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**Competition Agencies and Competition Distortion.
The Lithuanian Case**

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Introduction

Traditional competition law is based on several unrealistic assumptions, including the model of pure competition. Intellectually convincing case for the repeal of it is already made in Austrian economics. Theoretical arguments are available, and many authors, including Schumpeter, Rothbard, Salin, and others have contributed to this. Practice of competition laws is however going to the opposite direction: competition regulations are applied wider, and more strictly. New terms, such as an “effective competition” are being invented and implemented. The implementation of competition goes even further beyond limitations of traditional competition law.

One of possible problems for Austrian economists might be that arguments against competition regulation are still not supported by studies of implementation practices enough. This makes the case against competition regulation weaker in the eyes of policy makers, the general public, and the majority of economists and lawyers. It is also not often noted how these new tendencies to broaden the scope of competition regulation negatively affect real problems of distortion of competition: entry barriers.

Lithuanian case is quite an interesting one to investigate mainly because of the specific feature of the Law on Competition. It prohibits hampering competition by decrees of the state agencies. It also gives powers to Competition agency to declare such decrees illegal. This is not a common approach of Competition laws of the Western legal tradition nowadays. The practice of implementation however shows how the Competition agency shifts all the attention from the entry barriers to a “traditional” prohibition of cartels, an abuse of dominant position, a regulation of concentration.

The analysis of the implementation of competition regulation demonstrates that the competition rules are especially harmful for rapidly growing economy of relatively small country. The practice of the implementation of competition regulation shows that competition agency tends to use more and more indirect proofs, vague concepts in order to stop “harmful practices” of cartel agreements or using dominant position. Fines are imposed on enterprises whose “anticompetitive” actions did not even have any significant impact on the economic reality. There are also attacks made on business associations (as the head of Lithuanian Competition agency said, “Associations are nests of cartels”).

There are also numerous examples of how the competition regulation is used unsystematically: companies are encouraged to make certain cartel agreements (like agreeing of retail companies not to work on certain dates in Lithuania) while they are punished for making other cartel agreements; entrepreneurs are encouraged to ask for government regulation (applicable to all) instead of deciding on voluntary standards.

The other interesting aspect of the implementation of competition regulation is nowadays popular belief that traditional competition law is not sufficient because it is used *ex post*. This leads to the spread of *ex ante* regulation of competition. In fact it turns into market modeling instead of ensuring

competition. This tendency also shows that competition regulation is no different from any other regulation.

Theoretical arguments being ready there is a need for practical evidence of how implementation of competition regulation contributes to the instability of business environment, distortion of motivation, and waste of resources is also necessary to provide along with the Austrian theory of competition. This will be demonstrated by presenting analysis of Lithuanian case, especially focusing on implementation of prohibition of cartel agreements, and the use of *ex ante* competition regulation.

The goal of this work is to evaluate the policy of competition, its implementation. The study does not deal with *ex ante* competition regulation, which is very interesting development of competition law. This development illustrates clearly that competition is nothing else but a type of regulation. If you start with not allowing dominate, to make cartel agreements, or to concentrate, you end up with the modeling of the market itself, not protecting the market.

The conclusions of this work are made referring to theoretical competition policy principles analysis, European Union and Lithuanian law context, material provided in the Competition board reports and other material about the work of the Competition board in general and separately dealt cases, also referring to Competition law and the economic consequences of its applicability.

1. THE CONCEPT OF COMPETITION

The work is based on several assumptions (which are not proven separately) about the applied concept of competition

Even though the model of perfect competition (assuming that there are no restrictions to enter the market and that neither of the participants can influence the market) is fictions and inapplicable in reality, lately it is transformed to an effective competition concept and goal. (Assuming that effective competition is more a factual competing and slightly integrated structure of the market, than an institutionally or in other forceful way unrestricted ability to compete.) This is why the concept itself is unrealistic and ignores the dynamics of competition, rivalry between different products and technologies, potential competitors influence to the market.

The idea that some areas of economic activity are natural monopolies is still groundlessly used in country's economical policy. In reality a monopoly is a lawful monopoly, with privileges embedded in the law. Additional regulations do not change the mechanics of competition and often restrict the performance of „, so called“ natural monopolies without ground.

Competition can be maintained by strictly following free competition principles:

- Free entry and exit from the market
- No party can forcefully influence the behavior of the participants in the market,
- The market can not be restricted with standards,
- The Government can not provide any help or support,
- The Government, as the referee of the market, can not participate in business activities.

Consistent implementation of the competition principles is damaged by governmental regulation, including the regulation based on Competition law, with the pretext of „effective competition assurance“ or „monopoly control“.

2. THE DEVELOPMENT AND MAJOR PRINCIPLES OF LITHUANIAN COMPETITION LAW

2.2 Lithuanian Competition law

Development and major law norms

The basic norm of the Competition law is expressed in the Constitution of the Republic of Lithuania, article 46, „the law prohibits monopolized production and market, defends fair competition freedom“.

Following the article in the Constitution the first law regulating the constitution -Competition law of The Republic of Lithuania, was enacted on the 15th of September, 1992. Competition in this law was quite narrowly described as „competing, in which parties in the economy, independently acting in the market, limit each others possibilities to dominate the market, and promote the production of required goods and increase efficiency“. This law interdicted actions which limit competition such as using dominant position in the market¹, agreements between competitors, prohibited governmental suppression of competition and unfair competition however not as strictly as the law which is in place now (1). It should be noted that prohibited actions and exceptions were indicated in all cases.

The competition law of the Republic of Lithuania, which is now in place, was enacted on the 23rd of March 1999. It expanded the scope of prohibited actions, gave a more accurate description of the competition board (before - governmental price and competition board) functions together with duties and rights of parties in the economy. The Competition board consisting of five members is assigned by the President of Lithuania.

This law, which was adapted on the 15th of April 2004, when Lithuania joined the EU, outlines the actions of government of the country, municipal institutions or parties in the economy which restrict or potentially restrict competition. Mainly: prohibited agreements, usage of the dominant power in the market, concentration in action, unfair competition, actions limiting competition, procedural processing peculiarities, and subject responsibilities of the governmental institutions.

Integration with EU competition law²

The competition law of 1999 and on its basis developed law notes in general outlined the same principles which were used in EU competition law. Joining of the EU³, together with the

¹ A more free system was also guaranteed by the definition of dominant power. Now, even a company with a market power lower than 40% can be recognized as dominant, while according to the previous law it was strictly outlined that „a company can not be recognized as dominant if it does not have the market power of at least 40% in a market of one of its goods“.

² Factual data – according to Rimantas Stanikunas, 2004 05 21, Modernization of competition law in Lithuania

³ Changes made to the Competition law in 2004 04 15.

modernization⁴ of the EU competition rules in the spring of 2004 had an insignificant but direct effect on Lithuanian competition law.

After joining the EU Lithuanian institutions were obliged to adopt articles 81 and 82 from the Establishment agreement. The competences of the Competition board were expanded in order to ensure the parallel usage of the articles 81 and 82 of the Establishment agreement and Competition law in cases of agreements and usage of dominant power in the market which could have influence for trade between member states. Competition board, as well as European Commission, was also granted the right to assign fines for violations, which can influence the trade between EU members.

The integration to the EU had major influence to Lithuanian competition law, because the law of 1999 (which, with changes, is active today) was already developed in accordance with the model of EU competition law, and the help and support of experts from European Commission. Commission expressed their opinion about various aspects of the law quite unambiguously in the development and deliberation stage. Competition law in EU first of all outlines the law in EU level, however during the process of joining the EU European Commission provided support and *de facto* pushed Lithuania to develop a Competition law, which would apply principles to control competition in accordance with the regulations. Even though Lithuania accepted the duty to implement competition regulations when it signed the association with EU agreement, it could be said that the advocacy of the EU standards was quite often performed overstepping the formal authority of the Commission. The regulations of the EU which outline the competition law did not indicate the features of the national competition law notes. In other words, formally Lithuania could and still can be without national competition policy (except national support limitations). Empirically in a number of „old“ EU countries (Germany, Belgium) national competition law was and still is considerably more lenient than the EU model. However new EU members were forced to accept a more radical EU competition law model and implement it in national economic activities unregulated by EU law. Nevertheless, later an equivalent pressure with consequent changes was made for „old“ EU countries, which had a considerably different from EU competition law. Together with other developments the joining of the EU meant a voluntary *de facto* harmonization of the competition law for Lithuania.

3. MAJOR INSTITUTIONS ENACTING COMPETITION POLICY

The supervision of the Competition law of The Republic of Lithuania belongs to the Competition board; detailed functions are listed in the Competition board regulation, approved by the Government of The Republic of Lithuania on the 12th of July 1999. The principles of the functioning, internal administration, competence of the employees, application and decision making order are outlined in the Competition board work regulation, approved by the Competition board on the 16th of September, 2004.

Lawful functions of the Competition board

There are 3 major tasks of the Competition board indicated in the Competition board regulations⁵: the implementation of the national competition policy, control of the law (Competition law, Price

⁴ Board regulation Nr. 1/2003/EB about competition rules, set in articles 81 and 82 of the Treaty, inured in 2004 05 01, as well as new concentration regulations which are also applicable from 2004 04 21.

⁵ According to: Government resolutions approved on 1999 m. July 12. Governmental resolution Nr. 822 and its adjustments.

law, and partly Advertising law), governmental support, which must comply with EU governmental support rule, coordination. Moreover the Competition board is the institution with the power to implement EU competition rules. It should also be mentioned that several functions are given to the board by the Electronic networks law.

National competition policy is implemented by passing law notes, performing law and law notes projects analysis and evaluation, providing suggestions, recommendations and explanations to do with Competition law, Price law or Advertising law implementation and competition policy formation.

The control of the Competition law is performed by the Competition board by monitoring how governmental and municipal institutions together with other parties in the economy follow the law, inspecting law violations and punishing violators, also examining if law notes and other decisions passed by governmental and municipal institutions comply with the Competition law requirements. Major functions of the Competition board in the supervision of the Competition law are connected with the supervision of prohibited agreements, unfair competitions and concentration.

In the process of monitoring prohibited agreements Competition board examines notifications and other information about the possible prohibited agreements. It is also indicated in the Competition law that the board chooses requirements and conditions for market participant's agreements, which can not limit competition due to their small scale impact.

In the process of monitoring the concentration Competition board examines received notifications about the concentration cases and provides permissions for the concentration, outlines actions which should be made before the concentration can follow or declines the application for concentration. By the motivated request of entities participating in the concentration or the responsible individual Competition board can give permission for separate concentration actions, taking into account the consequences of possible concentration abortion for the participating parties and predicted effect for competition. Common income calculation rules for concentration control are indicated by the Competition board.

Lithuanian Competition law is exceptional in the context of similar laws because it allows the possibility of acknowledgement of illegal actions by Government and municipalities concerning the limitations of competition. Article 4 from the Competition law strictly prohibits actions that limit or could limit competition and are not controled directly by the law requirements, by the government or municipalities. Consequently the Competition board receives the function of inspecting disputes about the governmental or municipal institutions decisions and ensuring the enacting of the Competition law in these cases.

The third task of the Competition board is to coordinate *governmental support questions* regalement by the EU law. It includes participating in providing governmental support announcements and other information about the governmental support, also providing annual governmental support reports for European Commission. Moreover it includes governmental support project analysis and managing the registry of provided governmental support together with providing information for interested institutions.

Actual functions and priorities of the Competition board

Main areas of Competition law supervision by the Competition board, as indicated in the 2005-2007 strategic action plans, are control of prohibited agreements, usage of dominant position in the market and concentration. According to 2005-2007 strategic action plans, other priority functions of the Competition board are governmental support coordination and effective competition policy formation and implementation in the context of EU.

Even though this is not indicated in the plan literally as one of the major action areas, a considerable amount of research is made about the Advertising law supervision, as can be seen from the practice of the Competition board.

It should be outlined that the Competition does not indicate governmental and municipal institutions activity monitoring as one of the Competition law supervision areas board in its strategic action plan, even though the Competition law separately indicated these institutions as capable of taking actions limiting free competition and prohibits these actions.

According to 2005-2007 strategic action plan Competition board results are valued by:

1. Amount of research
2. Amount of issued concentration permissions
3. Amount of adjusted prices and tariffs for goods and services
4. Number of evaluated governmental support projects
5. Number of comments and conclusions provided for law notes and projects
6. Amount of reports for EK and PPO about the provided governmental support for participants of the economy
7. Number of governmental support providers, with annual report analysis and information register
8. Amount of evaluated violations of competition rules which have an effect on trade between EU member states
9. Amount of representation in EU institutions (people/day)

In the evaluation of these criteria it should be noted that the goal of making as much research as possible but not concentrating on the quality is unjustified. According to these criteria, namely the number of made research and decisions made, the Competition board pays most of its attention to competition control and within its competence to advertising law supervision. Only several investigations are made concerning the prohibited agreements and usage of dominant power in the market. Consequently an effort to artificialy creates danger for the competition by increasing the number of research can be seen. Nevertheless a concentration of research on a single considerable AB „Mažeikių nafta” case can be seen in 2005. There is a significant lack of public information about the process of formation and implementation of governmental support and effective competition policy in the context of EU.

It should be said that the Competition board is not very operative in a number of research projects even when it is not exclusively complex or lengthy. Projects that are started and transferred to the following year can be seen in reports every year. Even though it could be (and probably is) caused by limited resources, the influence of the lack of organizational efficiency should be noted, especially the overload of irrelevant functions and problems.

4. SEPARATE FUNCTIONS AND THEIR IMPLEMENTATION OF THE COMPETITION BOARD

Since 2000 there have been 70-80 resolutions about the violations of the Competition law and 10-30 resolutions about the violations of the Advertising law. The biggest amount of resolutions is signed in the concentration control area, but only several in other areas of the Competition law.

Table 1. **Resolutions about the violations of the Competition law and Advertising law of the Republic of Lithuania**

	2000	2001	2002	2003	2004	2005
Total amount of resolutions	69	86	84	94	106	73
Forbidden agreements	3	6	8	7	7	2
Usage of the dominant power	4	5	6	6	5	1
Concentration	50	51	48	53	54	66
Actions by Governmental and municipal institutions limiting competition	5	11	8	7	6	4
Unfair competition	7	-	-	-	3	-
Advertising law	-	13	14	21	27	

In 2000-2005 fines for the violations of the Competition law and Advertising law together with other commitment to the Competition board violations totaling 36.934.654 litas were set. AB „Mažeikių nafta“ got the biggest fine of 32 mln. Lt. in 2005, AB „Lietuvos telekomas“ got the fine of over 2 mln. Lt. in 2002 and AB „Hidrostatyba“ with AB „Panevėžio trestas“ got the fine of more than 1 mln. Lt. These three fines totaled to 95% of all fines set by the Competition board during the 2000-2005 period. It should be noted that the Competition law which was valid till 2004 05 01 allowed a fine of maximum 100.000 Lit. A fine calculated from the turnover could have been set only under complicating circumstances. Therefore there can only be a conditional comparison between fines before and after 2004 05 01.

Table 2. **Fines set for the violation of the Competition law and the Advertising law of the Republic of Lithuania**

	2000	2001	2002	2003	2004	2005
Total amount of fines	557.000	1.442.000	2.363.154	96.000	281.500	32.195.000
Forbidden agreements	87.000	1.387.000	160.000	80.000	36.500	80.000
Usage of the dominant power	375.000	-	2.202.154	3.000	-	32.000.000
Concentration	70.000	-	-	-	3.000	-
Unfair competition	25.000	-	-	-	-	-
Advertisement law	-	55.000	1.000	13.000	242.000	115.500

4.1. Cartel agreements

Major provisions prohibiting agreements which limit competition are set in chapter 5 of the Competition law. It says that all agreements that intend to, limit or could limit competition are illegal and are forbidden (...) including:

1. An agreement to directly or indirectly set the price or the conditions of the sale or purchase of a particular good;
2. An agreement to divide and share the market by the territory, by the consumer or the provider group or in any other way;
3. An agreement to set the amounts of produced and sold goods for particular merchandise or to limit technical advance and investment.
4. An agreement to apply similar discriminating conditions for particular parties in the market and create distinct competition conditions for these parties;
5. An agreement to request additional commitments which in its use and nature are not directly connected with the contract object from other parties in the market.

If the agreement is made by the competitors according to one or more of the first four points above, it is automatically assumed that it limits competition, regardless if it intentionally limited competition or if there was any damage for the competition.

The Competition board also sets the requirements about the situations when agreements due to their small scale effect can not have a significant effect on competition. The provision „ About the requirements and conditions for the agreements which due to their small scale effect are not considered to violate part 1 and 2 from chapter 5 of the Competition law“ outlines that unregulated agreements made by the parties, which taken together do not amount for more than 10% of the market power in the case of horizontal or mixed agreements and 15% in the case of vertical agreements. In its practice and in explaining its practice to the public the competition board evaluates that agreements made between parties that taken together do not exceed 30% of the market power as insignificant. Obviously the theoretical and practical definition of the market remains in the discretion of the Competition board.

The phrasing and criteria of the evaluation of the limitation of the competition from article 5 of the Competition law (5 listed examples are not comprehensive enough for all possible cases of agreements) allows the regulator to adopt the law quite freely. The Competition board in its practice uses this article both in cases of horizontal and vertical agreements.

After Lithuania joined the EU the Competition board also refers to the article 81 from the Establishment treaty and the practice of the ETT when assessing the potential violations of the article 5 from the Competition law. *In the case of cash registers and in the case of Vilnius taxi drivers* the Competition board referred to ETT's explanation of coordinated actions in its decision making.⁶ While *in the Mažeikių nafta* case they referred to an opinion about the parallel import

⁶ „The form of the coordination of actions between market participants which is consciously changed to practical cooperation in order to avoid the danger of competition, before the stage of agreement is reached“ (1972 m. July 14 ETT decisions *ICI-Dyestuffs v. Komisija*).

restrictions⁷. It could be said that the Competition board always referred to the practice of the Commission and ETT in employing the Competition law of 1999. The same applies to the courts.

The strictness of the competition board can be illustrated by the fact that in its decision making it often cites the 1999 *Anic* case (*Commission v. Anic Partecipazioni SpA*) in which ETT expressed an opinion that „ if the contact is recorded it can be presumed that the behavior that followed in the market was a result of the contact. The burden of refutation of these presumptions falls on the potential violators of the first part of the 81 article of the Establishment treaty. This is because coordinated actions, despite the results, are forbidden because of the purpose. In other words the factual proof of the limitation of the competition is not required in order to apply the article“.

The other case which is often mentioned is the *Sugar* case (Sugar, ECJ Dec. 16, 1975) in which ETT comments that the definition of the competition suggests that each party in the market should independently choose its behaviors in the market of the Union, including the choice of the customers and partners. Even though this requirement leaves the right for the parties to adapt to the current or future competitors behavior, it forbids the establishment of any direct or indirect contact between subjects if the purpose or the result of this contact is to influence the behavior of current or future competitor in the market or to reveal the future moves to the competitor, which were chosen by the party“. These decisions by the ETT unambiguously allow the Competition board to evaluate any contact between business partners and competitors as an action limiting competition and consequently as a violation of the Competition law.

Statistics

In 2000-2005 the Competition board made decisions in 12 investigations of violation of the 5th article of the Competition law. In 10 of these investigations violations were found and fines were set. The biggest fine was set in 2001 in the *Hidrostatyba* case. „Hidrostatyba“ and „Panevėžio statybos trestas“ together got fined for 1.041.000 Litass.

Table 3 gives data summering the investigations of the Competition board.

Table 3. Activity of the Competition board in the forbidden agreements area

Year	Rejected complaints	Approved exceptions	Rejected exceptions	Number of bans	Number of appeals of bans	Fines set	Fines after court judgment
2005	6	0	0	1	1	80.000	80.000
2004	4	1	0	2	0	36.500	36.500
2003	5	1	0	1	0	80.000	80.000
2002	3	3	1	1	1	160.000	160.000
2001	2	2	0	2	1	1.387.000	1.341.000
2000	0	1	0	3	1	87.000	87.000
Total	20	8	1	10	4	1.830.500	1.784.500

⁷ „In the case of *Consten and Grundig v. Commission* ETT concluded that a vertical agreement indicating the restrictions for parallel import, that is, creating limitations to import particular goods from one country to another, in its nature limits competition, so there is no need to take into account the effect of such an agreement“.

Main cases

The summaries of the most important cases about forbidden agreements investigated by the Competition board are given in the table 4

Table 4. **Major cases investigated by the Competition board in the area of the forbidden agreements**

Year	Investigation on	Investigated company	Short description	Decision
2005	<i>Vilnius taxi drivers investigation</i>	12 Vilnius companies	After a meeting and public statement of companies providing services in Vilnius, new prices of taxi services were set (call service).5.000 Litas each, two got	UAB „Martono taksi“ got a fine of 50.000 Litas, 9 companies got fined by The Competition board investigated because of that the agreement was organized by complicating conditions. UAB „Martono taksi“. Court changed this decision.
2003	<i>Computer companies investigation</i>	UAB „Blue Bridge“, UAB „Aideta“ and UAB „Techna Orbis“	UAB „Blue Bridge“, UAB „Aideta“ and UAB „Techna Orbis“ provided adjusted suggestions for the PHASEL competition for the IT equipment for the Agriculture ministry. Companies approved that there was an agreement and cooperated with the Competition board.	Companies got fined between 10000 and 50000 Litas.
2003	<i>Road construction companies investigation</i>	AB „Panevėžio keliai“, AB „Ukmergės keliai“	AB „Panevėžio keliai“ and AB „Ukmergės keliai“ provided suggestions for two competitions which were adjusted in advance in order to ensure a success in one of them. AB „Panevėžio keliai“ controls 49,95% of AB „Ukmergės keliai“ stocks.	The Competition board did not find violations in this case.
2002	<i>Insurance companies investigation</i>	AB „Lietuvos draudimas“, UAB „ERGO Lietuva“, UADB „Preventa“ and UAB „Sampo Lietuva“	Insurance companies made an agreement in which outlined requirements for security systems in the insurance of the vehicles in the case of theft. According to the Competition board an opportunity for customers to choose a more convenient insurance conditions was also limited.	All companies got a fine of 40.000 Litas.

2001	<i>Hidrostatyba</i> <i>a</i> <i>investigatio</i> <i>n</i>	AB „Hidrostatyba“ adjusted prices in competition suggestions with its competitor AB „Panevėžio statybos trestas“ and submitted them for the competition financed from the World Bank and the municipality of Klaipeda. AB „Hidrostatyba“ got about 16 mln. Litas income from this competition.	AB „Hidrostatyba“ got fined 543.000 Litas, AB „Panevėžio statybos trestas“ got fined 498.000 Litas.
2001	<i>Mažeikių nafta</i> <i>investigatio</i> <i>n</i>	AB „Mažeikių nafta“ and 6 other oil selling companies	In the agreements between AB „Mažeikių nafta“ and oil selling companies it was settled not to buy oil form other oil importing companies. fines 100.000 Litas, other companies got fines ranging from 29.000 to 86.000 Litas.
2000	<i>Photo equipment</i> <i>investigatio</i> <i>n</i>	16 Vilnius companies	Before the announcement of the abolishment of the discounts for the photo tape development representatives of the companies had a meeting in Vilnius technology school. Ten companies got fined from 3.000 to 20.000 Litas.

Investigated markets

There were 4 public acquisitions investigated in 2000-2005: Garbage collection system competition, Road construction and maintenance work competitions, IT equipment public acquisition and construction companies' agreement in a World Bank project. Except the AB „Mazeikiu nafta“ agreement with oil selling companies and insurance companies agreement about the common requirements for the vehicle theft insurance, other fined markets were insignificantly small and had limited influence to the Lithuanian economy and the welfare of the people. These are: Gas stations in Venta, Akmenes district, Vilnius photo laboratories, Vilnius and Klaipeda driving schools, Vilnius taxi companies, companies selling cash registers and architects union. In 5 of these 6 completed investigations, violations were found, 23 companies fined, totaling to 180500 Litas of fines.

Not taking into account the legal and formal conformity with the criteria of the violation expressed in the Competition law, they clearly illustrate that the Competition board, even though it is declared other wise, occupy themselves with unimportant investigations and denunciation of agreements that do not create real damage to society and state economy. Even though other countries have similar problems, as Lithuania uncovers a similar amount of forbidden agreements as Estonia and slightly more than Latvia, it should be noted that in the case of Lithuania the control of forbidden agreements is concentrated in the small and medium business sector significantly more. And the complaining from the head of the Competition board that they lack measures such as „secret listening possibilities“ can not be evaluated in any other way as a desire to be the business police⁸.

⁸ „Even though we did not feel that we were guilty, it was unpleasant. They searched my computer, copied something. I think it would be more appropriate to collect information and only then search for the evidence. It would be naive to think that parties in cartel agreements would keep the documents proving it in their drawers or computers“-said Gintautas Separaitis, „Siauliu intermaks“ director. (Verslo ziniuos, 2005 m. May 9)

Evaluation

Due to the fact that the fines are issued referring to the potential harm to the competition, the fact of cooperation between competitors or business partners and not to the actual harm, it is difficult to evaluate if there would actually be any harm committed. Referring to ETT's explanations that each event of contact between business partners followed by the action in the market, can be considered a violation of free competition, follows that the Competition board has the right to punish anyone they want, and to call all associations „cartel dwellings“⁹ (Rimantas Stanikunas, Competition board chairman) as they did in the autumn of 2005. Of course, there are interactions in the associations and according to the norms of the Competition board they could be acknowledged as cartels, but maybe it helps markets to function more effectively?

EU law as well as Lithuanian Competition law falls back on a principle that in the situations when the purpose of the agreement is to limit competition, there is no need to prove damaging consequences. This can have an effect for the sanctions. Consequences are evaluated only when the purpose of the agreement is not the limitation of the competition but something else. For example in the decision number 8/b of the 18th of May 2001 about the AB „MAZEIKIU NAFTA“ AND OIL SELING COMPANIES ACTIONS CONFIRMITY WITH COMPETITION BOARDS ARTICLE 5 REQUIREMENTS it is indicated that: Competition board outlines that in the case of such unambiguous commitments from parties to limit the import of the good and in this way limit the competition in the national market it is not required to determine factual consequences of such agreement for the competition. It is important to note that European Commission and European court of justice, in explaining and applying 81st article of the Establishment treaty of the European community, applied a provision that in a situation of a vertical limitation „in itself“ or „by its nature“ limit competition, there is no need to investigate the effect of these limitations. For example in the case of *Consten and Grundig v. Commission* European court of Justice established that vertical agreements about the parallel import limitations, more precisely, creating obstacles to freely import particular goods from one country to another, in their nature and essence are limiting competition and there is no need to refer the effect of such an agreement. The court also noted that if the agreement limits competition in its nature and essence, it is not relevant if the parties intended to limit competition. Consequently even if the parties can prove that they did not intent to limit competition the agreement itself can be assumed to limit competition if the economic and legal content of an agreement has a tendency to limit competition. (*NV IAZ International and others v. Commission*)

As a result, the real short or long term effects to the welfare of the society of the agreements between competitors are not investigated. The Competition board in general is not obliged to explain what is the damage to competition, what connection does it have with the damage to the welfare of the society and when does the hypothetical damage become factual. This encourages the application of already unrealistically constructed rules without taking into account the real situation.

Fines

Even though the European Commission allows applying the fines up to 10% from the annual income for the violations of the forbidden agreement regulations, the board is not very strict in applying the fines. Even in the *Hidrostatyba* case, in which companies were evaluated as disturbing the evaluation by hiding the violation, received a high amount of income due to the violation and

⁹ Especially when EPTT „made clear that market participants who participate in meetings, in which the question of prices is discussed are considered as performing adjusted actions (SA Hercules Chemicals NV v Commission, 1991).“

created huge damage, the fines were only 1% and 0.75% from the annual income. In that situation the Competition board took the position that while there is no competition tolerant culture in Lithuania; people should not be shocked with huge fines. The case of *Mazeikiu nafta* proves that the situation changes fast, unexpectedly and quite drastically.

On the other hand, it must be noted that the model of fine determination is quite unclear. If in this case the fine was calculated as a part from the annual income, in the case of *Insurance companies* same fines were given even though the position in the market was quite different. (the same applies to the *Vilnius taxi drivers* case, however in this situation the fine for the majority of the companies was decreased in order not to exceed the 10% limit outlined in the law, and later the court decreased it even more.) Also in other investigations, even though it is suggested that „ parties in the economy should be fined according to their general income, because this measure reflects the damage of the violation and the proportions of income resulting from the violation the best. This is because the results of the agreement limiting the competition in the context of the welfare of the society is directly proportional to the power market of the parties which is best reflected by the general income“. No explanation is provided how particular percentages are chosen, neither why fines often are not proportional to the income and differ between the companies which participated in the same violation. In conclusion the fine policy of the Competition board is unpredictable.

Exceptions

The fact that in 2000-2004 8 out of 9 exceptions were granted and even the one which was not, got a different form of exceptions, could mean that, by using solid legal arguments it was useful for businessmen to ask for an additional exception if the general one does not apply. Several examples of granted exceptions are given in the table 5. Even though it is not very relevant today, because exceptions are not granted any more from 2004, the practice itself is a good illustration of the inconsistent policy of the Competition board.

Table 5. Several exceptions granted to potentially forbidden agreements by the Competition board

Year	Investigated companies	Short description	Major reasoning by the Competition board
2002	UAB „Firma GPX“ and UAB „GNT Lietuva“	UAB „GNT Lietuva“ purchases from „Firma GPX“ distribution - encourages investment; rights for particular computer games. UAB- „Firma GPX“ agrees not to compete with UAB „GNT- Lietuva“ for 3 years.	Separate exception is granted because the Agreement: Improves the distribution of the goods; Created the possibility for all customers to get benefit; Does not give parties the chance to limit competition in a big part of the market.
2002	AB „Kalnapilis“, UAB „Švyturys-Utenos alus“, AB „Ragutis“, AB „Vilniaus tauras“, AB „Kauno alus“ and AB „Mažeikių lokys“.	Beer producers agree to use the same type of bottles and to purchase new bottles only when there is a lack of existing bottles.	This would improve investment, technological advance, and would create possibilities for customers to get additional benefit. The exception is granted because there are no limitations for the contracts with the bottle producers and there are no limitations for joining the agreement for other beer companies.
2003	AB „Akmenės cementas“ and UAB „Cemeka“	AB „Akmenės cementas“ agrees to supply exceptionally for UAB „Cemeka“, which gets the territory to distribute the	Because there are „important investments made for the expansion of the distribution web“ during the agreement period, a stable supply of certified quality concrete for the end users is created, a separate exception for the agreement supply. is granted.

It is interesting that in its decisions to grant exceptions the Competition board uses arguments that the agreement will „promote investment, technological improvement and it will create additional benefit for the customers“. On the other hand in the investigations about the forbidden agreements, the fact that the agreement allows the companies to promote investment, technological improvements and consequential additional benefit for the customers is not taken into account and according to the Competition board it is „not even required to investigate if the agreement had or could have a negative effect for the competition in the market. If the agreement is made between competitors the negative effect is presumed by the law maker“. The bureaucratic exception request and seeking system does not contribute to the efficiency of the market, with no doubt. There are also problems with the burden of the process of proving the case. The moment the Competition board decides that the agreement limits competition, the task to prove the opposite falls on the parties in the market, even though they do not have the knowledge about the market to prove anything.

The inefficiency of the cartel policy

Even when AB „Hidrostatyba“ and UAB „Panevezio statybos trestas“ paid the fines, totaling 1.041.000 Litas, and World Bank banned them from its future projects, AB „Hidrostatyba“ still got 16 mln Litas of income from the project. A new competition is not organized; the damage for the participants who lost is not compensated. After 5 years the management of AB „Hidrostatyba“ can

hardly remember this forbidden agreement¹⁰. These cases are the best examples that not even taking into account the validity, current policy of the supervision of forbidden agreements is ineffective and useless. Especially, when the energy of the Competition board is exhausted in investigating cases such as Ventos settlement in the district of Akmene where the board itself acknowledges, that there are no possibilities to perform major investigations¹¹.

Do cartels really harm the welfare of the society?

For now it is difficult to find arguments, to differentiate between a cartel and a company owned by several stock owners¹². If a company established by several persons and effectively using its resources occupying 70% of the market is not automatically punishable, why should a cartel occupying an important part of the market, and each of the companies in it established by one person, be punished? In both cases resources are joined for a common activity, which according to market participants is more effective, productive than separated. In other words, is there is a need for a coordinated action in the market; competition policy promotes concentration, but not the coordination of actions. If companies can see that by not cooperating they waste analytical and marketing resources for competing, why can't they join them for a common goal? If a cartel is not effective it falls apart, but if it is effective it becomes stable, usually in a form of legal merge of companies. On the other hand these permanent cartels are allowed, but why are then temporary cartels forbidden?¹³ What is the difference between an agreement amongst company owners and amongst several employees, participating in a union of a particular market? What about the agreement between European central banks to eliminate the competition between currencies? Under this undeterminable evaluation of the limitations of the competition, no businessman can say when he/she is violating the law. If any relationship between competitors can be evaluate as limiting competition, which institution will be the next one to attract the attention of the Competition board- the organization with the monopoly to decide what is good for the market?

4.2 The supervision of the concentration

The supervision of the concentration in Lithuania. Legal background

The regulation of the supervision of the concentration in the Competition law is not very different from the EU law norms. All planned merges of companies, shift of the control of the company to the same person, or the establishment of new companies should be coordinated with the Competition board and permission is required. The Competition law says that the permission is required if the companies participating in the concentration together have income higher than 30 mln. Litas, and if one of, at least 2 participating companies has income higher than 5 mln. Litas. The Competition board also holds the right to apply concentration supervision procedures even in the cases when income is not exceeding the limit.

¹⁰ „Jonas Dumasius, the chairman of the board and director of „Hidrostatyba“ at the time, with annual sanctions applied personally for him, sais that he almost forgot the event“

¹¹ „If we would go to court refering only to the simlirity of prices, lawers of gas companies would justlaught at us and would bring us to court for slander. And if we would try to get into their premises in order to colect evidence, there is a high chance we would not find much and had to compensate the damage“- Competition board's industry departments' chair Maciokas explained his reluctance to investigate gas market. (Verslo Zinios, 2002 m. September 27)

¹² Murray N. Rothbard, 2004, Man, Economy, State, Ludwig von Mises Institute.

¹³ Ibid.

A notice about the concentration has to be submitted to the Competition board before the concentration and the board has to examine the case in 4 months. During this period the Competition board can permit some particular actions of concentration. There is a fixed fee of 4000 Litas for the submission of the notice established in 2004.

The procedure of submitting the notice and the description of required documents is regulated in details in Competition board's resolution „About the notice of concentration, processing and common income calculation approval“. For the description of the market at question a resolution „About the Competition boards explanations about particular market definition“ is also relevant.

Statistics

The summary of Competition board's resolutions about concentration can be found in table 6.

Table 6. Competition boards activity in concentration supervision

Year	Resolutions made	Permissions	Permissions with conditions	Permissions for separate actions (not allowed)	Concentration not allowed	Violations
2005	66	57	2	6(1)	0	0
2004	59	50	3	4(1)	0	1
2003	58	48	4	5(1)	0	0
2002	52	46	2	3(1)	0	0
2001	51	41	1	9	0	0
2000	51	48	1	1	1	1
Total	337	285	12	28(4)	1	2

In 2000-2005 the Competition board passed 337 resolutions about the concentration control. There were 299 permissions issued, 12 of them with conditions, in 2 cases concentration was not permitted. There were also 2 uncoordinated concentration detected and 28 permissions given for separate concentration actions. More precisely, the board allowed some concentration actions while it investigated the whole case. The fact that 95% of all requests are granted with no questions, meaning that according to the Competition board 95% of cases do not pose any threat to competition, illustrates that the current system of permissions wastes the resources of companies and governmental institution, through its bureaucratic system. It should not be forgotten that the Competition board also performs consulting and, according to the board, companies often do not perform the concentration at all if they find out they would not be able to get a permission. On the other hand it is strange that this has to be subsidized by the companies which do not pose any threat to the competition. For a number of organizational, bureaucratic, financial and anticorruption reasons these unofficial consultations should not be a function of a governmental institution, which has the power to make decisions in legal cases (courts do not provide legal consultations, before the case started), or at least these consultations should be regulated in detail.

Major cases

A summary of major resolutions of the Concentration board, when the concentration was allowed with conditions can be seen in table 7.

Table 7. Major cases of concentration investigated by the Competition board

Year	Concentration	Condition
2005	Elion Ettevõtted AS purchased 100% of MicroLink AS stock	AB „Lietuvos telekomas“ is obliged to sell the stock of UAB „MicroLink Lietuva“ to a subject not connected with Elion Ettevõtted AS, AB „Lietuvos telekomas“ or MicroLink AS during the agreed period.
2005	Rautakirja Oy purchased 100% of UAB „Lietuvos spaudos“ Vilnius agency stock	The distribution and sale in stands should be performed by two separate entities the process should be organized by the companies participating in the concentration. These entities should apply equal and undiscriminating commission pay system to all publishers. They should provide an opportunity for the publishers to terminate contracts signed with Rautakirja Oy companies, on their own will. They also do not have a right to include any provisions about exceptional distributional conditions in contracts. Rautakirja Oy has to appoint an independent observer, who will perform the duty of supervising the following of the obligations.
2004	UAB „Alita“ purchases up to 100% of AB „Anykščių vynas“ stock	AB „Alita“ is obliged to sell all stock of UAB „Artrio-2“.
2004	A.Trumpa, UAB „Pieno pramonės investicijų valdymas“, UAB „Survesta“, UAB „Snavesta“ purchases up to 100% of AB „Rokiškio sūris“ stock and gets the control of the company.	UAB „Vinvesta“ is obliged to sell all stocks of AB „Kelmės pieninė“ for a subject not connected with UAB „Vinvesta“, UAB „Snavesta“, UAB „Survesta“, UAB „Pieno pramonės investicijų valdymas“, A.Trumpa.
2003	„Amber Mobile Teleholding AB“ purchases up to 90% of UAB „Omnitel“ stock	UAB „Omnitel“ can not be merged with or acquired by AB „Lietuvos telekomas“ or any other subject under the direct or indirect control of Telia AB, without a permission from the Competition board in advance. AB „Lietuvos telekomas“ can not transfer the fixed connection activity (contracts with clients) to UAB „Omnitel“, without the permission of the Competition board. UAB „Omnitel“ has to perform separate cost accounting for the fixed connection service.
2003	UAB „Mineraliniai vandenys“ purchases up to 100% AB „Stumbras“ stock	UAB „Mineraliniai vandenys“ is obliged to sell all UAB „Artrio-2“ stock, after UAB „Mineraliniai vandenys“ gets the control of AB „Stumbras“ and takes over the management of the company.
2002	Telia AB acquires Sonera Corporation	UAB „Omnitel“ can not be merged with or acquired by AB „Lietuvos telekomas“ or any other company directly or indirectly controlled by Telia AB without the permission of the Competition board
2002	AB „Mažeikių nafta“ purchases 85% (100%) of UAB „Uotas“ stock	UAB „Uotas“ and (or) controlled AB „Ventus – Nafta“ cannot be merged with or acquired by AB „Mažeikių nafta“ or with a company connected with AB „Mažeikių nafta“

2000 „Orkla“ and „Carlsberg“ Can not sell one of the three Lithuanian beer producers (UAB merges to one company. „Švyturys“, UAB „Utenos alus“, UAB „Kalnapilis“) or connect them in a single supply chain.

Market restrictions for competition

A good example of how market forces do not allow merging companies to occupy a whole market and of how free market is the best competition controller is the consolidation of Lithuanian beer industry. When the Norwegian company „Orkla“ and Danish beer company „Carlsberg“ created a joined beer trust Carlsberg Breweries it had a control of UAB „Svyturys“ and 50% of „Kalnapilis“ and „Utenos alus“ stock which at the time (year 2000) occupied 72% of Lithuanian beer market. The Competition board agreed with this deal with the condition that one of the companies should be sold to an unconnected party. In 2001 Carlsberg“ Breweries sold UAB „Kalnapilis“ which was, according to the Competition board, the most modern brewery in the country. However competitors still remained unsatisfied and in a statement made in 2003 announced that “ by allowing the sale of Kalnapilis, the company with the smallest amount of market power the Competition board itself created a dominant entity, with the power to have a one-sided influence to the market and using that power.” Even if the merged company „Svyturys-Utenos alus“ started dominating the market it was immediately restrained by the market itself. The same year (2003) the production of UAB „Svyturys-Utenos alus“ was excluded from the assortment of the biggest supermarket chain and it was changed by other, imported beer and by the production of other smaller breweries. No one knows if the competition board’s approved sale of „Kalnapilis“ created better conditions in the market, than would have been if other company would have been sold. What is obvious is that the market itself would have regulated itself effectively and instantly.

Economic theory also suggests that the concentration in the market has natural limits because there is no price and exchange mechanism allowing evaluating the efficiency as it is in the market. This forces huge, especially whole market occupying companies to become less efficient not even taking in to account scale economies.

Applicable limit

The first thing to be changed in the supervision of the concentration is the turnover limit of when companies have to report about the merge used in Lithuania. The limit of 30 mln. Litas is significantly lower than in Latvia and Estonia where the concentration has to be reported if the income sum of the companies together is respectively 125 mln. Litas and 108 mln. Litas. This lower limit causes loses for companies, while preparing the material required by the Competition board (in the case of formal request, when an acquisition of a relatively small company will not have an effect for the market, legal consultations can cost about 10.000 Litas), by paying to the government and by waiting for the decision and not realizing the potential benefit of the merge (if the merge is performed there obviously is benefit).

The growth of companies should also be taken into account. In 1999, when the limit of 30 mln. Litas turnover was set it was applicable to about 170-180 companies, while in 2004 it was already applicable to 370-380 Lithuanian companies¹⁴. Consequently in a growing economy where companies become bigger, more and more enterprises have to get the permission from the Competition board to perform concentration. The biggest 170-180 companies had a turnover of at

¹⁴ According to „Verslo zinios“ publications „Lietuvos verslo lyderiai“.

least 70 mln. Litas in 2004, so if the limit was set with the purpose to limit the biggest companies it should be increased two and a half time in order to keep up with the same principle.

Applicable limits are automatically reflected in the number of investigated cases and consequently in the exhaustion of Competition board's resources and high workload. In Lithuania the Competition board investigated 355 cases in last 6 years of activity while in Latvia only 45 cases were investigated in the same period.

From 355 cases the Competition board did not satisfy 16 requests. Taking into account that from 14 cases when concentration was not allowed strictly, 12 would have had to inform about the concentration even if the limit would have been 200 mln. Litas instead of 30 mln. Litas. Moreover the Competition board according to article 81 from the Establishment treaty in any case has the right to examine smaller merges and acquisitions, if they had the potential to cause danger for competition; therefore it is highly recommended to increase the limit considerably. Taking into account the expected growth of companies, it is suggested to ask for a notice from merging companies if their total turnover amounts to 150 mln. Litas and their separate turnover is at least 20 mln. Litas.

The execution of the commitments

Even though the Competition board declares that it performs the supervision of cases when permissions for concentration were given with conditions, the practice shows that if commitments are not executed companies are not punished. For example, UAB "Vinvesta" was asked to sell UAB "Kelmes pienine" stocks in 2004 and it extended the process of selling for 2 years. It could be a lenient approach of the Competition board or the inability to guaranty the execution of the commitments. If there is no buyer (this is especially relevant for the markets with high competition) how can a company be forced to sell artificially? By fining stockholders periodically, until they give up the company almost for free? On the other hand the competition in the milk market did not decrease, statistics show that average prices of natural milk purchase increased by 42.4%¹⁵ due to the „competition between milk producers“¹⁶. This is a good illustration that even huge merges do not necessary decrease competition in the market, even without the artificial mechanism suggested by the Competition board.

Is there a need for a control of merges and acquisitions?

The purpose of the control of merges and acquisitions in Lithuania (and EU) to safeguard competition is built on a wrong assumption of a Cambridge school that more players in the market guarantee stronger competition. Why do competitors get to be defended and why should they be more interested in the wellbeing of the customers than the companies which perform the merge or the question? Why do situations when companies build market power organically and by efficiently using its resources and acquiring another company, are strangely differentiated? Is the social ideology that the fact of the existence of the resources to acquire another company is punishable is used here? What is the difference between the acquisition and the usage of the same resources for investing in marketing or high technologies and consequential organic market power growth? Should two owners of big construction companies get the permission form the Competition board before they go in to the marriage? Why is there a declared fear of strong market players on one

¹⁵ From January of 2004 to January of 2006, information from Agriculture ministry. It should be noted that evaluating that the turnover of milk companies grew more due to price than amount, milk product prices increased by 30-40%.

¹⁶ The overview of Lithuanian economy and social climate in 2005.

occasion and a system created for merging medium sized companies? Finally, why is it not allowed for a business man to sell its business for the suggested price if the best price is provided by the competitor?

4.3 The control of dominant companies

The control of dominant companies in Lithuania. Legal background

According to the Competition law, article 3, part 11 a dominant position is a position of one or more subjects in the market, which does not interfere with competition directly, or the position which allows having one-sided final influence in a particular market, limiting the competition effectively. According to this law the subjects' market power is one of the major factors allowing drawing conclusions about subjects' possibilities to have one-sided final influence in the market. If it is not proved otherwise it is assumed that the subject had a dominant position in a particular market if its market share is no less than 40%. It is also assumed that every subject of 3 or a smaller number, which get the biggest share of the market and taken together amount to 70% or a bigger share of a particular market have the dominant power if not proved otherwise.

The Competition law article 9 regulates the prohibition of the usage of the dominant power by „an action which limits or could limit competition unfoundedly limits other subjects' possibilities to act in the market or interferes with customers interests, including:

1. Direct or indirect pressure to establish unfair price or sale conditions;
2. The restriction of sale, production or technological advance with the harmful effect for customers;
3. The application of unequal (discriminating) conditions for different subjects in the market, creating different competition conditions for them;
4. A contract in which the other side has to take additional commitments which in their commercial function are not directly connected with the object of the contract“.

In their nature these descriptions go along with European Communities Establishment treaty, article 82. More precise explanations about what is dominant position, in which markets it can take place, and how are the market power and other conditions calculated are provided in Competition board's resolution „ About the Competition boards explanations about the determination of a dominant power“.

In more difficult cases (AB „Mažeikių nafta“, AB „Lietuvos telekomas“), also in arguments about the procedural norm application Competition board often relies on ETT cases, strict courts opinion about the discount system, requirement for dominant subjects to be completely transparent with their customers and the commitment not to compete. This is also explained by the regulations of the European Commission about vertical agreements namely „ any direct or indirect customers commitment to buy more than 80% of all goods indicated in the agreement from the supplier, calculating it by taking the total purchased amount in last calendar year“. This agreement not to compete is allowed if the supplier has market power no bigger than 30% together with other conditions indicated in the regulation. If the market power is above 30% the general rule does not apply and evaluation is made on individual basis.

It should be noted that the conclusion by ETT that „the fact, that the supplier is not strict in making sure the restrictions are in place can not be the proof that they did not have any effect, because the existence of these restrictions can create „a visual and psychological “environment, which is

suitable for clients and contributes for a more or less clear division of the market“. So even if the agreement is not de facto active, even though it was established formally, the existence of it and not the possible damaging consequences are declared criminal.

In the case of AB „Lietuvos telekomas“ it was assumed that the dominant power is used even when „companies predatory actions to defeat competitors took place not in the dominated market (the market of the supply of the equipment and carton for sterile liquid food packaging) but in a different associated market“ *Tetra Pak International v. Commission*). The actions of Tetra Pak were announced too dominant because „ consumers in one segment were the potential customers of the other segment as well, moreover the major competitor was active in both segments“¹⁷. Even though ETT agreed that this parallel evaluation is applied because of an extraordinary situation in this particular case, the creation of the precedent scared the business community, because it completely destroyed the consistency of the application of the competition laws, turned around the legal expectation principles and allowed competition institutions to make the business supervision even stricter.

In the case of AB „Mazeikiu nafta“, some questions were raised if the market power itself can be the proof of the dominant position, the Competition board referred to *Hoffman-La Roche&Co* case, in which ETT concluded that „ a considerable power in the market is a strong proof for the dominant position in the market“, meaning that market power of 75-87% is big enough to be the proof of the dominant power itself, the power of 93-100% suggests that the company has a monopoly in the market.

In the case of AB „Mazeikiu nafta“ some questions about the usage of the test of demand changeability, if the company occupies a dominant position arose. Even though this test was often used by the European Commission, it was not used by the Competition board often, which concluded that in the case of AB „Mazeikiu nafta“ according to the European Commission „ SSNIP test is not suitable enough in determining the particular market in the cases of the usage of the dominant power and in some cases hardly applicable in practice“.

Statistics

The summary of the Competition boards' resolutions about the usage of dominant power can be found in table 8

Table 8. Competition board's activity in the area of the supervision of the usage of dominant power in the market

Year	Resolutions	Canceled and refused to start	Punished	Appealed	Fines	Fines after court decisions
2005	1	5	1	1	32.000.000	32.000.000
2004	5	5	0	1	0	0
2003	6	5	1	0	3.000	3.000
2002	6	2	4	1	2.202.154	2.202.154
2001	5	5	0	0	0	0
2000	4	0	4	1	375.000	375.000
Total	27	22	10	4	34.580.154	34.580.154

¹⁷ Philip Lowe, EU Competition Practice on Predatory Pricing, 2003 December 5.

In total 8 companies were punished during last six years, AB Lietuvos telekomas and AB Mazeikiu nafta twice (the last fine for „Mazeikiu nafta“ is already a third). 4 to 6 cases were investigated every year, except 2005 when only one, but the biggest case in Competition boards' history was investigated.

Major cases

The summary of major cases in the area of the usage of dominant power in the market by the Competition board can be found in the table 9.

Table 9. Major cases in the area of the usage of dominant power in the market investigated by the Competition board

Year	Company	Short description	Decision
2005	AB „Mazeikiu nafta“	AB „Mazeikiu nafta“ performed actions limiting competition, more precisely, used the dominant position in the market of oil refining and gas sale from the refinery or diesel sale from the refinery in Lithuania, Latvia and Estonia: used economically unjustifiable discriminating marketing, yearly commitments of loyalty, territorial price discrimination and other discriminatory actions such as discriminated separate subjects in its arctic diesel and diesel for bunkers sale, limited the territory of resale.	AB „Mazeikiu nafta“ got a fine of 32.000.000 Lit.
2002	AB „Lietuvos telekomas“	AB „Lietuvos telekomas“, after it accused UAB „Interprova“ according to the Telecommunication law article 8 point 1 and blocked the ISDN and telephone lines as it had the right to be the only provider of fixed telephone connection and service provider. However according to the telecommunication law, article 2 part 5 voice telephone service is described as the transfer of the voice signal in real time between end devices connected to the common telecommunication net end points, while it is not possible transferring voice through internet. By these actions AB „Lietuvos telekomas“ violated the Competition law, because with telephone lines blocked, it is impossible to act in the market and compete with companies which provide data transfer services.	AB „Lietuvos telekomas“ got fined by 2.077.154 Lit.

2002 UAB „Cemeka“	UAB „Cemeka“ applied favorable sale conditions and lower prices for companies in which it had a considerable amount of stock and could expect economic benefit from them. Market participants did not have the information about the conditions under which they could get discounts and other favorable condition, information about the discounts for other companies was not provided and why they are provided. Dominant subjects negotiate prices and conditions with each customer separately, and do not have a common and open discount policy.
2000 AB „Lietuvos telekomas“	AB „Lietuvos telekomas“ started installing equipment (filters) in local analog lines rented by other market participants and in this way restricted the range of frequencies, preventing the use of these lines for the transmission of digitally modeled signals and in this way changing the business conditions for other internet providers because they can rent analog lines only from AB „Lietuvos telekomas“.
2000 AB „Mazeikiu nafta“	Case started by UAB „Klevo lapas“ about the question if AB „Mazeikiu nafta“ violated the Competition law by providing exceptional conditions for the distribution of its products to companies importing only oil products: BĮ „Lukoil Baltija“, BI „Uotas“, BI „Pakrijas“ and UAB „Statoil Lietuva“.

The definition of the market

In order to distinguish the dominant business entity the market should be defined first. Because each good (because of a different brand or particular sale place) can be evaluated as irreplaceable, and at the same time each good fights for the same customer resources, neither of them can be dominant.

The Competition board in defining the market relies on its resolution “ About the Competition boards’ explanations of the description of a particular market” in which it is indicated that the market can be described in two dimensions: the merchandise and geographical. Even though the Competition board provides a number of conditions to be taken into account when defining the market of a particular company, it still lacks consistency in its evaluations. Defining SPAB “Stumbras” production market, it was concluded that it belongs to strong alcoholic drinks market, while according to the Competition board other alcoholic beverage producer UAB “Svyturys-Utenos Alus” is active in two markets, namely, beer sold in stores and beer sold in restaurants, bars and cafes.

Some differences can also be found in the definition of the market in two investigations of AB "Mazeikiu nafta". In the first investigation: "diesel fuel market, A-80 gas market and A-92, 95, 98 gas market". While in the second: "oil product refining process or gas sale from the refinery market or adequately, oil product refining or diesel sale from the refinery market". The difference is that oil products are not divided into categories in the second case. Even though it probably did not have influence on the case this time, a more consistent application of methods and clearer explanation of which aspects and proof will be used evaluating the market would prevent questionable results. It is interesting to note that Latvian Competition board in its 2006 05 24 decision defined gas market differently and declared that "Mazeikiu nafta" is not dominant in it.

Analyzed companies

From eight punished companies, three were controlled by the government or municipalities (SPAB „Stumbras“, SPAB „Utenos silumos tinklai“, UAB „Silumnesis“), one was granted exceptional monopoly (AB "Lietuvos telekomas"), one was active in a special market protected by the antidumping duties (UAB "Cemeka"). AB "Mazeikiu nafta" market also has excises and European quality standards. A. Jankausko service and sale companies' dominance in the market of Birzai mortuary services and AB "Klaipedos juru kroviniu kompanija" are the only ones left. In the later case the higher administrative court canceled the decision of the Competition board.

It can be seen that the majority of cases are connected with either governmental companies or with violations which occurred because of governmental regulation. Antidumping duties stopped the alternative production of cement imports from Belarus and Ukraine, so according to the Competition board, UAB "Cemeka" started using its dominant position. Due to a number of regulations, the import of cheaper fuel to Baltic States is also limited, which complicated the competition with AB "Mazeikiu nafta" production.

The Competition board constantly draws attention to the damage of governmental restrictions to the competition. In this respect the work of the Competition board- the supervision of governmental companies and governmental control is creditable. However in general the activity of the Competition board is still concentrated (and can only be concentrated) in investigating the cases, isolating particular real or possible cases of usage of the dominant power from directly or indirectly set governmental privileges. It is obvious that this does not help in solving competition problems and Lithuania should stop working on the surface and take up a stricter governmental regulation reform. In respect of private dominant subjects more favorable conditions should be created for competition instead of reaching this goal by fining the violators.

Fines

The same as in the cartel situation, even with the governmental resolution "About the determination of the fines for violating Lithuanian competition law" the fine determination procedure is not clear. If the law was not violated repeatedly the violator can expect a fine of 80.000-150.000 Lit. However in the case of AB „Klaipedos juru kroviniu kompanija“ the fine was not given because of the cooperative attitude of the company, even though the violation was continuous. If the law is violated continuously (as in cases of AB „Mazeikiu nafta“ and AB „Lietuvos telekomas“) the Competition board sets higher fines. In the case of AB "Mazeikiu nafta" it was 0,42% from annual income or 32 mln. Lit., and in the case of AB "Lietuvos telekomas" it was 0,2% from annual income or 2.077.154 Lit. Except the increase of the fine for AB "Mazeikiu nafta" by 10% from 0,34% to 0.42% for the long term of the violation, other calculations are unclear. Unclear fine calculation system is not just faulty in a legal society but also creates ground for various suspicions.

Are big companies really evil?

In countries with longer traditions of market economy practice shows that big companies which were monopolists in their markets could not keep the position for a long period and faced competition and lost their positions. Due to a “hopping frog” effect, as Benjamin Roche¹⁸ calls it, even without artificial institutions of competition supervision, monopolist is faced with competition from more innovative companies. In this way in one generation market leader IBM lost its positions for Microsoft, Intel and Dell, or Sears lost for – Wall Mart. Does a Marxist statement that unregulated free market moves to a monopolistic capitalism¹⁹ justify artificial competition and the interruption of the process of innovation by dominant companies and natural evolution of competition? This process is most likely to occur in dynamic sectors such as telecommunications. However in Lithuania telecommunications are actively supervised by the Competition board and Connection control agency.

On the other hand, dominant companies rarely appear naturally, usually they are created with governmental regulation. So instead of Sizif’s work in investigating the damage of dominating companies to the competition stricter governmental privilege, control and restriction policy reform should be taken.

4.4. Governmental support control

State supervision in Lithuania. Juridical basis

Currently, according to article 48 of LR Competition law, Competition board is coordinating institution of state assistance, which is under European Union state assistance rules, matters.

According to European Community law only European Commission and Court Of Justice can evaluate state assistance conformity with Common market. Therefore current functions of Competition agency restrict to project inspection, presentation of conclusions and recommendations to state assistance providers and administration of information about provided state assistance. Competition board can present recommendations only of consultative nature, by a request of state assistance providers help filling in the state assistance report forms, also by their demand, perform state assistance project inspection and present conclusions and recommendations for the state assistance provider about conformity of intended state assistance with European Union law specifications.

¹⁸ Mark Skousen, 2005, Vienna and Chicago: Friends or Foes?, Capital Press.

¹⁹ Alexander H. Shand, 1984, The Capitalist Alternative: An Introduction to Neo-Austrian Economics, Wheatshaf Books

Experience of Competition board

Till May 1, 2004, Competition board directly controlled the provision of state assistance, summary of which is presented in Tables no. 10-11.

Table 10. Methods of governmental support provided in years 2000-2004 (million Litas)

	Financial assistance: subsidies, grants	Exemptions from taxes, delay charges and fines	Increase of the state owned share stake in companies	Preferred loans	Tax postponement	State guarantees	Total
2004	20179	21512	1340	3	1569	40	44643
2003	5003	4622	1162	34	3213	0	14034
2002	9309	12719			3845	7	2588
2001	8799	2450	0	7	2754	0	14010
2000	22555	745	6	1	7	2248	25562

Table 11. Governmental support (from May 1, 2004) evaluated by the Competition agency

	Analyse d cases	Assistance particular economy subjects	Assistance schemes	Unconfirmed governmental support cases
2005	6	2	4	0
2004	6	3	3	1
2003	7	6	1	2
2002	11	10	1	4
2001	14	3	11	0
2000	5	1	4	0
Total:	49	25	24	7

Naturally, control of independent institution ensures objective evaluation of governmental support better than in a case when state assistance is directly administered by Government or institution directly subordinated to it, driven by political intentions. On the other hand, exactly the assignment of governmental support control to independent institution is legitimating state assistance itself. A couple of uncertified governmental support cases create the illusion that any kind of certified governmental support is proper and useful, especially when it is revised and confirmed by ostensibly competition stimulating Competition board. In this way it is forgotten that all direct or indirect governmental support is political and harms business environment. There is also a problem because in Lithuania assistance is controlled only if it is in the range of 87 article. Whereas that assistance which does not meet those requirements – is not regulated. Id est regulatory crack is existing. It is possible to eliminate it by the basis of article 4, but it is not effective and enough considering the influence of assistance in competitive conditions.

Governmental support compared with other European countries²⁰

Compared with other EU countries, governmental support (without assistance to agricultural, fishery and transportation sectors) in Lithuania is significantly smaller than in other new EU member states, also than collective average of overall EU. Calculating as a percentage from GDP, in years 2002-2004 in Lithuania amount of assistance provided by the state was 0,26%, whereas aggregate EU average was 0,49%. Among new EU members only Latvia (0,14%) and Estonia

²⁰ Data from State Aid Scoreboard, European Commission, March 27, 2006

(0,10%) gave less governmental support, on the other hand, taking into account that those economies are similar to Lithuanian, it seems that there even more ways to reduce governmental support.

Lithuania characterizes from other EU member by the structure of offered governmental support types. Otherwise than in other EU countries, in Lithuania most of the governmental support (for industry and service) is given by tax exemptions (81,1%). In no other EU member it amounts to such big share (aggregate average in EU is 32,3%), direct grants are more frequently used assistance mechanism (aggregate EU average is 48,1%).

4.5. Market research

Market research in Lithuania. Juridical basis

In LR Competition law among the functions of Competition board it is mentioned that Competition board “establishes criteria and order of correspondent market definition and dominant position, research defines correspondent markets, estimates market share of economy subjects and their positions in correspondent market“.

Implemented researches

It can be seen that analyzing Competition board’s practices, it carries out market research as an integrated part of its attached functions by the Competition law or by request of politicians, mostly government, request. In the first case market research is implemented as a part of research concerning violation of the Competition law, or on purpose of ascertaining if there is no monopoly situation emerged in the market or before providing proposals concerning different act projects. In the second case, usually when prices rise, politicians ask Competition board to estimate if the emerged situation in the market is reasonable.

Suppose, by Government request in years 2002 and 2003 there were two retail commerce’s and its chains’ analysis performed, also in 2004 and 2006 investigation about the reason of emergence of food product prices. However there were no violations found. In this way Competition board is becoming internal market research agency of the Government. Even eliminating any suspicions that Lithuanian politicians related with business structures want to profit from those market researches by just using taxpayers money, some doubts arise about the expedience of these functions of Competition board. Firstly it is not clear, why it is supposed that governmental market research agency is doing its job better than the private one, selected from public offering? Even if it is thought that Competition board powers to get information are beneficial to researches, still question arises about the expediency of those. Frequent and repeated food product and fuel price market research performances also suppose that there is no need for those at all and politicians ordering them, who suppose are against excise reforms in fuel market, just attempt to show their electorate that there is “something being done, analyzed and calculated”.

In the report of year 2004 Competition board also refers to mini market researches as an observation of monopolies: changes of monopoly type commodity and service markets were observed, fluctuations of prices and tariffs in those markets were analyzed, prices and tariffs of monopoly type commodities and services also their determination order and methods were coordinated. Neither in the Price law, nor among Government resolutions it is not specifically defined how results and benefits of monopoly supervision implemented by Competition board are being assessed.

4.6. Supervision of governmental and municipal institution actions

Both EU and Lithuanian competition law is traditionally pointed towards those actions which arise from market participants. However, as it is known, competition restrictions arise firstly from the state, and only conditionally market participant actions, by which they are just using their possession rights and agreement liberty, can be seen as competition restrictions.

Lithuanian Competition law is quite unique in worldwide context, because it pays attention to this question and takes competition saving from state and municipal institutions roles. Article 4 of the law defines two important provisions:

- 1) active responsibility for state and municipal institutions in own, as public institution, activities secure the freedom of conscientious competition: “State controlled and municipal institutions, as implementing assigned tasks, related with economic activity regulation in Lithuanian Republic, must secure the freedom of conscientious competition”;
- 2) restriction for state and municipal institutions to limit competition: „It is forbidden for State controlled and municipal institutions to pass laws or other resolutions, that give privilege or discriminate separate economy subjects or their groups and regarding to which competition condition differences for in relative markets competing economy subjects occur or can occur, excluding cases, when it is impossible to avoid different competition conditions in pursuance of Lithuanian Republic law requirements.“

These law provisions also mean that Competition board has also been given correspondent functions, related with realization of these provisions, analogical to those functions that it has in bargain prohibition and trespassing upon dominant position prohibition fields.

Most often Competition board after finding the violation of the Competition law obligates to liquidate institution or to change the resolution. For example after finding inconsistency with Competition law in 2004 Healthcare minister’s requisition “About medicine and pharmacy range goods supply for countryside residents through primary healthcare institutions“, Healthcare ministry was obliged to change it. By implementing the obligation, ministry chartered and confirmed new resident supply with medicine and pharmacy range goods supply through primary healthcare institutions rules, without a presence of provisions that contradict the Competition law. However, Competition board has to supervise how obligations are being implemented, because, for example, in year 2001 Healthcare minister passed the requisition, by which indicated articles were declared to be out of court. However, about one month later again passed the requisition, with contradictory to the law provisions being renewed, so Competition board was obliged again to consider this subject and pass the resolution. Competition board is only giving offers about changing resolutions that contradict to Competition law. Problem is that there is no mechanism letting to eliminate outcomes of violations. For example, in Litgen case it was estimated that Ministry of Agriculture unlawfully subsidized national companies and discriminated private ones. Competition board recognized corresponding decisions illegal, but did not speak up about wrongfully paid money (or rejecting to pay money). So even the lawsuit is won, its result and effect is zero.

Investigations are also beneficial as a preventive medium. In 2002 investigation about privileges for public primary healthcare institutions and their medical canters and private institution discrimination in Jurbarkas district was initiated. Investigation was discontinued because during it by Jurbarkas district municipality resolution competition limiting provisions were canceled.

Government institutions are inclined to take into account the Competition board. For example, even in year 2003 investigation about Agriculture minister's requisition about vegetable oil quality requirements was canceled, it stimulated Agriculture ministry to specify obligatory nutritional vegetable oil requirements.

State and municipality institution activity supervision is vital in order to secure competition. Competition law provisions, by setting Competition law obvious priority towards subsidiary legislation acts, create more juridical clarity and additional mechanism to avoid competition violations from state and municipality institution side. On the other hand, it is obvious that this provision is not panacea, because in Lithuanian law, except very common 46 Constitution article provision; there is no prohibition to limit competition using laws.

Unfortunately, it is getting more often noticed, that Competition board, by implementing this supervision is analyzing individual cases more often, related with discrimination of one or another company in particular case, but there is quite few, and, it seems it is getting even less, cases, related with subsidiary legislation act in more general meaning research. That, firstly, can mean that economy subjects have too little information about this function of the Competition board. This hypothesis is confirmed by the fact that educative activity of the Competition board is factually pointed to its exclusively other functions' propagation. This fact of "minuteness" also can be explained by the fact that administrative courts basically have analogical competence. It is also not ignored (market participants sometimes talk about that), that the Competition board unofficially sift out applications and *de facto* does not undertake investigations of state or municipality institution activities and avoid adequate investigations, if the case is not factually pushed into the Competition board by the claimant.

As it was said, the Competition board by setting priorities in its reports is not even mentioning state and municipal institution activity supervision as its action priority, even Competition law does not give any formal base to consider only a part of violation supervision as a priority, but threats for competition are arising exactly and primarily from state and municipal institution activity. Every year the Competition board performs less and less investigations, related with state institution activities, limiting competition. Number of applications is decreasing, and the Competition board does not initiate any new investigations. Question arises, if it reflects proper priorities of Competition board, considering that state regulation is main real threat to competition? Does not it show that for Competition board it is more important how its work going to look like in front of European Union institutions, but not implementation of Lithuanian Republic Competition law.

4.7. Coordination of legal acts

The implementation of effective competition provision is also strongly dependent on the legal acts passed by the other institutions; consequently, it is important they do not contradict to the Competition law. The Competition board performs expertise of laws and other projects of legal acts, provides conclusions about the influence for the competition to the House of Parliament and the Government. Competition board has started paying more attention to that during years of their activity. In 2004 it has already evaluated 76 laws and other projects of legal acts. Most often these are remarks for new laws or projects of law modification.

In case of attempts to provide monopolistic rights, the Competition Board reacts and puts forward proposals. For instance, in 2001 the proposal to adjust the Post law was made in order to prevent monopolistic rights when delivering pensions.²¹ The Competition board also gives remarks in order to prevent construction of diverse competition conditions for economy subjects. For example, in 2004 the Competition board noticed that diverse requirements for foreign and Lithuanian economy subjects in the Law of property and business evaluation basics determine variant conditions of competition.²²

However this work of the Competition board has some problems. Firstly this competition protecting institution (which is subsequently analyzing controversies) is forced to express its opinion about the particular legal act in advance, though later depending on its functions it may have to analyze adequate case. Likewise in the case of state assistance, when the Competition board is forced to confirm the part (actually- the most of it) of state assistance, though it according to the definition, contradict to the principle of equal competition, when holding its conclusions about projects of laws the Competition board also sort of blesses the entire project no matter the board usually has no possibilities to examine it whereas provision of the project “a little” violating competition is simply ignored.

There is no wonder that the Competition board can not always remain principled and consistent. For example, in year 2004 Competition board presented its comments to water supply and sewage disposal law project, where it is emphasized that project gives exclusive rights for assignment of one subject in the market. Even though that Competition board admitted the contradiction to both Competition law and article of LR Constitution (part 3, article 46), but did not opposed to that, and as one of the solutions offered act organizers to excuse contradiction with arguments that exclusive rights for one subject serve for all nation welfare. By those remarks the Competition board showed, that it is not completely loyal for establishing open competition conditions in Lithuania.

Since most of law acts are related with competition, for their evaluation in competition aspect a lot of attention has to be paid, but question arises, if all the time it has to be done by the Competition board.

4.8. Conclusions about separate Competition boards’ functions and their implementation

Cartel agreements

In Lithuania ascertained cartel agreement cases show that these are quite incidental cases. Negative cartel results emerge not because of cartels, but state regulations that let non-effective and *de facto* state created cartels exist. Practice showed that competition most notably emerges where there is least government participation in economy, and that is in no way related to anti-cartel government activity.

1. Cartels, especially when evidence of their existence is treated very freely (exactly this tendency can be seen in actions of the Competition board), are practically concurrent with parallel behavior in the market (when separate subjects independently make analogical decisions). At the same time one of the most serious modern-day competition law violations – cartel agreement – becomes not identified, but remains punishable.

Trespassing

²¹ <http://www.konkuren.lt/ataskaitos/> 2001 metų ataskaita

²² <http://www.konkuren.lt/ataskaitos/> 2004 metų ataskaita

2. Trespassing in a market can not be long lasting, because such kind of trespassing case opens alternative business possibilities. Market evolution shows that dominant economy subjects, which factually try to trespass by own dominant position, are outrivalled, if there is no institutional barriers to enter the market.
3. Trespassing by a dominant position successfully and permanently can show up only in these cases, when dominant position is secured by state regulations or other state assistance – that is being illustrated by Competition board’s experience gained by studying trespassing cases.
4. Correspondent market definition used in Competition law practice is not defined and in many cases noticeably too narrow.
5. Trespassing by a dominant position is not suitably defined concept, submitting for a too narrow interpretation, and therefore factually can be applied to any case, when any more significant market participant because of its actions ensures competitive advantage. That not only does not help to ensure competition, but contrary – often reduces possibilities to compete for consumers.

Concentration

6. Concentration control is not so competition securing measure, as market shaping measure, and this contravenes competition essence and troubles optimal company size to show up during competition process. For Lithuania, being a part of EU market and having open economy concentration extent inside the country do not make any significant influence to the market.
7. In Lithuania law sets task to implement control of too minor mergers (which do not make substantial influence for market institution, are way smaller than ordinary concentration control objects in all other countries, takes too much unnecessary activities of Competition board).
8. Present concentration regulation costs groundlessly a lot for business, both in direct input sense and because of procrastination to implement more effective activity solutions.
9. Suppositional unofficial advising activity of Competition board about concentration validity is not properly reasoned and regulated.
10. Present 30 million aggregate annual turnover margins, when in Lithuania it is obligatory to obtain Competition board permission for concentration, is untenably and insupportably small and troubling for business development in Lithuania.

State assistance

11. All state assistance is competition distorting and reducing effectiveness of economy factor. A fact that level of state assistance in Lithuania is quite low, is complimented, but existing forms should be abandoned (even if they are approved by the Competition board).

Market researches

12. Market researches made by the Competition board, which do not originate from address of private subjects, are not regulated, having indefinite outcomes and often related with realization of political wishes or attempt to confirm or deny common opinion about competition violations.

State and self-government institution activity supervision

13. Competition board currently delivers too little attention to state and self-government institution activities limiting competition and unsoundly considers other Competition law violations as its priorities.

