

NOVELTIES OF METHOD OF SETTING FINES IMPOSED FOR INFRINGEMENTS OF THE LITHUANIAN LAW ON COMPETITION

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Abstract. *Imposition of sanctions for violations of competition law rules is an important instrument of the European Union (EU) and Lithuanian competition enforcement authorities and is an inevitable part of the EU and Lithuanian competition law policy. The fining policy of the Lithuanian Competition Council for breaches of the Lithuanian and EU competition rules has recently been changed by the new 2012 Government resolution and has been aligned with the 2006 Commission Guidelines on the method of setting fines. The new Lithuanian fining rules set exactly the same basic principles for setting the amount of fines and are very similar to the Commission's Guidelines, however some peculiarities may and shall be distinguished. The new Lithuanian fining rules in some aspects are even stricter than the EU fining rules established in the Commission's Guidelines. The aim of the article is to analyse the main changes in the Competition Council's fining policy and identify the discrepancies in national and EU fining rules, analyse advantages and disadvantages of the new fining policy.*

Keywords: *fine, value of sales, basic amount of the fine, adjustments to the basic amount, mitigating circumstances, aggravating circumstances, recidivism.*

Introduction

Imposition of sanctions for infringements of competition law is an important instrument of the European Union (EU) and Lithuanian competition enforcement authorities and is an integral part of the EU and Lithuanian competition law policy. On 27 January 2012 the resolution of the Lithuanian Government adopted on 18/01/2012 “On approval of the description of the order for setting the amount of the fines imposed for the infringements of the Law of the Republic of Lithuania on Competition” (hereinafter - the Fining Rules or simply the Rules)¹ came into force. The Rules have established a new order for determination of the amount of fines that can be imposed by the Competition Council of the Republic of Lithuania (hereinafter – the Lithuanian Competition Council) for two types of competition law infringements – prohibited agreements and abuse of dominant position. The new Fining Rules on setting the fines are definitely “inspired” by the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (hereinafter – the Guidelines)² issued by the EU Commission on 26 September 2006. And though the Commission’s Guidelines and the national Fining Rules are very similar, some discrepancies and peculiarities may still be distinguished and therefore special attention is to be paid to them in this article.

The issue of the new Lithuanian fining policy has not been scrutinised by the Lithuanian scholars yet, therefore the topic of the article is relevant and novel in the Lithuanian competition law doctrine. As the new national fining policy is based on the Commission’s Guidelines, the authors of this article referred to the works of foreign (mostly EU) scientific researchers who analysed EU fining policy and its effectiveness, such as, for instance, Damien Geradin³, Massimo Motta⁴, Wouter P.J. Wils⁵, etc. However, these EU authors, of course, have not analysed the peculiarities of the Lithuanian Fining Rules.

The object of the article is the Fining Rules and the purpose of the research is to analyse the new Fining Rules to be applied by the Competition Council, to compare

- 1 Resolution No. 64 of the Lithuanian Government of 18/01/2012 on approval of the description of the order for setting the amount of fines imposed for the infringements of the Law on Competition of the Republic of Lithuania. *Official Gazette*. 2012, No. 12-511.
- 2 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. [2006] *OJ C 210/02*.
- 3 Geradin, D. The EU Competition Law Fining System: A Reassessment (October 3, 2011). *TILEC Discussion Paper*. 2011, 052 [interactive]. [accessed on 19-05-2012]. <<http://ssrn.com/abstract=1937582>>; Geradin, D.; Henry, D. The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts’ Judgments (February 2005). *GCLC Working Paper*. 2005, 2/05 [interactive]. [accessed on 23-05-2012]. <<http://ssrn.com/abstract=671794>>.
- 4 Motta, M. *On cartel deterrence and fines in the EU. 12 October 2007* [interactive]. [accessed on 23-05-2012]. <http://www.barcelonagse.eu/tmp/pdf/motta_carteldeterfines.pdf>.
- 5 Wils, W. P. J. The European Commission’s 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis. *World Competition: Law and Economics Review*. 2007, 30(2) [interactive]. [accessed on 19-05-2012]. <<http://ssrn.com/abstract=962654>>; Wils, W. P. J. The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights (October 22, 2009). *World Competition: Law and Economics Review*. 2010, 33(1) [interactive]. [accessed on 23-05-2012]. <<http://ssrn.com/abstract=1492736>>.

them to previous fining rules and to the Guidelines of the Commission, to identify the discrepancies, analyse advantages and disadvantages of the new Lithuanian fining policy. The authors do not attempt to analyse thoroughly all aspects of the Fining Rules or present a comprehensive study of the Guidelines; the main task of the article is to provide the reader with the analysis of the main features of the Fining Rules and their distinction from the Guidelines. The above-defined task of the research is performed by scrutinising the old and the new Fining Rules, Guidelines, relevant decisions of the Commission, EU case-law, as well as the decisions of the Lithuanian Competition Council and jurisprudence of the Lithuanian administrative courts. The subject-matter of the research of this article was analysed with the help of diverse methodology – by combining different scientific methods such as method of systemic analysis, historic, linguistic and, of course, comparative methods.

1. Former Rules on the Method of Setting Fines Applied and Prerequisites of Adoption of the New Fining Rules

The new Fining Rules replaced the 2004 Rules concerning the setting of the amount of a fine imposed for the infringement of the Law of the Republic of Lithuania on Competition⁶ (hereinafter - the old Fining Rules) which provided for the following method of setting fines:

(1) the amount of the fine was set by calculating the amount of the fine for gravity of the infringement, the amount of the fine for the duration of the infringement and the total of the two amounts;

(2) the amount of the fine for gravity of the infringement (up to 10%) was calculated on the basis of total turnover of the undertaking in the preceding business year; in assessing the gravity of the infringement account should have been taken of the nature of the infringement, impact of the infringement upon the relevant market (when this can be measured), and the area of the geographical territory (geographical market – local, national, etc.) related to the infringement;

(3) where the infringement lasted for a period exceeding one year, the amount of the fine for the duration of the infringement was set up to 10 % of the amount of the fine for the gravity of the infringement for each year of the infringement.

A fine could have been increased or reduced by no more than 50%, taking into account mitigating and aggravating circumstances, the impact of each undertaking upon the infringement, when committed by several undertakings.

It is notable that during the period of validity of the old Fining Rules the Competition Council, being influenced by both the Commission's Guidelines and the undertakings involved in the investigations, started referring in different ways to sales of the products or services related to the infringement while setting the amount of fines. For instance,

6 Resolution No 1591 of the Lithuanian Government of 6/12/2004 on the approval of the Rules concerning setting the amount of a fine imposed for infringement of the Law of the Republic of Lithuania on Competition. *Official Gazette*. 2004, No. 177-6567.

in 2009 *PEATA* case⁷ the Competition Council resumed that undertakings' revenue from sales on the relevant services market constituted a very small part (from 0.16% to 35 %) of their total turnover and therefore reduced the fines by 50-80% respectively. In its 2010 decision in *DVD* case⁸ the Competition Council calculated the fines on the basis of sales of DVDs, i.e. goods directly related to the infringement, and in its decision in *Decoupage* case⁹ the Competition Council also took into consideration the relationship between sales of the decoupage goods (i.e. goods related to the infringement) and total sales of an undertaking and calculated the fines for some of the undertakings on the basis of the sales related to the infringement. However, as it has become clear, the Competition Council each time treated the sales of the goods or services related to the infringement differently and did not have clear, transparent and consistent fining rules, therefore the need for their reform was actually obvious.

After the adoption of the new Fining Rules, the Competition Council admitted that the appearance of the new rules was inspired by several factors, such as, first, disadvantages of the old Fining Rules, second, intent that the fine more clearly reflected the activity of the undertaking, nature and duration of the infringement, and, third, amendments of the Law of the Republic of Lithuania on Competition¹⁰ (hereinafter – the Law on Competition) effected in April 2011, according to which the Competition Council was obliged to take regard to the value of the sold goods of the undertaking, directly and indirectly related to the infringement, and, of course, forth, the Commission's Guidelines¹¹.

It is also worth mentioning that after the adoption of the Guidelines in 2006 the Competition Commissioner Neelie Kroes commented: *“These revised Guidelines will better reflect the overall economic significance of the infringement as well as the share of each company involved. The three main changes – the new entry fee, the link between the fine and the duration of the infringement, and the increase for repeat offenders - send three clear signals to companies. Don't break the anti-trust rules; if you do, stop it as quickly as possible, and once you've stopped, don't do it again. [...] If companies do not pay attention to these signals, they will pay a very high price.”*¹² Empiric

7 Resolution No. 2S-1 of the Competition Council of the Republic of Lithuania of 8/1/2009 on the conformity of actions of undertakings involved in waste management, use and recycling with the requirements of Article 5 of the Law of the Republic of Lithuania on Competition.

8 Resolution No. 2S-2 of the Competition Council of the Republic of Lithuania of 28/01/2010 on the conformity of actions of undertakings involved in trade and publishing of audiovisual works with the requirements of Article 5 of the Law of the Republic of Lithuania on Competition.

9 Resolution No. 2S-29 of the Competition Council of the Republic of Lithuania of 22/11/2010 on the conformity of actions of undertakings involved in trade of decoupage, needlework kits and other related goods with the requirements of Article 5 of the Law of the Republic of Lithuania on Competition.

10 Law of the Republic of Lithuania on Competition. *Official Gazette*. 1999, No. 30-856 (new version from 01/05/2012. 2012, No 42-2041).

11 See 31/01/2012 press release of the Competition Council on the new Rules [interactive]. [accessed on 19-05-2012]. <http://www.konkuren.lt/naujienos/doc/news_20120130.pdf>.

12 Memorandum MEMO/06/256. Competition: revised Commission Guidelines for setting fines in antitrust cases – frequently asked questions [interactive]. [accessed on 14/05/2012]. <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/256&format=HTML&aged=1&language=EN&guiLanguage=enof>>.

data proved and are still proving that the price that had to be paid by the undertaking not obeying competition law rules is rather high: since the implementation of the 2006 Commission's Guidelines, fines had risen by 107%¹³. So what price a national undertaking would have to pay for the violations of competition law after the adoption of the Fining Rules? As referred above, most rules of the Commission's Guidelines were transposed into the Fining Rules, however, some of the fining aspects bore their special, "national colouring". Next parts of the article are devoted to the analysis of the "blindly accepted" and common rules as well as distinctive features of the Lithuanian Fining Rules in comparison to the Commission's Guidelines.

2. General Principles of the New Method of Setting Fines

The Fining Rules are only applicable to the infringements that take a form of a prohibited agreement or abuse of dominant position, which may violate Articles 5 or 9 of the Law on Competition or Articles 101 and 102 Treaty on the Functioning of the European Union¹⁴ (hereinafter - TFEU) respectively, which is in line with the Guidelines (see para 1 of the Fining Rules and the Guidelines).

As the Commission's Guidelines, the Rules establish a two-stage methodology for setting fines (paragraph 4):

First, the Competition Council shall calculate the basic amount of the fine (Sections III and IV of the Rules),

Second, it may adjust the basic amount by increasing or decreasing it in accordance with the grounds provided by the Rules (Section V).

The *basic amount of the fine* will be calculated as a proportion of the value of sales goods or services to which the infringement directly or indirectly relates (before taxes – VAT and excises), depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement (para 8).

Paragraph 10 of the Rules establishes the rule of a *case-by-case analysis*: the assessment of gravity of the infringement will be made separately for each infringement, taking into account all the significant relevant circumstances of the case. However, the percentage applied in any case for all types of the infringement *will not exceed 30 %* of the value of the sales. For cartels (hard-core prohibited agreements between competitors, such as horizontal price-fixing, market-sharing and output-limitation agreements) the percentage will be set at 20-30 % of the value of the sales.

The duration of the infringement is an important criterion influencing the amount of the fine, therefore, the fine determined in the above-mentioned manner (a proportion

13 Connor, J. M.; Miller, D. J. Determinants of EC Antitrust Fines for Members of Global Cartels. *Prepared for presentation at the 3rd LEAR Conference on The Economics of Competition Law, "What Makes Competition Policy Work?"*, Rome, June 25-26, 2009 [interactive]. [accessed on 22-05-2012]. <http://www.learlab.com/learconference_2009/documents/Predicting%20EC%20Fines%20for%20Members%20of%20Global%20Cartels%209-11-09.pdf>.

14 Treaty on the Functioning of the European Union. Consolidated version [2010] OJ C 83/47.

of the value of sales of goods) shall be multiplied by the number of years of the undertaking's participation in the infringement. Periods of less than six months will be counted as half a year, and periods longer than six months but shorter than one year will be counted as a full year (para 12).

In addition, in case of price-fixing, market-sharing and output-limitation cartels the Competition Council will add a sum, a so-called "entry fee"¹⁵, the amount of which is independent of duration of between 15% and 25% of the value of sales.

It is worth noting that the Commission's Guidelines do not provide for any other actions as regard the calculation of the basic amount of the fine, however, the Fining Rules do. The basic amount of the fine may be increased if the value of sales, unrelated to the infringement, exceeds 95% of the total turnover in the preceding business year of the undertaking concerned. The Competition Council may also take into account the need to increase the fine in order to exceed the amount of profit gained as a result of the infringement where it is possible to estimate such an amount¹⁶ (paras 14 and 15 of the Rules). There are no other criteria that shall be taken into account while calculating the basic amount of the fine, except its legal maximum – under paragraph 16 of the Rules the basic amount shall not exceed 10% of the total turnover of the undertaking concerned.

Once the basic amount of the fine is determined, the Competition Council may perform "adjustments"- take into account the circumstances that result in an increase or decrease of the basic amount as determined under the rules defined above. There are two main grounds for adjustment. *First*, the basic amount may be increased or decreased up to 50% having regard to aggravating or attenuating circumstances, as specified in the Law on Competition. However, the fine may be increased even up to 100% in case of a repeated infringement - earlier finding of an infringement for which the undertakings have already been imposed sanctions provided for in the Law on Competition (the so-called "recidivism"). Such an increase for recidivism may be made up to 100% for each earlier infringement. *Second*, when an infringement has been committed by several undertakings, in order to better reflect the relative weight of each undertaking in the infringement, the Competition Council will also pay attention to the influence of every undertaking in committing the infringement: the fine shall be increased when an undertaking is an initiator or instigator of the infringement, and shall be decreased if an undertaking plays a passive role in the infringement.

15 This additional amount was called an "entry fee" in the press release IP/06/857 (Press release IP/06/857. Competition: Commission revises Guidelines for setting fines in antitrust cases [interactive]. [accessed on 14/05/2012]. <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/857&format=HTML&aged=1&language=EN&guiLanguage=en>>) and memorandum MEMO/06/256. Competition: revised Commission Guidelines for setting fines in antitrust cases – frequently asked questions [interactive]. [accessed on 14/05/2012]. <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/256&format=HTML&aged=1&language=EN&guiLanguage=en>> 28 June 2006 issued after the Commission adopted the Guidelines.

16 The rule is understandable – the fine may only have a deterrent effect if the undertakings net gain expected from the infringement is lower than the amount of the fine imposed for that infringement (see more on deterrence – Motta, M., *supra* note 4, p. 5).

The fine calculated under the rules referred above may also be reduced by applying a “specific leniency rule”¹⁷ under section VI of the Rules – the fine may be reduced from up to 75% if an undertaking – participant in the prohibited agreement – submits all the information in its possession about the prohibited agreement and cooperates with the Competition Council during the investigation or meets the other leniency requirements specified in the Rules.

3. Specific Features of the New Method of Setting Fines

The amount of the fine is calculated on the basis of a two-stage methodology for setting fines provided by the Fining Rules: first, the basic amount of the fine is determined, second, adjustments to that basic amount may be made.

3.1. Calculation of the Basic Amount of the Fine

3.1.1. Value of Sales

Establishing the value of sales is the first step in calculation of the basic amount of the fine. The Rules (see para 5) provide that in determining the basic amount of the fine to be imposed on the undertaking concerned, the Competition Council shall take the value of the undertaking’s sales of *goods or services to which the infringement directly or indirectly relates*. It will normally take the sales made by the undertaking during the last one full business year of its participation in the infringement (hereinafter - value of sales). Calculation of the amount of the fine on the basis of the value of undertaking’s sales of goods or services to which the infringement directly or indirectly relates is the core aspect of the reform of the Lithuanian fining policy – previously the fines were calculated on the basis of total turnover of an undertaking within the last business year, without taking into account the sales related to the infringement. Definitely, this aspect is welcome, and it is difficult not to agree with the position of the Commission presented in the Guidelines (para 6), according to which “*the combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. Reference to these factors provides a good indication of the order of magnitude of the fine and should not be regarded as the basis for an automatic and arithmetical calculation method.*”

Determination of the value of sales seems easy only from first sight, in practice the establishment of the value of sales may be a rather problematic task. As the rules provide the same basis for calculation of the basic amount of the fine as the Commission’s Guidelines, some core aspects from the Fining Rules, as well as the Commission’s

17 The issue of “leniency” may be a separate subject-matter of scientific research and it is not analysed in this article.

practice and EU case-law, which will probably be followed by the Competition Council in its practice, need to be mentioned.

First of all, the value of sales is considered as value of sales of *goods or services to which the infringement relates*, i.e. the value of sales of the relevant commodity or service achieved by each undertaking in the relevant geographic area¹⁸. This also means that these goods or services *encompass all the goods or services of the kind notwithstanding their brand name*, even though the infringement was related only to goods or services bearing certain producer's trademark. This rule was clearly confirmed in the Lithuanian "DVD case" where the Competition Council found the infringement – vertical agreement on fixing of resale prices of DVD films. The sales of all DVDs, not distributed by a particular supplier–offender only, were taken into account by the Competition Council and the Supreme Administrative Court of Lithuania (hereinafter - SACL) supported this view¹⁹.

Second, the determination of value of sales does not require defining the relevant market to which the goods or services may be attributed²⁰. In *Brouwerij Haacht NV v. Commission*²¹ the General Court explained that "*The Commission cannot therefore be required to prove that the product or products concerned by a cartel having an anti-competitive object constitute a separate market for the purposes of assessing one of the criteria applicable when determining the amount of the fine, since such proof is not essential to the finding of the actual infringement. [...] the assessment, for the purpose of calculating the fine imposed for the infringement, of the effective economic capacity of the offenders to cause damage to other operators, in particular consumers, cannot be made by reference to products other than those to which the cartel related.*" Therefore, in *DVD* case the Competition Council wrongly concluded that value of sales was a turnover of all the goods of an undertaking in a relevant market²², as the relevant market might be narrower than the goods or services related to the infringement.

Third, the value of sales both directly and *indirectly relating* to the infringement shall be assessed. As the Commission explains in reference 6 of the Guidelines, such will be the case, for instance, for horizontal price fixing arrangements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products. Thus indirect sales may be relevant in case of intermediary products, i.e. when one product, to which the infringement directly relates, is included in another product²³ and thus this final product is indirectly affected by the infringement.

18 Case COMP/38.543 - *International Removal Services*, [2009] OJ C188/16, para 533.

19 Judgment of the Supreme Administrative Court of Lithuania of 23 June 2011 in administrative case No. A444-1433/2011 *UAB "Elektromarktas", UAB "Interatlas", UAB "Palink" v. Competition Council of the Republic of Lithuania*.

20 Whish, R.; Bailey, D. *Competition law*. Seventh Edition. London: Oxford University Press, 2012, p. 277.

21 Case T-48/02 *Brouwerij Haacht NV v. Commission* [2005] ECR II-5259, para 59.

22 Resolution No. 2S-2 of the Competition Council of the Republic of Lithuania of 28/01/2010 on the conformity of actions of undertakings involved in publishing and trade of audiovisual works with the requirements of Article 5 of the Law of the Republic of Lithuania on Competition.

23 Geradin, D. *The EU Competition Law Fining System: A Reassessment*, *supra* note 3, p. 8.

Fourth, in order to avoid double-counting, the sales performed between the offenders involved in the infringement shall be excluded. For instance, in *Bananas* case²⁴ the Commission deducted from the addressees' sales figures the value of fresh bananas sold to other addressees (deducted Chiquita-Dole inter-sales), which subsequently were sold in the Northern European region.

Fifth, in determining the value of sales by an undertaking, the Competition Council shall take that undertaking's best available figures. Where the figures made available by an undertaking are incomplete or not reliable, the value of sales may be determined on the basis of any other information. If this any other information is incomplete or not reliable then the fine may be calculated on the basis of total sales in previous business year.

Sixth, the Rules are silent on the geographic scope of sales that will be taken into account. As it is well known, the Commission takes the sales within the EEA area into account, and if the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant world-wide sales of the undertakings is considered (para 13). It is interesting to note that one of the drafts of the Fining Rules²⁵ has clearly provided that sales within the territory of the Republic of Lithuania shall be taken into account, and if the undertaking does not have sales in Lithuania, its sales within the geographical territory of the infringement shall be taken into account. This "geographical issue" is omitted in the adopted Rules, and thus it is not clear whether this omission means that sales while setting the amount of the fine will not be limited to sales in Lithuania or it is a matter-of-course that "national sales" shall only be taken into account. It is worth mentioning that the Commission is often criticized for calculating fines on the basis of world-wide turnover of undertakings concerned for two main reasons, first, such practice may cause extraterritorial effects, second, it may lead to "bis in idem" sanctions.²⁶ For instance, in concentration cases the Lithuanian Competition Council refers exclusively to the undertakings' turnover generated in the territory of Lithuania. However, it is rather difficult to predict if the Competition Council decides to follow its practice in concentration cases and consider only value of sales in Lithuania or to refer to the Commission's Guidelines and consider the sales in a wider geographical territory in case of "non-Lithuanian" infringements. Hopefully, the sales within Lithuania will be taken into account and this will be in line with Article 2(2) of the Law on Competition and the principle of non-extraterritorial application of the Law (though some exceptions are provided).

24 Thus the Commission explained that the bananas forming part of the sales figures purchased from the other addressees were subtracted from the sales figures of each undertaking. See Case COMP/39188 – *Bananas*, C(2008) 5955 final.

25 Draft Resolution No. 11-2468-01 of the Lithuanian Government on the approval of the description of the order for setting of the amount of the fines imposed for the infringements of the Law on Competition of the Republic of Lithuania" [interactive]. [accessed on 19-05-2012]. <<http://kaveikiavaldzia.lt/docs/2011/07/20/66284.html>>.

26 *The fining policy of the European Commission in competition cases*. Prepared by ICC Commission on Competition [interactive] [accessed on 19-05-2012]. <[http://www.iccwbo.org/uploadedFiles/ICC_The%20fining%20policy%20in%20the%20EU%2002-07-09_Final\(2\).pdf](http://www.iccwbo.org/uploadedFiles/ICC_The%20fining%20policy%20in%20the%20EU%2002-07-09_Final(2).pdf)>, p. 4.

The Rules also contain a rather questionable provision – if the undertaking has no revenue from sales of goods/services related to the infringement, the fine shall be calculated on the basis of its annual total turnover. This may be the case where the undertaking, e.g. agreed to refuse participating in the tender and thus did not get any revenue that could be considered while imposing the fine. Maybe, it shall first consider the infringement-related sales of the year preceding the year of the infringement, and if such are absent, only then consider total sales. In such a case a problem of equal treatment of undertakings may also arise, thus in such cases the Competition Council shall be especially careful while choosing the basis for calculation of the amount of the fine. Moreover, the Guidelines do not allow such exceptions when the Commission may calculate the fine on the basis of the total turnover (see paras 13-18).

3.1.2. Calculation of the Basic Amount

As it has already been mentioned, the basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.

In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower or at the higher end of the scale (0-30%), the Competition Council shall take a number of factors into account, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and other relevant circumstances of the case. Thus the Competition Council will enjoy a rather wide discretion while establishing the gravity of the infringement (however, the Commission is limited in this aspect – see para 22 of the Guidelines providing an exhaustive list of factors determining gravity). The main question is what are these “other relevant circumstances” that may be important for establishing gravity of the infringement. Are they guilt, consequences of the infringement? The Commission is often reasonably criticized for failure to consider the distinction between intentional and negligent infringements²⁷ while setting the amount of the fine, thus if an intent or its absence is rather obvious, it is recommended for the Competition Council to consider the issue of guilt and distinguish its form in each case. In case of non-*per se* restrictions of competition, special attention shall be paid to the effects of the infringement, especially when actual effects may be established and duly assessed. The consequences of the infringement were one of the criteria for assessing gravity of the infringement in the old Fining Rules and we believe that this tradition might be continued in the new Rules as well. The abovementioned rule to consider the combined market share of all the undertakings concerned will definitely oblige the Competition Council to define the relevant market and establish market shares of the undertakings concerned.

As it has already been mentioned, the proportion of value of sales in case of hardcore cartels will fluctuate between 20 and 30%. It is a novelty of the Rules, since the

27 See Geradin, D. The EU Competition Law Fining System: A Reassessment, *supra* note 3, p. 49.

Guidelines do not provide a strict frame for cartels, they only state that the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale. However, it shall be born in mind that recent practice of the Commission shows that the percentage of the basic amount of the fine for cartels usually does not step over 20%. For instance, in *International Removal Services* case (2008)²⁸ the Commission established a 17% basis for gravity of the infringement for a price-fixing, market-sharing and bidding cartel in *Sodium Chlorate* case (2008)²⁹ the basic amount of the fine for gravity of the infringement was set at 19% for cartel on market-sharing, quantity-sharing also related to fixing of the level of prices and information exchange. Price-fixing was “awarded“ for gravity 15% in *Banana* case (2008)³⁰ and 18% in *Flat Glass* case (2007).³¹ This means that the Rules provide for a very high threshold for fines in cartel cases and unreasonably limit the discretion of the Competition Council in defining the percentage of the fine in cartel cases.

3.1.3. “Intermediary Adjustments” of the Basic Amount

Specific grounds for increase for deterrence (non-related to infringement sales and benefit gained from the infringement) specified in paras 30-31 of the Commission’s Guidelines are referred to in paras 14-15 of the Rules, i.e. surprisingly, they are “correcting” factors of the basic amount, but not the final amount of the fine, as it is in the Guidelines of the Commission.

It is interesting to note that the Rules provide for the legal maximum for the basic amount of the fine – paragraph 16 states that the basic amount of the fine shall not, in any event, exceed 10 % of the total turnover in the preceding business year of the undertaking participating in the infringement. It seems that the rule shall be applicable in those cases where the basic amount of the fine is calculated on the basis of total annual turnover and not on the basis of value of sales of goods and services related to the infringement (cases described in paras 4.1 and 6 of the Rules), however in any case it seems unreasonable to apply legal maximum in case of application of total annual turnover and not to apply it when the fine is calculated on the value of sales of goods or services related to the infringement. Since the basic amount may be later adjusted and cut by legal maximum established by Article 36(1) of the Law on Competition,³² in both cases, the imputation of “intermediary” legal maximum and such double legal standard seems soundless, objectively unjustifiable, creates the ground for abuses by undertakings and is contrary to the principle of equal treatment.

28 Case COMP/38.543 - *International Removal Services*, [2009] OJ C188/16.

29 Case COMP/38.695- *Sodium Chlorate*, [2009] OJ C137/6.

30 Case COMP/39188 - *Bananas*, C(2008) 5955 final

31 Case COMP/39165 - *Flat glass*, C(2007) 5791 final.

32 According to Article 36(1) of the Law on Competition, the final amount of the fine cannot exceed the statutory maximum of 10% of the total turnover in the preceding business year of the undertaking concerned.

3.2. Adjustments to the Basic Amount of the Fine

While setting the fine, the Competition Council may take into account the circumstances that result in an increase or decrease in the basic amount as determined in accordance with the rules referred above. As it has already been stated, there are two main grounds for adjustment: first, mitigating or aggravating circumstances, including recidivism, and, second, the role of each undertaking in the infringement.

3.2.1. Aggravating and Mitigating Circumstances

The exhaustive lists of mitigating and aggravating circumstances are given in Articles 37(2) and 37(3) of the Law on Competition. Voluntary prevention of the detrimental consequences of the infringement after the commission thereof by the undertakings, assistance to the Competition Council in the course of investigation, compensation for the losses, elimination of the damage caused, voluntary termination of the infringement, non-implementation of restrictive practices³³, acknowledgement of the material circumstances established by the Competition Council in the course of investigation, also the fact that actions constituting the infringement were determined by the actions of the state authorities as well as serious financial difficulties of the undertaking shall be considered *as mitigating circumstances*. Obstruction of the investigation, concealment of the committed infringement, failure to terminate the infringement notwithstanding the obligation by the Competition Council to discontinue illegal actions or repeated commission of the infringement within seven years for which the undertakings have already been imposed sanctions provided for in the Law on Competition shall be considered *as aggravating circumstances*. The content of most of the above-mentioned mitigating and aggravating circumstances is defined in the jurisprudence of the Lithuanian administrative counts and practice of the Competition Council and are not discussed in this paper in more detail.

The Fining Rules place particular focus on *recidivism* as aggravating circumstance for which the basic amount of the fine may be increased up to 100 % for each earlier infringement. This issue is of special importance, in particular in the light of the new Rules. First of all, recidivism is clearly defined as commission of a repeated infringement, for which the undertaking has already been imposed sanctions provided for in the Law on Competition (para 17), i.e. the Rules establish a so-called general recidivism³⁴ - commission of infringement after having been penalised for any other infringement, which is not necessarily similar. The Guidelines of the Commission (para 28) contain a “specific recidivism” rule: the basic amount is increased up to 100 % for infringement where an undertaking repeats *the same or similar infringement* after the Commission or

33 It is worth mentioning that the termination of infringement in the Guidelines (para 22) is considered as a factor decreasing percentage of the basic amount of the fine, but not the basic amount itself (as a mitigating circumstance).

34 Wils, W. P. J. The European Commission’s 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis, *supra* note 4, p. 26.

a national competition authority has found that the undertaking infringed Articles 101 or 102 TFEU.

The recidivism-related rules of the Guidelines were widely criticised. *First*, the critique was aimed at the vague definition of “similar infringement”. It is not clear what is meant under “similar infringement”, e.g. whether all or only a few infringements of Article 101 TFEU are similar (e.g. all hard-core infringements). The only guidance was provided by the General Court in *ICI* case³⁵: infringements cannot be considered “similar” when different rules, e.g. Article 101 and 102 TFEU are breached. *Second*, there is no limitation period in the Guidelines after which recidivism cannot be established³⁶. Moreover, the EU courts have emphasised that the Commission cannot be bound by any limitation period when deciding on recidivism³⁷. However, recent case law provides some hope that a limitation period will be defined. For instance, in *Lafarge*, Court of Justice of the EU ruled that decisions adopted several years before the start of the repeated infringement should not be the basis for establishment of recidivism, because they were too distant in time and the Commission should not take account of recidivism without any limitation in time³⁸. The court confirmed that any increase for repeated infringement must comply with the principle of proportionality which requires that the time elapsed between the infringement in question and a previous breach of the competition rules be taken into account in assessing the undertaking’s tendency to infringe those rules³⁹.

The Law on Competition provides a time limit of seven years for recidivism. The determination of the limitation period for recidivism shall be definitely welcome, since it will at least ensure that the undertaking is not punished for infringements that are really too distinct in time from the infringement concerned. However, the formulation of the provision of the Law on Competition on the limitation period does not provide clear guidance on the way of calculation of this seven-year period. For instance, it may be calculated from the moment when a sanction for infringement of the law was imposed (from the date of the decision of the Competition Council) to the date of commencement of the repeated infringement. Another alternative is to calculate between the two decisions of the Competition Council imposing sanctions for infringement of the Law on Competition. The first alternative seems more logical and corresponding to the formulation of the provision of the law, however explanations of the Competition Council would be really preferable on that point.

35 Case T-66/01 *ICI v. Commission* [2010] ECR II-2631, paras 375-381.

36 *The fining policy of the European Commission in competition cases*. Prepared by ICC Commission on Competition [interactive]. [accessed on 19-05-2012]. <[http://www.iccwbo.org/uploadedFiles/ICC_The%20fining%20policy%20in%20the%20EU%2002-07-09_Final\(2\).pdf](http://www.iccwbo.org/uploadedFiles/ICC_The%20fining%20policy%20in%20the%20EU%2002-07-09_Final(2).pdf)>, p. 5.

37 Case C-3/06 *Groupe Danone v. Commission* [2007] ECR I-1331, para 38.

38 Case C-413/08 *P Lafarge v. Commission* [2010] ECR I-5361, paras 68-84.

39 Press release No 58/10 Luxembourg, 17 June 2010 of the Court of Justice of the European Union. *The Court confirms the fine of €249.6 million imposed on Lafarge for its anti-competitive conduct on the plasterboard market* [interactive]. [accessed on 19-05-2012]. <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-06/cp100058en.pdf>>.

The Rules removed the problem related to the limitation of the period of recidivism, however, some other problematic issues have been left open. For instance, due to the abovementioned general recidivism rule, the repeated infringement may be found even where the infringements are totally different in kind, e.g. non-notified concentration and prohibited vertical agreement. According to our view, only “specific” recidivism should have been established - for prohibited agreements and abuses of dominant position - and a distinction between these two infringements should have been provided, i.e. abuse of dominance should have been considered as “similar” infringement only for abuses, prohibited agreements – only for prohibited agreements (with possible further differentiation within the group). The current recidivism regulation in paragraph 17 of the Rules seems too strict, unreasonable and thus at least doubtful.

3.2.2. The Role of an Undertaking in the Infringement

According to a well-established case-law, *“where an infringement has been committed by a number of undertakings, it is necessary, in determining the amount of the fines, to establish their respective roles in the infringement throughout the duration of their participation in it [...]. It follows, in particular, that the role of “ringleader” played by one or more undertakings in a cartel must be taken into account for the purposes of calculating the amount of the fine, in so far as the undertakings which played such a role must therefore bear special responsibility in comparison with other undertakings”*⁴⁰.

The Rules also provide an obligation for the Competition Council to make a distinction between “active” and “passive” participants in the infringement. And, what is more important, not only instigators and initiators of the infringements shall be punished more severely, but also an undertaking that has played a passive role in the infringement shall be granted a reduction in the fine (para 18). The notion of “passive role” will depend on the circumstances of the case and will probably be assessed on a case-by-case basis. The Commission’s Guidelines do not provide for any “discounts” for undertakings for their passive participation in the infringement.

Conclusions

1. The new 2012 Lithuanian Fining Rules are very similar to the 2006 Commission’s Guidelines on the method of setting fines, however the Rules provide for some specific features that are distinct from the EU rules.

2. The Fining Rules do not provide clear guidance on the value of sales that shall be taken into account for calculation of the basic amount of the fine, however in some cases the Rules provide for a possibility to calculate the fine on the basis of total turnover

40 Cases T-236/01 etc. *Tokai Darbon and Others v. Commission (Graphite electrodes)* [2004] ECR II-1181, para 301.

of the undertaking, as well as intermediary legal maximum for basic amount of the fine which is a novelty in comparison to the Commission's Guidelines.

3. The Fining Rules leave more space for the discretion of the Lithuanian Competition Council to decide on the factors that may determine the gravity of the infringement, and the Guidelines provide an exhaustive list of such factors. It is recommended that while deciding on the gravity of the infringement the Competition Council takes the guilt of the undertaking and consequences of the infringement into account, especially in non-*per se* restrictions of competition.

4. The Fining Rules provide a clear floor for basic amount of the fine for cartel agreements which is higher than the average percentage of the value of sales usually applied by the Commission in its relevant practice.

5. Recidivism as an aggravating circumstance is distinct in the Fining Rules in two main aspects, first, it is limited in time, i.e. the Rules provide for a limitation period for infringements that may be considered repeated, second, they establish a so-called general recidivism rule, which allows treating any infringement of the Law on Competition as repeated infringement, even if it is not the same or even similar to the repeatedly committed infringement.

6. Most of the abovementioned peculiarities of the Fining Rules clearly show that the Rules provide for some stricter provisions of the fining policy in comparison to the Commission's Guidelines, and some of the aspects provide more space for the Lithuanian Competition Council for considering the reduction or limits of imposition of the fine. This may generally mean that the Fining Rules at least may cause the same effects as the Guidelines, i.e. increase the total level of fines imposed on undertakings for prohibited agreements and abuses of dominance, and only future may show if the new Lithuanian fining policy ensures greater deterrence for undertakings and effective prevention from committing competition law infringements.

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BAUDŲ, SKIRIAMŲ UŽ KONKURENCIJOS ĮSTATYMO PAŽEIDIMUS, DYDŽIO NUSTATYMO TVARKOS NAUJOVĖS

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Santrauka. Straipsnyje yra nagrinėjama nauja baudų, skiriamų už Lietuvos Respublikos konkurencijos įstatymo pažeidimus, dydžio nustatymo tvarka, patvirtinta Lietuvos Respublikos Vyriausybės nutarimu ir įsigaliojusi 2012 m. sausio 27 d. Priimti naują baudų dydžio nustatymo tvarką paskatino kelios priežastys – senos tvarkos netobulumas, Lietuvos Respublikos konkurencijos tarybos praktikos kritika, naujos Lietuvos Respublikos konkurencijos įstatymo pataisos, įpareigojusios Konkurencijos tarybą skiriant baudas atsižvelgti į pajams, gautas iš prekių ar paslaugų, susijusių su pažeidimu, pardavimo. 2006 m. ES Komisijos priimtos gairės dėl baudų dydžio nustatymo neabejotinai tapo naujosios baudų dydžio nustatymo tvarkos pagrindu, tačiau nepaisant akivaizdžių esminių panašumų (pvz., dėl baudų dydžio nustatymo metodo, bazinio baudos dydžio nustatymo taisyklių, pagrindų bazinei baudai didinti ar mažinti), nacionalinės Lietuvos baudų dydžio nustatymo taisyklės turi ir tam tikrų ypatumų. Straipsnyje analizuojami naujosios Lietuvos baudų dydžio nustatymo tvarkos ir 2006 m. Komisijos gairių panašumai bei skirtumai, naujosios tvarkos privalumai ir trūkumai. Autoriai laikosi nuomonės, jog naujoji Lietuvos baudų dydžio nustatymo tvarka tam tikrais aspektais yra griežtesnė nei 2006 m. Komisijos gairės (pvz., nustatant bazinės baudos dydį karteliniams susitarimams, dėl bendrojo pakartotinumų koncepcijos), o tam tikrais aspektais palieka Konkurencijos tarybai daugiau laisvės sumažinti baudą arba kitaip

ją apriboja dėl skirtinos baudos dydžio (pvz., per „tarpinio teisinio maksimumo“ baziniam baudos dydžiui, senaties pakartotiniams pažeidimams nustatymą). Galiausiai autoriai daro išvadą, jog naujoji Lietuvos baudų dydžio nustatymo tvarka tikėtina, jog sukurs bent tokias pat pasekmes kaip ir 2006 m. ES Komisijos gairių priėmimas, tai yra tikėtina, kad padidins bendrą baudų lygį.

Reikšminiai žodžiai: *bauda, pardavimų vertė, bazinis baudos dydis, bazinio baudos dydžio tikslinimas, lengvinančios aplinkybės, sunkinančios aplinkybės, pakartotinumai.*

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