*,¹⁰³ the court held that art.5 of the Law on Competition was not applicable for the mutual commercial agency contract, where both parties agreed that the defendant acting as a commercial agent would conclude contracts in the principal's name and at the latter's expense as well as in his interests and would not design or consult the competitors' equipment or otherwise act in competition to the claimant. Another unsuccessful case, although on a slightly different ground, was *UAB "Naftos grupe" / AB "Klaipedos nafta"*,¹⁰⁴ where the claimant *Naftos grupe* filed a lawsuit against the defendant *Klaipedos nafta* and sought compensation of damages for a breach of contract. In its counter-claim the defendant argued that the contract was void, as it violated art.5 of the Law on Competition. The Klaipeda's Regional Court (the court of first instance in this case) concluded that only the Vilnius Regional Court has exclusive jurisdiction to deal with cases that involved infringement of the competition rules.¹⁰⁵ The Court of Appeal upheld the decision.

Given a limited number of cases in private enforcement of competition law in Lithuania, one may question whether Lithuanian courts even though they seem to follow the EU practice truly uphold the principle of effectiveness,¹⁰⁶ making it practically possible or excessively easy to exercise the rights (such as the right to damages stemming from infringement of competition law) conferred by Union law. Lithuania is confronted with a conundrum. On the one hand, the injured parties in Lithuania are not active, as they are reluctant to seek redress due to the low expectation to be successful. On the other hand, the judges are unwilling to be more flexible with regard to the causality and quantum of damages, the two biggest obstacles in private enforcement of competition law in Lithuania. This is most likely due to the extremely scarce experience in the litigation of this type.

X. Why there is little practice of private enforcement in Lithuania?

The existing legal basis is sufficient for private enforcement of competition law in Lithuania, save collective redress. Yet, the actual practice is rare. It is only in the field of unfair competition that private parties are engaged in direct litigation, especially with regard to trademark infringements. It can be articulated that little practice of private enforcement in competition law in Lithuania can be attributed to a number of factors.

First of all, the non-litigious nature of Lithuanian society is to be condemned. Historically, the clutches of the Soviet Union precluded the Lithuanian legal system from development. This meant that modern private enforcement in Lithuania is relatively new and therefore lacks a litigation tradition.

Secondly, competition law cases are of immense complexity. The older generation of the Lithuanian judiciary who obtained their degrees in law during the Soviet era, does not have enough knowledge of sound competition law (which was non-existent in the Soviet era) and experience to deal with multifaceted legal and economic matters.¹⁰⁷ Steps were taken to change a deep-rooted socialist mentality and to re-educate judges to the new rules of the game enabling them to understand the principles of market economy. However, the low number of case law in the competition law field suggests that the Lithuanian judiciary has not yet built enough confidence to take more courageous steps in private legal proceedings (i.e. as there are barely any successful damage cases in competition law). This in turn potentially

⁹⁹ The Latvian Competition Council, the Decision of November 22, 2006.

¹⁰⁰ Article 148(3) of the Code on Civil Procedure (in Lithuanian).

¹⁰¹ Case No. 2-949/2008 (in Lithuanian).

¹⁰² See Table 1.

¹⁰³ Case No. 2A-79/2004 (in Lithuanian).

¹⁰⁴ Case No. 2-2655/2011 (in Lithuanian).

¹⁰⁵ Article 47(1) of the Law on Competition, March 22, 2012, No XI-1937.

¹⁰⁶ As defined in the *Courage and Crehan* (C-453/99) [2002] Q.B. 507; [2001] 3 W.L.R. 1646 at [29]. The Court did not attach any explicit equivalent requirement to the damages remedy for breach of competition law in this case, therefore national rules on causation apply.

¹⁰⁷ Aini Proos, OECD Global Forum on Competition, *Contribution from Estonia* (CCNM/GF/COMP/WD(2002)5, February 5, 2002). Vitalis Nakrosis, "Assessing Governmental Capacities to Manage European Affairs: the Case of Lithuania" in Vello Pettai and Jan Zielonka, (eds) *The Road to the European Union, Estonia, Latvia and Lithuania* (Manchester: Manchester University Press, 2003).

sows the seeds of lack of trust by society in the judicial system—the high costs of litigation and slim chances of the requested damages to be awarded leads to the conclusion that the litigation is not worth taking (“there is no point to seek redress in courts as the outcome will be unsatisfactory anyway”).

Thirdly, it is difficult to calculate and prove damages, as the Lithuanian case law reveals. It is often problematic for claimants to obtain the necessary information and evidence to substantiate their claims. There are insufficient experts in Lithuania to calculate damages (i.e. there are only two experts in the Forensic Science Centre of Lithuania¹⁰⁸).¹⁰⁹ The amounts awarded by the courts are insignificant (approx. €87,359 in the *UAB “Šiaulių tara”/SPAB “Stumbras”* case,¹¹⁰ only 11 per cent of the claimed amount). There is a desperate need for national guidelines on quantification of damages in Lithuania.

Fourthly, it is challenging for the claimant to prove causation and attribute loss specifically to the defendant’s behaviour rather than the claimant’s poor business strategy or other factors, such as a general economic slowdown in Lithuania. A high standard of proof can be seen in the *LUAB “Klevo lapas”/ AB “ORLEN Lietuva”* case, where the claimant *Klevo lapas* failed to prove successfully the existence of damage caused by a shortfall of a business opportunity available to the claimant’s competitors and instead the claimant’s inadequate business management was to blame.¹¹¹ Potentially, lowering the standard of proof could improve the current situation.

Fifthly, it is undisputed that private enforcement produces substantial costs on the side of persons (natural or legal). Therefore, expensive and prolonged litigation is one of the other obstacles for private enforcement in Lithuania. For instance, the litigation in the case *LUAB “Klevo lapas”/ AB “ORLEN Lietuva”*¹¹² lasted 10 years¹¹³ reaching the court of last resort—the Supreme Court of Lithuania, where the claim was rejected. Thus, rules on litigation costs could be relaxed to protect weaker parties.

Sixthly, an obvious obstacle to the growth of private enforcement in Lithuania is the current unavailability of procedural mechanisms for bringing class action lawsuits. Without this mechanism there are currently no practical possibilities of aggregating damages of a large group of consumers, which especially limit consumers’

opportunities to obtain redress, as it is impractical for individual consumers to initiate private enforcement actions against cartels or monopolists. Class action is important not just because it enables a group of consumers with small claims to secure relief, but also—even more significantly—it goes beyond individual benefits of the parties, as it produces external benefits for society. By explicating the externalities theory of the small claims class action, Professor Rubenstein elaborated that the lawsuit might develop legal principles, change industry practices, or even conserve judicial and social resources.¹¹⁴ Besides the economic theories, absence of a collective action framework in Lithuania undermines wider social goals, such as access to justice and equal treatment and levelling the playing field between the defaulting undertaking and its competitors.¹¹⁵

Finally, the relationship between public and private enforcement is rather fragile in Lithuania. It is essential to align the public and private interest in private enforcement of competition law. While private enforcement seems to be compensatory in nature, it must not be ignored that it can also help to pursue the public interest goal of deterrence. In their pioneering work Becker and Stigler argued that deterrence could be as effectively achieved if private individuals enforced the law by competing for the high damages.¹¹⁶ Therefore, further encouragement of the Competition Council is necessary (i.e. either through its own involvement in private litigation or some indication of possible damages) in order to establish a more fertile environment for private action in competition law.

XI. Concluding remarks

A traditional approach in Lithuania is to complain to “the watchdog”—the Competition Council, which is entrusted with the enforcement of the Law on Competition. Private enforcement in Lithuania is still in its infancy. Although any legal or natural person, whose interest has been violated from breaches of competition law, may seek compensation for direct and indirect damages, practically the related cases are scarce in Lithuania. There have been only a handful of cases (i.e. compensation for damages caused by allegedly abusive dominance by the major oil refinery in the Baltic sea, and one of the leading

¹⁰⁸ The Forensic Science Centre of Lithuania (www.ltec.lt).

¹⁰⁹ Dr Irmantas Norkus, the partner of the Raidla Lejins & Norcous, the paper presented during the conference on private enforcement in Lithuania, December 14, 2011 (in Lithuanian).

¹¹⁰ Case No 2A-41/2006 (in Lithuanian).

¹¹¹ Case No. 3K-3-207/2010 (in Lithuanian).

¹¹² Case No. 3K-3-207/2010 (in Lithuanian).

¹¹³ Jurate Šoviene “The Relationship between Public and Private Enforcement in Lithuania” presented at the seminar on December 14, 2011, Vilnius, Lithuania.

¹¹⁴ William B. Rubenstein, “Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action” (2006) 74 *UMKC L. Rev.* 709. Prof. Rubenstein explored further Posner’s sketches and grouped the positive externalities of individual lawsuits into four types of effects: i) degree effects; ii) settlement effects; iii) threat effects; and finally iv) institutional effects. First, degree effects mean that the legal principle developed in the case will build more certainty in structuring social behaviour and lower the need for future adjudication of the decided issue. Second, settlements can also change behaviour beyond the initial parties and can also reduce future litigation costs by establishing settlement ranges and preserving judicial resources. Third, the very threat of litigation can also change a firm’s behaviour and the risk of litigation is included in its decision-making. Finally, with respect to the institutional effects, by enabling litigation, the class action has structural consequences—shifting a significant amount of enforcement from public agencies to the private sector. Also see, Richard A. Posner, *Economic Analysis of Law*, 6th edn (New York: Aspen Publishers, 2003), pp.530–531.

¹¹⁵ These social objectives were indicated in the report of the DG for Internal Policies *Overview of Existing Collective Redress Schemes in EU Member States* July 2011.

¹¹⁶ Gary S. Becker and George J. Stigler, “Law Enforcement, Malfeasance and Compensation of Enforcers” (1974) 3 *J.L.S.* 1. Also see Gary S. Becker, “Crime and Punishment: An Economic Approach” (1968) 76 *J.P.E.* 169.

manufacturers and exporters of alcoholic beverages in Lithuania and most recently the airport case, which is still pending), even fewer of these were successful. A couple of cases¹¹⁷ ended in litigation settlement. Although settlements may be desirable as they save administrative costs, they “cannot therefore contribute to the same extent as judgements to the clarification and a better understanding of the competition rules”.¹¹⁸ All these cases were invoked either by a competitor or undertaking that suffered loss from breaches of competition law and sought redress. There has been no single claim raised by a consumer. This can be explicated by the lack of provisions specifying a class action in Lithuania, where a group of consumers with small demands could collectively initiate a claim in court. The rare use of courts in Lithuania can also be attributed to a number of factors which include the complexity of cases, difficulties in calculating damages and proving the causation, expensive and prolonged litigation (for instance, the litigation in the case *LUAB “Klevo lapas”/AB “ORLEN Lietuva”* lasted 10 years and was ultimately rejected), and, arguably, the non-litigious nature of the Lithuanian society¹¹⁹ or a fear to fail, as there has not been any successful stories in private enforcement of competition law. Yet, it has to be acknowledged that the authoritative conclusion cannot be made given the small volume of private enforcement of competition law occurring in Lithuania.

There have been some recent positive developments in Lithuania. For example, the recently amended Law on Competition provides the broad standing rules and no

longer contains any limitations as to who can seek damages in private enforcement. A single court—the Vilnius Regional Court—has the exclusive jurisdiction as the court of first instance to deal with competition cases in private enforcement in Lithuania concentrating expertise and knowledge in the field in one hand. The Parliament is in the process of introducing new provisions enabling collective redress to be workable in practice. Yet, there are still some steps that can be taken in order to cure some of the drawbacks, such as improving competition law awareness and the education of the judiciary, businesses and consumers. Public encouragement can be useful to build victims confidence to take legal action and to provide some financial support for weaker parties. Other measures include expanding the rights of public bodies protecting collective interests, issuing guidelines explaining the application of various economic models for the calculation of damages, potentially lowering the standard of proof, and improving the relationship between public and private enforcement. For instance, the Competition Council of Lithuania can take action in its own hands and claim damages where the state or other public entities have suffered as a result of anti-competitive practice.

While it is unlikely to expect any dramatic positive changes in private enforcement in the near future in Lithuania, the necessary developments are taking place and the improvements should gradually bear fruitful results.

¹¹⁷ Cases *UAB “Belvedere prekyba”/SPAB “Stumbras”* and *UAB “Palink”/SPAB “Stumbras”* (in Lithuanian).

¹¹⁸ Francis G. Jacobs and Thomas Deisenhofer, “Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: a Community Perspective”, in Claus D. Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford: Hart Publishing, 2003), pp.183–227.

¹¹⁹ Dr Irmantas Norkus, paper presented during the conference on private enforcement in Lithuania, December 14, 2011.